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Subject: Comment on proposed amendments to sentencing guidelines

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We are sending you the comments of the Division of Enforcement of the Commodity Futures Trading Commission on the proposed amendments to the sentencing guidelines. We will also fax a copy. Thank you for your consideration.

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The Division of Enforcement ("Division") of the Commodity Futures Trading Commission ("CFTC") appreciates the opportunity to comment on the proposal to repromulgate the temporary, emergency amendment implementing the Sarbanes-Oxley Act, Pub. L. 107-204 ("Sarbanes-Oxley"), as a permanent, non-emergency amendment to the sentencing guidelines. The Division also welcomes the chance to assist the Sentencing Commission by setting forth the CFTC's role in implementing, administering and enforcing the Commodity Exchange Act ("CEA"), 7 U.S.C. §1 *et seq.*

As the agency that enforces violations of the commodity laws and refers such violations to the Department of Justice for criminal prosecution, the Division is qualified to comment upon the appropriate sentencing levels for convictions based upon violations committed in the commodities arena. The Division is submitting this letter to recommend that fraudulent conduct committed in the commodity futures and options industry be treated comparably to similar types of securities and corporate fraud that are explicitly treated in Sarbanes-Oxley and under the guidelines.

The Division strongly supports the Sentencing Commission's proposed amendments that apply across the board to all forms of corporate and financial misconduct because, on their face, they provide for increased sentences against violators in the futures and options industry as well as against other perpetrators of white collar fraud. These amendments affect the sentences for, among other things: fraud offenses involving significantly greater than 50 victims; fraud offenses that endanger the solvency or financial security of a substantial number of victims; obstruction of justice offenses; and fraud offenses committed by officers and directors of publicly traded corporations.¹

¹ For example, the Division has extensively investigated violations of the CEA committed by public companies involved in producing and trading energy products, including crude oil and electricity. In addition to alleged market manipulation, the conduct under investigation includes potentially fraudulent conduct such as uncompetitive or "wash" trading, and false reporting of trading volume. Some of these acts have been the subject of criminal prosecutions. If it is proven that criminal liability for fraud runs to the officers and directors of these public

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In part I.(B) of the Notice's "Issues for Comment: Corporate Fraud," the Sentencing Commission raises two related questions relevant to Sarbanes-Oxley's request that the Sentencing Commission consider providing "an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses," Sarbanes-Oxley §1104: (1) whether the scope of the sentencing enhancement in §2B1.1(b)(13)² for violations of securities law should be expanded to include other individuals or entities besides officers and directors of public companies who also may have a fiduciary or similar statutory duty of trust and confidence to the investor; and (2) whether the enhancement should apply to entities or individuals that offer and manage securities or commodities futures or options but who are not regulated under securities law. The Division responds in the affirmative to both questions: the Sentencing Commission should extend the enhancements to bring these futures industry participant and futures-related acts within the guidelines, because the CFTC's regulatory scheme parallels the securities laws, and criminal prosecutions with respect to the futures and options industry often address the same types of fraud and abuse as those brought with respect to the securities industry.

I. The Enforcement Mission of the CFTC

The CFTC regulates the commodity futures and options markets. Its mission is to protect market users and the public from fraud, manipulation, and abusive practices related to the sale of commodity futures and options and to foster open, competitive, and financially sound commodity futures and options markets. In pursuit of that mission, the Division investigates and prosecutes alleged violations of the CEA and CFTC regulations.

The importance of the integrity of the futures and options markets to the United States economy is reflected by the CFTC's membership in the President's Working Group on Financial Markets and participation in the President's Corporate Fraud Task Force and the Enron Task Force, among other initiatives. Fraudulent investment schemes committed in the futures and options markets can have a devastating impact on the savings of individual ("retail") investors, and violations of the anti-manipulation provisions of the CEA can adversely affect broad sectors of the economy. Willful violations of the CEA are felonies under §9 of the Act. 7 U.S.C. §13.

Fraudulent conduct is contrary to one of the CEA's core regulatory protections. See, e.g., In re Nikkah, [2000-2001 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,129 at 49,892 (CFTC May 12, 2000)(civil monetary penalty imposed where respondent fraudulently allocated trades). The fraudulent conduct pursued by the Division and by criminal authorities encompasses a broad range of practices and sectors of the industry regulated by the CFTC. Certain prevalent

companies, then the enhancements could affect the sentences for these people as a result of their violation of the commodity laws.

² Section 2B1.1(b)(13) provides for a sentencing enhancement "if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or a director of a publicly traded company"

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fraudulent practices, that might merit sentencing enhancements in criminal prosecutions, are described below.³

Sales solicitation fraud: The Division regularly investigates fraud committed by intermediaries in the futures and options industry (such as introducing brokers, commodity trading advisors and commodity pool operators) in soliciting, selling, and providing advisory services concerning, commodity futures and options. Enforcement actions have alleged that introducing brokers, commodity trading advisors and commodity pool operators have lied to their customers (who often are individuals of modest means) about the profitability and risk of transactions in futures and options, about the intermediaries' track records and expertise, and about the nature of the transactions. Related criminal actions have charged that such fraudulent misrepresentations also constitute wire fraud, mail fraud and commodities fraud. In addition, the CFTC and the courts have found that a broker breaches a fiduciary duty to a customer by trading ahead of a customer's order.

The "Issue for Comment" inquires whether the Sentencing Commission should include in §2B1.1(b)(13) a registered broker or dealer, an investment adviser, or persons associated with either of those. Any affirmative response to that question with respect to participants in the securities industry should equally apply to registered intermediaries in the futures and options industry. These individuals and entities perform functions similar to those performed by brokers, dealers and investment advisers; some or all of them make sales solicitations, handle customer orders, provide trading advice, accept customer funds, and report to customers the status of their investments. As with securities brokers, dealers and investment advisers, they owe a duty of trust and confidence to their customers.

Commodity pool fraud: A commodity pool operator is a business similar to an investment trust or syndicate that raises funds for the purpose of trading commodity futures or options. Commodity pool operators have a fiduciary obligation to investors in the pools and are obligated to comply with statutes and regulations designed to ensure the safety and soundness of funds placed in the pools. The Division has civilly prosecuted commodity pool operators for running commodity pools as Ponzi schemes, in which much of the money raised from retail investors is misappropriated by the promoters of the scheme, and funds are used to pay purported profits to the earlier investors in order to create the appearance of profitability. The Department of Justice has brought related criminal actions alleging violations of the general fraud statutes as well as, in some cases, commodities fraud, against such pool operators.

Fraud involving sales of off-exchange instruments: The CFTC investigates, prosecutes and makes criminal referrals based upon fraudulent solicitations and sales of foreign currency (also known as "forex") and precious metals futures and options that are not traded on designated exchanges. While these investments might masquerade as "physical" or

³ The CFTC's enforcement complaints from the past several years are available on the CFTC website at www.cftc.gov. The website also includes several CFTC Consumer Advisories alerting the public to warning signs of possible fraudulent commodity activity and offering precautions that individuals should take before committing funds, www.cftc.gov/cftc/cftccustomer.htm.

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"spot" commodities, they often are futures or options as a legal matter, and thus are covered by

the CEA. The CFTC's actions prosecuting such fraud, and related criminal actions, often charge the promoters of these frauds with misappropriation as well as false and misleading representations.

II. Enhancements should apply to individuals and entities in the commodity futures and options industry

The Division recommends that the guidelines extend any enhancements for violations that involve breaches of a fiduciary or other statutory duty of trust and confidence to encompass violations by individuals and entities in the commodity industry that have similar duties. As demonstrated above, many of the acts of misconduct by individuals and entities regulated under the securities laws have their parallel in acts of misconduct by individuals and entities in the futures industry. As in the securities industry, futures and options professionals abuse their duties of trust and confidence to their customers through misrepresentation and misappropriation, among other things. The degree of criminal sentence should not vary depending on the particular investments that were the subject of the fraud, when the customers were similarly situated and the abuse involved similar duties and similar breaches of these duties. Indeed, many financial professionals stand with one foot in each of the securities industry and the futures and options industry under a system of dual regulation. It would be an odd result if a dual registrant's acts of defrauding a customer with respect to securities and futures transactions subjected the registrant to different sentences depending upon the financial instrument involved in the fraud.

For the same reasons, the scope of any enhancement should apply to entities and individuals that offer and manage commodity futures and options and are not regulated under the securities laws, but rather under the CEA. Significant to this conclusion is the provision in the "Application Notes" to §2B1.1(b)(13) which provides that "A conviction under a securities law is not required in order for subsection (b) to apply;" that is, even if the individual is convicted under a general fraud statute, if the defendant's conduct violated a securities law, it is appropriate for a sentencing enhancement. The fact that many futures and options violations also are prosecuted under general fraud statutes should warrant equivalent application of an enhancement when a criminal violation of the CEA is committed (but not necessarily charged), given the similar purposes and applications of the two statutory regimes.

Thank you for the opportunity to comment on the proposed amendments. Please call me at (202) 418-5314 if you have any questions about these comments.

Yours truly,

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