

## TEACHING RULEMAKING IN THE LINE OF FIRE

*By Donald L. Horwitz, Esq.  
Managing Director, Oyster Consulting,  
LLC*

In the fall of 2011, I accepted a post as an adjunct professor at the Chicago-Kent College of Law to begin in January 2012. If you think back, the focus of the futures and derivatives industry was directed on the then recently enacted Dodd - Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA). The DFA overhauled the regulation of Wall Street and in its wake generated regulatory rulemaking as a result of the law by both the CFTC and the SEC just to name a few agencies. Finally, if that wasn't enough, the high-profile collapse of MF Global in November 2011 drew additional concern and hand wringing by the public and the regulators. In was against this backdrop that caused the law school to resume offering a course in futures and derivatives regulation. With the spotlight aimed on financial market regulation, its revival was a natural and timely evolution.

While I have made numerous presentations to industry groups, written articles and tried to explain futures regulations to the heads of banking institutions, both foreign and domestic (with some degree of success), teaching *Futures and Derivatives Law and Regulation* to second- and

third-year law students was a challenge. Moreover, my most recent experience in law school was during the pre-computer/internet age where the course material was neatly packaged in a large case book. New cases and regulations were kept on reserve in the school's library.

Not anymore.

As we are all well aware, the DFA imposed a tremendous burden on both the SEC and the CFTC to write and enact rules on a very aggressive timeline. Indeed, the CFTC alone was tasked with drafting over 60 rules in a 360 day time frame. Unlike the previous amendments to the Commodity Exchange Act, Congress decided to leave the details of rulemaking to the regulatory agencies. This was a Herculean task at best. The metrics of the effort were impressive and well documented, and the CFTC was commended for a job well done.

So, faced with the enormous changes to the basic precepts of the laws and regulations governing the industry, how does an instructor prepare a course outline and materials that incorporate the fundamentals of the CEA while those foundations are changing daily? How do you explain to students that a regulatory regime based on prescriptive best practices was changing in front of you to a proscriptive rules-based regime? Even for those involved in the business, including their advisors and regulators, it was difficult to absorb the



flash-flood of Federal Register releases (averaging over 150 pages each) on issues involving transparency, margins, capital requirements and customer protection, just to name a few, while learning a new lexicon of terms (swaps, swap execution facilities, swap data repositories, etc.). I recall that in 1980 Congress first enacted the Paperwork Reduction Act. Perhaps the DFA was exempted.

Now, try to put yourself in the mind of a student, most likely one who is not involved in the business and who chose to learn everything about derivatives regulation in 14 weeks. Also, consider that English may not be your native language.

As the instructor, I felt there were at least three ways to approach the subject. The first was to teach the fundamentals of derivatives regulation in the classic law school Socratic Method, ignoring the new amendments and regulations since they were not fully (or even partially) baked. The second was to include the new law and proposed rules in the on-line materials and compare and contrast the differences while trying to understand or at least make sense of the rationale. The last was to discuss the process of statute and rulemaking, why it takes pages of staff analysis to come up with a rule, and a significant length of time to come up with something as basic as the definition of a swap.

Each approach had its own positives and drawbacks and I considered them carefully. After discussing the history of futures trading, the fundamentals of the marketplace, the development of regulation through the ages (always after a fraud, swindle or crash), and the significant judicial opinions, we began incorporating the new rules into the class discussion and focused

on the changes. The 2011 Edition of the CEA Regulations & Forms, which I used as a course book contained both the present regulations, the proposed regulations that were available and finally an indication of those regulations that were required to be amended. It was massive and confusing.

After a particular presentation that left more questions open than I had answers, I stepped back and began focusing on the process. This is where the students became curious: How are rules written? How is information gathered to form a draft? Does the Commission pay attention to the comment letters? How can I get to the essence of the proposed rule quickly when the Federal Register release goes on forever? We looked at the comments that were submitted, considered the persuasive nature of the letter and thought about the particular interest of the commenter. We also looked at the final rules when we could to see what, if any, changes were actually made. An excellent source was the section of the CFTC's website devoted to the DFA (<http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm#DFRBox>).

At the end of the course, the students learned the rule making process by experiencing it in real time. This was not an academic exercise. The class was fully aware of the comment below allegedly made by Otto von Bismarck circa 1850 and were still keenly interested in the process:

That I have come to the conclusion that the making of laws is like the making of sausages—the less you know about the process the more you respect the result.

For those students that ultimately graduated and perhaps went on to practice law in the industry, they at least learned how the process works

and might use this knowledge as they read future proposed rulemaking. There will clearly be opportunities as both the CFTC and SEC continue

to propose rules related to the DFA and, as at least one Commissioner has suggested, rewrite those already adopted.

