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January 22, 2003

COMMENT

Received CFTC
Records Section

1/24/03

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

Re: Advance Notice of Proposed Rulemaking on CPO and CTA Registration Exemptions

Dear Ms. Webb:

The Committee on Futures Regulation ("Committee") of the Association of the Bar of the City of New York ("Association") is pleased to submit the following comments on the Commodity Futures Trading Commission's (the "Commission") Advance Notice of Proposed Rulemaking ("ANPRM"), 67 FR 68785 (November 13, 2002), concerning exemption from certain registration requirements for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs").

The Association is an organization of over 22,000 lawyers. Although most of its members practice in the New York City area, the Association has members in 48 states and 51 countries. The Committee consists of attorneys knowledgeable concerning the regulation of futures contracts and other derivative instruments, and has a history of publishing reports analyzing regulatory issues critical to the futures industry and related activities. The Committee appreciates the opportunity to comment on the ANPRM and stands ready to assist the Commission and its staff if further clarification of any of the points raised in this letter would be helpful.

The Committee supports the adoption of the National Futures Association ("NFA") and the Managed Funds Association ("MFA") proposals, and commends the Commission for its favorable action to date on these two proposals and for providing no-action relief to CPOs and CTAs during this rulemaking proceeding. The Committee believes that the recent initiation of trading in security futures, as well as longer-term changes in investment management strategies and fund structures, demonstrate the importance and utility of the proposals and no-action relief, and anticipates that these new approaches will be used by many funds and managers. The Committee believes that both the NFA and MFA proposals offer advantages to funds that use the futures markets, and that the general policy purpose of the proposals would be best advanced by adopting both proposals and allowing funds and their managers to select the form of exemption

most relevant to their activities. The Committee believes that certain amendments to the proposals would help to clarify their intended operation, as discussed below.

The NFA Proposal -- Proposed Changes to Rule 4.13

The NFA Proposal is linked to the rule 4.5 standard, which is the subject of pending amendments proposed for comment by the Commission.¹ The Committee recommends that the proposed exemptive relief in 4.13 be conformed to the changes to rule 4.5, as and when adopted, so that the alternative to the speculative trading limitation is reflected in both rules. The rationale behind the proposed changes to rule 4.5 is equally applicable to the proposed rule 4.13 exemption. Conforming the proposed rule 4.13 changes to the final rule 4.5 will prevent the 4.13 registration exemption from being too restrictive to be useful.

With respect to proposed rule 4.13(b)(1)(iii), the Committee recommends that limited liability companies ("LLCs") be added as a CPO category to reflect the increasing use of that form of business organization. The required signatures for LLCs should be from a manager, managing member or equivalent LLC representative. This provision would also be improved by harmonizing it with proposed rule 4.14(a)(10)(vi)(B), which simply requires a CTA to provide a signature by a "duly authorized representative," and a similar approach would enhance clarity with respect to CPOs.

In addition, the Committee believes that proposed rules 4.13(d) and 4.14(a)(10)(v) should be conformed with regard to supplemental notices. As written, the proposal requires a CTA, but not a CPO, to file a supplemental notice upon the occurrence of certain events. The number of notices to be filed with the Commission (one or two) should also be clarified and made consistent for CPOs and CTAs. (Compare proposed rules 4.13(b)(1)(iv)(A) and 4.14(a)(10)(vi)(C)). There is also an inconsistency between proposed rule 4.14(a)(10)(iv)(C) and proposed rule 4.13, in that the notice for CTAs is expressly provided to become effective upon filing, but there is no such provision for CPOs. Also, proposed rule 4.14(a)(10)(iv)(C) contains a qualification regarding cessation of the exemption due to changes rendering representations inaccurate, but proposed rule 4.13 does not.

With respect to proposed rule 4.14(a)(10)(i), it is not clear why CTAs advising managed accounts are not eligible for relief. While CTAs who are SEC-registered investment advisers may in practice rely on the "engaged primarily" exclusion of section of 4m(3) of the Commodity Exchange Act, as amended, advisers who are not SEC-registered investment advisers will not be eligible for relief with respect to managed accounts that are not commodity pools, absent expansion of the proposed relief. We believe that all CTAs should qualify for comparable relief and suggest that the Commission consider making that modification to proposed rule 4.14(a)(10).

¹ 67 FR 65743 (October 28, 2002).

The MFA Proposal -- Proposed Rule 4.9

The MFA Proposal provides a general exemption from registration for CPOs. Subparagraph 4.9(e) implies that a registered CPO may avail itself of the benefits of rule 4.9 with respect to any pool operated in compliance with 4.9. The Committee believes that subparagraphs 4.9(b), (c), and (e) should be modified to make clear that a registered CPO that operates pools in compliance with proposed rule 4.9 may claim exemption pursuant to rule 4.9 with respect to those pools. Thus, proposed rule 4.9 relief will be available to registered and unregistered CPOs on a pool-by-pool basis.

In subparagraph (a)(i), reference is made to public offerings as a disqualification from making the registration exemption election. The Committee believes that this point should be harmonized with rule 4.7(b). Specifically, proposed rule 4.9(a)(i) would be replaced with revised language such as the following:

The commodity pool operator offers and sells participations in each pool that it operates pursuant to this exemption solely in an offering that qualifies for exemption from the registration requirements of the Securities Act of 1933, pursuant to section 4(2) of that Act or pursuant to Regulation S under that Act.

Proposed rule 4.9 contains references to qualified eligible persons ("QEPs") as defined in rule 4.7. Since CPOs may operate a fund pursuant to proposed rule 4.9 independently of rule 4.7, the Committee recommends that the QEP definition be modified or interpreted to make it clear that it includes a pool operating pursuant to proposed rule 4.9.

Further, with respect to financial reporting by a pool under proposed rule 4.9(b)(ii), the Committee recommends that the delivery requirement for financial statements be modified to provide for delivery 180 days after the end of each relevant pool's financial year, rather than after the CPO's own fiscal year. This would be in accordance with the pool-by-pool nature of this exemption.

Finally, the Committee notes that the MFA Proposal lacks any reference to relief for CTAs. We believe that a pool advised by a CTA may qualify under proposed rule 4.9 but not be a QEP, absent conforming changes to the QEP definition. The CTA managing such a pool should have regulatory parity with a CTA that is advising a fund operating pursuant to rule 4.7. Relief should be available on an account-by-account basis for CTAs that advise funds operating under proposed rule 4.9.

No-Action Relief

In the proposed no-action relief for CTAs, paragraph 2(b)(i)(C) is ambiguously worded. Eligibility for relief is based upon consistency of trading strategies employed with the notional test, which refers to positions, rather than the trading strategies that result in positions, being

established. The Committee recommends that paragraph 2(b)(i)(C) be reworded to read "is consistent with the 'notional test' under the No-Action Relief."

Other Requests for Comment

The Committee believes that qualifications for investors in funds or accounts operated by exempt CPOs and CTAs should be as set forth in the various proposals. The Committee recommends that no new definitions of sophisticated persons be introduced because several definitions already exist in the Commodity Exchange Act and the various federal securities laws.

The Committee stands ready to assist the Commission and its staff with further information or other assistance concerning these issues.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Susan C. Ervin". The signature is fluid and cursive, with a large initial "S" and "E".

Susan C. Ervin

cc: Daniel Roth, President and Chief Executive Officer, National Futures Association
John G. Gaine, President, Managed Funds Association

Association of the Bar of the City of New York
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* Member of Subcommittee who drafted this letter of comments.

Adjunct Member

Cindy Ma