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April 11, 2011

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FILED ELECTRONICALLY
David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: *Position Limits for Derivatives, 76 Fed. Reg. 4752 (Jan. 26, 2011); RIN: 3038.*

Dear Mr. Stawick:

The Committee on Futures and Derivatives Regulation (the “Committee”) of the New York City Bar Association (the “Association”) thanks the Commodity Futures Trading Commission (“Commission”) for the opportunity to provide comments on the Commission’s notice of proposed rulemaking regarding federal speculative position limits applicable to exempt and agricultural commodities, published on January 26, 2011 at 76 Fed. Reg. 4752 (the “Proposal”). The proposed rule implements Section 737 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”).¹

The Association is an organization of over 23,000 members. Most of its members practice in the New York City area. However, the Association also has members in nearly every state and over 50 countries. The Committee consists of attorneys

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111–203, 124 Stat. 1376 (2010) (“Dodd-Frank”).

knowledgeable about the trading and regulation of futures contracts and over-the-counter derivative products, and it has a practice of publishing comments on legal and regulatory developments that have a significant impact on futures and derivatives markets.

I. Concerns Regarding Changes to Aggregation Policy

The Committee is concerned that the Commission's proposed departure from its long-standing existing aggregation policy contained in Commission Rule 151.4, 17 C.F.R. § 151.4, will have significant adverse effects for market participants without an articulated regulatory or market benefit. Specifically, the Commission is proposing to not apply the existing exemption for independent account controllers (as defined in Commission Rule 150.1(e)) to Commission-set speculative position limits for exempt and agricultural commodities.

When the exemption for independent account controllers in Rule 150 was first proposed and then subsequently adopted in 1988, the Commission reasoned that trading directed by independent account controllers following different trading programs would establish positions that were not traded as a block, would not unduly influence the market, and would be consistent with the justification for speculative position limits of preventing aggregation of positions that could affect markets.²

Since first adopting the independent account controller rule, the Commission has periodically revisited the issue, each time affirming the soundness of its reasoning. In its final rules, the Commission broadened the exemption after observation and a market survey of commodity pool operators, leading it to conclude that the "exemption from speculative position limits has worked well" resulting in a "lack of adverse data" and "lack of problems associated with the exemptive relief..."³

The Commission's long-standing findings and reasoning remain as true today as when the Commission first adopted the independent account controller rule. The Proposal contains no rationale for treating independent account controllers differently based on the requirement of Section 737 of the Dodd-Frank Act that the Commission adopt and enforce speculative position limits in futures and related OTC derivatives on exempt and agricultural commodities. Furthermore, the Proposal cites no history of abuses related to independent account controllers in any Commission-regulated market. Nor does the Commission cite any study or finding that independent account controllers do trade as a block or have any adverse effect on the markets. To the contrary, the Commission offers only the thinnest of rationales, that "disaggregation exceptions may

² See Exemption from Speculative Position Limits for Positions Which Have a Common Owner But Which Are Independently Controlled, 53 Fed. Reg. 13290, 13292-93 (Apr. 22, 1988); Exemption from Speculative Position Limits for Positions Which Have a Common Owner But Which Are Independently Controlled and For Certain Spread Positions, 53 Fed. Reg. 41563 (Oct. 24, 1988).

³ Exemption from Speculative Position Limits for Positions Which Have a Common Owner But Which Are Independently Controlled, 56 Fed. Reg. 14308, 14311 (Apr. 9, 1991); *see also* Exemption from Speculative Position Limits for Positions Which Have a Common Owner But Which Are Independently Controlled, 57 Fed. Reg. 44490 (Sept. 28, 1992).

be incompatible with the proposed federal position limit framework and used to circumvent its requirements” and “the self-executing nature of the exemptions creates an insufficient and inefficient verification regime and ultimately diminishes the Commission’s ability to properly perform its market surveillance responsibilities.”⁴ This Committee believes that the rationale adopted by the Commission that originally supported and subsequently sustained the exemption for independent account controllers for many years remains valid.

The Committee urges the Commission to include a parallel exemption for independent account controllers in Proposed Commission Rule 151.7. If a parallel exemption were included, the Congressional intent in adopting Section 737 of the Dodd Frank Act would still be fully realized. By adopting a parallel provision, Commission speculative position limits for energy and agricultural commodities would be applied at the level of the independent account controllers rather than at the level of the commodity pool. Compliance by such independent account controllers would remain subject to Commission oversight; and entities claiming the exemption for independent account controllers would continue to be required upon call by the Commission to provide information supporting their claim that the account controllers are in fact acting independently, as they are now.

Deletion of the independent account controller rule as proposed would have a significant adverse impact on the operations of many trading entities, raising the very account administration problems the Commission sought to prevent or resolve in 1988. The April 1988 proposed rule⁵ contained an acknowledgment by the Commission that single entity limits create administrative difficulties for pool operators in tracking the positions of independent account controllers and taking necessary remedial action, creating a risk of inefficient operations and compromising the independent judgment of account controllers. Indeed, the problems noted by the Commission in 1988 would be even more severe now in light of the Commission’s policy of enforcing speculative position limits on an intra-day basis. Commodity pool operators simply do not have the transparency of positions traded by their independent account controllers to comply with the Commission’s new requirements. This compliance problem will be particularly acute for commodity pools with a fund of funds structure.⁶

If the Commission reverses the existing independent account controller rule, commodity pool operators will be required to take a much more active role in the monitoring and directing of trading by their account controllers in order to avoid inadvertently breaching a limit. Ironically, this will have precisely the opposite effect

⁴ Proposal at 4762.

⁵ See *supra* note 2.

⁶ The Commission proposed to exempt from the aggregation requirement limited partners with less than a 25% ownership interest. While this should assist some commodity pool operators in complying, many may have greater than a 25% ownership interest in any number of pools. If the only means for a commodity pool operator to ensure compliance with the new aggregation policy is to reduce its positions below 25% in every pool in which it is invested, the Commission’s policy will result in wholesale changes in the composition of many in the commodity pool industry.

that speculative position limits are meant to achieve, that is, ensuring that large positions do not trade as a block. By requiring commodity pool operators to take a more active role in monitoring and directing trading decisions of their account controllers, the Commission ensures that there will be more coordinated trading, not less. Moreover, the aggregation of such independently controlled positions also poses the risk of partial disclosure of position information related to other account controllers as aggregate entity limits are allocated and/or imposed on a group of account controllers.⁷ The committee believes that the predominant approach adopted by pool operators in administering pool-wide speculative position limits prior to adoption of the current rule was to allocate applicable limits pro rata based on assets allocated to each of the pool's advisers, which often created rigidity and inefficiency for CTAs in providing pool investors with the full benefits of their trading programs.

Reversal of the current independent account controller rule will have other, significant effects on the market. For almost all existing multi-CTA pools, the proposed change regarding independent account controllers could also require revised disclosures to pool investors in registration statements, prospectuses, offering memoranda, and/or periodic account statements to disclose how pools would be applying limits to the positions controlled by its advisers. The costs of such measures could fall on pool investors. Adoption of the rules could also require renegotiation of contracts with pool advisers in order to provide for pool-wide compliance with the Commission speculative position limits, as distinguished from limits in other markets. Reversal of the current rule could also discourage creation of multi-CTA pools -- the preferred approach for pool asset allocations due to perceived benefits of diversification of trading approaches -- and introduce as a consideration in pool operators' selection of CTAs the markets they trade and the volume in which they trade each affected market.

The Committee notes that unlike the speculative position limit rules proposed by the Commission in 2010,⁸ the Proposal retains the exemption for independent account controllers for non-financial entities, such as the affiliates of a corporate group. The Committee commends the Commission's recognition of the adverse effects of the reversal of its independent account controller rule for this group of market users and its determination to continue its current policy on independent account controllers to this group of market users. Similar considerations apply to those entities that have not been included within the proposed exemption, including commodity pool operators that use independent account controllers.

II. Conclusion

The reversal by the Commission of its long-standing rule on independent account controllers will have significant adverse effects on various market participants. It will establish regulatory standards with which compliance will be nearly impossible for many

⁷ See *supra* note 2.

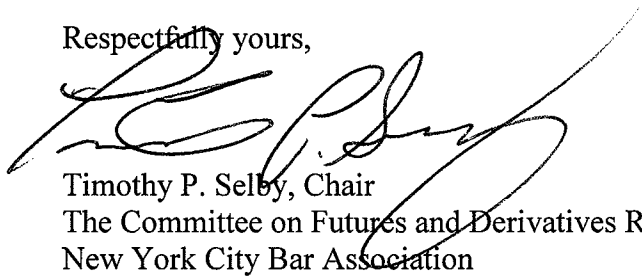
⁸ Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations, 75 Fed. Reg. 4144 (Jan. 26, 2010)

bona fide market participants or at a minimum will require such participants to implement unwieldy and complex administrative procedures. It may result in substantial changes in the way commodity pool operators are organized and in the composition of certain pools. For these reasons, the Committee respectfully urges the Commission to reconsider its proposed removal of the existing independent account controller rule in the context of Commission speculative position limits.

* * *

We appreciate the opportunity to present our views to you on this matter of importance to us as practitioners of derivatives law and regulation and our members are available to discuss any of the above at your convenience.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'T. Selby', is written over the typed name and title.

Timothy P. Selby, Chair
The Committee on Futures and Derivatives Regulation,
New York City Bar Association

**New York City Bar Association
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Howard Schneider §
Lore Steinhauser *

* These members of the Committee did not participate in this comment letter.

§ These members comprise the Ad Hoc Working Group.