

**NEW YORK  
CITY BAR**

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The Honorable Blanche L. Lincoln  
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The Honorable Collin Peterson  
Chair, House Agriculture Committee  
U.S. House of Representatives  
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Washington, D.C. 20515

Re: The Over-the-Counter Derivatives Markets Act of 2009

We write on behalf of the Committee on Futures and Derivatives Regulation (the "Committee") of the New York City Bar Association (the "Association") to respectfully convey our concerns respecting an important provision of Congressman Barney Frank's Discussion Draft (the "Discussion Draft") of the proposed derivatives legislation, "The Over-the-Counter Derivatives Market Act of 2009" (the "OCDMA").

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 such as credit default swaps, and it has a practice of publishing comments on legal and regulatory developments that have a significant impact on the futures and derivatives markets.

According to the Discussion Draft as well as the originally proposed legislation, the Commodity Futures Trading Commission (the "CFTC") and the Securities and Exchange Commission (the "SEC") would be prohibited from exercising their customary authority to grant

exemptions from the swap and security-based swap provisions of the OCDMA, except as expressly authorized under the proposed law. For the reasons explained below, the Committee is concerned that removing such exemptive authority from the CFTC and SEC will have consequences that are unintended by the proposed legislation and inevitably will contribute to legal uncertainty and risk. Accordingly, we recommend that these provisions of the OCDMA not be enacted as proposed and that, instead, any new derivatives law preserve the well-established exemptive powers of the CFTC and SEC with respect to particular transactions, particular persons and the like.

Before addressing our particular concerns in the context of the OCDMA, it is appropriate to recall that the question of the CFTC's power to grant exemptions to the Commodity Exchange Act has arisen in the past. For nearly twenty years beginning with its creation in 1974, the CFTC was precluded from granting explicit legal exemptions in even the most meritorious cases, until it was finally empowered to do so in 1992. During this ban on issuing exemptions, the CFTC was limited to issuing statutory interpretations and policy statements to fine tune its application of the statute, neither of which provided market participants with the same measure of legal comfort and protection as do statutorily permitted exemptive orders. Finally, in response to mounting concerns expressed by the commodities industry and legal community that the lack of exemptive authority contributed to legal uncertainty and the risks and costs of doing business, Congress included clear exemptive authority for the CFTC in the Futures Trading Practices Act of 1992. As proposed, the OCDMA would reverse this Congressional delegation of authority to the CFTC, at least with respect to swaps.

Moreover, the SEC has had broad exemptive authority in respect of all the major statutes which it administers since 1996. Since 1940, the SEC has had the ability under the Investment Company Act to exempt any person, security or transaction or classes of such from any provision of the statute if the exemption is considered by the SEC to be necessary or appropriate in the public interest and consistent with the protection of investors. In 1970, Congress conferred substantially similar exemptive authority on the SEC with respect to the Investment Advisers Act. Again in 1990, Congress conferred such authority on the SEC with respect to the Trust Indenture Act, even though more limited exemptive authority was available prior to that time.

Lastly, in 1996, with the passage of the Capital Markets Efficiency Act of 1996, Congress conferred such authority on the SEC with respect to the Securities Act and the Securities Exchange Act, finding that such authority was necessary to promote efficient capital markets.<sup>1</sup> In each case, the exercise of exemptive authority by the CFTC or SEC is subject to the usual processes of Congressional oversight and, ultimately, outright reversal when Congress disagrees with the respective commission's policies.

The OCDMA is a complicated and broad piece of legislation dealing with an area typified by evolving products, global markets and a high degree of legal complexity. Among other things, the legislation mandates the registration and regulation of swap and security-based swap dealers and major swap and security-based swap participants. It appears that, as proposed, the CFTC and SEC might be powerless to exempt persons that otherwise meet the definition of a

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<sup>1</sup> The SEC's exemptive authority under one section of the Securities Exchange Act was limited due to the fact that such section related to matters also administered by the Treasury Department.

swap dealer or major market participant from the registration, capital, business conduct and other requirements mandated by the proposed law.

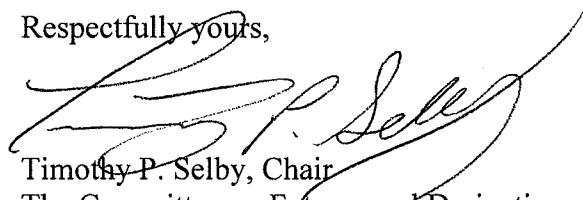
For example, a dealer that also provides its counterparties with any sort of electronic screen or trading system might be required to register both as a swap dealer and as an alternative swap execution facility ("ASEF"), and the CFTC would not be able to grant an exemption from the ASEF registration requirement even if the electronic screen or trading system would not change the nature of the dealer's business. Similarly, the OCDMA would require that a swap repository, which is defined as "any entity that collects and maintains the records of the terms and conditions of swaps or security-based swaps entered by third party" be registered with the CFTC. The definition of swap repository might cover various electronic vendors that provide back-office services to dealers, and the CFTC would not be able to exempt such vendors from the swap repository registration requirement even if the information stored by the vendors were also reported to a registered swap repository.

It should be noted that the Comprehensive Derivatives Regulation Act of 2009 (the "CDRA"), recently introduced by Senator Reed, retains the authority of the CFTC and SEC to exempt persons, transactions or securities from the law's various requirements if the relevant agency views such exemption as meeting the "necessary or appropriate in the public interest or for the protection of investors" standard. In the case of the grant of exemptive authority with respect to the required use of Derivatives Clearing Agencies, the CFTC or SEC, as applicable, must consult with the SEC or CFTC, as applicable, as well as with the Board of Governors of the Federal Reserve System and, if the consulted agency or the Board of Governors finds that the exemption does not meet the statutory standard, the exemption may not be granted. We believe that this process adequately circumscribes the situations in which an exemption may be granted thereby safeguarding legislative intent.

Looking further out into the uncertain future, the OCDMA in its current Discussion Draft form would place a large, vibrant and ever evolving market under new, federal supervision. Without quarreling with that objective, one can easily envision circumstances where the OCDMA will have unintended and unnecessary consequences that the CFTC and SEC should have the power to adjust through exemptive relief on a case-by-case or class basis. We believe that as a matter of good public policy, independent agencies such as the CFTC and SEC, which are experts in their fields of responsibility, should have the fullest array possible of means to achieve the fair application of this complex new law.

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

Respectfully yours,



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

New York City Bar Association  
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\*These members of the Committee did not participate in this comment letter.

§These members comprise the Ad Hoc Working Group.