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COMMODITY FUTURES TRADING COMMISSION
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COMMENT

To **Jean A. Webb**
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre, 1155 21st Street, NW
Washington, DC 20581

From **Evan Tucker**
641 W Briar Place
Chicago, IL 60657

Re **Views and comments on proposed Regulation 1.69**

To whom it may concern,

Evan Tucker applauds the Commission's effort to impose specific requirements upon SROs to write procedures that will help ensure that persons who are entrusted with surveillance, compliance, rule enforcement and disciplinary responsibilities are free from conflicts of interests. In doing so, Tucker wishes to express his concern that a possible "hole" may exist in proposed Regulation 1.69, as presently written.

Tucker notes and agrees with the EOA's original comment that recently, SROs have often ignored their "written and unwritten" standards regarding participation in governance and committee matters. Tucker notes the Commission's response that it's proposed rulemaking would address this concern to the extent that it would require SROs to codify their conflict of interest standards consistent with Regulation 1.69.

Tucker notes, however, that as presently written, proposed Regulation 1.69 limits its specific language when listing factors to be considered with respect to barring persons with potential conflicts of interest from deliberating or voting on committee decisions. This specific language appears to be limited to potential conflicts involving a personal or

ongoing business relationship between a committee member and a named party in interest in a matter being considered or a pecuniary interest on the part of the committee member. In fact, in publishing proposed Regulation 1.69 for public comment in THE FEDERAL REGISTER, January 23, 1998 (Volume 63, Number 15) the Commission explains that it "[the Commission] believes that the decision making ability of committee members is most likely to be influenced by their personal interests when they consider actions which could impact them monetarily."

Proposed Regulation 1.69(b)(1)(i) lists specific potential relationships between a disciplinary committee member and a named party in interest in a matter being considered by the committee on which the member is participating, that, if applicable to a member of a disciplinary committee, would require that committee member to abstain from voting or deliberating on the same matter before that committee. Proposed Regulation 1.69(b)(1)(ii) then requires any member of a disciplinary committee to disclose whether he or she has one of the relationships listed in paragraph (b)(1)(i).

Proposed Regulation 1.69(b)(1)(iii) then squarely places the burden on the SRO of determining whether any member of its disciplinary committee is subject to a conflicts restriction in any matter involving a named party in interest with which the committee member has a relationship by requiring that such determinations will be based upon:

(A) Information provided by the member pursuant to paragraph (b)(1)(ii) and

(B) Any other source of information that is reasonably available to the self-regulatory organization.

Proposed Regulation 1.69(b)(2)(i) prohibits committee members from participating in committee decisions where they "knowingly [had] a direct and substantial financial interest in the result of the vote."

In THE FEDERAL REGISTER, the Commission explains that it recognizes that SROs often do not have knowledge of **all possible aspects of the relationships that may exist between a committee's members and named parties in matters being considered by the committee**. The Commission then explains that "under this provision, SROs would be required, **at a minimum**, to base their conflict of interest determinations upon:

(1) information provided by the committee members themselves (proposed Regulation 1.69(b)(1)(iii)(A)), and

(2) any other source of information that was "reasonably available" to the SRO (proposed Regulation 1.69(b)(1)(iii)(B)).

In so explaining, the Commission strongly implies and appears to recognize that conflict of interest determinations made by an SRO should not necessarily be limited exclusively to the relationships listed in paragraph (b)(1)(i). In fact, the Commission clearly notes that proposed Regulation 1.69 would establish only "**minimum standards**" for conflict of interest restrictions.

Notwithstanding the above, Tucker asserts that, as presently written, proposed Regulation 1.69 does not adequately make clear that an SRO's procedures for determining conflicts of interest should not be limited exclusively to the relationships listed in paragraph (b)(1)(i). Moreover, Tucker asserts that this lack of clarity creates the

potential for proposed Regulation 1.69 to "backfire" in this regard by creating the potential for SROs to ignore any relationship not specifically listed in paragraph (b)(1)(i) in its rules and practice of determining potential conflicts of interest on the part of it's committee members. Tucker warns that proposed Regulation 1.69 could create a polarizing effect under which SROs could actually use the relationships listed in paragraph (b)(1)(i) as something to hide behind when defending committee decisions against challenges of impartiality and bad faith on the part of it's committee members.

In the interest of avoiding such a possibility, Tucker requests that the Commission carefully consider the inclusion of other relationships that could create a conflict of interest in addition to those already listed in proposed Regulation 1.69(b)(1)(i). Tucker requests that, at the very least, the Commission include additional language in paragraph (b)(1)(iii) which makes clear that the relationships listed in Paragraph (b)(1)(i) are not the only relationships with a named party which could create a potential conflict of interest for a disciplinary committee member.

Tucker asserts that, although this only makes common sense, a conflict of interest situation is exactly the type of situation in which a party to such a conflict, as well as the SRO itself, when defending committee decisions, could intentionally choose to interpret proposed Regulation 1.69 so narrowly as to assert that any relationship not specifically included in paragraph (b)(1)(i) should not be considered to be a conflict of interest.

In addition to generally suggesting that the Commission include more relationships in paragraph (b)(1)(i) that could create a possible conflict of interest, Tucker specifically suggests that the Commission strongly consider the inclusion of past or

present relationships with a named party in interest in which a committee member may be directly or indirectly liable for, have or share liability with, or could be considered to have been an accomplice to, the named party in interest in committing violations of law, Commission rules, Commission regulations or SRO rules when such potential violations are directly related to or based on the very same matters being considered by the committee on which the committee member is voting. Such a relationship would clearly constitute a **direct interest** in the matter under consideration. **This would be the equivalent of having a judge or jury member participate in a criminal trial in which they took part in the crime that the accused is charged with committing.** Such a relationship would arguably create a greater conflict of interest than either a family relationship or a financial interest.

Tucker asserts that, in the interest of ensuring that SRO disciplinary committee members "act with the utmost objectivity, impartiality, honesty and good faith", relationships involving shared liability for acts or omissions directly under consideration by the committee on which the member is voting must be given just as much consideration as pecuniary interests and ongoing business or family relationships when determining if a conflict of interest exists.

In support of this position, Tucker references a matter currently pending before the Commission in which Tucker is a named party in interest. In the matter of Evan T. Tucker, III v. National Futures Association, (Docket No. CRAA 98-2) Tucker submitted a petition for a stay of a decision of the National Futures Association pending review of his appeal before the Commission. In his petition, Tucker alleges that members of both

the NFA Hearing Panel and the NFA Appeals Committee improperly participated in the review of his pending case before the Commission and did so while fully aware that they had both direct and secondary liability for acts alleged to have been committed by Tucker that were directly under consideration before the committees on which they sat.

Tucker alleges that William H. Pauly, the former CFO of ING (U.S.) Securities, Futures & Options, Inc., sat on an NFA Hearing Panel and voted on a matter involving NFA rule violations, allegedly committed by Tucker, in which Pauly had clear joint and several liability for failing to supervise an Introducing Broker at which the alleged violations by Tucker were alleged to have occurred.

Tucker then points out that the Introducing Broker in who's offices the violative conduct is alleged to have occurred was charged and found to have violated NFA Compliance Rule 2-9 for failing to stop Tucker from committing the same alleged violations. Tucker noted that this occurred during the same time period that Tucker's appeal was under review before the NFA Appeals Committee on which Wallace G. Weisenborn, the President of ING (U.S.) Securities, Futures & Options, Inc., sat as Chairman. Tucker noted that at all relevant times, ING and, with it, Pauly and Weisenborn had joint and several liability under NFA Compliance Rule 2-23 for any violative acts or omissions committed at the Introducing Broker which was **guaranteed** by ING. Tucker notes that while he and his fellow respondents were severely sanctioned by the panels and committees on which Pauly and Weisenborn sat, both Pauly and Weisenborn are jointly and severally liable for the very same alleged violations for which Tucker was sanctioned. Meanwhile, NFA has not charged Pauly or Weisenborn with any

rule violations relating to the acts allegedly committed by Tucker or the Introducing Broker at which the violations allegedly committed by Tucker occurred.

Finally, Tucker notes that during the proceedings, neither NFA, Pauly or Weisenborn disclosed these relevant associations or the **direct interest** that these associations created or that these conflicts of interest existed to either Tucker or his fellow respondents. During the proceedings, both the panel on which Pauly sat, and the Appeals Committee, which was chaired by Weisenborn, made factual determinations and adverse rulings against Tucker relating to specific matters for which Pauly and Weisenborn were jointly and severally liable.

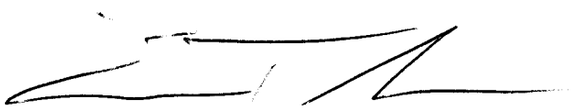
In response to Tucker's allegations, the NFA, who apparently was aware of the conflicting relationships all along but did not disclose them to Tucker, has argued that Tucker "should have known" of Pauly and Weisenborn's undisclosed associations and that because these relationships were not one of those specifically listed in paragraph (b)(1)(i) of proposed Regulation 1.69, such relationships did not constitute a conflict of interest. In so doing, Tucker believes that NFA is already fulfilling Tucker's prophesy that proposed Regulation 1.69, as written, could be interpreted by the SROs in a way that is contrary to that intended by the Commission and inconsistent with the purposes of the CEA.

Tucker realizes that part of the Commission's reason for codifying what is expected of SROs in their rulemaking is to make very clear what types of relationships would be considered to create a conflict of interest and what wouldn't. Tucker understands the Commissions desire to reduce the potential for collateral attack of such

committee decisions on the grounds that they were made in "bad faith". For this purpose, Tucker strongly urges the Commission to broaden the types of relationships covered in paragraph 1.69(b)(1)(i) to include other perhaps deeper past or present relationships where a voting committee member's own good standing with the SRO might be at stake.

Tucker hopes that, in the interest of truth, justice and the American way, the Commission will at least consider adding language to proposed Regulation 1.69 to make clear that it is possible for a conflict of interest to exist for reasons other than as a result of the relationships currently listed in paragraph (b)(1)(i) or because of a financial interest only.

Very Truly Yours,



Evan Tucker