January 18, 2011

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

Re: Comments on Proposed Rules to Implement Provisions of the Dodd-Frank Act Regarding CCO Designation (RIN 3038-AC96)

Dear Mr. Stawick:

The National Society of Compliance Professionals ("NSCP") appreciates the opportunity to comment on the proposed rules to implement Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[1] ("Proposed Rule") by the Commodity Futures Trading Commission ("CFTC").

[1] Specifically, Dodd-Frank contains the following provision pursuant to which the Proposed Rules have been issued:

SEC. 763.(K) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—
''(1) IN GENERAL.—Each security-based swap dealer and major security-based swap participant shall designate an individual to serve as a chief compliance officer.
''(2) DUTIES.—The chief compliance officer shall—
''(A) report directly to the board or to the senior officer of the security-based swap dealer or major security-based swap participant;
''(B) review the compliance of the security-based swap dealer or major security-based swap participant with respect to the security-based swap dealer and major security-based swap participant requirements described in this section;
''(C) in consultation with the board of directors, a body performing a function similar to the board, or the senior officer of the organization, resolve any conflicts of interest that may arise;
''(D) be responsible for administering each policy and procedure that is required to be established pursuant to this section;
''(E) ensure compliance with this title (including regulations) relating to security-based swaps, including each rule prescribed by the Commission under this section;
''(F) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—
''(i) compliance office review;
''(ii) look-back;
''(iii) internal or external audit finding;
''(iv) self-reported error; or
''(v) validated complaint; and

The Proposed Rule is of considerable interest to NSCP and its members. NSCP is the largest organization in the securities industry serving compliance professionals exclusively through education, certification (CSCP), publications, consultation forums, and regulatory advocacy. Since the founding in 1987, NSCP membership has grown to over 1800 members including compliance professionals at broker-dealers, investment advisers, banks, insurance companies, and hedge funds. The diversity of our membership allows the NSCP to represent a large variety of perspectives in the financial services industry.

As an initial matter, NSCP commends the CFTC for its support for compliance programs and compliance professionals, as evidenced by many aspects of the Proposed Rule. The critical importance of a competent CCO and an effective compliance program has been recognized repeatedly in recent years, including in the Organization Sentencing Guidelines,[2] SEC[3] and FINRA[4] rules, anti-money laundering statutes,[5] and leading cases on corporate governance.[6] NSCP welcomes the CFTC's recognition of the invaluable contributions made by CCOs and effective compliance programs.

NSCP takes this opportunity to address the specific questions posed in the proposing release for the Proposed Rule as well as to address other areas of concern to NSCP and its members.

''(G) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.
''(3) ANNUAL REPORTS.
''(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—
''(i) the compliance of the security-based swap dealer or major swap participant with respect to this title (including regulations); and
''(ii) each policy and procedure of the security based swap dealer or major security-based swap participant of the chief compliance officer (including the code of ethics and conflict of interest policies).
''(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—
''(i) accompany each appropriate financial report of the security-based swap dealer or major security based swap participant that is required to be furnished to the Commission pursuant to this section; and
''(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

[2] See 75 Fed. Reg. 27388 (May 14, 2010), from recent amendments to these guidelines.

[3] Investment Company Act of 1940, Rule 38a-1; Investment Advisers Act of 1940, Rule 206(4)-7.

[4] FINRA Rule 3012.

[5] See Section 352 of the USA Patriot Act.

[6] Caremark International, Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996). See also Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006). See also Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998) for cases involving sexual harassment.

I. Issues of Special Concern to NSCP

A. Role of the CCO: "Ensuring Compliance"

The Proposed Rule enumerates the duties of the CCO and includes in this list "ensuring compliance . . . with compliance policies . . . and all applicable laws, rules, and regulations, including, but not limited to the requirements set forth in the Act and Commission regulations."

Although this formation paraphrases the language of Dodd-Frank, which uses the words "ensure compliance" among the enumerated list of responsibilities of the CCO, NSCP strongly objects to this language and encourages the CFTC to adopt different language. For example, the CCO could be responsible for "administering the system of compliance that is designed to ensure compliance with" applicable requirements.

The use of the words "ensure compliance" imposes a level of responsibility on the CCOs which cannot be discharged and is inconsistent with their roles within a registrant. First, only a person who runs the firm can ensure the firm's overall compliance with the law; CCOs do not run their firms and thus lack the power to ensure that their firms comply with the law. Second, and more important, the compliance function guides, tests, monitors, and reports on the status of a registrant's activities for compliance with the law but does not actually engage in the business of the firm. It is the business unit within registrants that either obeys the law or violates it. All that the CCO can do is guide, monitor, and report on these business activities. Third, imposing responsibilities on CCOs which they cannot meet could discourage competent persons from accepting this responsibility.

NSCP recognizes that Dodd-Frank speaks of the CCO as "ensuring" compliance and that this statutory language may be viewed as constraining the CFTC in its rule-making. In this regard, however, NSCP notes that the Gramm Leach Bliley Act required, in Section 501, that financial institutions adopt safeguards to "ensure the security and confidentiality of personal information." During the rulemaking by the banking regulators, FTC and SEC, the regulators recognized that this standard needed to be modified, and required that financial institutions be required by the regulations to adopt safeguards "designed to ensure the security and confidentiality of personal information." That standard remains in the regulations to this day, has worked well, and has never been objected to by Congress as inconsistent with its instructions. This example suggests that the CFTC can adopt regulations that are consistent with the spirit of Dodd-Frank and will work well, without adopting verbatim the "ensuring" compliance standard for CCOs.

B. Content of the Annual Report: Descriptions of any Non-Compliance Issues and Responses

The Proposed Rule would require the preparation of an annual report that would be attested to by the CCO and filed with the CFTC. Among other requirements, the annual report would need to "[d]escribe any non-compliance issues identified and the corresponding actions taken."

This requirement is overbroad and discourages reporting of compliance issues to the CCO. A better approach would be to require the annual report to identify material compliance deficiencies that were not properly addressed.

If every compliance issue, no matter how trivial, must be recorded and reported to the CFTC, when the annual report is filed, there may be a chilling effect on open and continuous communication with the CCO about minor compliance issues. Under the Proposed Rule, a business person might well decide not to report minor violations for fear of initiating a CFTC investigation. *See, e.g.*, Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522 (N.D. Fla. 1994) (an organization should be protected from "the Hobson's choice of aggressively investigating accidents or possible regulatory violations, ascertaining the causes and results, and correcting any violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidence of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability")(In the context of the self-evaluative privilege).

Furthermore, as is the case in other regulatory regimes, the governance structure of a firm should be allowed to work, and we suggest that a listing of all compliance issues could undermine that process. Boards of directors and/or senior officers are tasked as a matter of corporate governance and regulatory supervision obligations to provide a framework for business operations and ongoing self-correction. Requiring a detailed listing of every compliance issue is counter to the recognition that mistakes and issues will arise even in well run organizations by virtue of the exigencies of daily operations and the reasonable expectation of some human error.

Accordingly, we suggest that the key issue is not whether compliance issues happened at a firm, but whether a firm's governance and supervisory processes are operating reasonably, and whether material issues were escalated and remediated by the firm. *Cf.* SEC Rule 38a-1 (calling for the reporting of material compliance matters to fund boards of trustees). Since compliance issues happen at great firms, the mere presence of compliance issues does not indicate weakness. The occurrence of compliance issues is inevitable; the issue is how a firm addresses them and tries to prevent them. Unless they are issues that present serious systemic weakness, cultural breakdowns or widespread customer harm, we respectfully submit that requiring such matters to be highlighted in an annual report risks being seriously counterproductive to good public policy.

II. Scope of Application of the Proposed Rule

The CFTC seeks comment "on its decision to apply the duties and responsibilities for chief compliance officers set forth for swap dealers and major swap participants to futures commission merchants."[7]

[7] The Proposed Rule would apply to "each futures commission merchant, swap dealer, and major swap participant."

NSCP supports the application of the general concept of requiring a chief compliance officer ("CCO") and recommends that all firms registered with the CFTC, including commodity trading advisers and commodity pool operators, be required to appoint a CCO. However, NSCP would not support a broad application of the Proposed Rule to all CFTC registered entities unless certain changes are made, as explained in this comment letter.

The benefits of requiring all CFTC registered firms to appoint a CCO, and to maintain an adequate compliance program, are multiple. An adequate compliance program, run by a competent and empowered CCO, can detect and prevent numerous compliance issues before they become serious. It is often the case that an effective compliance program prevents issues from developing into compliance violations by stopping the proposed actions before they are even implemented. The requirements imposed by the SEC and FINRA several years ago, including the appointment of CCOs and annual compliance reviews by all broker-dealers, investment advisers, and investment companies, have greatly enhanced compliance with the law by those entities. It is striking that even during the strains of the recent financial crisis, with a few exceptions, broker-dealers, investment advisers, and investment companies performed well from a compliance perspective. Bringing these advantages to all CFTC registered firms would greatly benefit those firms, their clients and the CFTC, in its oversight of those firms.

III. Reporting by CCOs

The CFTC seeks comment on "(i) [w]hether it would be more appropriate for a chief compliance officer to report to the senior officer or the board of directors; (ii) whether the senior officer or board of directors generally is a stronger advocate of compliance matters within an organization; (iii) whether the proposed rules allow for sufficient flexibility with regard to a registrant's business structure; (iv) whether the proposed reporting structure should be amended to address any issues related to affiliates; and (v) whether the rule should include a provision requiring a majority of a board of directors to remove the chief compliance officer."[8]

NSCP believes that CCOs generally should report to senior management of a firm and should have their compensation set by managers who are not so tied to a particular business unit that they are influenced in setting CCO compensation by the business demands and profit considerations of business units. This principle of the importance of independence was reaffirmed in the recent amendments to the Organizational Sentencing Guidelines, which permit a corporation to receive more lenient treatment in sentencing, even when the most senior officers of the company participate in the wrongdoing, provided that "[t]he individual or individuals with operational responsibility for the compliance and ethics program have direct reporting

[8] The Proposed Rule would require that "[t]he chief compliance officer shall report to the board of directors or the senior officer of the futures commission merchant, swap dealer, or major swap participant. The board of directors or the senior officer shall approve the compensation of the chief compliance officer and meet with the chief compliance officer at least once a year to discuss the effectiveness of the compliance policies . . . as well as the administration of those policies by the chief compliance officer. The board of directors or the senior officer of the futures commission merchant, swap dealer, or major swap participant may not delegate its authority over the chief compliance officer, including authority to remove the chief compliance officer."

obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors)."[9]

On the other hand, NSCP recognizes the need for flexibility in reporting and compensation setting arrangements. Registrants range in size, complexity, and affiliations across a vast spectrum. Individual managers also vary widely in their styles and skills. NSCP believes that the Proposed Rule strikes an appropriate balance between aspirational standards – CCOs should report to the board or senior management and their compensation should be determined at that level – and an inappropriate effort to standardize reporting and compensation setting so that all firms would be forced to conform to one standard.

IV. Qualifications of a CCO

The CFTC seeks comment "on whether additional limitations should be placed on the persons who may be designated as a chief compliance officer."[10]

NSCP believes that the Proposed Rule strikes an appropriate balance in ensuring that the CCO is qualified without seeking to impose a "one size fits all" set of standards for CCO qualifications. The Proposed Rule sets an aspirational standard – that the CCO have the background and skills necessary to perform as a CCO and not be disqualified by virtue of certain disciplinary events – without requiring that the CCO pass a test or have a specified number of years of experience to qualify as a CCO. Given the diversity of the registrant community, this is an appropriate approach to the qualification issue.

V. Pressure on CCOs

The CFTC seeks comment on "whether there is a need to insulate the chief compliance officer of registrants from undue pressure and coercion."[11]

The Proposed Rule contains no specific provision that directly addresses the problem of CCO coercion, although the provisions for compensation of the CCO indirectly address this issue. NSCP would support a provision, similar to ones imposed by the SEC on improper influence of chief compliance officers to investment companies[12] and independent public accountants [13] that would expressly make it illegal to improperly coerce a CCO.

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[9] 75 Fed. Reg. 27388 (May 14, 2010).

[10] The Proposed Rule would require that "[t]he individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual disqualified from registration . . . may serve as a chief compliance officer."

[11] The Proposed Rule does not specifically address this issue.

[12] Rule 38a-1 under the Investment Company Act of 1940 provides as follows: "No officer, director, or employee of the fund, its investment adviser, or principal underwriter, or any person acting under such person's direction may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the fund's chief compliance officer in the performance of his or her duties under this rule."

VI. The Annual Report by the CCO

The CFTC seeks comment "regarding: (i) [t]he required content of the annual report; (ii) whether any additional content should be included therein; (iii) whether the Commission should require explicit approval of the annual report by the registrant's board of directors prior to submission of the annual report to the Commission; (iv) whether additional provisions are necessary to ensure that individual directors or employees have an adequate opportunity to register their concerns or objections to the contents of the annual report; and (v) whether additional guidance is needed on what efforts by the chief compliance officer would be required to permit the chief compliance officer to certify that, to the best of his knowledge and reasonable belief, the annual report is accurate and complete."[14]

With the exception of an issue of grave concern to NSCP, which is identified in Section I.B. of this comment letter, NSCP generally supports the broad subject matters proposed to be included in the annual report. However, NSCP questions whether the level of detail contemplated by the Proposed Rule would impose unnecessary burdens on CCOs with little, if any, offsetting benefits. A better approach might be to follow the example of the SEC requirements for annual reviews of compliance by registered investment advisers. Such documents must reflect a "[r]eview, no less frequently than annually, [of] the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation."[15]

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[13] SEC Rule 13b2-2(b)(1) provides that: "No officer or director of an issuer, or any other person acting under the direction thereof, shall directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence any independent public or certified public accountant engaged in the performance of an audit or review of the financial statements of that issuer that are required to be filed with the Commission pursuant to this subpart or otherwise if that person knew or should have known that such action, if successful, could result in rendering the issuer's financial statements materially misleading."

[14] The Proposed Rule would require that the annual report set forth the following information:

"(1) Contain a description of the compliance by the futures commission merchant, swap dealer, or major swap participant with respect to the Act and Commission regulations and each of the registrant's compliance policies, as defined in Sec. 3.1(g);
(2) Review each applicable requirement under the Act and Commission regulations, and with respect to each:
(i) Identify the policies and procedures that ensure compliance with the requirement under the Act and Commission regulations;
(ii) Provide an assessment as to the effectiveness of these policies and procedures; and
(iii) Discuss areas for improvement, and recommend potential or prospective changes or improvements to its compliance program and resources devoted to compliance;
(3) Provide a statement of certification of compliance with sections 619 and 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and any rules adopted pursuant thereto;
(4) List any material changes to compliance policies during the coverage period for the report;
(5) Describe the financial, managerial, operational, and staffing resources set aside for compliance with respect to the Act and Commission regulations, including any deficiencies in such resources;
(6) Describe any non-compliance issues identified, and the corresponding action taken; and
(7) Delineate the roles and responsibilities of its board of directors or senior officer, relevant board committees, and staff in addressing any conflicts of interest, including any necessary coordination with, or notification of, other entities, including regulators."

[15] Investment Advisers Act of 1940, Rule 206(4)-7(b).

NSCP is also concerned that the Proposed Rule would require that the annual report include a certification by the CCO "that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the information contained in the annual report is accurate and complete." Although this language paraphrases a provision of Dodd-Frank,[16] this requirement would impose a severe burden on CCOs. NSCP would favor the addition of a materiality requirement in the certification provision, so that the CCO would certify, to the best of his or her knowledge and reasonable belief, that the annual report is complete and accurate in all "material" respects. The addition of a materiality standard would relieve the CCO from liability for an immaterial omission from the annual report. The omission of an immaterial matter should not be of concern to the CFTC or the registrant that employs the CCO. NSCP is also confused by the use of the phrase "under penalty of law" in connection with the CCO's certification and requests that the CFTC clarify that this phrase refers to liability under 18 U.S.C. Sec. 1001[17] for a false statement to a federal officer.

VII. Compliance Date

The CFTC seeks comment "on how long it might take for a registrant to hire a chief compliance officer and how long it might take for the registrant to implement the required policies and procedures under these proposed rules."[18]

Generally, for a registrant that does not currently have a CCO or a compliance program, approximately eighteen months would be required to recruit and hire a CCO and implement a compliance program.

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[16] Dodd-Frank requires the CCO to "include a certification [in the annual report] that, under penalty of law, the compliance report is accurate and complete."

[17] In relevant part, 18 U.S.C. Sec 1001(a) provides that: "(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years."

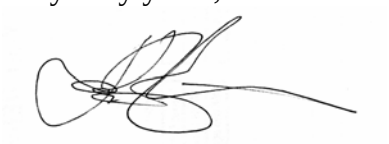
[18] A compliance date is not specified for the Proposed Rule. Dodd-Frank contemplated that the rules would be effective by July 21, 2011.

Our comments reflect NSCP's fundamental mission, which is to set the standard for excellence in the securities compliance profession. This commitment is exemplified, among other things, by the time and resources NSCP, and the industry professionals whose volunteer services it marshals, have devoted in the past four years to the development of a voluntary certification and examination program for compliance professionals.[19]

Our mission is directed at the interests of compliance programs and compliance officers. We accordingly support a regulatory scheme that: (i) promotes practices that support market integrity and the interests of investors; (ii) creates clarity as to a firm's obligations to provide a reasonable system of supervision; (iii) promotes requirements that enable compliance officers to create reasonably workable programs; and (iv) avoids requirements or mandated tasks that are more costly or less efficient in realizing a regulator's public policy objectives, thereby increasing the difficulty facing a compliance officer in the discharge of his or her duties.

NSCP would be delighted to work with the CFTC in formulating a revised approach consistent with these comments. Questions regarding our comments or requests for additional information should be directed to the undersigned at 860.672.0843. Thank you.

Very truly yours,



Joan Hinchman
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NSCP

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[19] Persons who complete the NSCP's program qualify for the "Certified Securities Compliance Professional" designation.