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COMMENT

April 21, 1998

BY HAND DELIVERY

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

Re: **Rule Proposal for Requests for Exemptive, No-Action and Interpretative Letters**

Dear Ms. Webb:

The Law and Compliance Division of the Futures Industry Association ("FIA") respectfully submits this comment letter in response to the Commodity Futures Trading Commission's ("CFTC" or "Commission") Notice of Proposed Rulemaking ("Notice") for Requests for Exemptive, No-Action, and Interpretative Letters, published in the Federal Register, 63 Fed. Reg. 3285 (Jan. 22, 1998).

FIA, a not-for-profit corporation, is a principal spokesman for the futures industry. Its members include approximately 70 of the largest futures commission merchants ("FCMs") in the United States. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than 80 percent of all customer transactions executed on United States contract markets.

I. INTRODUCTION & GENERAL COMMENTS

We understand that the Commission is concerned with a lack of uniform procedures regarding the issuance of no-action letters and other requests for relief, and that the absence of such procedures has, at times, placed unnecessary burdens on Commission staff. However, the CFTC's practice of issuing informal no-action and interpretative letters and granting formal exemptions has been a cornerstone of regulatory and compliance practice in the commodity futures industry. The ongoing, informal dialogue between Commission staff and industry members in connection with requests for interpretative advice and no-action relief is a valuable tool for both sides. Industry participants and commodity law practitioners are able to obtain the informal views of Commission staff with respect to proposed transactions and related statutory and regulatory interpretations under the Commodity Exchange Act ("CEA" or "Act") and CFTC regulations. Meanwhile, the no-action process serves a valuable educational function for the Commission and its staff by providing information not otherwise readily available about cutting-edge business and risk management products. The process enables the Commission and its staff to keep their fingers on industry's pulse, to monitor regulatory gaps and conflicts that arise in practical situations, and to guide the application of existing regulations to new developments.

Given the mutual benefits of the informal consultative process, procedures should be designed to foster and even encourage a continuing exchange of issues and ideas between the Commission staff and the industry participants they regulate. We appreciate the Commission's effort to give more structure to the consultative process, to assure regulatory consistency, and to reduce needless burdens upon its staff. Given the substantial benefits of the existing process, we believe that the proposed rules may discourage the use of the no-action and interpretative processes -- an effect the Commission does not desire.

Thus, if industry members think that the costs and risks outweigh the benefits in seeking no-action or interpretative advice, many would forgo discussions with the Commission staff. They would, instead, structure their business activities based upon their own judgment or the advice of their counsel. Then, the Commission would learn of significant developments only after the fact. Regulatory issues that might earlier have been resolved quickly and informally to the Commission's satisfaction

may have to be resolved through formal procedures that are more costly and provide no direct benefit to the industry and the Commission.

In view of these considerations, we respectfully suggest that the proposed detailed, uniform procedures for no-action and interpretative letters be reconsidered or be drafted as general guidelines rather than formal rules. As currently drafted, the proposed formal rules would be extremely burdensome and inhibiting for small businesses and individuals with limited resources. If changes are to be made to the Commission's procedures regarding no-action and interpretative matters, they should be implemented cautiously and incrementally. At a minimum, the Commission should delete or modify those elements of its current proposal that will substantially increase the risks and costs of seeking agency guidance and consequently provide strong disincentives to industry-agency communication.

As a final general comment, we urge the Commission to ensure that the consultative process retains a reasonable measure of informality and flexibility. Industry participants and their counsel should remain welcome to engage in informal meetings with Commission staff, by telephone or in person, regardless of whether no-action relief or more formal interpretations ultimately may be sought. To this end, we recommend that the Commission consider including discussion in an adopting release, staff legal bulletin, and/or appendix to its rules, to promote the availability of informal meetings with Commission staff to solicit general advice, similar to the rule issued by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 202.2.[1]

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[1] The SEC rule, 17 C.F.R. § 202.2, specifically provides for pre-filing assistance and interpretative advice:

> The staff of the Commission 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

II. SCOPE OF PROPOSED RULES & RELIEF

A. Definitions

Proposed Rule 140.99 sets forth definitions for exemptive, no-action, and interpretative letters ("Letters"). We suggest that any rule that addresses these matters also include definitions for "statutory interpretations" and "policy statements," both of which are issued by and in the name of the Commission (not staff), and published in the Federal Register. Alternatively, the Commission should discuss the availability of statutory interpretations and policy statements in its adopting release. The inclusion of such definitions in a single definitional section or Commission release will provide a more comprehensive description of the various types of guidance and relief offered by the Commission and its staff and the relative significance attributed to each by the Commission.

B. Scope of Proposed Rules

Given the substantive differences between no-action and interpretative letters, on one hand, and exemptive letters, on the other, we believe the Commission should address requests for exemptive relief as a separate matter. Interpretative and no-action letters, even if issued in the Commission's name and with its express authority, do not have the force of law. In an appropriate context, interested parties may persuade a court that the law differs from what the staff or even the Commission has stated. In contrast, an exemption must be authorized by the Act and has the force of law whether issued by the Commission itself or by its staff acting pursuant to delegated authority. A court is required to give effect to the exemption. Also, Section 4(c) of the Act already includes requirements and procedures for certain exemptions. Thus, it may create confusion if rules applicable to exemptive requests are combined with rules for no-action and interpretative requests.

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appropriate officer of the Commission's staff. In addition, informal discussions with members of the staff may be arranged whenever feasible, at the Commission's central office or . . . at one of its regional or district offices.

C. Legal Significance of Staff Letters

The Proposed Rules set forth the Commission's position concerning the legal effect of no-action letters. That is, a no-action letter would be "applicable only with respect to the particular circumstances and binding only with respect to parties addressed by the letter." Proposed Rule 140.99(a)(2). Likewise, the proposed rules should set forth the extent to which a staff interpretative letter (and an exemptive letter, if included in the same rule) may be relied upon, and by whom. Cf. Proposed Rules 140.99(a)(1), (3). Any such rules should not preclude Commission staff, in appropriate circumstances, from extending the application of Letters to others in the same or substantially similar circumstances. Exemptive letters generally, and Section 4(c) exemptive rules, regulations or orders in particular, should offer a greater zone of protection.

Where a Letter addresses common or recurring issues, Commission staff should include a statement that other persons in the same circumstances may rely upon the Letter. This will benefit both the public and the Commission, because Commission staff will avoid the need to address repeatedly the same or substantially similar issues. For example, the SEC Divisions of Corporate Finance and Market Regulation specify when others may rely upon a no-action letter, and the SEC Division of Investment Management "generally permits third parties to rely on no-action and interpretive letters to the extent that the third party's facts and circumstances are substantially similar to those described in the underlying request for a no-action or interpretive letter." Informal Guidance Program for Small Entities, 62 Fed. Reg. 15604, 15606 n.20 (SEC Apr. 2, 1997). In any event, other interested parties should not be prohibited from relying on such Letters. The Commission should make clear that even where the specific relief offered by a Letter may only be relied upon by the requesting party, third parties may rely on the Letter for general guidance.

Exemptions stand on a different footing. Any Letter granting an exemption should make clear the statutory and other authority on which the exemption is based. If a class of persons will be able to claim the exemption, the criteria for inclusion in the class should be set forth with particularity.

For the sake of consistency, the definition of "exemptive letter" should include a statement that the Letter binds the Commission, other divisions and all other concerned persons. Compare Proposed Rule 140.99(a)(1) (no statement regarding upon

whom exemptive letters are binding) with Proposed Rule 140.99(a)(2) (proposing that a no-action letter represents the position of only the Division that issued it and does not bind the Commission itself or any other division thereof) and Proposed Rule 140.99(a)(3) (proposing that an interpretative letter is "binding only upon the staff unit providing the advice or guidance and not upon the Commission itself").

We also suggest that interpretative letters should be binding upon the entire Division or Office that issued it, and not just the "staff unit." The SEC rules, for example, provide that "any statement by the director, associate director, assistant director, chief accountant, chief counsel, or chief financial analyst of a division can be relied upon as representing the views of that division." 17 C.F.R. § 202.1(d). Here, too, any written interpretative advice or guidance from an authorized senior representative of a CFTC Division or the Office of the General Counsel should be binding upon the entire Division or Office.

We note that the Division of Enforcement (not the Division of Trading and Markets or the Division of Economic Analysis) recommends enforcement action to the Commission. See, e.g., 17 C.F.R. Part 11. Thus, the rules should clearly state that no-action letters should bind all Divisions or require the Division issuing the no-action letter to describe the process of consultation with other Divisions and to state whether any other Division concurs or disagrees with the issuing Division's position, so that affected persons will be able to judge the weight to be accorded the no-action letter.

III. SPECIFIC PROCEDURAL RULES

A. General Requirements

Proposed Rule 140.99(b)(3) provides that requests must relate to a specific proposed activity or a proposed transaction. The Proposed Rule states that, absent extraordinary circumstances, Commission staff will not issue a Letter based upon past transactions or activities. To the extent that the proposal applies to exemptive letters, it is inconsistent with Section 4(c) of the Act, which expressly authorizes retroactive exemptive relief. Furthermore, the proposal makes no allowance for cases where a particular activity or transaction raises CEA or regulatory issues only

after the activity or transaction is underway, or where persons acting in good faith do not identify the regulatory issues beforehand. We believe that persons should not categorically be prohibited from requesting no-action or interpretative relief once they realize that there may be issues with respect to a particular transaction or course of conduct. This is particularly true where the issues are more technical than substantive.

Proposed Rule 140.99(b)(4) provides that staff will not respond to a request that is made by or for an unidentified person. Similarly, Proposed Rule 140.99(c)(1) requires identifying information for the (interested) person seeking the Letter. These provisions are likely to discourage parties from seeking informal regulatory guidance from the CFTC, for fear that their inquiry could spawn increased regulatory scrutiny or even an investigation. The chilling effect of this proposed requirement should not be underestimated. At a minimum, we believe that staff should be open to informal consultations with the person's outside counsel or other representative on an undisclosed basis, so that regulated parties can seek preliminary guidance without fear of regulatory repercussions. As discussed above, leaving the doors open for an ongoing informal exchange between industry and its regulators benefits the Commission as well as the public, because it affords the Commission and its staff an opportunity to learn about and monitor the practical dilemmas industry participants face in applying CFTC rules to real-world business activities and transactions.

Proposed Rule 140.99(b)(5)(i) provides that requests must "set forth as completely as possible the particular facts and circumstances giving rise to the request." This language is likely to result in costly and lengthy submissions, which have little incremental value. Instead, we suggest that any rule that addresses the content of requests should require a concise statement of all relevant and material facts. This modification would help ensure that Commission staff have the information they need to render advice or a no-action decision, while protecting requesting parties from the cost and burden of drafting an unnecessarily lengthy submission. The SEC has used this approach in its procedures. See Procedure Applicable to Requests for No-Action or Interpretative Letters, SEC Rel. No. 33-5127, 36 Fed. Reg. 2600, at ¶ 4 (Jan. 25, 1971) ("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."); accord Procedures Applicable to Requests for No-Action and Interpretive Letters, SEC Rel. No. 33-6269 (Dec. 12, 1980) (republishing same procedures).

Proposed Rule 140.99(b)(5)(ii) states that "Commission staff will not respond to a request based on a hypothetical situation." We believe that this rule should be modified to clarify that requests may propose alternative activity or transactions, which should not be considered purely hypothetical. Indeed, Proposed Rule 140.99(c)(7) provides that requests may ask that if the primary relief is denied, alternative relief may be granted. Likewise, requests should be able to inquire about Commission staff's view of an alternative course of action or transaction, if staff denies no-action relief for the primary proposed activity or transaction. Moreover, if the Commission permits informal pre-filing conferences with Commission staff (as suggested above), requesting parties will have an opportunity to identify, discuss, and eliminate various alternatives, so that any written request for relief will be more succinct.

B. Information Requirements

1. Certification and undertaking

Proposed Rule 140.99(c)(3)(a) would require (i) a certification by a person with knowledge of the facts that the "representations made in the request are accurate and complete"; and (ii) an undertaking that, if any material representation in the request changes, such person will submit a written supplement to Commission staff. The Notice explains that "Requesters must make a complete and reliable presentation of the facts relevant to a request. A certification requirement is intended to assure that requesters fully review the facts and keep Commission staff advised of changed circumstances, without the need for repeated requests by staff for supplemental information." Notice, 63 Fed. Reg. at 3286.

We believe that the intent of the proposed certification requirement is already accomplished by: (i) the conditions imposed by the Letter responses, and (ii) attorneys' ethical obligations. First, staff responses are usually conditioned upon the accuracy and completeness of the facts set forth in the request letter; if the request is misleading, the Letter issued would not provide the requesting party with appropriate interpretative advice or protection from enforcement action. Second, where lawyers submit requests, the local bar association

rules of professional conduct require the attorney(s) to be truthful when dealing with others on a client's behalf, and not to make a false statement of material fact or law to a third person. E.g., D.C. Bar Rule 4.1. Moreover, the Commission may deny an attorney the privilege of appearing or practicing before it if the attorney is found to lack the requisite qualifications, character, or integrity in a Commission proceeding. 17 C.F.R. § 14.8.

In light of the measures already on the books, the proposed certification requirement is unnecessary, and would create needless paperwork for Commission staff and the interested parties. Thus, the certification should not be enacted as a blanket requirement for requests for no-action and interpretative relief. At most, we suggest that staff should require certifications only where parties are not represented by counsel and there is some reason to believe that material misrepresentations may have been made. Any such certification should apply only to factual representations (not legal analyses). If a party is represented by counsel and a certification is still required, the certification should be executed by the actual party in interest -- not counsel.

Similarly, we believe that the proposed undertaking to notify Commission staff of material changes is unnecessary. As noted above, Letters are conditioned on the accuracy and completeness of the facts set forth in the request. Consequently, if parties materially change their activities or transactions from those described in their request, they proceed with the materially changed action or transaction at their own risk. As a result, requesting parties have every incentive to keep Commission staff apprised of material changes in connection with their requests, even without a formal undertaking.

2. Relief requested, legal and factual issues, and legal and public policy discussion

Proposed Rule 140.99(c)(4) provides that a request identify the type of relief requested and clearly state why a Letter is needed. The proposal would further require that the requester "must identify ***all*** relevant legal and factual issues and must discuss the legal and public policy bases supporting issuance of the Letter." (Emphasis added). As above, this type of requirement is likely to result in costly and lengthy requests, which in many circumstances are an unnecessary burden upon the requester and the recipient (*i.e.*, Commission staff).

While we agree that requests should be as materially complete as possible at the outset, mandating absolute comprehensiveness is not always practical. We believe that the no-action and interpretative process necessarily is and should continue to be somewhat iterative. When reviewing a request for relief, regulators may raise issues that the requester had not foreseen; in turn, the requester may then devise a satisfactory response or solution that regulators may not have anticipated. This type of cooperative exchange is administrative procedure at its best.

In this spirit, we suggest that any rules that address the no-action and interpretative process should be modeled after the comparable SEC provision: "The writer should indicate why he thinks a problem exists, his own opinion in the matter and the basis for such opinion." SEC Release Nos. 33-5127 and 33-6269, *supra*, at ¶ 6. Similarly, the CFTC procedural rules should require only that the requester: (i) identify the type of relief requested, (ii) briefly identify the factual and or legal issues requiring issuance of a Letter (*i.e.*, why a letter is needed), and (iii) identify a sufficient legal and/or public policy basis to support issuance of the Letter. This balanced approach provides sufficient information for Commission staff to assess the request for relief, without requiring the requesting party to draft an unnecessarily lengthy dissertation.

3. Requirements to cite all relevant authorities and prior Letters

Proposed Rule 140.99(c)(5) would require references to ***all*** relevant authorities, including the Act, Commission rules, regulations and orders, judicial decisions, administrative decisions, statutory interpretations and policy statements, and would further require that all adverse authority be cited and discussed. In addition, Proposed Rule 140.99(c)(6) would require identification of prior Letters issued by Commission staff in similar circumstances, as well as any conditions imposed by prior Letters. The text of the Notice explains that "Requesters and their counsel must exercise due diligence in identifying and assembling the relevant authorities, including prior Letters of Commission staff." Notice, 63 Fed. Reg. at 3286.

We recognize and respect that submitters have a responsibility to make sure that there is a good faith basis for their request and to support their requests for relief adequately. Nevertheless, these provisions could be interpreted

to require an unnecessary comprehensive legal brief, which, in many circumstances, would be prohibitively expensive and burdensome to produce and review.

Overbroad research requirements create a huge financial and practical disincentive to persons seeking regulatory guidance. Consequently, this requirement may discourage requests for no-action relief or interpretative advice, especially by individuals and smaller entities without the resources to conduct exhaustive legal research or the financial wherewithal to pay someone else to conduct the research. Even larger entities would be deterred from submitting requests if faced with the expenditure of substantial internal resources and/or a large legal bill to prepare a basic request that should require only a few basic authorities to address.

Moreover, it would be difficult to measure compliance with such a sweeping, open-ended research requirement. Reasonable minds may differ. That is, the requesting parties and Commission staff may have legitimately different views of which issues, authorities and precedents are relevant or applicable.

Rather than mandating encyclopedic research, we recommend that any Rule require requesting parties to present the authorities on which they rely and any authorities of which they are aware that express a different view of the issue. Indeed, it is in the requesting party's interest to cite supporting authorities and to distinguish salient adverse precedent.

Finally, any such rule should clarify that there is no requirement to identify Letters issued before 1993, because the Commission's record of publication was not consistent before that time. Even published Letters may not be readily available from on-line services and legal databases before 1989.[2] It would be onerous to require requesters to go beyond the electronic databases and manually search for prior Letters in the industry digests and reporters, which in many cases are difficult and inefficient research resources to use. We further encourage the Commission to publish all prior no-action and interpretative letters and to ensure that all new Letters are published promptly.

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[2] The LEXIS-NEXIS library currently contains CFTC no-action, interpretative, and exemptive letters from January, 1989; the WESTLAW database contains CFTC Letters since 1987.

C. Additional Requirements

1. Filing requirements

In connection with Proposed Rule 140.99(d), the Commission specifically seeks comments on whether to permit electronic filing. We recommend that the Commission should permit electronic filing.

2. Form of staff response

In connection with Proposed Rule 140.99(e), the Commission requested comment on whether and when abbreviated or endorsement type responses are appropriate. We believe abbreviated or endorsement type responses are appropriate for general use, as long as a nonconfidential version of the underlying request letter is available to the public.

3. Withdrawal of requests

Proposed Rule 140.99(f) provides that requests may only be withdrawn where: (i) the requester has decided not to proceed with the proposed transaction or activity, (ii) intervening events have rendered the request moot, or (iii) a request for confidential treatment of the request letter pursuant to Reg. § 140.98 was denied. We think these restrictions on withdrawal of requests are likely to inhibit requests for no-action relief for fear that if staff response is delayed, the requester will be unable either to withdraw the request or to proceed with the proposed transaction or activity while the request is pending.

It would be problematic for the Commission to adopt a rule that could be viewed as prohibiting otherwise lawful transactions or activities based entirely upon a requester's decision to forgo staff guidance and to proceed, instead, upon advice of counsel. Parties should be able to withdraw request letters at any time. Once a party is no longer interested in no-action relief, it is a waste of staff resources to continue considering the request. Of course, Commission staff is not precluded from expressing its views or issuing a response to a request, even where the request has been withdrawn. However, a decision to forsake staff advice, without more, should not expose anyone to a risk of a formal investigation or other formal administrative action or proceeding. The mere possibility that this might occur would be enough to deter industry members from further consultation with Commission

staff. Such a result would be counterproductive for both the Commission and the industry.

4. Failure to pursue a request

Proposed Rule 140.99(e) would require requesters to respond to staff inquiries within 30 days (unless an extension of time has been granted), or staff generally will issue an adverse response. We suggest that any such rule should be modified to permit requesters to respond to staff inquiries or to seek an extension within 30 days (without requiring that the extension be granted); and should further provide for an automatic 30-day extension upon timely written request. This more flexible approach fulfills the intent ensuring that the requesters are still interested in pursuing their request, while permitting last-minute requests for an extension within the response period.

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We appreciate the opportunity to comment on the Commission's proposed rules. If you have any questions, please contact the undersigned at 212-648-6563.

Sincerely yours,

David C. Sturm/jf

David C. Sturm
President, Executive Committee
FIA Law & Compliance Division