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September 8, 2010

Mr. David A. Stawick
Secretary to the Commission
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Proposed Rules for Acknowledgment Letters for Customer Funds and Secured Amount Funds -- 75 Fed. Reg. 47,738 (August 9, 2010)

Dear Mr. Stawick:

The Futures Industry Association (“FIA”)¹ is pleased to submit this letter in response to the Commodity Futures Trading Commission’s (“Commission’s”) request for comments on the Commission’s re-proposed amendments to its regulations requiring futures commission merchants (“FCMs”) and derivatives clearing organizations (“DCOs”) to obtain acknowledgment letters from depositories (each a “Depository”) accepting customer funds and secured amount funds.² The amendments, which were originally proposed by the Commission on February 20, 2009 (the “Original Proposal”),³ are intended to clarify the obligations which Depositories incur when accepting customer funds or secured amount funds and now include a requirement to use standard template acknowledgment letters. As the Commission is aware, FIA submitted a comment letter in response to the Original Proposal (the “March 23, 2009 Letter”). Among other things, FIA recommended an extension of the effective date of the final regulations, the adoption of standard template acknowledgment letters and electronic filing of

¹ 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 in the United States. Among its 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.

² Currently, Regulation 1.20 requires FCMs and DCOs to obtain from each bank, trust company, FCM or clearing organization holding customer funds in the capacity of a depository a written acknowledgment that the Depository was informed that the customer funds deposited therein are those of commodity or option customers and are being held in accordance with the provisions of the Commodity Exchange Act (Act) and CFTC regulations. Regulation 1.26 repeats the requirement to obtain an acknowledgment letter, and Regulation 30.7 requires FCMs to obtain a written acknowledgment from initial Depositories holding funds, securities and property comprising the “secured amount” that such “secured amount” is being held for or on behalf of the FCM’s foreign futures and foreign options customers “in accordance with the provisions of these regulations.”

³ 74 Fed. Reg. 7,838 (February 20, 2009).

acknowledgment letters. FIA appreciates the Commission's thoughtful consideration of the comments received on the Original Proposal. In particular, FIA commends the Commission's decision to propose standard template acknowledgment letters, which should facilitate the process of executing new acknowledgment letters. However, as discussed below, FIA believes that the Commission's current proposal continues to present a number of concerns which need to be resolved in connection with the adoption of final rules.

Effective Date and Obligation to Obtain Amended Acknowledgment Letters

Our March 23, 2009 Letter requested that the effective date for final regulations be extended beyond the Original Proposal's 180 days from the date of publication in the Federal Register. The Commission is now proposing that the effective date be 90 days from the date of publication of final regulations in the Federal Register because the Commission believes that the use of a standard template acknowledgment letter will eliminate any need for the parties to negotiate new acknowledgment letters to satisfy the applicable provisions. As noted, FIA believes that the use of template letters should streamline the process, but the internal review of the new standard form acknowledgment letters by Depositories, along with certain operational changes that Depositories will need to make to comply with their terms (e.g., establishing a mechanism and procedures for Commission-directed withdrawals), will require a substantially longer time frame to implement than 90 days. The need for additional time is especially critical with respect to the numerous non-U.S. Depositories located across multiple foreign jurisdictions. Such Depositories often lack familiarity with the Commission's regulations and will be unaware of this rulemaking proceeding, and as a result will need to be educated regarding the new requirements, which will be a time-consuming process. Therefore, FIA believes strongly that the effective date should be extended to at least the originally proposed 180 days from the date of publication in the Federal Register.

The proposed regulations also would obligate the parties to execute an amendment to an acknowledgment letter within 60 days of the occurrence of a party changing its name. FIA believes that this proposed requirement would introduce unnecessary burdens and that so long as the provisions of the acknowledgment letter are binding on the renamed party, a change in name should not trigger an obligation to execute an amended acknowledgment letter. In lieu of requiring the execution of a new acknowledgment letter, FIA therefore recommends including "binding effect" language in the acknowledgment letters to ensure that the parties thereto remain subject to the applicable provisions, e.g., "the terms of this letter shall remain binding upon the parties, their successors and assigns, including, for the avoidance of doubt, regardless of the change in name of any party." If, however, the Commission determines to adopt this requirement, FIA requests that the time period be extended to 120 days because even the execution of a simple amendment acknowledging a name change may take substantially longer than the 60 days proposed. In this regard, a change in name often occurs in the context of a merger, acquisition or similar corporate transaction, in which case the relevant party likely will need to amend many of its agreements and related documentation.

Clarification Regarding Commission Staff Authorized to Direct Withdrawals

Our March 23, 2009 Letter also indicated that our Depository members are interested in working with the Commission on the development of a standardized notice, authentication and instruction protocol regarding authorization of direct withdrawals to help ensure against delay or confusion. FIA understands that the Commission is reluctant to establish specific standards for what constitutes “proper notice” because “reasonable actions could vary, depending on the situation.”⁴ However, to avoid potential confusion and reduce the risk of serious errors in connection with a direction for the immediate release of funds from a customer account, FIA requests that, at a minimum, the Commission define and limit the term “appropriate officer or employee,” *i.e.*, the class of Commission officers or employees who are authorized to direct the immediate release of funds from a Depository, to Division Directors or other senior designated personnel such as Deputy Directors or Associate Directors. It also would be helpful for the Commission to confirm our understanding that this authority would be expected to be used sparingly, *i.e.*, only in exceptional circumstances.

Intra-Day Lending By Depositories

As the Commission is aware, FCMs routinely enter into arrangements with Depositories to advance funds to the FCMs intra-day, with the understanding that the FCM will deposit in the customer segregated or secured account funds sufficient to repay the advance generally by close of business that day. These intra-day liquidity arrangements are operationally and administratively efficient and cost effective for FCMs because, without such arrangements, an FCM could potentially have to effect numerous intra-day transfers of funds to multiple accounts at multiple Depositories. In response to a request from one commenter to clarify that “in the event an FCM fails to repay [an] advance in a timely manner, or in the event of an FCM’s bankruptcy, a depository is entitled to recourse against the customer funds account for the amount of such funds advanced,” the Commission stated that Section 4d of the Act does not permit such an arrangement.⁵

Without expressing a view on the Commission’s position concerning Section 4d of the Act, FIA believes that Depositories will be reluctant to provide intra-day advances to FCMs for the benefit of customer accounts without having adequate assurances of recourse against these accounts in respect of the amounts loaned. This funding issue may be less significant for FCMs with bank affiliates, but FCMs without bank affiliates may encounter greater funding difficulties in the absence of such arrangements. FIA therefore believes that the Commission should revisit this issue, including the proposed language in the standard template acknowledgment letter.

Limiting the “Merger” Clause

FIA agrees with CME’s comment that the scope of the “merger clause” in the template acknowledgment letters should be narrowed to make clear that these clauses do not invalidate the terms of other agreements that may have been entered into by the parties and that do not conflict

⁴ See 75 Fed. Reg. 47,738 at 47,741 (August 9, 2010).

⁵ See *id.* at 47,740.

with the template acknowledgment letters. We believe that the CME's proposed language on this point would achieve this objective.

Obtaining Acknowledgment Letters Concerning Investments in Money Market Mutual Funds

As proposed, Rule 1.26(c) would provide that when customer funds are invested by an FCM or a derivatives clearing organization in a money market mutual fund, the acknowledgment letters must be obtained from the "money market mutual fund."⁶ Because industry practice is for FCMs or DCOs to invest in money market mutual funds through intermediaries (typically through a financial intermediary's omnibus customer account or a trading platform that offers investments in various money market mutual funds) and not to interact directly with the money market mutual fund, FIA requests that the Commission clarify that acknowledgment letters in respect of money market mutual fund investments may be obtained from the money market mutual fund or the relevant financial intermediary. In addition, FIA requests that the Commission add a corresponding template acknowledgment letter for the investment of Rule 30.7 secured amount funds in money market mutual funds.

Use of Template Acknowledgment Letters for Cleared OTC Derivatives Customer Account Class; Technical Amendments

FIA requests that the Commission take this opportunity to confirm that the forms of template acknowledgment letters may be used in respect of funds deposited in the recently created cleared OTC derivatives customer account class.⁷ We believe that doing so would foster consistency across customer account classes and avoid any potential confusion regarding the applicability of these regulations to the cleared OTC derivatives customer account class. We also note that Rule 1.20 does not require a written acknowledgment to be obtained from a "derivatives clearing organization" that has "adopted and submitted to the Commission rules that provide for the segregation as customer funds, in accordance with all relevant provisions of the Act and the rules and orders promulgated thereunder."⁸ FIA requests that the Commission adopt a parallel amendment to Rule 30.7 and any other rules relating to the cleared OTC derivatives customer account class so that acknowledgment letters with respect to secured amount funds or funds deposited for cleared OTC derivative transactions need not be obtained from a derivatives clearing organization that has adopted and submitted to the Commission rules that provide for the separate treatment of customer funds, in accordance with all relevant provisions of the Act and the rules and orders promulgated thereunder.

Additionally, FIA wishes to note that the account naming convention utilized in the proposed forms of template acknowledgment letters may present certain issues with respect to acknowledgment letters obtained by FCMs maintaining customer funds with another FCM through a customer omnibus account relationship. In this regard, due to operational limitations on the number of characters available for account names as well as the manner in which omnibus

⁶ Id.

⁷ See 75 Fed. Reg. 17,297 (April 6, 2010).

⁸ We agree with the Commission's proposed technical amendment to the rule that would replace the predecessor term "clearing organization" with the term "derivatives clearing organization".

customer accounts may be held, we understand that certain abbreviations and other account designations which vary from the proposed naming conventions are often used for naming such accounts. We understand further that the naming convention for such omnibus accounts typically would include the words "Customer Omnibus Account" and the relevant account number. However, because the account naming conventions in the proposed forms of acknowledgment letters do not accommodate acknowledgment letters obtained by FCMs maintaining customer funds with another FCM through a customer omnibus account relationship, FIA requests that the Commission clarify that in these limited circumstances the Rule 1.20 and the Rule 30.7 template (and an eventual customer cleared OTC derivatives template) acknowledgment letters may be modified to permit the use of the words "CFTC Regulated FCM Customer Omnibus Account."

Potential Operational Issues Relating to Use of WinJammer for Electronic Filings

Lastly, we thank the Commission for adopting the recommendation in our March 23, 2009 Letter to develop a system for electronic filing of acknowledgment letters. FIA wishes to note, however, that there may be certain operational issues associated with using the current version of WinJammer for that purpose. We hope that the Commission's guidance on electronically filing acknowledgment letters through WinJammer will address these issues, as well as recognize that FCMs will need adequate time to establish a mechanism and procedures for implementing and complying with an electronic filing requirement.

FIA appreciates the opportunity to submit these comments in response to the re-proposed amendments and looks forward to working with the Commission, DCOs and Depositories to develop an efficient working solution that satisfies the proposed regulations. If you have any question concerning our comments, please feel free to contact Barbara Wierzynski, Executive Vice President and General Counsel, Futures Industry Association at (202) 466-5460.

Sincerely,



John M. Damgard
President
Futures Industry Association

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Ms. Phyllis Dietz, Associate Director
Ms. Eileen Donovan, Special Counsel