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Sent:	Wednesday, September 8, 2010 6:16 PM
To:	acknowledgmentletter <acknowledgmentletter@CFTC.gov>
Cc:	Gensler, Gary <GGensler@CFTC.gov>; Dunn, Michael <MDunn@CFTC.gov>; Sommers, Jill <JSommers@CFTC.gov>; Chilton, Bart <BChilton@CFTC.gov>; O'Malia, Scott <SO'Malia@CFTC.gov>; Radhakrishnan, Ananda <ARadhakrishnan@CFTC.gov>; Dietz, Phyllis <pdietz@CFTC.gov>; Donovan, Eileen A. <edonovan@CFTC.gov>
Subject:	Acknowledgment Letters for Customer Segregated Funds and Secured Amount Funds -- RIN 3038-AC72
Attach:	Acknowledgment Letters for Customer Funds and Secured Amount Funds (September 8, 2010).PDF

Attached is a comment letter in response to the Commission's proposed amendments regarding acknowledgment letters for customer funds and secured amount funds.

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September 8, 2010

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

Re: Proposed Rules for Acknowledgment Letters for Customer Segregated Funds and Secured Amount Funds—75 Fed.Reg. 47738 (August 9, 2010)

Dear Mr. Stawick:

Katten Muchin Rosenman LLP is pleased to submit this letter in response to the Commodity Futures Trading Commission's ("Commission's") request for comments on the Commission's revised proposal to amend Commission Rules 1.20, 1.26 and 30.7. The proposed amendments would prescribe standardized forms of acknowledgment letters containing specific representations that futures commission merchants ("FCMs") would be required to obtain from 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.[1] We continue to support the purpose underlying the proposed amendments and suggest below certain further revisions to enhance legal certainty.

In our earlier letter, we had expressed concern that requiring a Depository to represent that it would release customer funds "immediately upon proper notice and instruction" from the Commission would potentially expose a Depository to liability, if releasing such customer funds would otherwise violate the Depository's contractual obligations to its FCM customer. We are pleased, therefore, that the Commission has sought to address this concern by incorporating a provision in the form acknowledgement letters contained in the Appendix to Rule 1.20, Appendix A to Rule 1.26 and Appendix E to Rule 30.7, in which the FCM confirms that it will not hold the Depository responsible for acting pursuant to any instruction from the Commission. In doing so, however, the Commission has introduced a new element of legal uncertainty by

[1] The instant proposal differs from the Commission's initial proposal, which expanded the representations that Depositories would be required to make under the above-referenced rules without prescribing the specific form of the acknowledgment letters. 74 Fed.Reg. 7838 (February 20, 2009). We submitted comments on the initial proposal by letter dated April 8, 2009, a copy of which is enclosed herewith for the convenience of the Commission.

providing that a Depository will be released from liability for relying on an instruction from the Commission, only if the Depository has first taken "reasonable measures" to assure that such instruction was provided to the Depository by a "duly authorized officer or employee" of the Commission.

This is particularly true since the Commission has declined to propose specific actions that would constitute "proper notice" or offer any guidance on the "reasonable measures" that a Depository may take to assure that the instruction was received from a "duly authorized officer or employee" of the Commission. The Commission's reluctance to define "proper notice" or "reasonable measures" imposes on Depositories the conflicting obligations (i) to the Commission, to release customer funds "immediately upon proper notice," and (ii) to its customer FCM, to take "reasonable measures" first to assure that such notice was "duly authorized."[2] As such, and in light of the substantial sums that a Depository may be requested to transfer, the Depository is potentially exposed to claims from both the Commission and its customer FCM.

We understand that the Commission is proposing to amend Commission Rule 140.91 delegate to the Director of the Division of Clearing and Intermediary Oversight ("DCIO") and "to such members of the Commission's staff acting under his direction as he may designate from time to time" the Commission's responsibilities under Rules 1.20, 1.26 and 30.7. As such, the Director of DCIO, "would have delegated authority to instruct a Depository to release customer funds or secured amount funds." 75 Fed.Reg. 47738, 47741 (August 9, 2010). To the extent that a Depository could be assured that any instruction to transfer customer funds would be issued only by the Director of DCIO (or the Director's designee), we submit that a Depository would have a reasonable basis to conclude that any such instruction received was "duly authorized." However, we do not read the proposed amendments to Rules 1.20, 1.26 and 30.7 to so limit the identity of the Commission officers and employees that may issue a notice to a Depository or the process that must be followed before such notice is issued.[3]

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[2] In this regard, we ask the Commission to reconsider its decision to permit an instruction to transfer customer funds to be made orally, with written confirmation to follow. We submit that a Depository's obligation to take "reasonable measures" to assure that an instruction is "duly authorized" is made significantly more difficult if an instruction is received orally and, in fact, may require a Depository to await written confirmation in any event.

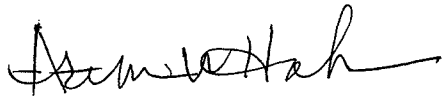
[3] We note that Commission Rule 140.91(a)(8), proposed to be re-designated Rule 140.91(a)(11), currently provides that any action taken pursuant to that subparagraph "shall be made with the concurrence of the General Counsel or, in his or her absence, a Deputy General Counsel." We believe this is an appropriate safeguard that would further assure that any instruction under Rules 1.20, 1.26 or 30.7 to transfer customer funds is "duly authorized." We, therefore, recommend that the Commission revise the proposed rules to confirm that any such instruction may be made only by the Commission or by the Director of DCIO (or the director's designee) acting with the concurrence of the General Counsel (or a Deputy General Counsel).

In our earlier letter, we asked the Commission to provide additional guidance on a Depository's obligation to release customer funds "immediately" upon receipt of an instruction from the Commission, citing possible practical considerations that would make immediate release difficult or impossible. We expressed concern that a Depository might incur liability as a result of a delay in the release of customer funds resulting either from circumstance beyond its control or from reasonable actions on its part. In the proposing release, the Commission determined to retain the term "immediately," but recognized that practical considerations, such as the unavailability of the Fedwire system, might make immediate release of customer funds impossible. However, the Commission notes that Depositories must nonetheless "make every effort" to release customer funds as soon as possible upon instruction. Although we appreciate the Commission's recognition of the potential practical obstacles to immediate release, we remain concerned that, in the absence of further guidance or clarification, the use of the term "immediately" may subject a Depository to potential claims by either FCMs or the Commission in the event that there is a delay in the transfer of customer funds, even in the event such delay is the result of reasonable actions on the part of the Depository or events beyond the control of the Depository.

Finally, we support the proposed amendment to Rule 1.26 adding a new subparagraph (c) to require a money market mutual fund ("MMMF") in which an FCM directly invests customer funds to provide an acknowledgment letter in the form prescribed by Appendix A to Rule 1.26. We note, however, that it is often industry practice for a Depository, on behalf of one or more FCMs, to invest customer funds in shares of one or more MMMFs through an omnibus account maintained by the Depository. We ask the Commission to confirm that an FCM depositing customer funds with a Depository would not be required under Rule 1.26(c) to obtain an acknowledgement from an MMMF in the event that the Depository, upon instructions from the FCM, subsequently invests such customer funds in such MMMF. Rather, it is sufficient if the FCM obtains an acknowledgment letter from the Depository as required under Rule 1.20.

We appreciate the opportunity to submit these comments. If any member of the Commission or its staff has any questions concerning the matters discussed above, please feel free to contact me at 312.902.5241.

Respectfully submitted,



Arthur W. Hahn

Enclosure

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

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