

064



James
Ishida/DCA/AO/USCOURTS
02/15/2007 03:20 PM

To Gale Mitchell/DCA/AO/USCOURTS@USCOURTS, Jennifer
Noell/DCA/AO/USCOURTS@USCOURTS
cc dcapra@mail.lawnet.fordham.edu
bcc

Subject Fw: Proposed Federal Rule of Evidence 502(c)

----- Forwarded by James Ishida/DCA/AO/USCOURTS on 02/15/2007 03:19 PM -----



"Berkowitz, Susan A."
<sberkowitz@CFTC.GOV>
02/15/2007 03:17 PM

To <Rules_Comments@ao.uscourts.gov>
cc

Subject Proposed Federal Rule of Evidence 502(c)

The U.S. Commodity Futures Trading Commission submits the attached letter in response to the request for comments on proposed Federal Rule of Evidence 502(c) under consideration by the Judicial Conference's Advisory Committee on Evidence Rules.

Regards,

Susan A. Berkowitz
Deputy Chief Counsel
Division of Enforcement
Commodity Futures Trading Commission
525 West Monroe, Suite 1100
Chicago, IL 60661



312.596.0719



312.596.0714



sberkowitz@cftc.gov



15Feb2007 filed comment letter re FRE 502(c).pdf



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5100
Facsimile: (202) 418-5521
www.cftc.gov

Office of the Secretariat

06 - EV - 064

February 15, 2007

By electronic mail (Rules_Comments@ao.uscourts.gov)

Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of United States Courts
Suite 4-170
1 Columbus Circle, NE
Washington, DC 20544

Re: Proposed Federal Rule of Evidence 502(c)

Dear Mr. McCabe:

The U.S. Commodity Futures Trading Commission ("CFTC" or "Commission") appreciates the opportunity to write in support of the proposed Federal Rule of Evidence 502(c), the so-called selective waiver provision. The CFTC is an independent federal regulatory agency charged with protecting market users and the public from fraud, manipulation, and other abusive practices related to commodity futures and options, and to foster open, competitive, and financially sound futures and options markets. The Commission's Division of Enforcement investigates and prosecutes alleged violations of the Commodity Exchange Act and CFTC regulations.

As a federal regulatory agency with enforcement responsibilities, the Commission supports the selective waiver provision, which would allow a person or entity to provide privileged or protected information to the Commission without waiving that privilege or protection as to other persons or entities. Such a rule will provide legal certainty to persons or entities who want to produce privileged materials to the Commission without the risk of waiving the privilege or protection as to private parties if they do so.

The proposed rule would serve the public interest by enhancing the Commission's ability to conduct expeditious investigations resulting in more timely enforcement, at a reduced cost to taxpayers as well as witnesses. The proposed rule also would enhance the Commission's ability to obtain relief for customers where appropriate.

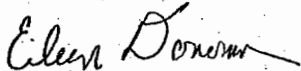
The Commission is sensitive both to the attorney client privilege and work product protections. We also recognize the important role played by private, third party litigants in the enforcement process. However, the Commission agrees with other commenters that, if the provision is adopted, private litigants will not be harmed. Indeed, they will be in precisely the same position under the proposed rule as they would be if the government had not obtained the privileged or protected documents. That is, if the privileged or protected documents were not produced to the government, private third-party litigants would not be able to argue that the individual or entity had waived attorney-client privilege or work product protection; similarly, they would not be able to make those arguments under the proposed rule.

Finally, the Commission supports previous comments:

- requesting clarification that a regulatory agency could make use of the documents it obtains as necessary and appropriate to fulfill its law enforcement responsibilities (including onward disclosure and the ability to introduce the documents in litigation); and
- urging that the rule prevent waiver under both federal and state law.

The Commission appreciates your consideration of these issues and the opportunity to share our views. Please let us know if we can provide any additional input as you continue your work on this important issue.

Respectfully submitted,



Eileen Donovan
Acting Secretary to the Commission
Commodity Futures Trading Commission