



January 5, 2009

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

**Re: Proposed Rules for Trading Off the Centralized Market
73 Fed.Reg. 54097 (September 18, 2008)**

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 proposed amendments to Commission rule 1.38 and the related proposed guidance on Core Principle 9 (“Guidance”). The proposed amendments and Guidance attempt to strike an appropriate balance between the need of institutional customers to effect certain transactions off a centralized market (and the desire of designated contract markets (“DCMs”) to accommodate such transactions) with a DCM’s obligation under Core Principle 9 to “provide a competitive, open, and efficient market and mechanism for executing transactions.”

As the Commission is aware, FIA filed a comment letter when the Commission first proposed amendments to rule 1.38 and guidance with respect to Core Principle 9 in July 2004.² 69 *Fed.Reg.* 39880 (July 1, 2004). At that time, we supported the proposed amendments to rule 1.38, while opposing the adoption of the proposed guidance to Core Principal 9. Specifically, we expressed concern that the proposed Guidance would have the effect of stifling innovation with respect to transactions that may be executed off a DCM’s centralized market.

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 (“FCMs”) 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 Letter from John M. Damgard, President, Futures Industry Association, to Jean A. Webb, Secretary to the Commission, dated August 27, 2004.

Guidance on Core Principal 9. We continue to oppose adoption of the Guidance. With the exception of the discussion on the appropriate minimum size of a block trade, the proposed Guidance, as was the case in 2004, does little more than synthesize existing exchange rules that have either been approved by the Commission or certified by the relevant exchange. We understand that the proposed Guidance would not provide the exclusive means for complying with Core Principle 9. Nonetheless, adoption of the Guidance would appear to impose on a DCM a significant burden in establishing to the Commission's satisfaction that any block trading procedures and other procedures for trading away from the centralized market that differ from those that the Commission has previously approved comply with section 5(d)(9) of the Commodity Exchange Act.³

Further, adoption of the proposed Guidance may cause uncertainty among market participants. An example is in the area of transitory EFPs. As the Commission is aware, the use of transitory EFPs was discussed in detail in the Division of Trading and Markets *Report on Exchanges of Futures for Physicals*, dated October 1, 1987 (pp. 192-201). Since that time, market participants have developed a means of conducting business in a manner consistent with the policies set out therein. Publication of the proposed Guidance has already caused certain market participants to question whether this signals a change in the Commission's position with respect to transitory EFPs. We assume the Commission intends no change. However, if the Commission determines to adopt the proposed Guidance, we request the Commission to provide assurance on this point.

Although FIA opposes adoption of the proposed Guidance in its entirety, we are pleased that the Commission responded to a number of our comments in preparing this latest proposal, in particular, as they related to the Commission's original proposed guidance with respect to block trading. We endorse specifically the Commission's decision to replace the earlier numerical test for determining the appropriate minimum size of a block trade and to propose instead that the appropriate minimum size of a block trade should be the size at which it is reasonable to assume that the order could not be filled in its entirety at a single price.

As the Commission is aware, FIA has long supported the adoption of block trade procedures at the several exchanges. Block trade procedures can fulfill "a compelling need for alternative procedures to facilitate the execution of large orders in all contract markets in order to enhance the ability of these markets to meet the needs of institutional participants concerning transaction size and price."⁴ To date, however, DCMs have set the minimum size of a block trade of several of the more critical contracts at a level that is substantially above the size at which it is

³ Adoption of the proposed Guidance at this time, therefore, appears to be particularly incongruous, as the several DCMs and their related derivatives clearing organizations provide facilities for the execution and clearance of an increasing number of transactions effected off the centralized market, *e.g.*, ClearPort, Swapstream, and the various proposals for clearing credit default swaps. Any guidance with respect to Core Principal 9 should consider all such off central market transactions. FIA would be pleased to work with the Commission staff and the several DCMs in developing guidance that more appropriately addresses these transactions more broadly.

⁴ Letter from Ronald H. Filler, President, FIA Law and Compliance Committee, to Jean A. Webb, Secretary to the Commission, dated April 24, 2000.

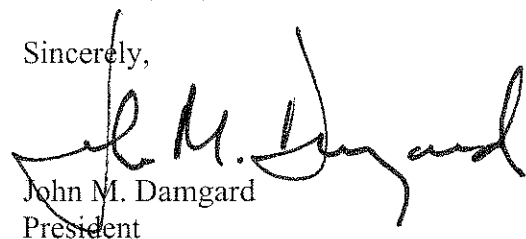
reasonable to assume that the order could not be filled in its entirety at a single price. Upon adoption of this Guidance, we would encourage the DCMs to review the minimum size of block trades for all contracts and reduce them accordingly.

Proposed Rule 1.38(b)(2). In light of the significant discretion the Commission is proposing to grant DCMs in determining the appropriate minimum size of a block trade, it is especially troubling that the Commission is proposing concurrently to restrict the authority DCMs as it relates to block trades, in particular, trades between affiliates.⁵ The proposed conditions are considerably more restrictive than those currently in place at several DCMs, including the Chicago Board of Trade and the Chicago Mercantile Exchange. Rule 526 of each exchange, for example, in no way restricts block trades between affiliates. In the absence of empirical evidence of abuse by affiliates under the existing exchange rules—and the Commission cited no such evidence in the Federal Register release accompanying the proposal—we see no reason to impose additional restrictions on affiliates and other parties engaged in block trades. FIA, therefore, opposes the adoption of proposed rule 1.38(b)(2) in its entirety.

Conclusion

We appreciate the opportunity to submit these views on the proposed amendments to rule 1.38 and the proposed Guidance on Core Principle 9. If the Commission has any questions concerning our comments, please feel free to contact Tammy Botsford, FIA's Assistant General Counsel, (202) 466-5460.

Sincerely,



John M. Damgard
President

cc: Honorable Walter L. Lukken, Acting Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner

Division of Market Oversight
Richard A. Shilts, Acting Director
Gabrielle A. Sudik, Special Counsel

⁵ Moreover, by proposing to incorporate conditions governing block trades between affiliates in a new rule 1.38(b)(2), rather than in the Guidance as was proposed in 2004, the Commission would further limit the flexibility that has been accorded DCMs to date.