

From: Legal <legal@futuresindustry.org>
Sent: Thursday, October 7, 2010 5:15 PM
To: OCR <OCR@CFTC.gov>
Subject: Account Ownership and Control Report - FIA Comment Letter
Attach: CFTC OCR Rules_Final 100710.pdf

Attached please the Futures Industry Association's comment letter on Account Ownership and Control Report.

If you have any questions or comments please do not hesitate to contact us.

Thank you.

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October 7, 2010

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

Re: Account Ownership and Control Report, 75 Fed.Reg. 41775 (July 19, 2010)

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 comment with respect to its proposed rules requiring designated contract markets and other “reporting entities,” as defined in the proposed rules,² to submit certain ownership and control reports (“OCR”) to the Commission weekly (“OCR Rules”). The OCR Rules would require each reporting entity to provide the Commission detailed information, comprised of approximately 28 separate data points, with respect to each account reported in its trade register. “The OCR will necessitate each reporting entity to collate and correlate these and other data points into a single record for trading accounts active on its trading facility, and to transmit such record to the Commission for regulatory purposes.”³

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 FIA’s 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 A “reporting entity” is defined as “any registered entity required to provide the Commission with trade data on a regular basis, where such data is used for the Commission’s trade practice or market surveillance programs.” Reporting entities include, but are not limited to, designated contract markets and exempt commercial markets with significant price discovery contracts. Proposed Commission Rule 16.03(a). In addition, the Commission anticipates that it would also collect ownership and control information from foreign boards of trade operating in the US pursuant to staff direct access no-action letters, provided such letters are conditioned on the regular reporting of trade data to the Commission. FIA is concerned that efforts to extend the OCR Rules to foreign boards of trade may conflict with the laws and regulations of the jurisdiction of that board of trade. Significantly, the definition does not contemplate that FCMs would be designated as “reporting entities.”

³ 75 Fed.Reg. 41775, 41776, fn. 1 (July 19, 2010).

As the Commission further explains in the Federal Register release accompanying the proposed OCR Rules:

The OCR will serve as an ownership, control, and relationship directory for every trading account number reported to the Commission through reporting entities' trade registers. The data points proposed for the OCR have been specifically selected to achieve four Commission objectives. These include: (1) identifying all accounts that are under common ownership or control at a single reporting entity; (2) identifying all accounts that are under common ownership or control at multiple reporting entities; (3) identifying all trading accounts whose owners or controllers are also included in the Commission's large trader reporting program (including Forms 40 and 102); and (4) identifying the entities to which the Commission should have recourse if additional information is required, including the trading account's executing firm and clearing firm, and the name(s) of the firm(s) providing OCR information for the trading account.⁴

Broadly, the Commission asserts that the information collected will: (i) enhance market transparency; (ii) increase the Commission's trade practice and market surveillance capabilities; (iii) leverage existing market surveillance systems and data; and (iv) facilitate the Commission's enforcement and research programs.

Although reporting entities would be responsible for submitting the OCR, the Commission acknowledges that these entities do not currently collect a significant amount of this information. The "root sources" for much of the information required rests instead with others. As discussed below, clearing member FCMs will be the primary source of this information. They, in turn, will be required to rely on their customers to provide, and keep current, the required information.⁵

FIA supports the underlying purposes of the proposed OCR Rules. Although we cannot support the adoption of the OCR Rules as currently proposed, we are developing an alternative solutions and look forward to working with the Commission on implementing an effective and

⁴ 75 Fed.Reg. 41775, 41783 (July 19, 2010).

⁵ In the Federal Register release accompanying the OCR Rules, the Commission implies that it would expect a reporting entity to prohibit members from trading on or through the entity, unless the member complies with any applicable reporting requirements the reporting entity may impose: "Successful implementation of the OCR will require reporting entities to offer their services only on the condition that ownership and control information be provided upon request by the relevant party in possession of such information." *Id.* at 41785. Presumably, member FCMs, in turn, would be prohibited from carrying accounts on behalf of customers that fail to provide, and keep current, the information required with respect to each account. As discussed below, FCMs must rely almost entirely on customers to provide and keep current, information with respect to data such as: (i) beneficial owners; (ii) account controllers; (iii) dates of birth; (iv) primary residence addresses; and (v) date accounts are assigned to current controllers. Although FCMs can advise customers of the information required and contract with their customers to provide such information, FCMs cannot be placed in the position of being guarantors of the information that their customers provide, or fail to provide.

efficient OCR program. As explained in detail below, the OCR Rules would force an unwarranted structural change in the conduct of business among US futures markets participants, especially among clearing member and non-clearing member FCMs, foreign brokers, and their respective customers. In particular, the proposed requirement that clearing member FCMs know and report to the relevant clearing organization the identity of each customer that comprises an omnibus account and their respective positions will disrupt, if not destroy, the regulatory and operational synergies among market participants that have developed over decades and are essential to the efficient operation of the markets.

Equally important, the OCR Rules would impose on such FCMs substantial increased regulatory and concomitant financial obligations. As a result, a number of FCMs could be compelled to withdraw from registration and the barrier to entry for potential new registrants will be raised. In addition, a significant number of foreign customers will effectively be denied access to US markets.

The OCR Rules would impose substantial costs on FCMs

Because the OCR Rules would require FCMs to collect and report a substantial amount of information that either is not collected in the manner the Commission may anticipate or is not collected at all, the proposed rules would require a complete redesign of the procedures, processes and systems pursuant to which FCMs create and maintain records with respect to their customers and customer transactions. Such redesign would take far longer and be far more expensive than the Commission suggested in the Federal Register release accompanying the proposed rules.

In this latter regard, we respectfully submit that the Commission erred in basing its cost analysis under the Paperwork Reduction Act.⁶ FCMs are the root source of approximately one-half of the data points the Commission is proposing to collect. The cost to FCMs of building an OCR database, collecting the required information and transmitting it to the relevant exchange will be substantially greater than the Commission's estimate of the costs that will be incurred by the exchanges alone. Such costs will be particularly burdensome on smaller FCMs, which frequently carry a proportionately higher number of accounts, comprised of non-institutional hedgers and individual traders.⁷

We are concerned that the cost of opening and maintaining these smaller accounts in compliance with the OCR Rules may result in certain FCMs withdrawing from registration, raising the bar to entry, and denying certain customers, including certain non-institutional hedgers, access to the futures markets. To obtain and maintain the required information, an FCM would be required to: (i) re-negotiate all active customer agreements to require customers

⁶ We take no view on the analysis presented in the Federal Register release of the costs to be incurred by exchanges. We anticipate that the designated contract markets will submit comments in this regard.

⁷ Implementation of the OCR Rules would also place smaller exchanges and potential new exchange entrants at a significant disadvantage.

to provide and routinely update the necessary data points; (ii) build systems to enter the data; (iii) manually enter the data for each active account; (iv) put in place resources and processes to maintain the data; (v) provide it to the reporting entity on a weekly basis; and (vi) monitor changes daily in order to update the database.

FIA received cost estimates for building and maintaining an OCR database from 12 FIA member firms. The cost analysis included:

- operational costs, such as notifying beneficial owners and account controllers, collecting and recording data;
- technology costs of building databases, developing user interfaces, storing additional data, and developing a transmission mechanism; and
- legal costs of client notification, and re-executing client agreements.

These cost estimates do not include rebuilding systems/processes to manage account numbers, including vendor costs, which will be passed on to each FCM. They also do not include the cost of tracking beneficial owner and account controller information through the omnibus chain.

Our sample of 12 firms represents approximately 16 percent of the approximately 70 FCMs that execute and clear customer accounts. These firms handle in excess of \$83.8 billion of customer funds or approximately 62 percent of customers' segregated funds (as of July 31, 2010, according to monthly financial reports filed with the Commission). While the estimates are preliminary, we found that the median firm would face total costs of roughly \$18.8 million per firm, including implementation costs of roughly \$13.4 million, and ongoing costs of \$2.6 million annually. On a per account basis, the median cost would be \$623 per account.⁸

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⁸ We understand that the Commission requested that cost data be presented with respect to specific firms and not on an aggregate basis. However, because this cost data constitutes confidential business information, the firms that provided the data have not been identified by name.

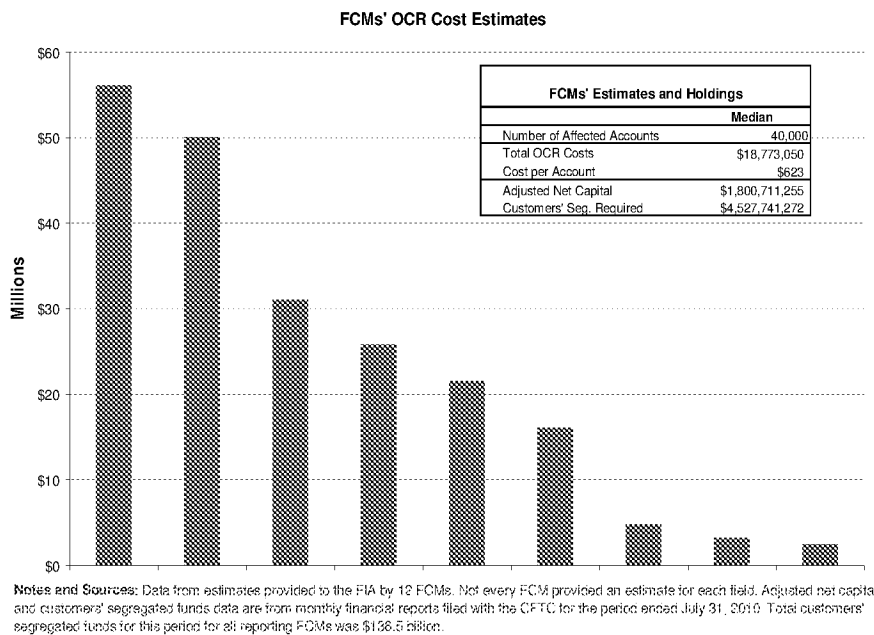
FCMs' OCR Cost Estimates¹

	Affected Accounts	Start-up	Ongoing	Total Start-up and Ongoing
Firm A	90,000	\$49,280,000	\$6,768,844	\$56,048,844
Firm B	19,473	N/A	N/A	\$50,000,000
Firm C	50,000	\$28,000,000	\$3,000,000	\$31,000,000
Firm D	34,700	\$22,000,000	\$3,750,000	\$25,750,000
Firm E	14,000	N/A	N/A	\$21,525,000
Firm F	75,300	\$13,395,600	\$2,625,500	\$16,021,100
Firm G ²	39,979	N/A	N/A	\$18,208,863
Firm H	550	\$3,600,000	\$1,150,000	\$4,750,000
Firm I	40,000	\$2,900,000	\$280,000	\$3,180,000
Firm J	130,000	\$2,000,000 - \$2,500,000	\$200,000	\$2,200,000 - \$2,700,000
Firm K ³	40,000	\$10,000 - \$35,000	\$540,000	\$560,000 - \$575,000
Firm L	250	\$50,000 +	\$150,000 +	\$200,000 +

Notes:

- 1 The 12 firms in the sample handle in excess of \$83.8 billion, or almost 62% of customers' segregated funds (as of July 31, 2010, according to monthly financial reports filed with the CFTC).
- 2 Total cost estimate is based on estimate for affected accounts and average cost per account.
- 3 Firm's estimates exclude IT costs.

Cost Analysis



Based on the foregoing, we submit that the cost of building and maintaining a database to comply with the OCR Rules is overly burdensome for FCMs and some reporting entities. This is particularly true, since FIA found that the size of the FCM had little to do with the projected costs. As noted earlier, smaller FCMs may have a large number of retail accounts, *i.e.*, non-institutional hedgers and individual traders. Taking into consideration today's extremely low commission rates, it could take years for firms to recoup the cost of OCR implementation and maintenance. Most firms will certainly elect to pass on those costs to end-users. FCMs may avoid smaller accounts altogether, since the commissions earned would be far less than the cost of establishing and maintaining the account.

In addition, although the costs for a reporting entity may not seem significant for the larger, well-established exchanges, they are significant for the smaller exchanges and other entities such as swap execution facilities that the Commission has indicated may be required to be reporting entities. At a time when legislators and regulators are trying to encourage transparent execution venues and centralized clearing, the scope of the OCR seems counterproductive.

The Commission and the industry must work together.

Notwithstanding the foregoing, and as noted earlier, FIA supports the Commission's goals. We are committed to working with the Commission and the other futures market participants to develop a meaningful alternative to the proposed OCR Rules. To this end, FIA plans to submit for the Commission's consideration by month's end an alternative proposal that has been developed by FIA's OCR Working Group, comprised of representatives of FIA member firms, other affected market participants, *i.e.*, representatives of the exchanges and vendors, and other experts.⁹

The alternative seeks to maximize the use of existing data; automate and enhance the current, largely manual, large trader reporting system;¹⁰ provide the Commission with an efficient means of monitoring trading behavior based on volume thresholds; and linking ownership data to the trade registers. The large trader reporting system already provides the Commission the ability to aggregate certain customer activities across clearing firms. In addition to automating the large trader system, the OCR Working Group's alternative will propose to enhance this system, in part, by extending reporting requirements to traders that engage in a certain volume of transactions without regard to their open positions. As under the proposed rules, the Commission will remain responsible for linking accounts across exchanges and FCMs.

We believe the suggested alternative will provide the Commission with the bulk of the information it is seeking in a useful format, while reducing the regulatory, operational and financial costs that would be imposed by the OCR Rules.¹¹ Importantly, these costs would be distributed more fairly across the industry, thereby easing the potentially adverse competitive impact of the OCR Rules.

⁹ The OCR Working Group that FIA formed includes 16 FCMs, both large and small, representing retail and institutional customers, exchanges and back office service providers.

Before deciding to explore an alternative to the OCR Rules, the OCR Working Group first analyzed each of the data points required to be collected under the proposed rulemaking and identified (i) the required data that is currently collected, (ii) the required data that is not collected, and (iii) the required data that would be difficult, if not impossible, to collect. The group then estimated the cost of implementing and maintaining the database as proposed. Only after fully analyzing the Commission's proposal and concluding that the burdens imposed by the OCR Rules would be overwhelming did the group undertake to develop an alternative.

¹⁰ Currently, once an account becomes reportable, the carrying FCM assigns it a "special account number" and submits ownership and control data to the Commission and the exchanges on Commission Form 102. This form is submitted by facsimile or e-mail, and the Commission staff then enters the information into its systems. (We understand that some exchanges, but not all, enter this information into an exchange database.) At the request of the Commission, a customer may be required to file a separate report effectively confirming and supplementing the information provided on the Form 102. This Statement of Reporting Trader, Commission Form 40, is also filed with the Commission by facsimile or email. The carrying FCM frequently does not receive a copy of the Form 40.

¹¹ To the extent the OCR Working Group alternative does not provide the Commission the full scope of information contemplated under the proposed OCR Rules, the Commission would be able to use its special call authority to obtain such information.

The alternative represents our best collective efforts to date. However, we must emphasize here, as we did at the staff roundtable on September 16, the importance of Commission participation in this project. We submit that nothing is gained by the Commission and the industry working on parallel yet separate tracks. Without the active participation of Commission staff, the industry runs the considerable risk of expending substantial time and resources developing an alternative that the Commission will ultimately conclude does not achieve its goals. FIA, therefore, encourages the Commission to authorize the staff to meet with industry representatives (and other participants as the Commission may select) to develop a mutually acceptable alternative to the OCR Rules or, at the very least, to provide necessary feedback to the industry's initiative.¹²

Proposed Data Points

The balance of this letter will first discuss each of the data points that the proposed OCR Rules would require FCMs and reporting entities to collect and maintain. We will describe (i) the data that is currently collected, (ii) the data that is not currently collected, and (iii) the data that the OCR Working Group has concluded would be difficult, if not impossible, to collect.¹³ We conclude with a discussion of the tremendous structural changes the OCR Rules would impose.

In general. Because FCMs, not reporting entities, establish and maintain the customer relationship, much of the information that would be required to be collected and reported under the OCR Rules would be collected in the first instance by FCMs. Of the approximately 28 data points listed in OCR Rules, FCMs are the root source for 10-12.

Exhibit A, set out on the following page, identifies the data points that the Commission is proposing to be collected and reported in the OCR for which FCMs would be the root source. The exhibit identifies the data points that currently: (i) are captured electronically; (ii) are captured in hard copy; and (iii) are not captured at all. To the extent these data points are currently captured, they reside in a variety of systems and formats. Importantly, no system consolidates this information in a single location, where it can be easily reported to an exchange. Rather, FCMs use mapping tables and a variety of reconciliation tools to manage the accounts they carry or for which they act as an executing broker.

In order to collect the information as proposed in the OCR Rules, therefore, an FCM would have to overhaul completely its existing procedures, processes and systems. As noted earlier, an FCM would be required to: (i) re-negotiate all active client agreements to require a customer

¹² FIA has no objection to opening these meetings to the public, if the Commission were to determine that it would be necessary or appropriate to do so.

¹³ The information with respect to the proposed data points is based in substantial part on information that was provided to FIA by 13 of its member FCMs. In the aggregate, these FCMs carry approximately 530,000 accounts. As noted earlier, the number of accounts carried by an FCM is not necessarily proportional to the FCM's size, *i.e.*, its adjusted net capital. Several smaller FCMs carry significantly more accounts on behalf of non-institutional hedgers and individual traders.

to provide and routinely update the necessary data points; (ii) build systems to enter the data; (iii) manually enter the data for each active account; (iv) put in place resources and processes to maintain the data; (v) provide it to the reporting entity on a weekly basis; and (vi) monitor changes daily in order to update the database.

Exhibit A Proposed OCR Data Elements

Proposed OCR Data elements		Front Office					Back office	
		Client documents	Form 102	Form 40	Order routing platform	Exchange Trading platform	Other internal IT systems	3 rd Party Vendors
1.	Trading Account #	X	X		X	X	X	X
2.	i. Trading account's ultimate beneficial owner who IS a natural person	a. First and last name	X	X				X
		b. Middle name						
		c. Date of birth						
		d. Address of primary residence	X	X	X			X
	ii. Trading account's ultimate beneficial owner who IS NOT a natural person	a. Name and primary business address	X	X	X			X
b. NFA identification (if any)								
3.	i. Trading account controllers (must be natural persons)	a. First and last name	X	X	X			
		b. Middle name						
		c. Date of birth						
		d. Name and primary business address of the entity that employs each controller	X	X	X			
		e. NFA ID						
4.	Date on which trading account assigned to current controller							
5.	Designation of trading account used exclusively or partially by a natural trading system							
6.	Special account number associated with trading account	X				X	X	
7.	Indicator whether trading account is part of a reportable account under the Commission's large trader reporting system	X				X	X	
	For a trading account that becomes part of a reportable account under the large trader reporting system after 12/31/2011, the date on which the trading account first becomes part of a reportable account							
8.	Gambus account indicator and if so, name of firm	X				X	X	
9.	Name of the executing firm for the trading account					X	X	

	and its unique ID reported in the reporting entity's trade register							
10.	Name of the clearing firm for the trading account and its unique ID reported in the reporting entity's trade register	X		X	X	X	X	
11.	Name of each root data source providing the reporting entity with information with respect to the trading account							
12.	Name of the reporting entity submitting the OCR to the Commission	X						
13.	OCR transmission date	X	X			X	X	

Data Captured In Hardcopy
 Data Captured Electronically
 Data Not Captured

We now turn to a discussion of the various data points identified in the OCR Rules. As indicated above, we will identify those data points that currently are not collected and would be particularly difficult to obtain.

Account numbers. Account numbers are the key to identifying trading activity but present significant challenges in tying account ownership and control information to the trade register, as proposed in the OCR Rules. Account numbers assigned by FCMs when the account is opened are not standardized across the industry. The field that carries account numbers varies from system to system, firm to firm and exchange to exchange. Some fields allow six characters; others allow nine characters. Some justify left; others justify right. Some recognize spaces; others do not.

In addition, a customer may have multiple account numbers, representing various trading strategies, funds, or traders. For example, FIA understands that one major fund manager has 1,500 account numbers at a single FCM. Further, certain customers may have their own account numbers, which they provide to their carrying FCM. The FCM assigns an account number that follows the FCM's account number conventions, which it then maps to the customer provided account number.

Critically, the account numbers reflected in the trade register will not always match the account numbers assigned by the carrying FCM. Among other reasons, these differences arise from the use of: (i) give-up transactions; (ii) short codes; and (iii) average pricing. Give-up transactions and average price transactions, for example, are often allocated to suspense accounts using short codes, pending completion of the trade and allocation among the receiving customers and carrying FCMs.¹⁴ FCMs use mapping tables and reconciliation tools extensively to manage account numbers.

¹⁴ The use of short codes is consistent with Commission Rule 1.35(a-1), which does not require that an FCM record the customer's account number when submitting an order for execution. It simply requires that the order include an account identification.

In many cases, of course, the ownership information can be tied to the trade register through the account number (Diagram 1). “Trade Order Routing Flow” shows at a high level how orders are initiated from a customer or trader, either directly or through an executing broker, and are processed through the various systems in the trade management chain of systems. An account identifier is used by the executing firm and clearing firm to identify the customer account associated with the individual trades/positions. The account identifier is entered into trade management systems by the customer or traders (directly), or by the executing broker trading on behalf of the customer. The account identifier is captured in trade management interfaces, passed through to the exchange trading platforms and is stored in the exchange/clearinghouse clearing systems. These same account identifiers are reported to regulatory agencies through trade register files.

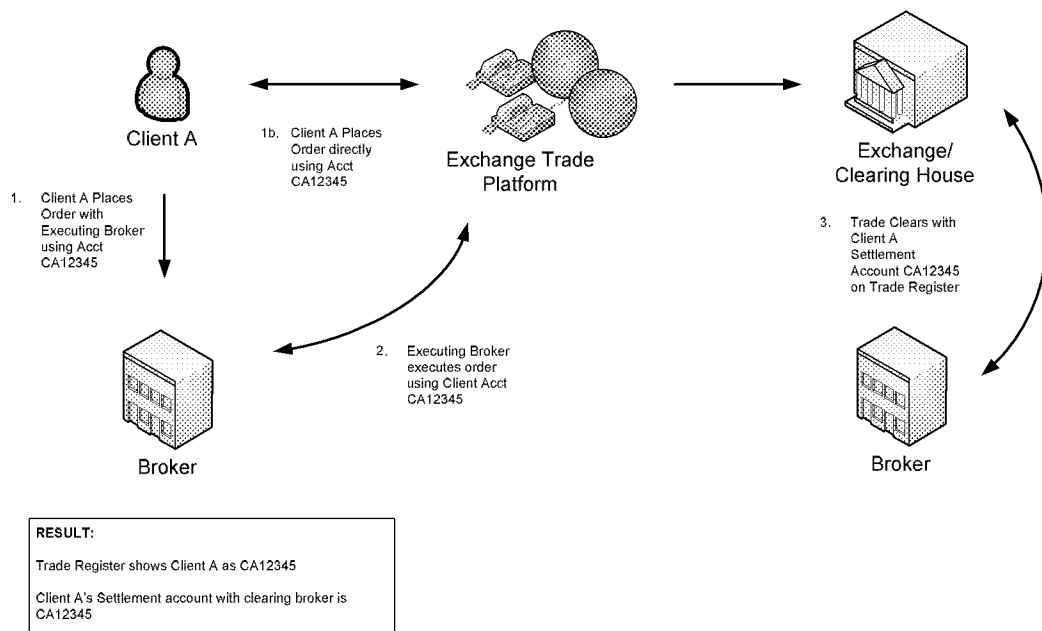


Diagram 1: Trade Order Routing Flow

Account identifiers are maintained in firm accounting systems. As FCMs allocate trades to different customer accounts, their account systems notify clearing systems of these changes to keep the trade register synchronized with the FCMs' books.

There are several instances, however, when the account identifiers recorded on the trade register do not reflect the actual customer or traders (Diagrams 2-4). In these instances, the account identifiers on the trade register cannot be used to identify trade account ownership.

In Diagram 2, Client A places an order with the executing broker. The executing broker enters the order using account identifier “12345,” which represents the company making the trade and not the individual executing the trade. The order is given up to the clearing broker, which assigns the account identifier “ABCDE,” which is a short code that allows the clearing broker to tie the trade back to the individual trader at Client A. The clearing broker converts the short code to the Client A settlement account identifier in its internal system. The trade register contains the short codes used by both the executing and clearing brokers, but not the client’s settlement account number (123-ABCDE).

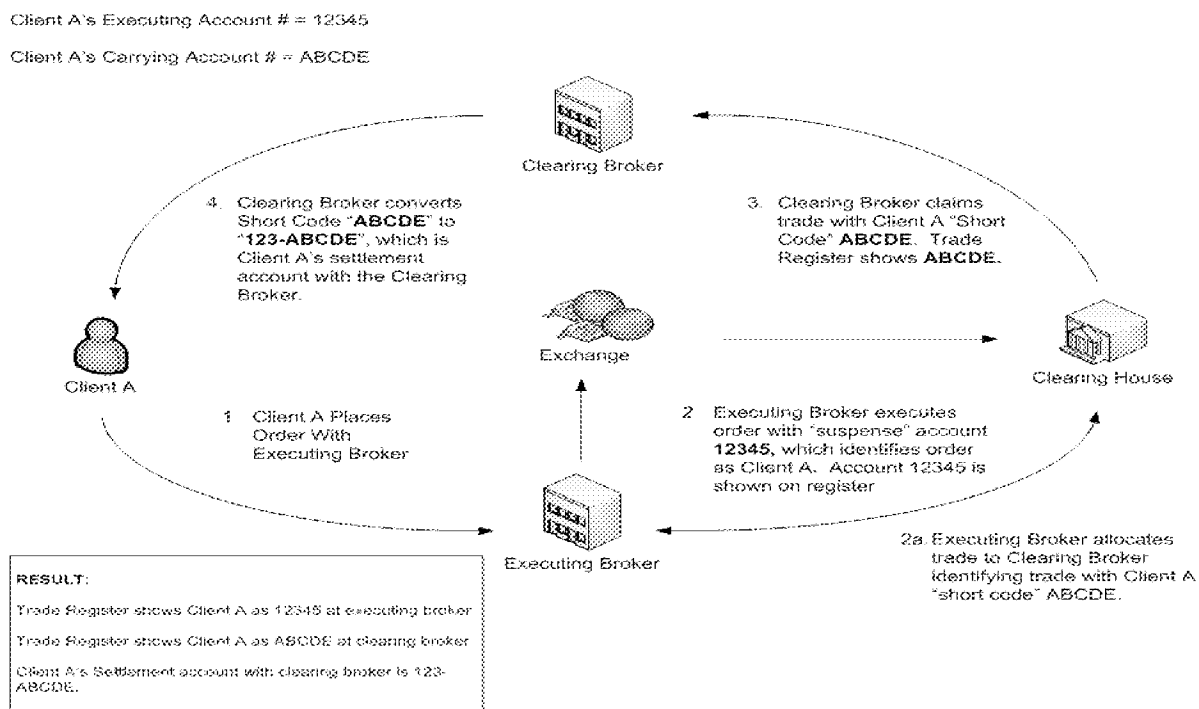


Diagram 2—Give-Ups

Executing broker records client order using “short code” and allocates give-up to Clearing Broker. Clearing broker claims give-up using short code, and converts to firm client settlement account identifier. Settlement account number differs from account number on original execution and give-up allocation.

Diagram 3 describes how the use of “short codes” adversely impacts the ability of the trade register to identify account ownership. In this diagram, the customer/trader executes a trade using the short code “ABCDE”. The executing broker also executes a trade for a client using

the short code “UVXYZ.” The clearing broker receives both the client executed trade (ABCDE) and the broker-executed trade (UVXYZ) for Client A. The clearing broker then converts both short codes to Client A’s settlement account 123-ABCDE. As in the previous example, the trade register does not contain Client A’s settlement account identifier.

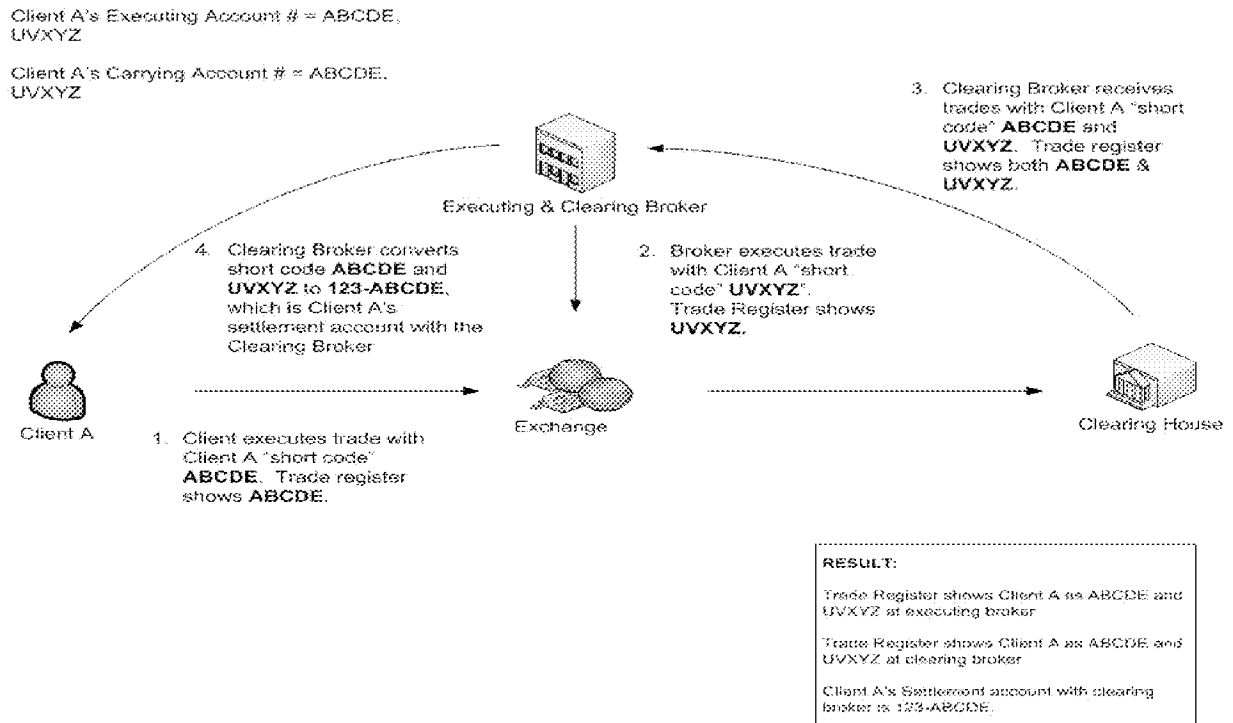


Diagram 3—Broker and Self-Executed Trades

Client “self executes” a trade and the executing broker records transaction under a short code. Executing broker executes a trade for same client using a different short code and gives up both trades to clearing broker with both short codes. Clearing broker converts both short codes to same client settlement account.

Diagram 4 shows processing for average priced transactions executed by one firm and given-up to the carrying FCM. Average priced trades represent transactions traded as a group with an average price applied to them. In many cases, they are given up using an account identifier for the average priced group. In the diagram, an average priced trade for account “APS12” is executed. The trade is then given up to the clearing broker using the clearing broker’s short code 123-APS12. The clearing broker subsequently allocates the trades into Client A’s

settlement account 123-ABCDE, which is not represented on the executing firm’s records or on the trade register.

Client A’s Executing Account # = APS12

Client A’s Carrying Account # = 123-APS12

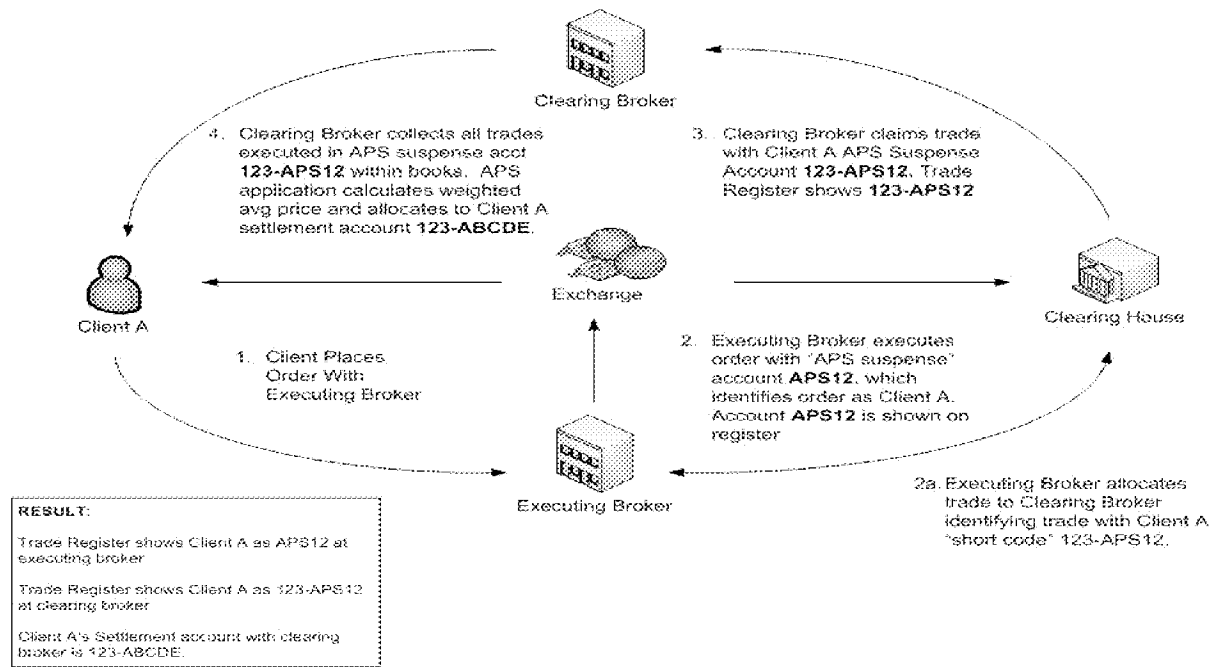


Diagram 4—Average Price Trade

Executing broker executes Client A’s order and books the trade to an “APS short code” or suspense account. Executing broker allocates client’s trade to clearing broker using a short code. Clearing broker claims APS transaction to its own short code, and then calculates weighted average price and allocates to its own Client A settlement account identifier.

Ultimate beneficial owners. An FCM currently collects only limited information on certain ultimate beneficial owners of an account. This information is obtained only when the account is opened and is generally not updated.¹⁵

For example, when an account is opened for a managed fund (*e.g.*, a commodity pool), the FCM generally will ask the fund manager for the identity of any investor that holds more than a 10 percent interest in the fund. The FCM employs its customer identification program to verify the identity of these investors. However, FCMs have no means to independently verify the fund's beneficial owners and rely completely on the fund manager to identify these investors. Moreover, investors may increase or decrease their investment throughout the life of the fund (or may withdraw entirely), and new investors will be accepted on a regular basis. FCMs generally do not receive information with respect to changes in the composition of the investors in a fund once an account is opened. Although FCMs will ask for a copy of the fund's annual report, this report does not reflect changes in the composition of investors.

When a corporate account is opened, FCMs will obtain information on the parent company, if any, and on the individual or entity that controls the trading in the account. However, once the account is opened, FCMs generally do not monitor the customer for changes in its organizational structure and relies on the customer to inform the FCM of any changes. As a practical matter, FCMs do not receive updates to this information on a regular basis.

Owner's Name. While an individual account owner's name is certainly kept within a firm's books and records, it can be difficult to compare names across systems. One firm may enter a customer name in full while another may use a version of the customer name. For example, the name for John Smith could be entered in an FCM's records as follows: (i) John Smith; (ii) John R. Smith; (iii) John Ronald Smith; (iv) John R Smith; (v) J R Smith; or (vi) J. R. Smith. Each variation of this name refers to the same individual account owner. However, because of manner in which names are stored electronically, electronic systems cannot detect that each of the six names refers to the same account owner.

The same is true for accounts that are owned by entities. For example, when setting up a database for give-up agreements, FIA found 52 versions of the name ABN Amro.

Date of birth. An FCM generally does not record the date of birth of a customer or account controller. An FCM is required to confirm the age/date of birth of the customer, but does not have to capture that information in its systems for purposes of NFA Compliance Rule 2-30 or compliance with anti-money laundering requirements. Therefore, an individual's date of birth

¹⁵ We note that, effective January 3, 2011, NFA Compliance Rule 2-30, Customer Information and Risk Disclosure, has been amended to provide, in relevant part: "For an active customer who is an individual, the FCM Member carrying the customer account shall contact the customer, at least annually, to verify that the information obtained from that customer under Section (c) of this Rule [*i.e.*, name, address, occupation, estimated income and net worth, approximate age, and previous investment experience] remains materially accurate, and provide the customer with an opportunity to correct and complete the information.

generally is not stored electronically. When it exists in the records maintained by the FCM, it is stored in the form of a paper copy of a driver's license or passport.¹⁶

Primary residence. An FCM may collect the residential address of its individual customers. However, in some cases this information is subject to data privacy laws. Further, residential address information is not routinely updated, particularly when customer statements are delivered electronically). Moreover, if the beneficial owner participates in a fund or is part of an omnibus account, FCMs would not have the individual's primary residence address. In any event, primary address information is entered in a free form field in the FCM's system and is not standardized. Therefore, to the extent this information is collected to meet the OCR Rules, it would have to be re-entered in a standardized format.

NFA identification number. Not all entities or individuals are registered with the Commission and members of NFA. Subject to NFA Bylaw 1101, FCMs generally do not request or record this information. If the Commission were to insist on this data point, an FCM would be required to separately confirm with NFA whether each account owner, beneficial owner or account controller had an NFA identification number (or whether the number provided was accurate).

Account controllers (who must be natural persons). Our comments with respect to the difficulty in obtaining and maintaining records with respect to name, address, date of birth and NFA identification number of account owners (and beneficial owners) of accounts apply equally to account controllers.

More important, the broad definition of an account controller is troubling. The OCR Rules define an account controller as "a natural person, or a group of natural persons, with the legal authority to exercise discretion over trading decisions by a trading account, with the authority to determine the trading strategy of an automated trading system, or responsible for the supervision of any automated system or strategy."¹⁷

This definition cuts too broad a swath and would require information on individuals that never actually exercise trading authority over an account but, because of their position with the customer, as a owner or officer, would be deemed to have this authority.¹⁸ FCMs do not collect

¹⁶ FIA further understands that it is considered a violation of privacy to ask for date of birth in certain countries, including Germany and Canada. We understand that privacy laws in foreign jurisdictions generally may prevent the routine disclosure of other proposed data points relating to individuals.

¹⁷ The authority to exercise discretion is sufficient, regardless of whether such authority is actually exercised. Proposed Rule 16.03(c).

¹⁸ Although certain exchanges have adopted programs that require customers afforded direct access to the exchange trading platform be identified to the exchange (*e.g.*, CME Tag 50), the individual responsible for data input may not be the account controller. Correspondingly, account controllers are not always identified through such programs.

information on officers or employees of a customer who place orders for the customer's account.¹⁹

FIA believes the definition of an account controller should be consistent with the Commission's definition of control as set out in Commission Rule 1.3(j) and generally applied at exchanges. That is, unless a customer specifically provides discretionary trading authority to a third party that is either registered with the Commission as a commodity trading advisor or is excluded or exempt from registration, the account controller should be deemed to be the owner of the account.

Date account is assigned to the current controller. This information is not captured by FCMs. The cost of capturing this information would outweigh the regulatory benefit.

Designation of the manner in which the trade is executed. FCMs do not currently capture information with respect to whether a trade is executed by a natural person, automated trading system or both. We believe any effort to do so would be difficult at best. Many account controllers, as broadly defined in the OCR Rules, input orders in a variety of ways for a variety of reasons. Simply because an account controller generally executes trades through an automated trading system does not mean that certain trades will not be executed manually.

Special account number. Special account numbers associated with an account are generally assigned by an FCM's compliance or operations department. The number is not included with the customer information that is submitted with a trade and, therefore, is not included on the trade register. Rather, the special account number is added to the position file at the end of the day.

Date the account becomes reportable. The FCM currently has no way of indicating when an account becomes reportable.

Omnibus accounts. Although FCM systems identify accounts as omnibus accounts, the name of the account may be different at each carrying FCM, making it difficult to compare names across systems.

Name of the executing firm and its unique identifier reported in the reporting entity's trade register. This information is not included in the trade register. A customer may use a variety of executing brokers and the carrying firm does not record this information at the account level.

¹⁹ At one point, FCMs collected this information but stopped this practice many years ago after finding that a customer's authorized traders changed frequently, but customers advised FCMs of such changes infrequently, if at all. As a result, FCMs were placed in the untenable position of either refusing to accept an order from an individual that was not on the approved traders list, potentially adversely affecting the customer's trading strategy, or accepting a trade from an individual with apparent authority, potentially exposing the FCM to liability for accepting an order from an unauthorized individual. FCMs generally concluded that the responsibility for maintaining control of an account belonged to the customer, not the FCM.

Name of the clearing firm for the trading account and its unique identifier reported in the reporting entity's trade register. This information is contained in the trade register and carried at the account level.

Name of root data source. Providing the reporting entity with information with respect to the trading account. This point needs additional clarification. The root data source is typically the beneficial owner or account controller. The FCM, however, would provide the data to the reporting entity. This data point appears to be unnecessary and would add complexity to the OCR database.

Reporting entity. Name of the reporting entity would be added when submitted to the Commission.

OCR transmission date. The OCR transmission date would be added automatically upon transmission of the data to the Commission.

The OCR Rules Would Force a Structural Change in the Conduct of Business

As we noted at the outset of this letter, implementation of the OCR Rules would force an unwarranted structural change in the conduct of business among US futures markets participants, especially among clearing member and non-clearing member FCMs, foreign brokers, and their respective customers. Because the proposed rules would require clearing member FCMs to know and report to the relevant clearing organization the identity of each customer that comprises an omnibus account and their respective positions, the ability to maintain omnibus accounts would be significantly impaired, if not eliminated.

Omnibus accounts, which are treated as the account of a single customer for all purposes on the books and records of the carrying FCM or clearing organization, have been an integral part of the futures markets since well before the Commission was created in 1974. Foreign brokers and FCMs that are not members of a particular clearing organization maintain omnibus accounts with clearing members; clearing member FCMs, in turn, maintain omnibus accounts with the relevant clearing organization.

Omnibus accounts serve both a practical and regulatory purpose. FCMs, whether clearing members or non-clearing members of a particular clearing organization, compete for customers.²⁰ Non-clearing member FCMs, therefore, do not want to disclose the names of their customers to the FCM that clears their customers' accounts. The same practical considerations

²⁰ An FCM may choose to become, or elect not to become, a member of a particular clearing organization for a number of reasons. For example, the cost of becoming a member of a clearing organization may be too high or the volume of business that the FCM would clear through the clearing organization may not justify the operational and financial costs.

lead foreign brokers to open customer omnibus accounts with the FCMs that clear their customers' positions.²¹

For their part, clearing member FCMs may not want to incur the operational expense of maintaining an extensive branch office network or the financial risk of accepting certain customers whose credit they have not had an opportunity to evaluate fully. Non-clearing member FCMs are often closer to their customers and, as result, are better able to serve them and understand the credit risk they may pose.²² Because non-clearing member FCMs stand between their customers and the clearing member FCM, the clearing member FCM has to consider only the credit of the non-clearing member FCM.

From a regulatory perspective, omnibus accounts facilitate the conduct of business by a clearing member FCM, in particular, in connection with customers located outside of the US. A clearing member FCM's ability to carry an omnibus account of a foreign broker allows the FCM to carry the accounts of foreign customers without having to be registered in the home jurisdiction of each customer.

The Commission historically has taken the position that a firm acting in the capacity as an FCM is required to be registered as such if either the firm is located in the US or the firm's customers are located in the US. Under the Commission's Part 30 rules, the only exception to this requirement the Commission has made is with respect to foreign firms that carry a customer omnibus account on behalf of a US-registered FCM.²³

Foreign jurisdictions generally take the same position. That is, a US FCM would be prohibited from soliciting or accepting orders directly from a foreign person for execution on a US contract market, unless the FCM were properly registered in the foreign person's home jurisdiction. A US FCM, however, may carry the customer omnibus account of a foreign broker without being so registered.

²¹ The Commission's recognition of the essential purpose of omnibus accounts was described in a 1984 exchange of correspondence between the Commission's Division of Trading and Markets (now the Division of Clearing and Intermediary Oversight) and the Federal Deposit Insurance Corporation ("FDIC"), in which the FDIC confirmed that, provided that the books and records of bank and the relevant FCMs properly indicate that the funds in the account are being held in a custodial capacity, FDIC insurance would be afforded each ultimate customer's interest in an omnibus account in which the transactions of two or more persons are carried by a carrying FCM in the name of an originating FCM. Interpretative Letter No. 84-14, [1984-1986 Transfer Binder] Comm.Fut.L.Rep. ¶22,311.

²² For these same reasons, a customer may prefer to deal with a non-clearing member FCM that is able to provide more personal service and make an informed judgment concerning the credit risk the customer may pose. Alternatively, an institutional customer holding positions cleared through a smaller clearing organization may prefer to have its trades carried by a non-clearing member FCM that has substantially greater capital than a clearing member FCM of that clearing organization.

²³ Commission Rule 30.4(a).

More generally, because the omnibus account is treated as a single customer, a clearing member FCM's rights and responsibilities under the Act and Commission rules are solely with respect to the omnibus account. The clearing member FCM has no obligation to pierce through the omnibus account to know the identity of each of the customers that comprise the omnibus account. In the absence of particular knowledge (or potentially unlawful conduct), therefore, the FCM has no rights or responsibilities with respect to the customers that comprise the omnibus account.

Thus, the omnibus account is treated as a single account for purposes of compliance with: (i) the provisions of section 4d(a)(2) of the Act and Commission Rules 1.20-1.30, including the investment of customer funds under Rule 1.25; (ii) the early warning requirements under Rule 1.12(f)(3); (iii) the provisions of Rule 1.33 regarding confirmations and monthly statements; (iv) the provisions of Rule 1.35 regarding records of futures and options on futures transactions; (v) the provisions of Rule 1.36 regarding records of securities and property received from customers; (vi) the provisions of Rule 1.37 regarding the name, address and occupation of customers; (viii) the large trader reporting requirements of Part 17; and (ix) the provisions of Rule 166.3, which require an FCM to supervise diligently the handling of all commodity interest accounts carried, operated, advised or introduced by the FCM and all other activities relating to its business as a Commission registrant. Significantly, the omnibus account also is treated as a single account for purposes of compliance with the PATRIOT Act, including an FCM's anti-money laundering and suspicious activity reporting requirements.

If the Commission were to require clearing member FCMs to know and report to the relevant clearing organization the identity of each customer that comprises an omnibus account and their respective positions, the carefully crafted provisions of law and rules that have governed the conduct of omnibus accounts for decades would be destroyed. We do not believe—and more importantly, do not believe that the Commission has ever taken the position—that an FCM can know the identity of customers in an omnibus account, as well as the positions that are attributable to such customers, with incurring the concomitant obligations of treating those customers as customers of the FCM for all purposes.

In the absence of a Commission rule to the contrary,²⁴ which would specifically relieve a clearing member FCM of such obligations, once the FCM knows the identity of such customers, the FCM would have to assume that it would have the obligation with respect to each such customer, individually: (i) under Rule 166.3, to supervise the handling of each customer's accounts; (ii) under section 4d(a)(2) of the Act and Commission Rules 1.20-1.30, to segregate each customer's funds; (iii) under Rule 1.33, to provide each such customer with a confirmation of each trade and a monthly statement; (iv) under Rule 1.35, to make a record of each customer's transactions; (v) under Rule 1.36, make a record of the securities and property received from each customer; (vi) under Rule 1.37, record the name, address and occupation of each customer; and (vii) under Part 17, file a large trader report with respect to each customer.

²⁴ The Treasury would also have to grant relief from the applicable PATRIOT Act requirements.

The clearing member FCM would have no choice but to restructure completely the way in which it conducts business. It would be required to make each customer within the omnibus account a direct customer, thereby negating any need or reason for maintaining a relationship with the non-clearing member FCM. The result would be a further contraction of the number of FCMs able to compete for customer business. Further, without the intermediation of a non-clearing member FCM willing to assume the credit risk of customers not known to the clearing member FCM, those customers would probably not be able to maintain a trading account.

The abolition of omnibus accounts could have potentially serious effects as well on smaller exchanges and their affiliated clearing organizations. As noted earlier, an institutional customer holding positions cleared through a smaller clearing organization may prefer to have its trades carried by a non-clearing member FCM that has substantially greater capital than a clearing member FCM of that clearing organization. If the institutional customer is required to open an account directly with the smaller clearing member FCM, it may simply decline to trade on that smaller exchange.

Perhaps most severe could be the potential impact on the ability of foreign customers to trade on US markets. If US FCMs were required to be registered in the home country of each foreign customer whose account it carried, the FCM would be subject to potentially conflicting regulatory requirements. Even if the conflicting regulatory requirements could be managed, the operational and financial burdens would be such that only the most highly capitalized FCMs could even contemplate conducting business on behalf of foreign customers. The more likely result would be that foreign customers would be effectively shut out of the US markets.

Unique Account Identifier

The Commission has invited comment on how the futures industry could develop and maintain a system to assign unique account identification numbers (“UAIN”) to all account owners and account controllers. We do not believe such a project is feasible. On the surface, assigning each customer a unique identifier that would be used by all firms and exchanges would appear to solve many of the issues with creating an OCR database. However, UAINs would require a massive change in all systems in the trading cycle. Every system in the industry would have to be modified, including all front-end systems, customer order entry systems, middleware and back-end systems, as well as exchange trading and clearing systems. We have not computed this cost. The addition of a UAIN also adds data/risk to the clearing systems which are already facing capacity issues.

Conclusion

For all of the above reasons, FIA regrets that we cannot support the OCR Rules as proposed. We nonetheless appreciate the deliberative manner in which the Commission has approached this project and, following the submission of the OCR Working Group alternative proposal later this month, we look forward to having the opportunity to work with the Commission and staff in developing an OCR database and reporting system that will achieve the Commission’s

Mr. David A. Stawick
October 7, 2010
Page 22

goals in an effective and efficient manner. In the meantime, if the Commission has any questions concerning the matters discussed in this letter, please contact Barbara Wierzynski, FIA's Executive Vice President and General Counsel.

Sincerely,



John M. Damgard
President

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner

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