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COMMENT

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

Re: Exemption from registration as a Commodity Trading Advisor

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 the request for comments concerning the proposed exemption from registration as a Commodity Trading Advisor (the "Proposal"), which was published in the Federal Register on December 7, 1999 (64 Fed. Reg. 68304). The Association is an organization of approximately 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.

The Committee supports the Proposal to exempt from registration as a commodity trading advisor those persons who furnish only impersonal commodity trading advice. The Committee believes that the Proposal is a timely and appropriate recognition of recent court decisions that have held that the application of Section 4m(1) of the Commodity Exchange Act, as amended, to the publishers of impersonal trading advice constitutes an unconstitutional prior restraint on speech in violation of the First Amendment. The recent decisions cited by the Commission rely on *Lowe v. SEC*, 472 U.S. 181 (1985), and emphasize the impersonal nature of the investment advice provided by the advisors involved in those cases as well as in *Lowe*. Adoption of the Proposal would provide parallel treatment for advisors that provide impersonal advice, whether their activities fall under the Investment Advisers Act of 1940 or the Commodity Exchange Act.

The Committee believes that, in order to maintain the focus of the recent cases, the new rule and the release accompanying it should emphasize that the exemption is based on the nature of the advice that is provided, regardless of how it is communicated to the client. Therefore, the Committee suggests that subsection (iii) of the Proposal be deleted because it unnecessarily

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blurs the distinction between the nature of the advice provided and the mode of communication of that advice. Subsection (iii) detracts from the appropriate focus of the exemption: the nature of the advice provided<sup>1</sup>. As written, subsection (iii) would deny the exemption to an advisor for any interactive communications without regard to the substance of the information conveyed. The Committee believes that subsections (i) and (ii) are broad enough to prohibit a non-registered advisor from providing individualized advice in any form and through any medium. In order to emphasize the intended scope of the prohibitions in (i) and (ii), the Committee suggests the additional language described below.

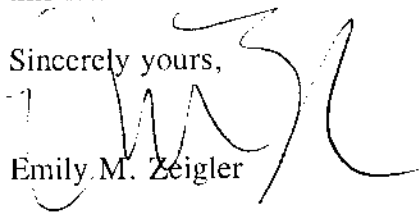
In addition, the Committee notes that the rapid development of communications technology could require periodic reexamination of subsection (iii) as proposed to determine which new methods of communication between the advisor and the client should be eligible for exemption. In addition, the emphasis placed in subsection (iii) on the method of communication, rather than on the substance of the communication, may also make policing the terms of the exemption more difficult.

Moreover, the Committee notes that the anti-fraud provisions of the Commodity Exchange Act continue to apply to unregistered advisors, meaning that any communication by an advisor that acts as a fraud on a client, without regard to the form of communication, is subject to action by the Commission whether or not the advisor is registered with the Commission.

The Committee supports clarifying the breadth of the Proposal to include prohibition of informal arrangements that contravene the purposes of the exemption. In order to exclude informal arrangements from the terms of the exemption, it is not necessary to define "informal arrangements" specifically. The Committee believes that the purpose of the Proposal would be achieved if the introductory language to Section 4.14(a)(9) were expanded by adding "directly or indirectly" after the word "engage."

The Committee appreciates the opportunity to comment on the Proposal and stands ready to assist the Commission and its staff if further clarification is required on the points raised by this letter.

Sincerely yours,

  
Emily M. Zeigler

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<sup>1</sup> If the Committee's suggestion is accepted, then any examples provided in the release accompanying the new rule should be amended to maintain a similar focus.

**Association of the Bar the City of New York**

**Committee on Futures Regulations**

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\* Chair of Subcommittee who drafted this letter of comments.

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