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November 29, 2010

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Re: CFTC and SEC Rulemakings Under Dodd-Frank Wall Street Reform and Consumer Protection Act

We write on behalf of the Committee on Futures and Derivatives Regulation (the "Committee") of the New York City Bar Association (the "Association") to provide advance comments that may assist the Commodity Futures Trading Commission and the Securities and Exchange Commission (the "regulators") in their forthcoming proposed rulemaking under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") prior to the publication of proposed rules and the commencement of the attendant official comment periods.

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 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.

Set forth below are the Committee's comments concerning issues that should be addressed in the regulators' prospective rulemakings under the Act. These comments are in addition to the points relating to the definitions in the Act that were made in our letter dated September 20, 2010 in response to your Advance Notice of Proposed Rulemaking published in 75 Fed. Reg. 51429. The advance comments of this letter are principally of a conceptual nature and remain subject to any additional comments that the Committee may provide as official

comments following the regulators' issuance of proposed rules. We have concentrated on identifying issues which arise from the intersection of established swap market contracts and practices with the new regulatory regime introduced by the Act.

SUMMARY OF ADVANCE COMMENTS:

(1) ***Margin Requirements for Uncleared Swaps.*** With respect to the margin requirements for swap dealers ("SDs") and major swap participants ("MSPs"),[1] the Committee proposes that the regulators address the following items in rules relating to such requirements:

(i) whether SDs and MSPs are obligated to request from their swap counterparties certain minimum margin as determined by the regulators;

(ii) whether SDs and MSPs are permitted to request margin from their swap counterparties in excess of any minimum margin determined by the regulators;

(iii) whether SDs and MSPs are obligated to post margin to their swap counterparties as determined by the regulators;

(iv) whether SDs and MSPs are permitted to post margin to their swap counterparties in excess of any minimum margin determined by the regulators;

(v) whether and to what extent the amount of required margin should be based upon an SD's or MSP's net counterparty exposure (taking into account applicable contractual netting and the value and quality of any collateral that has been provided to minimize such exposure); and

(vi) whether margin requirements should apply to swaps that are exempt from clearing pursuant to the commercial end-user exemption.

(2) ***Capital Requirements for Uncleared Swaps.*** With respect to the capital requirements for SDs and MSPs, the Committee proposes that the regulators address whether and to what extent the amount of required capital should be based upon an SD's or MSP's net counterparty exposure (taking into account applicable contractual netting and the value and quality of any collateral that has been provided to minimize such exposure).

(3) ***Segregation of Collateral to Secure Uncleared Swaps.*** The Committee proposes that the regulators clarify whether a swap counterparty may enter into an advance waiver of its right to request segregation of collateral that is posted by the counterparty to an SD or MSP to secure uncleared swaps and, if so, what, if any, restrictions apply to the financial incentives that an SD or MSP may offer the counterparty as consideration for such waiver.

(4) ***Process of Review of Swaps for Mandatory Clearing.*** With respect to the regulators' review of individual swaps or any group, category, type or class of swaps to determine whether such swaps should be subject to mandatory clearing, the Committee submits that, before the

[1] For ease of reference, the terms "swap," "swap dealer" and "major swap participants" include references to "security-based swap," "security-based swap dealer" and "major security-based swap participants," respectively, as applicable.

regulators make such determination, the regulators should consider whether such swaps would be accepted for clearing by any derivatives clearing organization ("DCO"),[2] for example, by making such determination conditional upon existing or eventual acceptance for clearing by a DCO. The regulators should further clarify that:

(i) no swap shall be required to be cleared pending a determination by the regulators that the mandatory clearing requirement applies to any swap or group, category, type or class of swaps;

(ii) any such determination of mandatory clearing should apply prospectively only and not to any swap or group, category, type or class of swaps entered into prior to the date of such determination;

(iii) any such determination of mandatory clearing does not empower the regulators to approve or dictate the commercial terms of a swap transaction and that, consequently, a DCO may accept a swap for clearing whether or not the regulators determine that such clearing should be mandatory; and

(iv) mandatory clearing requirements will not apply to a particular swap in the event that no DCO accepts such swap for clearing.

(5) ***Commercial End User Exemption.*** The Committee encourages the regulators to clarify (a) the requirement that a swap counterparty to be eligible to rely on the commercial end-user exemption must be "using swaps to hedge or mitigate commercial risk," and (b) whether such requirement mandates that all swaps of the entity be used for hedging or mitigating commercial risk or whether some lesser percentage would be acceptable for purposes of satisfying such requirement.

(6) ***Board Committee Approval to Rely on Commercial End-User Exemption.*** The Committee requests that the regulators clarify (a) what constitutes an "appropriate committee" for the purpose of reviewing and approving the decision to rely on the commercial end-user exemption and (b) that such approval may be given prospectively with respect to all specified types of swaps entered into in reliance upon the exemption and not just on a swap-by-swap basis.

(7) ***Business Conduct Standards.*** The Committee encourages the regulators to clearly address the question as to whether or not the duties of SDs and MSPs when acting as counterparties to "special entities" are applicable to non-governmental plans.

(8) ***Incorporation of Congressional Colloquies.*** The Committee proposes that the regulators establish a transparent process for identifying and giving effect to the various colloquies made by the bill sponsors that clarify the intent of Congress as expressed in the final wording of the Act.

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[2] For ease of reference, the term "derivatives clearing organization" include a reference to "clearing agency," as applicable.

(9) ***No-Action Letter or Advisory Process.*** The Committee proposes that the regulators establish a no-action letter or other advisory process to allow parties to obtain prompt guidance concerning the application of the rules to novel or unusual facts.

DETAILS OF ADVANCE COMMENTS:

(1) Margin Requirements for Uncleared Swaps

Section 4s(e)(3)(A) of the Commodity Exchange Act, as amended by the Act (the "CEA"),[3] and Section 15F(e)(3)(A) of the Securities Exchange Act, as amended by the Act (the "Exchange Act"),[4] directs the regulators to adopt margin requirements applicable to SDs/MSPs "[t]o offset the greater risk to the swap dealer or major swap participant and the financial system arising from the use of swaps that are not cleared." The language would benefit from clarification as to whether the SD/MSP is required to request margin from its counterparty and/or to post margin itself. Because the purpose of the margin requirement is to "help ensure the safety and soundness of the swap dealer or major swap participant," it seems that the purpose of the relevant section is to require the SD/MSP to request margin from their counterparties, but not to require the SD/MSP to post margin to their counterparties. In any event, the SD/MSP should be permitted to post margin to its counterparties.

In determining who must post collateral and to what extent and how collateral must be posted, the regulators should take into consideration the fact that the use of collateral is already widespread in the derivatives markets, that there are many different forms of documentation governing the posting of collateral and that established market practices already exist with respect to the posting of collateral. The regulators should consider the efficiency and usefulness of permitting market participants to satisfy any new requirements using existing documentation and practices. In addition, new requirements set by the regulators should not prevent market participants from agreeing to other terms and conditions relating to collateral so long as they are not inconsistent with those new requirements, including margin in excess of the minimum margin determined by the regulators.

The Act expressly provides that the margin requirements should be "appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant."[5]

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[3] "(3) STANDARDS FOR CAPITAL AND MARGIN.—

(A) IN GENERAL.—To offset the greater risk to the swap dealer or major swap participant and the financial system arising from the use of swaps that are not cleared, the requirements imposed under paragraph (2) shall—

(i) help ensure the safety and soundness of the swap dealer or major swap participant; and

(ii) be appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant."

[4] "(3) STANDARDS FOR CAPITAL AND MARGIN.—

(A) IN GENERAL.—To offset the greater risk to the security-based swap dealer or major security-based swap participant and the financial system arising from the use of security-based swaps that are not cleared, the requirements imposed under paragraph (2) shall—

(i) help ensure the safety and soundness of the security-based swap dealer or major security-based swap participant; and

(ii) be appropriate for the risk associated with the non-cleared security-based swaps held as a security-based swap dealer or major security-based swap participant."

[5] *See supra* notes 3-4.

This appears to refer to the additional counterparty risk that the SD/MSP might incur as a result of entering into uncleared swaps. The regulators should clarify whether and to what extent "appropriate" margin levels are to be based upon the SD/MSP's net counterparty exposure (taking into account applicable contractual netting and the value and quality of any collateral that has been provided to minimize such exposure). Clarity should also be given generally to the required margin methodology, including whether excess margin posted on cleared swaps across various DCOs may be taken into consideration. We encourage the regulators to carefully consider the effects that inefficient collateralization requirements may have upon the U.S. derivatives market.

The proposed rules should also address any transitional rules applicable to swaps entered into before the effectiveness of the margin requirements. The Act includes several transitional provisions that exempt pre-effectiveness swaps from various requirements under the Act, including mandatory clearing and position limits. It should be assumed that swap counterparties who entered into swap trades prior to the enactment of the Act did so in reliance on then existing law without regard to the fact that the Act was subsequently adopted in its final form. The margin requirements of the Act could therefore not have factored into the commercial considerations of such swap counterparties and should not apply to swaps entered into prior to the enactment. Given the yet uncertain final form in which the margin requirements will be implemented by the regulators, swaps entered into post-enactment but pre-effectiveness should likewise not be subject to the margin requirements. Such view has been supported by Chairmen Gary Gensler and Mary Schapiro[6] and CFTC Commissioner Scott O'Malia.[7]

In addition, the proposed rules should clarify whether Section 4s(e) of the CEA and Section 15F(e) of the Exchange Act require SD/MSPs to request margin from counterparties that rely on the commercial end-user exemption from the clearing requirement in Section 2(h)(7) of the CEA or Section 3C of the Exchange Act, respectively. In this regard, we note that in order for a commercial end-user to utilize the foregoing exemptions, it must notify the regulators as to how it generally meets its non-cleared swap obligations. Such notification requirement is inconsistent with any requirement for a commercial end-user to post margin for swaps, since if a margin requirement did in fact apply to such end-users, all such end-users would uniformly meet their obligations through margining, in which case such notification would be unnecessary. Moreover, Senators Dodd and Lincoln in a letter to Chairmen Barney Frank and Colin Peterson following the enactment of the Act clarified their intention that the capital and margin requirements introduced by the Act are not to be imposed on end-users, and that margin requirements are not intended to result in the imposition of greater margin transfer obligations by end-users under exempt transactions.[8] Any proposed rule should also expressly state that an SD/MSP may request margin as a matter of commercial prudence from counterparties who utilize the commercial end-user exemption from clearing.

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[6] *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act: Hearing on Pub. L. 111-203 Before the S. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. (Sep. 30, 2010) (statements of Gary Gensler and Mary Schapiro).

[7] Scott O'Malia, *Concurring Statement, Open Meeting on First Series of Proposed Rules Under the Dodd-Frank Act* (Oct. 1, 2010)

[8] Letter from Chairman Christopher Dodd and Chairman Blanche Lincoln to Chairman Barney Frank and Chairman Colin Peterson (June 30, 2010). *See also* 156 CONG. REC. S5904 (floor statement by Senator Lincoln on July 15, 2010).

(2) Capital Requirements for Uncleared Swaps

As mentioned above, Section 4s(e)(3)(A) of the CEA and Section 15F(e)(3)(A) of the Exchange Act expressly provide that the capital requirements applicable to an SD/MSP should be appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.[9] This appears to refer to the additional counterparty risk that the SD/MSP incurs as a result of entering into uncleared swaps. The regulators should clarify whether and to what extent "appropriate" capital levels are to be based upon the SD/MSP's net counterparty exposure (taking into account applicable contractual netting and the value and quality of any collateral that has already been provided to minimize such exposure).

(3) Segregation of Collateral to Secure Uncleared Swaps

With respect to uncleared swaps, Section 4s(*l*) of the CEA provides that a "counterparty to a swap that provides funds or other property to a SD/MSP to margin, guarantee, or secure the obligations of the counterparty" may require the SD/MSP to segregate such funds or property (except variation margin) with an independent third-party custodian.[10] The Act added a substantively identical provision to Section 3E(f) of the Exchange Act that is applicable to security-based swaps. The Act clearly provides the counterparty with a right, but not an

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[9] *See supra* notes 3-4.

[10] "(*l*) SEGREGATION REQUIREMENTS.—

(1) SEGREGATION OF ASSETS HELD AS COLLATERAL IN UNCLEARED SWAP TRANSACTIONS.—

(A) NOTIFICATION.—A swap dealer or major swap participant shall be required to notify the counterparty of the swap dealer or major swap participant at the beginning of a swap transaction that the counterparty has the right to require segregation of the funds or other property supplied to margin, guarantee, or secure the obligations of the counterparty.

(B) SEGREGATION AND MAINTENANCE OF FUNDS.—At the request of a counterparty to a swap that provides funds or other property to a swap dealer or major swap participant to margin, guarantee, or secure the obligations of the counterparty, the swap dealer or major swap participant shall—

(i) segregate the funds or other property for the benefit of the counterparty; and

(ii) in accordance with such rules and regulations as the Commission may promulgate, maintain the funds or other property in a segregated account separate from the assets and other interests of the swap dealer or major swap participant.

(2) APPLICABILITY.—The requirements described in paragraph (1) shall—

(A) apply only to a swap between a counterparty and a swap dealer or major swap participant that is not submitted for clearing to a derivatives clearing organization; and

(B)(i) not apply to variation margin payments; or

(ii) not preclude any commercial arrangement regarding—

(I) the investment of segregated funds or other property that may only be invested in such investments as the Commission may permit by rule or regulation; and

(II) the related allocation of gains and losses resulting from any investment of the segregated funds or other property.

(3) USE OF INDEPENDENT THIRD-PARTY CUSTODIANS.—The segregated account described in paragraph (1) shall be—

(A) carried by an independent third-party custodian; and

(B) designated as a segregated account for and on behalf of the counterparty.

(4) REPORTING REQUIREMENT.—If the counterparty does not choose to require segregation of the funds or other property supplied to margin, guarantee, or secure the obligations of the counterparty, the swap dealer or major swap participant shall report to the counterparty of the swap dealer or major swap participant on a quarterly basis that the back office procedures of the swap dealer or major swap participant relating to margin and collateral requirements are in compliance with the agreement of the counterparties."

obligation, to request such segregation. It is unclear whether the right to request segregation applies only at the beginning of a swap trade or at all times during which a swap is in effect. Because segregating collateral may increase the costs of a swap for the parties, the regulators should clarify that the right to request segregation may only be exercised at the beginning of a swap and not during the period the swap is in effect. Since the imposition of collateral segregation can have an economic impact on a swap and is therefore a legitimate subject for commercial negotiation between the parties, the Commission should recognize this commercial reality in its rulemaking. The Commission should consequently allow parties to negotiate advance waivers of the right to segregate and, further, should allow such waivers to be irrevocable so that the party with the original right to require segregation cannot unilaterally change the terms of a particular swap after it has come into existence. If the regulators nevertheless believe that the right to request segregation should continue during the term of a swap transaction, then the regulators should clarify in rulemaking that (i) any request for segregation after the commencement of a swap will be effective only if the requestor pays the costs associated with such segregation and (ii) a party to a swap may prospectively waive its right to request such segregation. These clarifications will prevent one party to a swap from foisting costs onto another party to a swap.

(4) Process of Review of Swaps for Mandatory Clearing

The Act does not require swap counterparties who intend to enter into a swap to submit the swap to the regulators for determination of whether mandatory clearing will apply. Rather, the language of the statute contemplates two main routes for designating swaps as being subject to mandatory clearing: (a) the regulators are authorized to determine on their own initiative that mandatory clearing should apply to a swap, and (b) a DCO that plans to accept any swap, or group, type or class of swaps for clearing must submit an application to the regulators for a determination whether such clearing should be mandatory.

The proposed rules should provide further clarity and detailed guidance with respect to the factors that the regulators should employ for determining whether a swap category or individual swap should be subject to mandatory clearing and should explain how groups, classes, categories and types of swaps will be distinguished for purposes of clearing. In addition, the rules should clarify that the regulators' determination does not include prior approval of the terms of the swaps and does not restrict DCOs from clearing a swap that the regulators determine is not subject to mandatory clearing. More generally the proposed rules should clarify, in the form of a safe harbor or otherwise, that a swap is not subject to the mandatory clearing requirement until the regulators have made a determination to such effect.

In addition, the proposed rules should consider whether the existence of a DCO willing to accept a swap for clearing should be a factor in the regulators' determination of whether a swap should be subject to mandatory clearing. As a corollary, the proposed rules should also address the possibility that the regulators mandate clearing of a swap that no DCO is willing to accept. The DCOs are generally free to make their own determination of whether to accept a swap for clearing, and the Act expressly provides that it does not impose a duty on DCOs to accept any swap for clearing and that nothing in the Act authorizes the regulators to require a DCO to accept a swap for clearing if doing so would threaten the financial integrity of the DCO. However, the Act does not offer an exemption from the clearing requirement in a situation where clearing is

mandated but not possible to effectuate. The proposed rules should consider the necessity of a safe harbor for such situation.

(5) Commercial End User Exemption

Section 2(h)(7)(A) to the CEA contains an exception to the mandatory clearing requirements which are available to swap counterparties that are commercial end-users.[11] The Act added a substantively identical provision to Section 3C(g)(1) of the Exchange Act that is applicable to security-based swaps. In order to satisfy the requirements of these exemptions, a commercial end-user counterparty must be "using swaps to hedge or mitigate commercial risk." We encourage the regulators to clarify whether the foregoing requirement mandates that all swaps of a commercial end-user be used for hedging or mitigating commercial risk or whether some lesser percentage would be acceptable for purposes of satisfying the requirement.

(6) Board Committee Approval to Rely on Commercial End-User Exemption

Section 2(j) of the CEA requires commercial end-users that are issuers of securities registered under Section 12 of the Exchange Act or that are required to file reports pursuant to Section 15(d) of the Securities Exchange Act, to have an "appropriate committee" of the board approve the decision to rely on the commercial end-user exception to clearing. The Act added a substantively identical provision to Section 3C(i) of the Exchange Act that is applicable to security-based swaps. We encourage the regulators to provide clarity as to the type of committee that would be an "appropriate committee" for purposes of these provisions. We also believe that the regulators should expressly address whether a separate approval for each swap is required each time a company relies on the foregoing exemption from clearing or whether a general approval for all swaps or for specified types of swaps would be permissible. In this regard, we note that it may be extremely inefficient for a committee of a public company's board to meet every time a swap is effected and believe that the purposes of the Act would be adequately served by requiring a company's board committee to authorize the use of the foregoing exemption for specified categories of swaps (for example, by permitting the company to utilize the exemption for all oil swaps).

(7) Business Conduct Standards

Section 4s(h)(5) of the CEA imposes business conduct standards upon SD/MSPs who act as swap counterparties to "special entities."[12] The Act added a substantively identical provision

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[11] "(7) EXCEPTIONS.—
(A) IN GENERAL.—The requirements of paragraph (1)(A) shall not apply to a swap if 1 of the counterparties to the swap—
(i) is not a financial entity;
(ii) is using swaps to hedge or mitigate commercial risk; and
(iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into noncleared swaps."

[12] "(5) SPECIAL REQUIREMENTS FOR SWAP DEALERS AS COUNTERPARTIES TO SPECIAL ENTITIES.—
(A) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity shall—
(i) comply with any duty established by the Commission for a swap dealer or major swap participant, with respect to a counterparty that is an eligible contract participant within the meaning of subclause (I) or (II) of

to Section 15F(h)(5) of the Exchange Act that is applicable to security-based swaps. However, the reference to "a counterparty that is an eligible contract participant within the meaning of subclause (I) or (II) of clause (vii) of Section 1a(18) of the Commodity Exchange Act" that is contained in each of those sections creates an ambiguity in the statute. This ambiguity has generated significant commentary as to whether the statute is intended to apply to non-governmental plans. It is quite possible that the reference in the statute to clause (vii) of Section 1a(18) of the Commodity Exchange Act was incorrect and should have, instead, been a reference to clause (vi) of Section 1a(18) of the Commodity Exchange Act. However, regardless of whether the citation is a mistake or not, we encourage the regulators to clearly address the question as to whether or not the provisions in the foregoing sections are applicable to non-governmental plans. In this regard we note that Section 4s(h)(5)(A)(VII) of the CEA and Section 15F(h)(5)(A)(VII) of the Exchange Act expressly refer to "employee benefit plans subject to the Employee Retirement Income Security Act of 1974."

(8) Incorporation of Congressional Colloquies

The intense negotiations leading up to the adoption of the Act left little time for the draftspersons to review the final wording of many provisions. As a result, the sponsors of the Act themselves have identified certain instances where the final wording of the Act arguably does not reflect the precise intent of Congress. Many of these instances have given rise to colloquies, including statements in Congress and formal exchanges of letters that are intended to provide guidance to regulators in implementing the Act.[13] The Committee recommends that the regulators adopt a transparent process for identifying such colloquies and exchanges and carrying out the Congressional intent they express.

We note that some colloquies and exchanges may be more difficult to address than others in the rulemaking process and yet we encourage the regulators to attempt to address each instance where colloquies and exchanges address issues with the Act. One such example is the floor statement by Senators Lincoln and Dodd on July 15, 2010 that uninsured U.S. branches and agencies of foreign banks are treated the same as "insured depository institutions" under Section 716 of the Act, including the safe harbor language in that Section.[14] In Section 716, the term

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clause (vii) of section 1a(18) of this Act, that requires the swap dealer or major swap participant to have a reasonable basis to believe that the counterparty that is a Special Entity has an independent representative that—

(I) has sufficient knowledge to evaluate the transaction and risks;

(II) is not subject to a statutory disqualification;

(III) is independent of the swap dealer or major swap participant;

(IV) undertakes a duty to act in the best interests of the counterparty it represents;

(V) makes appropriate disclosures;

(VI) will provide written representations to the Special Entity regarding fair pricing and the appropriateness of the transaction; and

(VII) in the case of employee benefit plans subject to the Employee Retirement Income Security act of 1974, is a fiduciary as defined in section 3 of that Act (29 U.S.C. 1002); and

(ii) before the initiation of the transaction, disclose to the Special Entity in writing the capacity in which the swap dealer is acting; and

(B) the Commission may establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act."

[13] *See, e.g., supra* notes 6-8.

[14] 156 CONG. REC. S5903-04.

"insured depository institution" is used in subsections (b)(2)(B), (c), (d), (e), (f) and (g), in each instance in order to mitigate, exempt or provide some relief to insured depository institutions from the restrictions applicable to "swaps entities" that are not insured depository institutions. While the implementation of Section 716 may be beyond the jurisdiction of the regulators to which this letter is addressed, the oversight referred to in the colloquy demonstrates the need for the regulators to exercise their delegated rulemaking powers to avoid inconsistent or unintended results in the application of the Act.

(9) No-Action Letter or Advisory Process

Because the rules will not be able to anticipate all the issues that will arise from the required changes in the swaps markets, the Committee believes that the regulators should establish a no-action letter or other advisory process to allow parties to obtain prompt guidance concerning the application of the rules to novel or unusual facts. Such process should apply generally, including with respect to provisions not specifically commented on in this letter.

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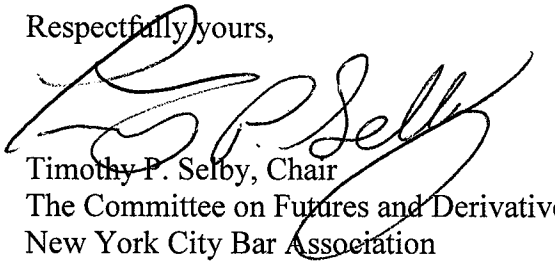
We appreciate the opportunity to present our views to you on this matter of importance to us as practitioners of derivatives law and regulation.

Respectfully yours,



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§ These members comprise the Ad Hoc Working Group.