BY OVERNIGHT MAIL AND E-MAIL

January 5, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 18th Street, N.W.
Washington, D.C. 2058
secretary@cftc.gov

Re: Newedge USA, LLC Comment Letter Relating to Antidisruptive Trading Practices/RIN Number 3038-AD26

Dear Mr. Stawick:

Newedge USA, LLC ("Newedge USA") is pleased to submit this comment letter on behalf of itself and its parent organization, Newedge Group SA ("Newedge Group") relating to the above-referenced request for comment by the Commodity Futures Trading Commission ("CFTC").[1] Newedge USA applauds the CFTC for seeking comment on Section 747 of the Dodd-Frank Wall Street Transparency and Accountability Act of 2010 ("Dodd-Frank"), [2] and hereby publicly recognizes staff of the CFTC for their yeoman's efforts to propose a multitude of rules to implement Dodd-Frank under an extraordinarily tight timeframe.

As we set forth below, however, we believe that Section 4c(a)(5) of the Commodity Exchange Act (i.e., Section 747 of Dodd-Frank): (a) is unconstitutionally vague; (b) was

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[1] "Newedge" refers to Newedge Group, a 50%-50% joint venture between Societe Generale and Credit Agricole CIB, headquartered in Paris, France, and all of its worldwide branches, subsidiaries and other units. Newedge maintains offices in over 15 countries, and is a member of over 85 exchanges worldwide. As of June 30, 2010, Newedge had an estimated global market share in listed derivatives of 11.6% (clearing) and 12.4% (execution), and over $56.4 billion of client assets on deposit. Newedge USA is a leading US futures commission merchant ("FCM") and broker-dealer ("BD"). According to CFTC statistics, Newedge USA, as of the end of November 2010, held the largest pool of segregated and secured customer funds among all US-registered FCMs.

[2] As you may know, Newedge USA and Newedge Group are actively involved globally in working with regulators to develop rules and regulations designed to strengthen our financial markets.

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(and is) unnecessary given other trade practice and anti-manipulation provisions of the CEA and similar rules of many exchanges; (c) should be repealed by Congress or, at a minimum, clarified by the CFTC through the issuance of a rule or a formal interpretation, and (d) will likely have a negative impact on market liquidity, transparency and spreads to the extent it is not clarified. What is most surprising to us about this provision is that it appears to prohibit conduct that is already prohibited by Sections 4c(a)(2)(B), 6(c) and 9(a)(2) of the CEA. Indeed, each of the specific activities prohibited by Section 4c(a)(5) seems aimed at preventing conduct that intentionally causes a non-bona fide or artificial price. However, the CFTC already possesses the express authority to prosecute such conduct under the provisions of law noted above. Section 4c(a)(5) only seems to add confusion to the marketplace by making it unclear what (1) additional conduct is prohibited and subject to what standard, and (2) whether, under basic principles of statutory construction, certain potentially "disruptive" trading practices that are not specifically enumerated in Section 4c(a)(5) continue to be a concern of the CFTC or Congress.

In addition, we submit that existing standards of supervision for brokers are adequate. Executing brokers should not be held liable for the actions of their customers absent a clear failure of supervision or if there is complicity. It would be patently unfair to require executing brokers to assess their customers' orders for their potential market disruption affects pre-trade in nano-seconds, when automated technology is typically not available today to perform such pre-trade surveillance on a real time basis.

DISCUSSION

Section 747 of the Dodd-Frank Act amended Section 4c(a) of the CEA to make it unlawful for any person to engage in any trading, practice or conduct on or subject to the rules of a registered entity that:

(A) violates bids or offers;

(B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or

(C) is, is of the character of, or is commonly known to the trade as "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).

Section 747 also amended Section 4c(a) of the CEA by (a) granting the CFTC authority to promulgate rules that are, in its judgment, reasonably necessary to prohibit the trading practices enumerated above (as well as any other trading practice that is "disruptive of fair and equitable trading"), and (b) providing that it shall be unlawful for any person to enter into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap as part of a device, scheme, or artifice to defraud any third party.

A. Sections 4c(a)(5) and 4c(a)(7) of the CEA are Unconstitutionally Vague.

In our view, Sections 4c(a)(5) and 4c(a)(7) of the CEA (as implemented by Section 747 of Dodd-Frank) are unconstitutionally vague. It is a well-established principle of due process that "an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). Many different aspects of Sections 4c(a)(5) and 4c(a)(7) are not "clearly defined."[3] For example:

- What does it mean to engage in trading practices that violate "bids and offers? Assuming that this means trading outside the normal bid/ask spread (which is not even clear), does this mean block and EFP transactions are prohibited?

- What does it mean to demonstrate intentional disregard for the "orderly execution of transactions during the closing period? At what point does the "closing period" begin -- within 10 minutes of the close, within 5 minutes of the close, during the final seconds? And what does the term "orderly" mean? Trading at the close almost always differs from the trading that occurs during the earlier part of the trading day and frequently involves a flurry of last minute orders and executions. Does this mean under Section 4c(a)(5) that such trading, which has generally been allowed absent fraudulent intent, is now prohibited? Do fundamental principles of statutory construction indicate that Congress is not concerned about "disorderly trading" so long as it does not occur during the closing period?

- Does prohibited "spoofing" include trading activity -- which again, has generally been allowed absent manipulative intent -- whereby a party enters orders into the market larger than the actual size he or she seeks to fill in order to ensure obtaining that the full size desired is in fact filled? Are orders submitted for the purpose of mitigating market risk prohibited under Section 4a(c)(5)(C)? Indeed, a literal reading of Section 4c(a)(5)(C) would create the absurd and surely unintended result of prohibiting a retail customer from submitting a few trailing stop loss orders to lock in potential trading gains, because the customer obviously hopes the orders will not be triggered; i.e., the customer submits the orders with the express hope of subsequently canceling them because his/her gains have increased further.

- Does the prohibited conduct include an offer to enter into a prohibited transaction or just entering into the prohibited transaction? For example, Section 4c(a)(1) makes clear that a violation could result from an offer to enter into, entering into or confirming the execution of a transaction, while Section 4c(a)(5) simply refers to impermissible "trading, practice, or conduct." Why is there a difference in these preambles? Does this difference have

[3] Indeed, the CFTC itself asks in its request for comment whether it should provide "additional guidance as to the nature of the conduct that is prohibited" -- a question that goes to the heart of the void for vagueness doctrine. The fact that the CFTC is requesting comment to clarify a statute already enacted is, in our view, a validation of the industry's uncertainty as to the conduct prohibited under Sections 4c(a)(5) and 4c(a)(7).

significance? Will the CFTC, in determining whether a violation of Section 4c(a)(5) has occurred, apply the preamble set forth in Section 4c(a)(1)?

- What does the phrase "disruptive of fair and equitable trading" refer to in Section 4c(a)(6)?

- What type of due diligence, if any, is required of a swap counterparty under Section 4c(a)(7) to avoid liability to the extent the counterparty ultimately uses it as part of an artifice, device or scheme to defraud a third party?

- Why are there different standards of intent required for each of the activities prohibited under Section 4c(a)(5) and 4c(a)(7)? Specifically, to prove a violation of Section 4c(a)(5)(A) (bids or offers) no intent is required; to prove a violation of Section 4c(a)(5)(B) (orderly executions at the close) "intentional or reckless disregard" is required, to prove a violation of Section 4c(a)(5)(C) (spoofing) "intent" is required, and to prove a violation of Section 4c(a)(7) (swaps) "knowledge" or "reckless disregard" is required. What is the reasoning and/or purpose behind these distinctions? Why would "recklessness" not be required to show "spoofing," but is required to show manipulative intent under 4c(a)(5)(B) or Section 753 of Dodd-Frank (new anti-manipulation provisions of the CEA)?

- To the extent the purpose of Section 747 of Dodd-Frank is to prohibit intentional conduct resulting in non-bona fide prices, why was it carved out from Section 753 of Dodd-Frank (the general anti-manipulation statute)?

We believe that these are just a small sampling of the many questions created by Section 747. [4]

We also note in this regard that the issues caused by unconstitutionally vague and overbroad statutory provisions are extremely serious. As stated by the Supreme Court in Grayned:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

[4] We also are unclear why Congress provided almost no insight or detail with respect to Section 747, while providing ample detail and guidance regarding Section 753. Does this mean that the detail set forth in Section 753 should be used by the CFTC and courts – and market participants – to interpret the provisions of Section 747 considering that they appear designed to prohibit the same types of conduct?

Section 5c(a)(5)(i), without further clarification: (a) is, in our view, so vague it will violate the due process rights of market participants by failing to give them adequate notice and fair warning as to what conduct is prohibited, (b) could easily result in arbitrary and discriminatory enforcement by the CFTC (or, potentially, the Department of Justice to the extent a criminal action is brought in connection with a violation of Section 4c(a)(5)), and; (c) will enable executive officials to engage in policy-making activities -- all of which are unconstitutional.[5]

B. Section 4c(a)(5) is Unnecessary.

We also believe that Section 4c(a)(5) was (and is) unnecessary given the existence of other CEA, Dodd-Frank and exchange rules prohibiting the types of abusive trading practices enumerated therein.

For example, the CEA already prohibits the placement and execution of orders that cause or attempt to cause a non-bona fide price – which we believe represents the crux of the specific conduct prohibited under Section 4c(a)(5). See Section 4c(a)(1) and 4c(a)(2)(B) ("[i]t shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction ..... that ... is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price"); Section 6(c)(1) ("[i]t shall be unlawful for any person, directly or indirectly, to employ ..... any manipulative or deceptive device or contrivance"); Section 9(a)(2) ("[i]t shall be a felony ... for ..... [a]ny person to manipulate or attempt to manipulate the price of any commodity").

Similarly, most if not all designated contract markets already have rules prohibiting trading conduct that is harmful to their markets, including practices encompassing and/or relating to spoofing, trading at the close and trading outside prevailing bids and offers.[6] For example, as indicated by CME Special Executive Report S-5481 (dated November 18, 2010), CME Rule 402.A provides that its Business Conduct Committee has jurisdiction over member firms with respect to "trading practices, sales practices, trading ethics and market manipulations or other actions that threaten the integrity of the market" and the authority take actions against such members for engaging in such abusive trading practices (including taking "emergency actions" with respect to the "emergencies" identified in CME Rule 402.C such as any "actual, attempted, or threatened market manipulation" or any "actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions").

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[5] Indeed, this lack of clarity is particularly troubling since certain violations of Section 4c(a)(5) could potentially result in criminal action against the alleged violators.

[6] Further, these current exchange rules are likely to be amended as a result of Section 735 of Dodd-Frank which, among other things, provides such markets with "the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance and enforcement practices and procedures, including (A) methods for conducting real-time monitoring of trading; and (B) comprehensive and accurate trade re-constructions"). More specifically, Section 735 directs exchanges to establish and enforce rules to "protect markets and market participants from abusive practices committed by any party" and to "promote fair and equitable trading on the contract market."

We also note that, to our knowledge, all contract markets have at least some controls and systems in place to mitigate the effects of disruptive trading (whether such trading be intentionally or unintentionally disruptive). For example, CME Group employs price banding, maximum order sizes, stop logic, protection points, price limits and circuit breakers to mitigate against the effects of disruptive trading in connection with electronically placed orders.[7]

C. Sections 4c(a)(5) and 4c(a)(7) Should Be Clarified, If Not Repealed.

Given the serious constitutional flaws contained in Sections 4c(a)(5) and 4c(a)(7) generally -- and the fact that Section 4c(a)(5) does not, in our view, appear necessary for the reasons noted above -- we believe these statutes should be repealed, and we urge the CFTC to lobby for such repeal. We also believe the individual SROs should lobby for repeal of these statutes as well inasmuch as they will (1) result in confusion among the CFTC and exchanges as to whose responsibility it is to prosecute trade practice violations, (2) cause unnecessary regulatory overlap, and (3) have a chilling effect on market liquidity.

To the extent these statutes are not repealed, however, they must be clarified through the issuance of rules or formal guidance by the CFTC. Consequently, we respectfully submit that the CFTC possesses the authority and the responsibility -- as the administrative agency charged by Congress with monitoring and protecting the futures markets -- to engage in such rulemaking or issue such guidance.[8] In this regard, it is our view — considering courts' general reluctance to declare statutes unconstitutional[9] -- that any court reviewing the propriety of a CFTC rule designed to clarify the ambiguity embedded in Sections 4c(a)(5) and 4c(a)(7) would be hard-pressed to nullify it so long as such a rule was in the public interest and based on a reasonable statutory construction of legislative intent. Absent such clarification, we believe that, as stated by FIA in its comment letter of December 23, 2010, Section 747 (and more specifically Section 4c(a)(5)) will result in "unintended consequences" such as reduced trading volume, less transparency and wider spreads. In addition, without such clarification, we believe the statutes will be ripe for constitutional challenge in court.

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[7] We also believe that Section 4c(a)(5) has made the responsibilities between the CFTC and the exchanges for trading practice violations less clear and will potentially result in regulatory overlap and the unnecessary duplication of regulatory resources. In addition, we believe Section 4c(a)(5) will place additional, and unnecessary enforcement responsibility on the CFTC – which it may not have the resources to handle – and take it away from the entities closest to the occurrence of disruptive trading practices – the exchanges.

[8] Indeed, as noted by FIA in its December 23, 2010 comment letter, it was the CFTC itself that "requested, and received enforcement authority with respect to ..... disruptive trading practices," but failed to elaborate on the new authority's meaning.

[9] See, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) ("An Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available. Under this canon of statutory construction, the elemental rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality").

D. Section 747 Should Be Clarified, at a Minimum, in the Following Ways.

We believe certain clarifications of Section 747 need to be made to, at a minimum, allow the statute to survive a constitutional challenge and allow for the current functioning of the futures markets. Among other things, the CFTC should clarify:

- that enforcement actions will only be brought under Section 4c(a)(5) to the extent the CFTC can prove that a defendant acted with intent to cause a non-bona fide or artificial price;[10]

- that certain trading practices -- such as OTC trading, block trading and EFPs -- will be exempt from potential liability under Section 4c(a)(5);

- that no private right of action is available under Section 4c(a)(5) (as we believe this was Congress' intent since it did not specifically provide for a private right of action in Section 747 but does appear to have allowed for one in Section 753);

- that it will defer to SROs to bring trade practice cases (i.e., cases not involving intentional or reckless conduct), and;

- what due diligence, if any, is required to be conducted by a swap counterparty so as to avoid liability under Section 4c(a)(7) in the event its counterparty ultimately uses the swap to defraud a third-party.

E. Obligation of Executing Brokers

We also believe that the regulatory obligations of executing brokers – as well those of other market participants such as exchanges and direct market access customers – must be clarified with respect to Section 4c(a)(5) (indeed, the CFTC has asked for comment on this topic). As an initial matter, we note that under Rule 166.3 registrants already have a basic duty to supervise the trading activity they facilitate:

> Each Commission registrant ..... must diligently supervise the handling by its partners, officers, employees and agents (or person occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its partners, officers, employees and agents ... relating to its business as a Commission registrant.

In our view, this duty to supervise necessarily includes the obligation to establish procedures and controls reasonably designed to prohibit abusive and disruptive trading

[10] Indeed, any particular trade has the potential to be disruptive given unpredictable market conditions (such as the E-Mini trade credited with causing the May 6th "flash crash"). To hold market participants in violation of Section 4c(a)(5) for trades submitted in good faith and for legitimate economic reasons that subsequently cause market disruption would have a severe chilling effect on market liquidity.

practices, including those designed likely to result in non-bona fide prices.[11] We believe that CFTC must clarify that executing (and clearing) brokers will not be held liable for the acts of their customers – most of whom trade on a direct market access basis without human intervention by actual brokers – unless the basic supervisory obligation set forth in Rule 166.3 has been violated or there is complicity with a customer who commits an unlawful act.

In this regard, we note that (as we witnessed during the aftermath of the May 6, 2010 "flash crash") it can take weeks if not months to determine the nature and cause of a market disruption, including the disruptive impact of any one customer's trading activities. Indeed, it took two federal agencies – the CFTC and the SEC – with all of their significant resources several months to review and issue their report on the flash crash. In short, it simply is not possible – with today's technology – for executing brokers to determine on a pre-trade basis (in a "nano-second") whether a customer's trade may have a disruptive impact on the market. Consequently, the CFTC should clarify, at least for now, that executing brokers are not taking on additional obligations or potential liability with respect to Section 4c(a)(5), but rather, that the standard they will continue to be held to is that set forth in Rule 166.3 and the various interpretations and guidance issued pursuant to that Rule (which standard, as noted above, requires that FCMs, among other registrants, implement procedures and controls reasonably designed to ensure their compliance with their brokers' and customers' trading activities).[12]

We also believe that the CFTC should clarify that to the extent a broker has implemented procedures and controls reasonably designed to prevent abusive trading practices by their customers, they be given a safe harbor from lawsuits filed against them by their customers alleging damages based on the broker having stopped what appeared to be an abusive or disruptive order. To the extent such a safe harbor is not available, some brokers may choose to implement relatively lax systemic filters and controls in order to reduce their potential liability to customers.

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[11] Such procedures and controls can and should be customized to fit each registrant's particular business, and thus, no "one size fits all;" however, FCMs typically implement a wide variety of procedures and controls to supervise their agency and principal trading activities, including: implementing compliance manuals and supervisory procedures; conducting training and education on applicable rules for brokers and customers; reviewing new products and rule proposals; conducting monitoring and surveillance of trading activity, etc. In particular, we believe FCMs can and should be required to implement systemic filters and blocks reasonably designed to prevent their customers from engaging in abusive trading practices.

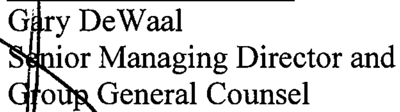
[12] Of course, brokers that are complicit in the unlawful trading practices of their clients should also be prosecuted to the full extent of the law.

Again, thank you for allowing us to provide you with our comments on Section 747 of Dodd-Frank. We would be happy to discuss them further with you to the extent you wished to do so. If you have any questions or would like further information regarding this matter, please do not hesitate to contact the undersigned at (646) 557-8548 or John Nicholas, US Securities Compliance Director and Global Securities Coordinator, Newedge Group, at (646) 557-8516.

Sincerely.

Newedge USA, LLC

By



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