The Pulse of Finance

Newedge

BY OVERNIGHT MAIL

January 7, 2011

Mr. David Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
secretary@cftc.gov

Re: Newedge Comment Letter Relating to the CFTC's Proposed Chief Compliance Officer Requirements/RIN 3038-AC96

Dear Mr. Stawick:

Newedge USA, LLC ("Newedge USA") is pleased to submit this comment letter on behalf of itself and its parent company, Newedge Group SA ("Newedge Group"), relating to the above-referenced proposed rulemaking by the Commodity Futures Trading Commission ("CFTC").[1] As a general matter, Newedge USA applauds the CFTC for seeking ways to ensure that swap dealers, major swap participants and futures commission merchants (collectively, "Registrants") enhance the prestige of the Chief Compliance Officer ("CCO") position within CFTC registrants. We believe such an enhancement is critical for maintaining a strong compliance culture within such entities.[2]

However, as we set forth below, we believe the proposal places an unreasonably disproportionate burden on CCOs for ensuring compliance with registrants' overall

[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.

[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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regulatory obligations, and that such responsibility should be allocated more evenly among a Registrant's other senior officers. In our view, such a "shared" approach will create a more effective and complete culture of compliance for Registrants by, among other things, assigning compliance responsibility to those best positioned to enforce it. In this regard, we have also set forth some alternative proposals for your review.

DISCUSSION

The CFTC's proposed rule would require each Registrant to designate an individual to serve as its CCO, and

> provide [him/her] with the full responsibility and authority to develop and enforce, in consultation with the board of directors or the senior officer, appropriate policies and procedures to fulfill the duties set forth in the Act and Commission regulations.

Specifically, the rule would require CCOs, in consultation with a Registrant's board of directors or the senior officer to, among other things:

1. establish the Registrant's "compliance policies;"[3]
2. resolve any conflicts of interest;
3. review and ensure the Registrant's compliance with compliance policies;
4. establish procedures for the remediation of noncompliance issues identified by the CCO;
5. establish procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues, and;
6. prepare, sign, and certify an annual compliance report.

The compliance report required by the proposed rule must, among other things: contain a description of the Registrant's compliance with the "compliance policies;" provide a certification of the firm's compliance with Sections 619 and 716 of Dodd-Frank; list any material changes to compliance policies; describe the financial, managerial, operational and staffing resources the firm has set aside for Compliance; describe any noncompliance issues, and; delineate the roles and responsibilities of the board of directors or senior

[3] Compliance policies are defined very broadly in the proposed rule as "all policies, procedures, codes, safeguards, rules, programs, and internal controls required to be adopted or established by a registrant pursuant to the Act and Commission regulations, including a code of ethics." Thus, as written, such policies would necessarily include all applicable rules relating to, for example, a Registrant's accounting, margin, risk, credit, operations, information systems, legal, client relations, treasury, sales, trading, books and records and research requirements.

officer and staff in addressing any conflicts of interest. Further, the annual report must include a certification by the CCO, under penalty of law, that the information contained in the report is accurate and complete. In this regard, we note that, contrary to the CFTC's assertion, Dodd-Frank itself does not state that it must be the CCO that certifies the annual compliance report. Rather, requiring the CCO to provide such a certification was an element added by the CFTC. As we discuss in more detail below, we do not believe the CCOs should be required to provide such certifications, but rather, that they should be made by Registrants' CEOs based on guidance provided by the CCO (similar to the certifications that are required under FINRA Rule 3130).

1. CCO Requirements for FCMs Should be Different Than Those Prescribed for Swap Dealers and Major Swap Participants, and Should be Established by the NFA.

As an initial matter, we note that while Dodd-Frank sets forth specific requirements for CCOs of swap dealers and major swap participants, it does not set forth specific requirements for CCOs of FCMs. Indeed, with respect to FCMs, Dodd-Frank states merely that:

> Each futures commission merchant shall designate an individual to serve as its Chief Compliance Officer and perform such duties and responsibilities as shall be set forth in regulations to be adopted by the Commission or rules to be adopted by a futures association registered under section 17.

We believe this distinction indicates Congress' intent that CCO requirements for FCMs should not be the same as those for swap dealers or major swap participants. Further, given the significant differences between full-service FCMs and swaps dealers/major swap participants in terms of governing rules and responsibilities – including, for example, responsibilities involving traditional futures trading activities – we also take the view that CCO requirements should not be the same for all three types of entities. Indeed, the CFTC itself acknowledges the aforementioned distinction made in Dodd-Frank, but then chooses to ignore it without explaining its reasoning in any way. We also believe the most appropriate organization to define CCO requirements for FCMs is – as suggested by Dodd-Frank – the National Futures Association ("NFA"). In this regard, we note that in the securities world it is generally FINRA – a registered securities association comparable to the NFA – that issues rules which define the roles of principals at broker-dealers, including CCOs (such as those set forth in FINRA Rule 3130 which we discuss below). Similarly, we believe that the NFA – by virtue of its extensive experience dealing directly with FCM CCOs over the years – is best positioned to determine what roles and responsibilities should be taken on by FCM CCOs. Obviously, once proposed, such responsibilities would have to be approved by the CFTC.

2. The Proposed Rule Places An Unreasonably Heavy Burden on the CCO.

In addition, with respect to all Registrants, we believe the proposal places an unreasonably heavy burden on the CCO.[4] Indeed, as written, the rule places "full responsibility" on the CCO to "develop and enforce" all relevant rules and regulations at a Registrant.[5] In addition to the sheer enormity of this task (given the substantial size and diversity of many Registrants), the rule would appear to place ultimate compliance responsibility on CCOs for activities over which they are likely to have little knowledge or experience, such as certain accounting, systems, financial and operational matters. See Part 3.1(d)(3) (CCO responsible for "ensuring compliance" with "all ..... laws, rules and regulations" applicable to a Registrant). Similarly, the rule, as written, would appear to place ultimate compliance responsibility on CCOs for activities and individuals over which they are likely to lack authority or control. Part 3.1(d)(2), (4), (5) (CCO responsible for the "resol[ution of] any conflicts of interest," "the remediation" of any noncompliance and the "enforce[ment]" of applicable rules). In this regard, we are concerned that CCOs at many registrants may not have the necessary "business line" supervisory authority – such as the ability to terminate employees or set their compensation – to accomplish these tasks. It is for this reason that most financial organizations (and regulators) do not place ultimate responsibility on the CCO to enforce compliance with applicable laws.[6] We also note that the proposal to place "full responsibility" for compliance on the CCO would appear to transfer certain regulatory responsibilities currently held by other key executive officers of FCMs – such as the CFO, CEO and COO – to the CCO, with the possible unintended effect of reducing the amount of time and level of concern such other executive officers will spend on and have regarding compliance matters.

In addition, we believe that the proposed rule places responsibilities on CCOs that far exceed those normally prescribed for such individuals.[7] While CCOs typically

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[4] To be clear, the arguments set forth below in Sections 2-4 are meant to apply to FCMs, as well as swap dealers and major swap participants.

[5] We note that while the proposed rule requires CCOs to "consult" with their firms' board of directors or senior officers on compliance matters, the rule is clear that CCOs have "full responsibility" for enforcing the Registrant's compliance.

[6] See, e.g., SIA White Paper on the Role of Compliance (October 2005) ("SIA White Paper") at 10 ("Compliance Department personnel are not, in most cases, in a position to remediate wrongful or potentially wrongful conduct, nor to authorize or approve business transactions; only supervisors have the authority and responsibility to make those judgments ..... [P]rimary responsibility for compliance must be borne by the branch manager as the first line supervisor of sales personnel ..... The important concept is that of direct reporting chains and the inseparable responsibilities and authority of line managers"); SIA Letter to NASD (July 18, 2003) ("Management has line authority to direct firm activities, enforce firm policies and procedures and impose sanctions for violations of firm rules when appropriate, up to an including suspension or termination of firm personnel. As such, this function naturally resides with branch managers, line supervisors, and other senior line officers that are registered principals of the Firm. Therefore, when we speak of ensuring a culture of compliance within a firm, that authority ultimately rests with the CEO not the CCO").

[7] CCOs in financial institutions generally are responsible for (a) providing regulatory advice to business and control units; (b) assisting in the development of policies, procedures and guidelines designed to facilitate compliance; (c) conducting training and education on regulatory matters; (d) conducting monitoring and surveillance of sales and trading activities; (e) conducting business unit compliance

"establish" certain discrete policies and procedures (Part 3.1(d)(1)), "review" a firm's compliance with applicable rules and requirements (Part 3.1(d)(2) and "establish" procedures for the remediation of compliance issues (Part 3.1(d)(4), they generally do not, as noted, have "full responsibility ..... to develop and enforce" applicable rules and requirements. As noted in the SIA White Paper:

> The role of the Compliance Department is to advise business on how to comply with applicable laws and regulations, and to monitor business activity and employee conduct to identify violations (or potential violations) of rules, regulations, policies, procedures and industry standards. Even with the evolving, and in many cases increased, emphasis being imposed on the Compliance Department function, there is a huge difference between the role of the Compliance Department and its personnel, and the overall broad firm responsibility 'to comply' with applicable rules and regulations. The Compliance Department plays an integral support function for firm compliance programs, but only senior management and business line supervisors ultimately are responsible for ensuring firm compliance with laws and regulations.

White Paper at 10. In short, while we believe the rule certainly is well-intended, we also believe that CCOs at many Registrants will simply be unable to accomplish all of the assigned tasks and duties, and further, that it may have the unintended effect of reducing the involvement of other senior executives at Registrants in compliance and regulatory matters.

3. Compliance Responsibilities Should Be Allocated More Evenly Among Registrants' Senior Executive Officers.

In our view, a more effective approach to ensuring compliance would be to allocate compliance responsibility more evenly among a Registrants' senior executive officers, including those who are best positioned to enforce such compliance. We believe that FINRA Rule 3130 provides a good illustration of this shared approach.

Pursuant to Rule 3130, a member broker-dealer's CEO must certify annually that his or her firm has in place processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable rules, and that he/she has met at least once during the preceding 12 months with the CCO. See Rule 3130(b). However, such certification is based primarily on a compliance report provided to the CEO by the CCO.[8] And, in

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reviews; (f) conducting AML/KYC, registration and licensing related tasks; (g) conducting internal inquiries; (h) responding to regulatory inquiries and facilitating on-site audits; (i) fostering regulatory relationships; (j) promoting a compliance culture, and (k) reviewing the adequacy of existing policies and procedures.

[8] See Rule 3130.05 ("It is the expertise in the process of compliance that makes a chief compliance officer an indispensible party to enable the chief executive officer(s) to reach the conclusions stated in the certification").

reviewing the annual report, the CEO is required to consult not only with the CCO but with "such other employees" to the "extent deemed appropriate." Rule 3130(c)(4).

Thus, Rule 3130 seeks to allocate the responsibilities for compliance equitably among the senior staff of member broker-dealers – and in a manner that takes best advantage of their specific areas of knowledge and authority. We also believe that the Rule was designed – as the CFTC CCO rule should be – to encourage as much interaction between the CCO and other senior executive offices (such as the CEO, COO and CFO) as possible. Only in this way can the senior leadership of a financial services firm hope to be aligned with respect to its commitment toward creating a strong compliance culture. However, we also note that Rule 3130.07 makes clear that it is the "supervisors with business line responsibility [who] are [ultimately] accountable for the discharge of a member's compliance policies."[9]

In addition to Rule 3130, recently issued SEC Rule 15c3-5 – which relates to DMA controls that must be implemented by US broker-dealers – requires the CEO to certify annually that his/her firm has in place procedures and controls reasonably designed to achieve compliance with the rule. See Rule 15c3-5(e)(2). Among other things, the CEO certification requirement was designed to require the involvement of a BD's most senior staff in reviewing and assessing the adequacy of the firm's compliance. See Rule 15c3-5 Adopting Release ("because of the potential risks associated with market access ... it is critical that a broker-dealer with market access charge its most senior management – specifically the CEO or an equivalent officer – with the responsibility to review and certify the efficacy of its controls and procedures at regular intervals ..... the Commission also believes that the CEO certification requirement should serve to bolster broker-dealer compliance programs, and promote meaningful and purposeful interaction between business and compliance personnel").

In short, we believe Registrants – and their customers – would be best served by a more shared approach to compliance responsibility. In this regard, we make the following suggestions:[10]

a. With respect to Part 3.1(d)(1), we believe CCOs should be responsible for "reviewing" whether a Registrant has established compliance policies

[9] While the proposed rule requires the Board or senior officer of a Registrant to meet with the CCO "at least once a year to discuss" compliance issues, we recommend that such meetings be required no less than four times per year.

[10] While we appreciate that some of the provisions we are questioning were established expressly by Congress for swap dealers and major swap participants (but not FCMs), we remind the CFTC that courts, in interpreting legislative intent – including in the context of reviewing agency regulations – "should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." Bob Jones University v. U.S., 461 U.S. 574 (1983). Here, we believe the "plain purpose" of this section of Dodd-Frank is to ensure that registrants act in a compliance fashion. As we have pointed out above, however, we believe the enormity of the responsibilities and obligations assigned to chief compliance officers is not the best, or even an adequate means of ensuring registrants' compliance, and thus, the express statutory language would in fact "defeat the plain purpose of the statute." Based on these circumstances and well-recognized cannons of statutory construction, we believe the CFTC has the authority to issue rules which enhance the express language in Dodd-Frank.

necessary to conduct its business activities. And, while we believe CCOs should also assist Registrants in drafting and implementing their policies and procedures, it is the responsibility of the firms' CEO and business line supervisors ("Front-Office") to implement and enforce such policies.

b. With respect to Part 3.1(d)(2), we believe CCOs should be responsible for conducting inquiries into material conflicts of interest and making recommendations to senior management as to how best to resolve them. However, we believe that the Front-Office is best positioned (for the reasons stated above) to actually "resolve" the conflicts.

c. With respect to Part 3.1(d)(3), we believe CCOs should be responsible for assisting in the review of a Registrant's compliance with applicable rules and regulations, but that the Front-Office should share in that responsibility as well. In addition, we believe the responsibility to enforce compliance should, as noted, reside with the Front-Office.

d. With respect to Part 3.1(d)(4), we believe the CCO, working in conjunction with the Front-Office, should be responsible for establishing procedures for the remediation of noncompliance issues. However, the implementation and enforcement of such procedures should reside with the Front-Office.

e. With respect to Part 3.1(d)(5), we believe the same allocation of responsibilities should apply as we have recommended be applied in connection with Part 3.1(d)(4).

f. With respect to Part 3.1(d)(6), we believe the CCO (and his/her staff) should be responsible for drafting the annual compliance report, but that the CEO (as in FINRA Rule 3130 and SEC Rule 15c3-5) should certify that the Firm is either in compliance with applicable rules or not. Indeed, as previously noted, Dodd-Frank, contrary to the CFTC's assertion, did not state that CCOs should necessarily certify the contents and/or accuracy of compliance reports. Rather, the CFTC – without explaining its reasoning – has added this requirement on its own. For all of the reasons set forth above -- including a CCOs' likely lack of intimate knowledge regarding many of the activities that must be included in the annual compliance reports – we do not believe CCOs should have to provide such certification. Rather, we recommend that the CFTC adopt a rule similar to FINRA Rule 3130 wherein, as noted, the CEO executes the certification upon the recommendation of the CCO and other senior officers.

g. We also have no issue with and indeed recommend that CCOs be required to pass a specific compliance examination and obtain a specific compliance license, as they are currently required to do in the securities world.

In addition to recommending that CCOs not be required to certify annual compliance reports, we also question whether any senior executive officer of a Registrant – including the CEO – should be required to certify under "penalty of law" that the annual compliance report is "accurate and complete" or that the Registrant is in compliance with certain applicable rules (Sections 619 and 716 of Dodd-Frank) given, among other things, (a) that whomever is providing such certification will necessarily have to rely on many individuals throughout his/her firm to compile the report, and thus, will not have personal knowledge of all the facts and information contained in the report, and (b) the substantial size and inclusiveness of such reports. We recommend, again, that the CFTC adopt an approach similar to the one set forth in FINRA Rule 3130 and SEC Rule 15c3-5 , wherein the CEO certifies only that the Firm has in place processes reasonably designed to ensure the BD's compliance with applicable rules and regulations.

Finally, we also believe that certain of the requirements relating to the annual compliance report are simply too broad. For example, the rule would require CCOs to describe in the report a Registrant's compliance with the "Act," "Commission regulations" and "each of the registrant's compliance policies." Given that hundreds (if not thousands) of federal, SRO and internal rules could potentially apply to a large Registrant, we would recommend that the rule require only a summation or overview of a Registrant's compliance policies and activities, and require a specific description only for material areas of noncompliance. Similarly, the requirement in the rule to (a) identify in the report each policy and procedure a Registrant has in place with respect to "each applicable requirement under the Act and Commission regulations" and (b) assess the effectiveness of such policies and procedures would appear difficult to achieve in a large Registrant. Again, we would recommend that the rule require that reports contain a summation of such policies and procedures (and the rules to which they relate) and then identify specifically any material areas of noncompliance that need improvement.

4. Issues Created by the Proposed Rule Relating to Joint BD/FCMs, Affiliated Financial Groups and General Counsels Who Act as CCOs.

We believe that it would be onerous and confusing for joint BD/FCMs to be subject to different CCO, compliance report and certification requirements. Indeed, as discussed, there are significant differences between the proposed CFTC rule and the two securities rules discussed herein. To avoid such confusion, we believe that joint BD/FCMs should be able to apply the requirements of FINRA Rule 3130 to the futures and swaps side of their business (since Rule 3130 is, in our view, a better designed rule). In this regard, we note that Newedge USA has consistently included the "futures side" of its business activities in its Rule 3130 annual review, compliance report and supervisory review meetings given, among other things, the difficulty in separating our supervisory procedures and controls neatly between jointly registered broker-dealers and FCMs. We also note that such a unification would be consistent with Congress' mandate that the SEC and CFTC harmonize their rules in the absence of compelling reasons not to (we can find no such compelling reason not to allow for such harmonization here). To the extent the CFTC's CCO rule does not have a comparable provision within Rule 3130, however, joint BD/FCMs would be required to follow that portion of the CFTC's CCO rule.

Second, the CFTC asks for comment on whether a registrant's General Counsel can also be a CCO. In our view, the answer should be yes. Among other things, while the CCO may not represent the board of directors, he/she has obligations similar to those of most GCs in escalating compliance and regulatory issues to the Board. Indeed, Compliance and Legal are two of the most important control functions within each financial services firm, and firms should have the flexibility to place both under one "hat" (as well as Internal Audit and Operational Risk Management). This is particularly true with respect to smaller firms that may not be able to afford separate CCOs and GCs. Further, we do not believe any conflicts of interest are created by a GC also being a CCO.

Finally, we believe that one person should be able to be a CCO for affiliated FCMs, swaps dealers and major swap participants; i.e., in circumstances where such firms are related but separate legal entities. Allowing for such a position will, in our view, increase compliance efficiency at each entity – and thereby enhance the groups' overall compliance – given the significant overlap in business activities that may occur among such firms under Dodd-Frank. We also believe that allowing one CCO to preside over such related firms' compliance activities will minimize the chance that the group will violate the conflict rules proposed under Dodd-Frank since one person will have greater knowledge of the activities of each registrant. Finally, we believe that allowing for such a position is consistent with key objectives of Dodd-Frank; namely, to enhance compliance and minimize conflicts of interest among firms involved in swaps and futures activities.

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Thank you for your consideration of our position. If you have any questions regarding the above or would like to discuss these matters further, please do not hesitate to contact me at (646) 557-8548 or John Nicholas, US Securities Compliance Director, Newedge USA, LLC, at (646) 557-8516.

Sincerely,

Newedge USA, LLC

Gary DeWaal
Senior Managing Director and
Group General Counsel, Newedge