

**CFTC letter No. 04-27**

**October 1, 2004**

**No-Action**

**Division of Clearing and Intermediary Oversight**

Mr. Thomas R. Kadlec  
Vice-President & Chief Financial Officer  
ADM Investor Services, Inc.  
1600A Board of Trade Building  
141 W. Jackson Boulevard  
Chicago, Illinois 60604

Re: “No-Action” Relief for Bank Service Charges on Specified Customer-Segregated Accounts

Dear Mr. Kadlec:

This is in response to your letter dated April 21, 2004, submitted on behalf of ADM Investor Services, Inc. (“ADM”), a registered futures commission merchant, to the Division of Clearing and Intermediary Oversight (the “Division” or “DCIO”) of the Commodity Futures Trading Commission (“Commission”). By your letter, you have asked whether ADM may use customer funds, which have been deposited in segregated accounts under Section 4d(a) of the Commodity Exchange Act<sup>[1]</sup> (the “Act”), to pay account service charges to banks for the maintenance of such accounts in which the customer funds are held. Such bank account service charges are expenses of ADM and not of its customers, and Section 4d(b) of the Act and Commission Rule 1.20 prohibit the use of customer-segregated funds for any person other than an FCM’s customers. The Division hereby confirms by this letter that, so long as ADM holds excess funds in segregation and has a residual interest in such funds<sup>[2]</sup>, it will not recommend that the Commission commence an enforcement action against ADM with respect to the payment of account services charges directly out of a Section 4d(a) customer-segregated account as a reduction of such residual interest, subject to all the additional conditions set forth in this letter.<sup>[3]</sup>

As represented in your letter, almost all customer-segregated funds held by ADM are maintained in accounts near its main office. In order to facilitate customer business, however, ADM often will open accounts to hold customer funds in bank locations near its seven branch offices and/or one hundred and thirty-one guaranteed introducing brokers. As of November 30, 2003, ADM maintained eighty-four (84) such accounts, which taken together represented only 0.48 percent of all customer-segregated funds held by ADM. The monthly bank service charges for these 84 accounts totaled \$144.88 as of that same date. By your letter, ADM seeks confirmation that these bank service charges may be deducted directly by the bank from the funds maintained in the customer-segregated accounts in these 84 locations.

If such deductions are not permissible, ADM advises that it will be required either to (1) open in each of

these 84 locations a corresponding house account that would have no purpose other than to maintain minimal deposits in order to pay the bank service charges, or (2) issue from existing house accounts a monthly check or wire in the minimal amounts required to pay the bank service charges for these accounts. ADM accordingly seeks relief from the paperwork and administrative burden that ADM must undertake for accounts that represent a minor percentage of all customer-segregated funds held by ADM, but which are spread out among numerous bank locations. As additional support for the requested relief, you have noted that the deduction of such fees will have a *de minimus* effect on the total amount of customer funds held in customer-segregated accounts. As noted earlier, as of November 30, 2003, the total amount of bank service charges for the 84 accounts was \$144.88. As of that same date, the amount of customer funds held in the 84 customer-segregated accounts totaled \$2,908,600. Also, as of the same date, ADM held \$22,369,000 in customer-segregated accounts in excess of the total amount of funds owed to ADM's customers.

In consideration of the foregoing representations, and subject to ADM's compliance with each and all of the following conditions, the Division has determined that it will not recommend that the Commission commence an enforcement action against ADM for using customer-segregated funds to pay bank account service charges for accounts in certain locations, as set forth below:

1. Only customer-segregated bank accounts established to facilitate ADM's branch office or guaranteed introducing broker (hereinafter, "remote customer-segregated accounts") may qualify for this no-action relief. This relief is not applicable for general customer-segregated accounts used by ADM's main office location.
2. If a bank that maintains remote customer-segregated accounts also maintains any non-segregated account for ADM, the bank's account service charges for the customer-segregated accounts may not be deducted from ADM's customer-segregated accounts.
3. Only bank account service charges required for the account's maintenance may be paid from such remote customer-segregated accounts, and the amount of the charges must be *de minimus*. Any other fees to the bank, or to any other person, for any other services for such remote customer-segregated accounts may not be deducted or offset against the customer-segregated accounts.
4. The use of customer funds to pay bank service charges may not benefit the bank to the potential detriment of ADM customers. Any payment of bank service charges from a remote customer-segregated account is prohibited if the amount of the payment is greater than the total amount of excess segregated funds in all customer-segregated accounts of ADM.
5. ADM is at all times responsible for ensuring compliance with all these conditions and may not delegate that responsibility to the bank or any other entity or individual.

The position taken herein is based upon the representations that have been made to DCIO. Any different, changed, or omitted facts or conditions might require DCIO to reach a different conclusion. You must

notify DCIO immediately in the event that there is any change from the facts as presented to us. Further, this letter represents the position of DCIO only and does not necessarily represent the views of the Commission or any other division or office of the Commission.

If you have any questions concerning this correspondence, please contact Jennifer C.P. Bauer or Thelma Diaz, attorneys on my staff, at (202) 418-5430.

Very truly yours,

James L. Carley  
Director

cc: Joseph Sanguedolce, Chairman, Joint Audit Committee, and Director Financial Surveillance, New York Mercantile Exchange  
Barbara Lorenzen, Vice President, Chicago Board of Trade

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<sup>[1]</sup> 7 U.S.C. §1 *et seq.* (2000). Commission rules referred to herein are found at 17 C.F.R. Ch. 1 (2004).

<sup>[2]</sup> Customer-segregated accounts may include deposits from FCMs that are in “excess” of the customer funds in such accounts, because Commission Rule 1.23 provides that the prohibition in Section 4d of the Act against commingling customer funds and FCM funds shall not be construed to prevent an FCM from adding its own funds to insure against customer accounts becoming undermargined. The rule also allows FCMs to withdraw funds from customer-segregated accounts to the extent of their interest in such accounts, provided that: (1) the FCM's books and records accurately reflect its interest in customer-segregated accounts; and (2) the withdrawals of funds by the FCM does not result in the funds of one customer being used to margin or carry the trades of another person. *See* 17 C.F.R. §1.23.

<sup>[3]</sup> Although you requested that the Division respond to your letter by issuing an “interpretive” letter, the appropriate form of response in this instance is a “no-action” letter, as described in Commission Rule 140.99.