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April 8, 2009

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

COMMENT

Re: Proposed Rules for Acknowledgment Letters for Customer Segregated Funds and Secured Amount Funds—74 Fed.Reg. 7838 (February 20, 2009)

Dear Mr. Stawick:

Katten Muchin Rosenman LLP welcomes the opportunity to submit this letter in response to the Commodity Futures Trading Commission's ("Commission's") request for comments on the Commission's proposed amendments to Rules 1.20, 1.26 and 30.7. The proposed amendments would expand the specific representations that futures commission merchants ("FCMs"), derivatives clearing organizations ("DCOs"), banks and other permitted depositories (collectively, "Depositories"), which receive customer segregated funds or foreign secured amount funds (collectively, "customer funds") from an FCM, would be required to make in the acknowledgment letters prescribed under those rules. We support the purpose of the proposed amendments, which is to clarify, and require Depositories to acknowledge, the rights and obligations of Depositories holding customer funds. Nonetheless, we suggest below certain revisions with the intent of enhancing legal certainty, which is particularly essential in times of financial stress.

If the Commission determines to promulgate final rules, we recommend that the Commission further amend Rules 1.20, 1.26 and 30.7 to require an FCM, in opening a account with a Depository, to include in the account opening agreement, an obligation on the Depository to release customer funds "immediately upon proper notice and instruction" from the FCM or the Commission. A Depository's relationship with a depositing FCM is governed in the first instance by the terms and conditions set forth in the contract between those two parties.[1] We are

[1] As discussed in more detail below, this contract may also provide that the Depository may advance monies to an FCM intra-day for the purpose of transferring cash to DCOs or meeting other obligations of the FCM's customers, including the investment of customer funds. The revised rules should confirm the rights of a Depository with respect to the obligations incurred to the Depository by an FCM on behalf of its customers.

concerned that, without the contractual obligation to act upon "proper notice" from the Commission, a Depository would be exposed to potential liability to its FCM customer, if the Depository were to honor the Commission's instruction without the express consent of the depositing FCM. This uncertainty could cause the Depository to delay acting upon the Commission instruction as it seeks clarification from a court.

We note that the proposed amendments set no guidelines the Commission would follow or standards that would have to be met before the Commission, or the Director of Clearing and Intermediary Oversight by delegated authority, could issue an instruction to release customer funds. Without such guidelines or standards, we are concerned that any such instruction may be susceptible to challenge.

We also recommend that the Commission establish a reasonable methodology for authentication so that a Depository can timely comply with an instruction from the Commission or a DCO in accordance with revised Rules 1.20(d)(1)(iv) and 1.26(e)(1)(v). Especially in circumstances in which the Commission's instruction is provided orally, a Depository must be afforded a means to authenticate such instruction. Separately, we ask the Commission to confirm that, in the event an FCM files a petition for relief under the Bankruptcy Code, a Depository will have no obligation to release customer funds except upon the instruction of the Trustee in Bankruptcy or pursuant to the order of the Bankruptcy Court.

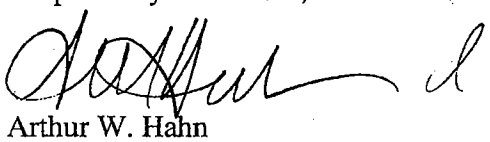
Further, we request that the Commission provide additional guidance on a Depository's obligation to release customer funds "immediately" upon receipt of an instruction from the Commission, as proposed in Rules 1.20(d)(1)(iv) and 1.26(e)(1)(v). As the Commission recognized in the *Federal Register* release accompanying the proposed rules, procedures and time deadlines for compliance with any such instruction are market-driven and are not always within the control of the Depository. For example, while many transactions are settled at the end of the business day, redemptions of customer investments may be delayed in accordance with the terms of a fund's redemption requirements, the late receipt of an instruction, or a *force majeure* event. The Commission may want to consider using the term "promptly" instead of "immediately." At the least, we suggest that the Commission make clear that a Depository will be deemed to have acted "immediately" if it releases customer funds as soon as reasonably practical and without undue delay following receipt of such notice.

Finally, the proposed amendments to Rules 1.20(d)(1)(iii) and 1.26(e)(1)(iii) require the Depository to explicitly acknowledge that customer funds will not be subject to any right of set-off or lien for any obligations of the FCM. Although we generally agree with the principle underlying this requirement, we believe the revised rules should confirm the rights of a Depository with respect to the obligations incurred to the Depository by an FCM on behalf of its customers.

Depositories frequently contract with an FCM depositor to advance monies to the FCM intra-day, with the understanding that the FCM will deposit in the customer segregated account prior to the end of the business day (or by the start of the next business day), sums sufficient to repay the advance.[2] Advances are made in the ordinary course of business, for example, to satisfy margin, premium, settlement or other obligations of the FCM's customers to a DCO, or to purchase permitted investments under Commission Rule 1.25. In these circumstances, we ask the Commission to confirm that, upon receipt of a Commission instruction to release customer funds to another Depository, the initial Depository may withhold the amount of any such advance that has not been repaid. More generally, we request the Commission to confirm that, in the event the FCM fails to repay the funds advanced by the end of the business day (or by the start of the next business day), or in the event of the FCM's bankruptcy, a Depository is entitled to recourse against the customer funds account for the amount of such funds advanced.

Thank you again for the opportunity to submit these comments. If any member of the Commission or its staff has any questions concerning our comments, please feel free to contact me at 312.902.5241.

Respectfully submitted,



Arthur W. Hahn

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

Division of Clearing and Intermediary Oversight
Ananda K. Radhakrishnan, Director
Eileen A. Donovan, Special Counsel

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[2] Advances are repaid either by the sale of securities held in the customer funds account at the Depository or by a deposit received from a customer funds account held at another Depository or from the FCM's own account.