

**COMMENT**

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January 14, 2010

Via-E-mail: [secretary@cftc.gov](mailto:secretary@cftc.gov)  
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Mr. David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.S.  
Washington, DC 20581

Re: **RIN 3038-AC90**  
**17 CFR Part 190**

Ladies and Gentlemen:

I am currently serving as the Trustee for Refco, LLC ("Refco") in its Chapter 7 bankruptcy case pending before the Honorable Robert D. Drain in the United States Bankruptcy Court for the Southern District of New York, Case No. 05-60134 (RDD). Refco has the distinction of being the first futures commission merchant ("FCM") to have been sold as a going concern in bankruptcy.

The Commodity Futures Trading Commission (the "Commission") has proposed amending its regulations (17 CFR Chapter 1, the "Regulations") regarding a commodity broker in bankruptcy to permit the bankruptcy trustee to operate, with the written permission of the Commission, the business of such broker in the ordinary course, including the purchase or sale of new commodity contracts on behalf of its customers under appropriate circumstances as

Mr. David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
January 14, 2010  
Page 2

determined by the Commission (the "Proposed Amendment"). For the reasons detailed below, I support the Proposed Amendment.

Based upon my firsthand experience, I believe that the Proposed Amendment, if enacted, will better serve the Commission's regulatory purpose (*i.e.*, "to provide an understandable and workable method for operating the estate pending liquidation") than does the current regulatory scheme which prohibits the bankruptcy trustee, immediately upon the commencement of the commodity broker's bankruptcy case, from processing any new trades on behalf of customers.

As noted by the Commission in the commentary accompanying the Proposed Amendment, Refco was the unique situation where the business of the commodity broker was able to be sold to a third party following a bankruptcy filing without any disruption to customer trades or prejudice to customer accounts.<sup>1</sup> As the Commission correctly observed, however, this was able to take place (among other reasons) because the Refco bankruptcy filing, the third-party sale, and the related transfer of customer accounts all occurred after the close of the domestic commodity markets on a shortened (and very light) trading Friday, November 25, 2005, and prior to the re-opening of domestic markets on the next business day.

The sale had to be closed on the same day the case was commenced because once the Chapter 7 petition was filed, there was no room for any delay; customers would likely have pulled their accounts from Refco, trades would not have been able to be processed and the marketplace would have suffered from severe disruptions and chaos -- given the fact that a bankruptcy trustee could not operate Refco, trades could not be processed and customer positions would have been required to be transferred to a third party commodity broker under the current regulatory scheme.

The timing of the commencement of the Refco case was carefully considered. Under the Regulations then in effect, I was constrained to sell the business to the buyer immediately upon the bankruptcy petition filing because (except for certain limited exceptions) Regulation 190.04(d)(2) expressly prohibited me from purchasing or selling new commodity contracts for customers. Although the Bankruptcy Court could, and did, authorize my limited operation of the Refco business, it could not authorize continued trading because of the Regulations then in effect. This significantly limited what I could do. So, to minimize the loss of customer accounts due to customer fear that the Refco bankruptcy would freeze their account activity, the bankruptcy filing was timed to occur after the markets closed on a holiday weekend (Thanksgiving), on the Friday when there would be little trading. To effect a transfer of all customer accounts before the markets could reopen and to be able to have a

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<sup>1</sup> It is my understanding that all other FCMs that preceded Refco in bankruptcy proceedings could only be liquidated in their Chapter 7 cases because, unlike Refco, their businesses could not be sold intact.

Mr. David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
January 14, 2010  
Page 3

hearing in open court, on a weekday, the hearing to approve the sale of the Refco business to its buyer had to occur on the Friday after Thanksgiving, a day when there would be little court activity. The Refco Chapter 7 petition was filed at 4:31 p.m. that post-Thanksgiving Friday, and Judge Drain stayed late until the sale was approved.

This timing was critical to the overall success of the transaction, the protection of customers, and the stability of the market. However, the Commission's commentary fails to note that such timing was only possible due to an extraordinary measure taken by the United States Trustee, with the concurrence of other parties in interest. Had the United States Trustee strictly followed the Bankruptcy Code as written (*i.e.*, the Trustee does nothing until appointed and is not notified of an appointment until after the petition is filed), the Refco case would have been a disaster because no trustee could ever have been able to adequately prepare to understand the sale, draft the necessary pleadings to get the sale before the Court, obtain Court approval, and then on the same day attend a complex closing and close the sale.

The Trustee in Refco was afforded that needed time by the United States Trustee. Since, as explained above, the time could not be available after the Chapter 7 petition was filed, it was created before the case began. The United States Trustee afforded me the time I needed to prepare for, seek and obtain Court authorization to enter into and consummate the Refco sale transaction on day one of the bankruptcy filing by telling me several weeks prior to the bankruptcy filing that I would be appointed the Trustee. As a result, I was able to obtain informal authority to begin extensive due diligence and work as a "trustee-in-waiting," and was able to spend the several weeks before the Chapter 7 filing to be prepared to immediately move on the Chapter 7 filing date.<sup>2</sup> Without this extraordinary flexibility afforded to me by the United States Trustee, the Court and other parties in interest, neither I nor any other person appointed as the Refco trustee would have been in a position to obtain Court approval of, and consummate, a sale of the complex commodity brokerage business on day one of the case.

By allowing a bankruptcy trustee to operate the commodity broker's business, including placing and processing trades pending an orderly sale to a third party, the Proposed Amendment would eliminate the very real possibility of disaster faced in the Refco case and

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<sup>2</sup> As noted by Bankruptcy Judge Drain at the hearing to approve the Refco sale (on the first day of the case):

"As is clear from the statute and regulations, the only way to perform such meaningful due diligence was to do it in advance of the filing and by giving Mr. Togut as 'trustee-in-waiting' such an opportunity, the U.S. Trustee was truly fulfilling her obligations to make sure that the bankruptcy system runs properly and particularly in the area where Congress has recognized that if possible and consistent with the desires of the applicable regulatory bodies, customer accounts should be transferred as expeditiously as possible. . . . That obviously is what is happening here. The result, I believe, is the best that could be hoped for the customers." (Ch. 7 Sale Hrg. Tr. 41).

Mr. David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
January 14, 2010  
Page 4

rationalize, going forward, the orderly sale process for a solvent commodity broker able to conduct business in bankruptcy. The trustee will be given essential time to do the things I was only able to do prior to Refco's filing that must be done for any trustee to perform intelligently. The current structure constrains the trustee's ability to act as a fiduciary as he is required to do under the Bankruptcy Code; any trustee needs time to perform due diligence and to confirm that a complex sale is in the best interests of the estate.

An unintended consequence of the Proposed Amendment is that, currently, a trustee in bankruptcy may be sued by third parties for acts or omissions in connection with the operation of a debtor's business. *See* 28 U.S.C. § 959 (a).<sup>3</sup> Chapter 7 trustees do not normally operate businesses in a Chapter 7 case. Operating a Chapter 7 debtor's business is very much the exception, not the rule, and is extremely rare.

Recognizing such potential liability to a trustee, the Proposed Amendment should be expanded beyond what is currently proposed. If an individual is to serve as a bankruptcy trustee authorized to operate the business of a commodity broker, including the executing and processing of customer trades, then that person should receive protection in the form of some degree of quasi-judicial immunity -- or else the trustee could face substantial personal liability. That will deter qualified individuals from being willing to serve as trustee, an undesirable result.

As the Chapter 7 Trustee in the Refco case, I sought and obtained a provision granting me such quasi-judicial immunity in the Court order pursuant to which I was afforded limited authority to operate the debtor's business for the purpose of consummating the sale, and winding down and liquidating the remainder of the debtor's business. That provision provided:

In acting pursuant to this Court's orders and otherwise performing his statutory and other duties, the Trustee is granted the fullest measure of quasi-judicial immunity permitted by law. The Trustee shall be free from any personal liability, and immune from any suit for personal

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<sup>3</sup> The statute provides as follows:

Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

28 U.S.C. § 959(a).

Mr. David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
January 14, 2010  
Page 5

liability, on account of any actions or inactions taken by the Trustee in good faith pursuant to orders of this Court, in compliance with any order, rule, law, judgment, regulation or decree, and/ or in exercising his objectively reasonable business judgment, in connection with his operation of the debtor's business and the discharge of his duties in this chapter 7 case.

*See In re Refco, LLC*, No. 05-60134 (RDD), Docket No. 11 (Bankr. S.D.N.Y. Nov. 25, 2005).  
A copy of the Order is attached.

Accordingly, as part of my comments to the Proposed Amendment, I strongly urge the Commission to afford a bankruptcy trustee, who is to operate the business of a commodity broker, a level of quasi-judicial immunity in the limited operation of the business, and suggest that the language employed by the Court and acceptable to the parties in *Refco* be utilized.

The foregoing constitutes my comments to the Proposed Amendment, which I respectfully submit for consideration by the Commission and other parties. I stand ready and able to appear voluntarily, and at my own expense, to further discuss my views concerning the foregoing.

Thank you for your consideration.

Respectfully yours,



Albert Togut

AT/cj

cc: Ananda Radhakrishnan  
Director, Division of Clearing and Intermediary Oversight (Fax (202) 418-5547)

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re: : Chapter 7  
Refco LLC, : Case No. 05-60134 (RDD)  
Debtor. :  
-----X

**ORDER AUTHORIZING CHAPTER 7 TRUSTEE TO OPERATE BUSINESS OF REFCO  
LLC FOR A LIMITED PERIOD AND GRANTING RELATED RELIEF**

Upon the motion (the "Motion")<sup>1</sup> of Albert Togut, interim chapter 7 trustee (the "Trustee") for the above-captioned debtor (the "Debtor" or "Refco LLC"), for entry of an order authorizing the Trustee to operate the business of the Debtor for a limited period and for related relief; the Court having considered the Motion, the Chapter 7 Sale Motion filed contemporaneously therewith, the statements of the Trustee and counsel in support of the Motion and the record made at the November 25, 2005 hearing on the Motion; it appearing that the relief requested in the Motion is in the best interests of the Debtor's bankruptcy estate, its creditors and other parties-in-interest; and after due deliberation and sufficient cause appearing therefor;

**IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as provided herein.
2. The Trustee is authorized to continue to operate the business of the Debtor in order to effectuate the Sale and the terms of the Chapter 7 Sale Order, and to fulfill his

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<sup>1</sup> Unless otherwise defined, capitalized terms herein shall have the meanings assigned to such terms in the Motion.

obligations under Subchapter IV, the Part 190 Regulations, and the Bankruptcy Code, as set forth more fully in the Motion.

3. In acting pursuant to this Court's orders and otherwise performing his statutory and other duties, the Trustee is granted the fullest measure of quasi-judicial immunity permitted by law. The Trustee shall be free from any personal liability, and immune from any suit for personal liability, on account of any actions or inactions taken by the Trustee in good faith pursuant to orders of this Court, in compliance with any order, rule, law, judgment, regulation or decree, and/or in exercising his objectively reasonable business judgment, in connection with his operation of the debtor's business and the discharge of his duties in this chapter 7 case.

Dated: November 25, 2005  
New York, New York

/s/ ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE