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June 29, 2009

Ms. Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street, NW
Washington, DC 20006-1506

RE: Proposed Consolidated FINRA Rules Governing Suitability and Know-Your-Customer Obligations

Dear Ms. Asquith:

The Futures Industry Association ("FIA")¹ is pleased to submit this letter in response to Financial Industry Regulatory Authority's ("FINRA") request for comments on its proposed consolidated FINRA rules governing suitability and Know-Your-Customer obligations. In conjunction with consolidating FINRA rules governing suitability and know-your-customer obligations with respect to those activities that fall within FINRA's jurisdiction, FINRA requests comments on whether it should propose expanding suitability obligations to all recommendations of investment products, services and strategies made in connection with a firm's business, regardless of whether the recommendations involve securities. FIA is submitting this comment with respect to the futures business of firms (i.e., executing brokers, futures introducing brokers, or futures commission merchants ("FCMs")) that are also broker/dealers that are governed by FINRA regulations.

FIA objects to the imposition of these FINRA requirements on commodity futures trading and commodity futures commission merchants for two primary reasons: 1) commodity futures are exclusively governed by the Commodity Futures Trading Commission ("CFTC"); and 2) under the CFTC's delegated powers, the National Futures Association ("NFA") has created and implemented a regulatory

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.

framework respecting futures customer suitability. Additionally, FIA does not support the extension, without further justification, of FINRA's regulatory reach to the unrelated activities of a FINRA-regulated entity, as a matter of principle.

With respect to the CFTC's jurisdiction, Congress passed the Commodity Futures Trading Commission of 1974 and created the CFTC. "Along with an increase in powers, the [CFTC] was given exclusive jurisdiction over commodity futures trading."² The brief CEA exclusive jurisdiction provision of the 1974 legislation has been amended slightly on occasion since 1974 and now reads in its entirety:

The [CFTC] shall have exclusive jurisdiction, except to the extent otherwise provided in subparagraphs (C) and (D) of this paragraph and subsections (c) through (i) of this section, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for futures delivery (including significant price discovery contracts), traded or executed on a contract market designated or derivatives transactions execution facility registered pursuant to section 7 or 7a of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the commission pursuant to section 23 of this title. Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on the courts of the United States or any state.

When enacted in 1974, this provision was intended to "separate the functions of the [CFTC] from those of the Securities and Exchange Commission and other regulatory agencies."³ In other words, through 7 U.S.C. §2(a)(1)(A) Congress sought "to consolidate federal regulation of commodity futures trading in the [CFTC]."⁴ Under the exclusive grant of jurisdiction to the Commission, the authority of the Commodity Exchange Act (and regulations issued by the Commission) would preempt the field insofar as futures regulation is concerned."⁵ As further described by the Senate and House Conference Committee Chairmen:

² *Merrill Lynch vs. Curran*, 356 U.S. 353 (1982), at 386

³ *Merrill Lynch*, 356 U.S. at 386.

⁴ *Merrill Lynch*, 356 U.S. at 387

⁵ *Id.*

“In establishing this Commission, it is the Committee’s intent to give it exclusive jurisdiction over those areas delineated in the Act. This will ensure that the affected entities – exchanges, traders, customers, et cetera – will not be subject to conflicting agency rulings.”⁶

The 1974 Conference committee on the CFTC Act explained that “the Commission’s jurisdiction over futures contract marketsis exclusive ... and the Commission’s jurisdiction, where applicable, supersedes State as well as Federal agencies.”⁷

This recognition of the inherent differences of the structure and customer base between traditional futures contracts and securities products is particularly apt when it comes to customer suitability. While applicable to all clients investing in securities, suitability rules in the securities markets are primarily designed to provide important customer protections for retail securities investors. In contrast, there has never been a suitability rule in the futures markets. The only common denominator is that NFA rules require the registered FCM to “know its customers” but NFA KYC rules relate primarily to the identity and financial information relating to such futures customers. Also, futures markets have historically been predominantly institutional client focused with only a small retail client base.

In addition, there is a definitive difference in the various types of products overseen by the SEC and those overseen by the CFTC. Securities and futures products differ in that, while there may be an endless variation of different types of securities with varying investment strategies (conservative, principal protection, growth, capital gains, etc.), futures contracts are inherently standardized with only two traditional types of investors -- hedgers and speculators -- each of whom trade futures with the investment strategy of risk management and capital gains. Therefore, the small number of retail futures investors are able to assess risk factors as they pertain to their particular situation much more easily by examining very well-defined contract specifications, which change infrequently, if at all. Also, contract specification changes are well-publicized at the time of adoption and are generally phased in as a futures contract is listed for trading well ahead of delivery or expiration. These issues are best addressed through the NFA KYC rule and the risk disclosure requirement.

In the case of securities, on the other hand, it is important that an investor consider the disclosures in the relevant company’s SEC filings, press releases

⁶ 120 Cong. Rec. 30459 (1974) (Sen. Comm. Chairman Talmadge). *See also* 120 Cong. Rec. 34736 (1974) (House Comm. Chairman Poage, the provision was adopted “in an attempt to avoid unnecessary overlapping and duplicative regulation.”)

⁷ H.R. Rep. No. 93-1383, at 35 (1974) (Conf. Rep.).

and other company specific information. Of course, this information can change drastically over time and generally there is no specific time of expiration for these products. This quality of there being additional relevant information is also true for security futures, where knowing the information published by the company is also important. For the average retail investor, this may be too much information to readily understand and assess. Thus the suitability rule provides protection that is more appropriate for a retail investor.

Pursuant to Section 17(p)(3) of the Commodity Exchange Act (7 U.S.C. §21(p)(3)), which requires that the rules of a registered futures association “establish minimum standards governing the sales practices of its members and persons associated therewith...”, the National Futures Association (“NFA”) has established standards in its Compliance Rules which apply to sales practices and communications between NFA Members and Associates and futures customers⁸ and generally prohibit fraud and deceit and require NFA Members and Associates to “observe high standards of commercial honor and just and equitable principles of trade in the conduct of their commodity futures business.” Additionally, these general rules are supplemented with specific guidance from NFA’s Business Conduct Committee decisions and guidance from NFA’s Advisory Committees.

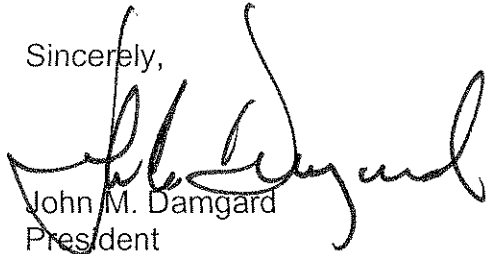
Through its rules and its disciplinary structure, NFA has defined standards for its Members’ and Associates’ relationship with their customers.⁹ Principles of fair conduct are laid out in the rules and NFA’s disciplinary actions also provide specific guidance respecting acceptable conduct. The NFA rules cover all kinds of promotional communications with the public, as well as routine day-to-day contact with customers. The NFA rules include, for example, any kind of written, electronic or mechanically produced message or presentation which is directed to any member of the public, whether broadcast over the media, delivered through the mail or presented personally. Another layer of customer protection is provided through risk disclosure statements. This framework of regulation by the CFTC and NFA is premised on the conclusion that the customer is in the best position to determine the suitability of futures trading if the customer receives an understandable disclosure of risks, as required in CFTC regulations. It is NFA’s position that the approach taken in its Rule 2-30 is preferable to one which would erect an inflexible standard that would bar some persons from using futures markets.

⁸ Notably, there are differences in the definition of “customer” under FINRA rules and its definition under the futures regulation. (For example, for CIP purposes, a “customer” is “a person that opens a new account with a futures commission merchant.” 31 C.F.R. § 103.123(a)(5)(i).)

⁹ Notably, FINRA’s proposed suitability rule makes no distinction as to the type of relationship between the “customer” and Member. Under the established regulatory regime for futures trading, there are different obligations with respect to customers depending upon the nature of the relationship. (For example, CIP requirements do not apply to an FCM when acting solely as an executing broker. FIN-2007-G001.)

FIA appreciates the opportunity to submit these comments with respect to FINRA's request for comment on its proposal to expand suitability obligations with respect to instruments other than securities (which fall under FINRA's jurisdiction). If you have any questions concerning our comments, please feel free to contact Tammy Botsford, FIA's Assistant General Counsel, at (202) 466-5460.

Sincerely,

A handwritten signature in black ink, appearing to read "John M. Damgard". The signature is fluid and cursive, with a large initial "J" and "D".

John M. Damgard
President

cc: Gary Goldsholle, Vice President and Associate General Counsel (FINRA)
Matthew E. Vitek, Counsel (FINRA)
James S. Wrona, Associate Vice President and Associate General Counsel (FINRA)
Ananda Radhakrishnan, Director, Clearing and Intermediary Oversight (CFTC)