RIN Number: 3038-AE09

To: Commodity Futures Trading Commission

From: James W. Lovely, Esq.

Date: December 20, 2013

Re: Proposed CFTC Regulation 170.17

Ladies and Gentlemen:

With regard to the CTAs described herein, proposed CFTC Regulation 170.17, while well-intentioned, is ill-founded in many respects. In particular, the CFTC fails to consider both the true economic cost of NFA registration for small CTAs, registered only with the CFTC and that do no manage or exercise discretion over customer accounts or funds ("CFCTAs"), and the nearly total lack of relevance of most NFA regulation to such CFCTAs. Finally, the CFTC fails to consider the likely adverse effects of adopting this regulation in driving CFCTAs out from the ambit of CFTC registration.

Presently, per the NFA and applicable law, a person acting as a commodity trading advisor is not required to register if:

- The person has provided advice to 15 or fewer persons during the past 12 months and does not generally hold out to the public as a CTA (7 U.S.C. Sec. 6m(1) and CFTC Reg. 4.14(a)(10)); or
- The person is in one of a number of businesses or professions listed in the Commodity Exchange Act or is registered in another capacity and provides advice is solely incidental to the person's principal business or profession (7 U.S.C. Sec. 1a(12)(B) and (C) and CFTC Reg. 4.14); or
- The person is providing advice that is not based upon knowledge of or tailored to customer's particular commodity interest account, particular commodity interest trading activity, or other similar types of information (7 U.S.C. Sec. 1a(12)(D) and CFTC Reg. 4.14(a)(9)).

Notwithstanding the above, many persons and entities may choose to register with the CFTC because doing so provides some legal comfort to the registrant given the inevitable practical ambiguities around concepts such as "solely incidental", "principal business or profession", "holding out"[1] and "tailored advice." In such instances, CFTC registration does not currently necessitate NFA registration, so long as the CFTC registered CTA does not manage or exercise discretion over customer accounts or funds. See http://www.nfa.futures.org/NFA-registration/cta/index.HTML.

The CFTC benefits from the existing state of affairs because CFCTAs register with the CFTC, undergo background checks and fingerprinting, obtain licensing following examination, and remain subject to CFTC audit and basic recordkeeping requirements. CFCTAs benefit from the existing state of affairs because they obtain a measure of legal certainty as to their activities and greater knowledge of the

[1] For example, one new issue that the CFTC has yet to address is the concept of holding out as regards CFTC Reg. 4.14(a)(10)(iii) and recently revised SEC Regulation D, Rule 506.

industry, without incurring the $750 per year NFA dues and the burden, cost and frustration of trying to comply with NFA regulations that are almost entirely irrelevant to their limited activity relating to the Commodity Exchange Act.

In proposed Regulation 170.17, the CFTC significantly understates the cost of NFA registration and, more importantly, the nearly complete lack of utility of NFA regulation for CFCTAs, particularly (but not exclusively) those that are involved with swaps. Even the most cursory examination of NFA regulations reveals that such regulations have almost no relevance to a CFCTA that is not managing, trading or exercising discretion over customer accounts or funds. A brief, but by no means exhaustive, summary of such inapposite regulations includes:

- Rules regarding account opening, risk disclosure and trading authority;
- Rules regarding bunched orders and order allocation;
- Rules regarding suitability or churning of security futures products;
- Rules regarding CTA program and performance disclosure for managed accounts or pools;
- Rules regarding solicitation and execution of customer orders;
- Rules regarding disaster recovery protocols (other than in connection with CFTC mandated record retention);
- Rules regarding trading programs, performance and related promotional materials;
- Rules regarding anti-money laundering (as no customer funds held, managed or transferred); and
- Rules regarding quarterly reporting of assets under management, trading programs, performance, carrying brokers and the like (as no customer funds held, managed or transferred).

The CFTC is grossly understating the cost of compliance with such NFA regulations for CFCTAs. As the CFTC noted, the time required to file for membership may be a half hour, and the annual cost of registration and renewal with the NFA is $750 per year. However, most CFCTAs are small or one-person operations or may have only incidental involvement with commodity interests. As a consequence of proposed Regulation 170.17, such CFCTAs would need to retain external legal counsel or compliance consultants to try to ascertain whether the panoply of inapposite NFA regulation and reporting requirements (summarized above) apply to their activities and, if so, how to comply with the same. As an attorney with more than twenty (20) years' experience with futures and derivatives, I can assure you that such external legal and compliance assistance with respect to NFA regulations could easily cost a CFCTA $15,000.00 to $20,000.00 per year. Moreover, the CFTC overstates the overlap between general CFTC regulation applicable to CFCTAs under 17 C.F.R. Part 4 and the far broader and more awkward to apply NFA regulations summarized above.[2]

It is also worth noting that, by requiring registration with the NFA and compliance with NFA regulations by CFCTAs, the CFTC would be adding very substantially to the burden imposed on those CFCTAs who

[2] This is especially true for CFCTAs that might only interact with QEPs and otherwise fall within the scope of CFTC Reg. 4.7.

are exercising their commercial and other free speech rights granted under the First Amendment to the United States Constitution. This is true particularly for those CFCTAs writing and speaking about the commodity markets, who are not news reporters, columnists or news editors. See 7 U.S.C. Sec. 1a(12)(B)(ii) and CFTC Reg. 1.3(bb)(1)(ii). By doing so, the CFTC, by Constitutional necessity, would be jeopardizing the current reach of CFTC authority and expanding the likely scope of First Amendment protection, when applying intermediate scrutiny of government regulation of commercial speech as mandated by the U.S. Supreme Court.

Finally, the CFTC should respectfully consider the likely adverse effects of adopting this regulation in driving CFCTAs out from the ambit of CFTC registration. If proposed CFTC Regulation 170.17 is adopted, CFCTAs, faced with very substantial costs to comply with a host of inapposite NFA regulations, will likely drop registration entirely in reliance on (1) the scope of existing statutory and regulatory exemptions and exclusions from registration and (2) in some cases, commercial free speech rights under the U.S. Constitution. It is simply not worth it for them to try to fit the "square peg" of limited CEA related activity (unrelated to managing, trading or exercising discretion over customer accounts or funds) into the "round hole" of NFA regulations focused precisely on topics concerning the managing, trading or exercising of discretion over customer accounts or funds.

Thank you for considering these comments.