

NEW YORK  
CITY BAR

**COMMITTEE ON FUTURES  
AND DERIVATIVES REGULATION**

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

**Re: Implementation of Commission's Dodd-Frank Rules**

Dear Mr. Stawick:

The Commodity Futures Trading Commission ("CFTC" or "Commission") recently re-opened the comment period<sup>1</sup> on a number of proposed rules in order to provide the public with an opportunity to comment on the mosaic of proposed rules implementing Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") in its entirety.<sup>2</sup> The Committee on Futures and Derivatives Regulation (the "Committee") of the New York City Bar Association (the "Association") appreciates the Commission inviting comment on the implementation of all proposed Commission rules.

**The Association**

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

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<sup>1</sup> "Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act," 76 *Fed. Reg.* 25274 (May 4, 2011).

<sup>2</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010).

state and over 50 countries. The Committee consists of attorneys 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.

### **Process for Exemptive Relief**

In reopening the comment period on the rules implementing Dodd-Frank, the Commission invited comment “on any aspects of the rulemakings, including comments on individual rulemakings subject of this extension, on the intersection of any combination of these rulemakings, or on the proposed rulemakings from a global perspective.”<sup>3</sup> This comment is global in nature and is made with respect to the implementing rules as a complete package. The scope and breadth of the Commission’s proposed rules implementing Dodd-Frank is without precedent. The proposed rules will affect every aspect of the swaps market and many aspects of the traditional futures markets. The impact of these rules should not be underestimated.

Without question, due to the scope and breadth of the various rulemakings that implement Dodd-Frank, issues will arise in the application of the rules as the myriad participants in the futures and swaps industry that are affected by these rules seek to comply with the rules and apply them to their individual businesses and in their particular contexts. In light of the scope, breadth and specificity of the rulemakings, the Commission will undoubtedly face instances where it encounters situations it had not previously considered, determines that the rules do not operate in the manner intended, or finds particular provisions have unintended consequences when applied in a specific context. In such instances, exemptive relief would be appropriate, but the Commission has not included general exemptive authority within its rules.

Commission Rule 140.99, 17 C.F.R. 140.99 sets forth the procedures for requesting exemptive, interpretative, and no-action letters. Commission Rule 140.99 provides that an exemptive letter “may only be issued by staff of a Division when the Commission itself has exemptive authority and that authority has been delegated by the Commission to the Division in question.” Accordingly, it is clear from Commission Rule 140.99 that exemptive relief, to be granted, must be based on a statutory or regulatory exemptive provision. Commission Rule 140.99 does not itself establish the authority to grant exemptions from particular Parts or Sections of the Commission’s Rules.

The Commission has previously provided the authority to grant exemptive relief as part of its rules establishing a new regulatory framework that has an impact on a significant segment of the industry. For example, the Commission included exemptive authority when it introduced its regulatory framework permitting the introduction of option trading,<sup>4</sup> when it established the

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<sup>3</sup> Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act,” 76 Federal Register 25274 (May 4, 2011).

<sup>4</sup> See, Commission Rule 32.4(b), 17 C.F.R. 32.4(b) (exemptive relief to Part 32 rules governing the trading of commodity option transactions).

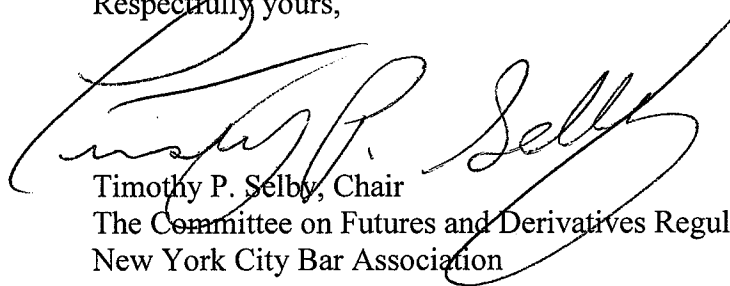
regulatory framework permitting that permitted the re-introduction of exchange-traded options,<sup>5</sup> and when it established its rules governing access to the U.S. by non-U.S. brokers under Commission Rule 30.10. Even though used infrequently, over the years exemptive authority has proven to be an important avenue for addressing particular unforeseen issues that may arise when establishing an entirely new regulatory framework, as the Commission is in the process of doing now. Further, setting forth the standards for exemptive relief provides guidance to both the Commission and the public on when exemptions will be appropriate.

Section 721(d) of the Dodd-Frank Act limits the authority of the Commission to exempt swaps from particular sections of the Act. That limitation, however, does not suggest that the Commission is constrained in providing exemptive authority from its own implementing rules. There is a significant and fundamental difference between exempting a person from the application of the Act, which Congress has determined should not be permitted, and exempting a person from the application of a specific rule or rules.

Accordingly, the Association believes that the Commission should follow the precedents described above by including within its Dodd-Frank Act implementing rules the authority to make exemptions therefrom under the standards established in such a rule or rules. This will provide the Commission with the flexibility to address particular instances which may arise when it determines an exemption from the Dodd-Frank Act rules would be in the public interest.

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,



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

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<sup>5</sup> See, e.g., 17 C.F.R. 33.11 (exemptive relief to rules governing commodity domestic exchange-traded commodity options transactions). Specifically, Rule 33.11 provides: "The Commission may, by order, upon written request or upon its own motion, exempt any person, either unconditionally or on a temporary or other conditional basis, from any provisions of this part, other than §§ 33.9 and 33.10, if it finds, in its discretion, that it would not be contrary to the public interest to grant such exemption." *Id.*

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! Member of drafting committee of letter.