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**By Electronic Mail**

April 30, 2010

Mr. David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
1155 21<sup>st</sup> Street NW  
Washington DC 20581

**Re: Delegation of Authority to Disclose Confidential Information  
75 Fed.Reg. 15635 (March 30, 2010)**

Dear Mr. Stawick:

The Futures Industry Association (“FIA”)<sup>1</sup> is pleased to respond to the Commodity Futures Trading Commission’s (“Commission’s”) request for comments on the proposed amendments to Commission Rules 140.72 and 140.73 relating to the delegation to Commission staff of its authority to disclose confidential information.<sup>2</sup> With the exception of the Commission’s proposal to repeal Rule 140.73(b), we generally support the proposed amendments. As discussed below, however, we believe the Commission should adopt enhanced policies and procedures to guide Commission staff in the exercise of their authority under the proposed rules.

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<sup>1</sup> FIA is a principal spokesman for the commodity futures and options industry. FIA’s regular membership is comprised of approximately 30 of the largest futures commission merchants (“FCMs”) in the United States. Among FIA’s associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than eighty percent of all customer transactions executed on United States contract markets.

<sup>2</sup> Although section 8(a) of the Commodity Exchange Act (“Act”) generally prohibits the Commission from disclosing “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers,” the Commission is nonetheless authorized under sections 8a(6) and 8(e) of the Act to disclose such information to any (i) registered entity, (ii) registered futures association or self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934), and (iii) federal, state and foreign governmental authority, subject to the terms and conditions sets forth in the applicable provisions of the Act. (For convenience, registered entities, registered futures associations and self-regulatory organizations are sometimes collectively referred to herein as “SROs”).

The proposed amendments are primarily non-substantive, intended to assure that the rules reflect the changes to the Act adopted in the Commodity Futures Modernization Act of 2000 and the CFTC Reauthorization Act of 2008, as well as the reorganization of the Commission's operating divisions since the rules were last amended. In this regard, the proposed amendments would: (1) extend the scope of the rules beyond contract markets to all registered entities, as defined in section 1a(29) of the Act, as well as registered futures associations and self-regulatory organizations; (2) clarify the limited purposes for which an SRO may use confidential information;<sup>3</sup> (3) require each SRO to file with the Commission annually a list of all employees authorized to receive confidential information; (4) require the chief executive officer of each SRO to notify the Commission within 10 days of any change in the authorized list; and (5) remove the specific titles of Commission staff authorized to disclose confidential information.

We appreciate and support the Commission's desire to facilitate the disclosure of confidential information as authorized under the Act. Nonetheless, we are concerned by the broad authority proposed to be delegated, without further Commission guidance, to the directors of the several Divisions "and to such other employees in their respective Divisions and Offices as they may designate from time to time." Proposed Rule 140.72(a). Although Congress has yet to take final action on financial regulatory reform legislation, each of the pending bills would require over-the-counter derivatives market participants to submit to the Commission a substantial amount of confidential information to which the Commission to date has not had routine access. The Commission would be authorized to disclose this information to any SRO in accordance with the provisions of section 8a(6) of the Act. Since this information will be new to the Commission as well as to the SROs that will be receiving it, it is particularly important that the Commission adopt an agency-wide policy statement to guide the staff in determining which confidential information to release and for which purpose. Such a policy statement would afford the Commission appropriate flexibility, while providing staff necessary direction.

FIA appreciates that section 8a(6) of the Act and the Commission 140.72 restricts the purposes for which an SRO may use confidential information. However, the Commission's rules provide no penalty for an SRO or SRO employee that violates these provisions of the Act and rules. Separately, the rules provide no mechanism by which a market participant whose confidential information is improperly disclosed is notified or may seek appropriate redress. Before adopting the proposed amendments to Rule 140.72, the Commission should propose rules to address these critical issues.

### **Disclosure of Information to Governmental Authorities**

For similar reasons, we cannot support the Commission's proposal to repeal Rule 140.73(b), which currently provides that the Director of Enforcement, or the director's designee, must

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<sup>3</sup> In the Federal Register release accompanying the proposed amendments, the Commission further clarifies that confidential information may not be used for business development purposes. 75 Fed.Reg. 15635, 15636 (March 30, 2010).

approve the disclosure of confidential information to other federal, state and foreign regulatory authorities. To the extent confidential information is disclosed to other governmental authorities, both within and outside of the US, it is essential that one office at the Commission act as a central clearinghouse to make an initial determination that the requesting agency is acting within the scope of its authority and to assure that only the information that is responsive to the request is being disclosed. Moreover, in these circumstances, even more so than when the Commission discloses information to an SRO, the Commission's policies governing the release of confidential information must be consistently applied. Requiring the concurrence of the Director of the Division of Enforcement, or the director's designee, before such data is released will assure this result.

We understand that confidential information disclosed to foreign governmental authorities is generally released pursuant to the May 2002 IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ("MOU"). The MOU describes (i) specific procedures that a requesting authority must follow in requesting the disclosure of confidential information, (ii) the limited purposes for which such information may be used, and (iii) the obligations of the requesting authority to maintain the confidentiality of the information provided. The procedures established in the MOU reaffirm the importance of having one office at the Commission through which all requests for information are processed.

### **Disclosure of Confidential Information not Obtained from the Government**

In the Federal Register release accompanying the proposed amendments, the Commission notes that the requirements of section 8 do not apply to confidential information that registered entities independently collect, and the Commission requests comment on whether restrictions similar to those set out in the proposed amendments should be applied to confidential information generated internally. FIA strongly believes that all confidential information of the type described in section 8(a) and these rules should be subject to the same restrictions on disclosure. Commission rules should prohibit a registered entity: (i) from using such information except in connection with the performance of its market surveillance, audit, investigative or rule enforcement responsibilities; and (ii) from disclosing such information, except in connection with any self-regulatory action or proceeding. In this latter regard, Commission rules should specifically prohibit a registered entity that generates confidential information internally from using such information for business development purposes or from disclosing such information to a third party for any purpose.<sup>4</sup>

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<sup>4</sup> As above, Commission rules should require an SRO to notify a market participant if confidential information is misused and provide an opportunity for redress. Further, in the event a registered entity receives a subpoena for such confidential information, the registered entity should be required to notify the Commission and the individual or entity with respect to which confidential information is being sought before responding. Such a requirement would be consistent with the Commission's obligations under the provisions of section 8(e) of the Act.

We urge the Commission to use such statutory authority as it deems appropriate to assure that registered entities do not disclose or use confidential information except as authorized under section 8(a). If the Commission believes it needs additional statutory authority to impose these obligations on registered entities, it should request Congress to provide such authority in connection with the pending financial reform legislation.

In 2004, FIA submitted a comment letter on the revised Joint Audit Agreement, in which we encouraged the Commission to take steps to assure that registered entities do not misuse confidential information. Our comments bear repeating:

The information that DSROs obtain in the course of their examinations of member firms and the records they prepare obviously contain confidential proprietary and business information that an FCM would not otherwise disclose. FIA is concerned that the confidentiality provisions set forth in paragraph 8 of the Proposed Agreement do not provide sufficient assurance that such information will not be shared with other divisions of the DSRO or with other SROs except for appropriate cause. Since FCMs are not parties to the Proposed Agreement and otherwise appear to have no cause of action against an SRO that may improperly disclose confidential information, it is particularly important that the responsibilities of SROs in this regard be clearly circumscribed.

In a press release dated February 6, 2004, the Commission announced that it has “encourage[d] every SRO to reexamine its policies and procedures, employee training efforts, and its day-to-day practices to confirm that there are adequate safeguards in place to prevent the inappropriate use of confidential information obtained by SROs during audits, investigations, or other self-regulatory activities.” The Commission also encouraged SROs “to publicize these safeguards so that market participants continue to have full faith in the integrity of the self-regulatory process and participate enthusiastically in it, even as major changes in the futures markets create new competitive pressures.”

Consistent with the Commission’s recommendations, FIA respectfully submits that the Proposed Agreement governing confidentiality of FCM proprietary and business information should be revised to describe specifically the limitations on the use of such information. In addition, FIA believes the Commission should consider adopting a rule requiring the confidential treatment of all proprietary and confidential information collected during an examination. Such a rule would assure that violations of FCM confidentiality would be subject to appropriate penalty.<sup>5</sup>

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<sup>5</sup> Letter from John M. Damgard, President, Futures Industry Association, to Jean A. Webb, Secretary to the Commission, dated September 4, 2004. Commission action on the revised Joint Audit Agreement remains pending.

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## **Conclusion**

FIA appreciates the opportunity to submit these comments of the proposed amendments to Commission Rule 140.72 and 140.73. If the Commission has any questions concerning the matters discussed in this letter, please contact Barbara Wierzynski, FIA's Executive Vice President and General Counsel, at (202) 466-5460.

Sincerely,

*John M. Damgard*

John M. Damgard  
President

cc: Honorable Gary Gensler, Chairman  
Honorable Michael Dunn, Commissioner  
Honorable Jill E. Sommers, Commissioner  
Honorable Bart Chilton, Commissioner  
Honorable Scott O'Malia, Commissioner