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July 27, 2000

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COMMENT

Office of the Secretariat,
Commodity Futures Trading Commission,
Three Lafayette Centre,
1155 21st Street,
Washington, D.C. 20581.

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Re: Regulatory Reinvention

Dear Ms. Webb:

On June 27, 2000, I testified at the Commodity Futures Trading Commission's ("CFTC") Public Hearing on Regulatory Reinvention. In my testimony, I briefly addressed the legal authority of the CFTC to establish the category of Derivatives Transaction Facility ("DTF"). In particular, I stated my view that the establishment of the DTF category was within the CFTC's legal authority and did not constitute an expansion of the CFTC's authority. At that time, I indicated an interest in supplementing my comments with a letter to the Commission. I ask that this letter be included in the record of the Public Hearing and in the rulemaking files.

As the CFTC recognized in its proposed rulemaking (65 F.R. 38986, 38989), when Congress granted CFTC exemptive authority pursuant to Section 4(c) in 1992, the Conferees stated:

The Conferees do not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument, or transaction for which an exemption is sought is subject to the Act. Rather, this provision provides flexibility for the Commission to provide

legal certainty to novel instruments where the determination as to jurisdiction is not straightforward. Rather than making a finding as to whether a product is or is not a futures contract, the Commission in appropriate cases may proceed directly to issuing an exemption. H.R. Rep. No. 978, 102d Cong. 2d Sess. 82-83 (1992).

In so stating, the Conferees recognized that to require the Commission first to determine whether transactions were within its jurisdiction before exempting them would create substantial legal uncertainty. As the CFTC well recognizes, neither it nor any court has ever determined that swaps are futures contracts. With the express approval of Congress, the CFTC has been able to exempt swaps from most of the provisions of the Act without making such a determination.

The Commission is proposing to use the same approval with respect to the new category of DTFs. Facilities can agree to be subject to the regulatory oversight of the Commission as DTFs pursuant to a Section 4(c) rulemaking without the Commission having to first determine that their activities are subject to the Act. The parties would be subject to CFTC jurisdiction to the extent that their activities are governed by the Act. Of course, the Commission could not use this rulemaking to expand its jurisdiction; the rulemaking cannot give the Commission jurisdiction over transactions that are not within its jurisdiction under the Act. Just as a party could contest the Commission's jurisdiction in an antifraud action relating to a swaps transaction eligible for the swaps exemption, a party would be able to contest the Commission's jurisdiction with respect to the party's activity as a DTF. However, the Commission holds the ultimate sanction. The Commission can withdraw or deny a party's DTF status. If it did so, the party would lose the benefit of legal certainty provided by the DTF exemption and would lose whatever other benefits are available to a party qualifying for DTF status.

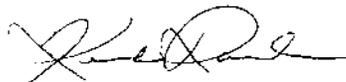
The alternative of having the Commission first determine that a particular DTF is subject to the Act would expose market participants to the very legal uncertainty that Congress sought to avoid when it adopted Section 4(c). In particular, to first find that the derivatives transactions traded on a DTF are futures contracts would be the very same finding that Congress sought to

have the CFTC avoid. The fact that the Section 4(c) exemption for DTFs involves a degree of regulatory oversight is fundamentally no different from the swaps and hybrids exemptions which are subject to CFTC antifraud and antimanipulation authority. In each of these cases the parties have the benefit of the exemption's legal certainty. Congress recognized that the question of CFTC jurisdiction need not be resolved prior to issuance of any of these exemptions.

The goal of the new DTF category is twofold. First, and most importantly, it provides legal certainty for a new category of trading facility. Such legal certainty is very similar to the legal certainty provided by the CFTC through its existing swaps and hybrids exemptions. Promoting legal certainty is the goal of Section 4(c), and the rationale for the CFTC's adoption of swaps and hybrids exemptions applies equally to the new DTF category. Second, being overseen by the CFTC as a DTF may enhance the reputation of a facility and may provide cross-border benefits. While we believe that this goal is secondary, there is nothing in Section 4(c) that forecloses such benefits. Again, if the CFTC is not satisfied that such benefits are appropriate for a particular DTF, it can take away the DTF approval.

I appreciate the opportunity to present these additional views to the Commission and ask that this letter be included in the record.

Sincerely,



Kenneth M. Raisler