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Via Electronic Mail (amr@cftc.gov)

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: RIN Number 3038–AD12; 17 CFR Part 162; 75 FR 66018
Business Affiliate Marketing and Disposal of Consumer Information Rules

Dear Mr. Stawick:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to provide comments on Commodity Futures Trading Commission ("CFTC") RIN Number 3038-AD12, *Business Affiliate Marketing and Disposal of Consumer Information Rules* ("Notice") which proposes to implement statutory provisions recently enacted by Title X of the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Dodd-Frank").[2] SIFMA supports the aims of the proposed rules, and offers these comments on particular topics to assist the Commission in developing regulations that accomplish Dodd-Frank's goals without causing unnecessary disruption to the operation of the financial markets. The financial sector has long recognized the importance of protecting customers' information and providing safeguards related to the privacy of customer information. SIFMA members have worked diligently to ensure the security, confidentiality and integrity of customers' information.

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[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] In a separate notice of proposed rulemaking, the Commission has proposed to amend its rules to implement statutory provisions enacted by Titles VII and X of the Dodd-Frank Act. By separate letter also filed today, SIFMA submits comments in response to RIN Number 3038-AD13, *Privacy of Consumer Financial Information; Conforming Amendments Under Dodd-Frank Act.*

I. The Proposed Rules Should be Consistent with the Rules of Other Federal Agencies.

SIMFA applauds the Commission's efforts to conform its proposed rules to those of other federal agencies, including the Federal Trade Commission ("FTC"), the Office of the Comptroller of the Currency ("OCC") and the Securities and Exchange Commission ("SEC"). SIFMA urges the Commission to ensure to the greatest extent possible that its proposed rules are consistent with the rules of its sister agencies.

Consistency benefits the government, regulated persons and the industry in general. Federal agencies will be better positioned to exercise appropriate oversight and offer guidance drawing on experiences throughout the government; regulated persons will better understand what measures are necessary for compliance; and the industry in general will benefit from the settled expectations of consistent regulations. Consistency is of particular importance to the members of the financial industry who are covered by the proposed rules, and that have already implemented policies and procedures and developed systems, applications and processes in accordance with standards of other federal agencies. Accordingly, SIFMA supports the proposed amendments to the extent that they are consistent with the guidance of other federal agencies. Below, SIFMA highlights particular areas where greater consistency would be desirable.

II. Disposal of Consumer Information

A. The Proposed Rules Should Not Contain Duplicative "Writing" Requirements.

The proposed disposal rule requires adoption of "written policies and procedures" for the protection of customer information,[3] in conformity with analogous rules.[4] However, the proposed rules also require disposal "pursuant to a written disposal plan,"[5] a duplicative requirement that departs from analogous agency rules. The duplicative "writing" requirement is concerning for several reasons. First, it offers confusing guidance: it is not clear whether the "written disposal plan" is meant to be a portion of – or an addition to – the "written policies and procedures" for the protection of customer information required by proposed section (a). Second, the divergence from highly similar analogous rules puts undue emphasis on this provision – and may cast some doubt on the scope of the "writing" requirement of the analogous rules. Moreover, SIFMA notes that CFTC has not justified this separate requirement of a written disposal plan.

For these reasons, we urge the Commission to delete the phrase "pursuant to a written disposal plan" from proposed section 162.21(b) so that it conforms with analogous agency rules. Alternatively, CFTC could clarify that: (i) the "written disposal plan" is simply a component of the overall "written policies and procedures" that relates specifically to "disposal;" and/or (ii) entities that implement "written policies and procedures" to safeguard consumer information in

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3 S*ee* proposed section 162.21(a).

4 *See, e.g.*, 17 C.F.R. § 248.30(a).

5 *See* proposed section 162.21(b).

compliance with analogous agency rules are in compliance with the CFTC's written disposal plan requirement.

B. "Reasonableness" Is the Appropriate Standard for the Disposal Program.

SIFMA supports the "reasonableness" standard in proposed section 162.21(a). SIFMA agrees with the Commission that the disposal standard should take into consideration a number of factors, such as the sensitivity of the consumer report information, the nature and size of the entity's operations, the costs and benefits of different disposal methods, and relevant technological changes.

C. The Burden Estimate Should Be Refined In Light of Additional Anticipated Costs.

The Commission estimates that there will be approximately 3,172 CFTC registrants who would be required to develop written disposal plans. The Commission estimates that such a plan would be developed only once, with an estimated 3 to 10 burden hours per plan, at an average of 3.5 burden hours, for an aggregate of 11,102 burden hours.[6]

Based on SIFMA's rough estimates, SIFMA believes that the CFTC's figures underestimate the costs for all firms to implement changes required by the proposal. In particular, the estimate fails to account for the likelihood that firms will need: (i) to revise disposal plans to account for use of new technology, new business processes, etc.; and (ii) to conduct regular reviews of its disposal plan to determine when revisions are necessary or advisable. These factors may significantly increase the estimated burden hours. Accordingly, we recommend that CFTC revisit and refine its cost-benefit analysis relative to the proposal.

III. Affiliate Marketing Rule

A. The Definition of Affiliate Should Conform to Definitions in Analogous Agency Rules.

As discussed above, SIFMA urges the Commission to conform its proposed affiliate marketing rules to analogous SEC, OCC and FTC rules, where possible. For example, while the proposed affiliate marketing rule defines "affiliate" in largely the same way as analogous SEC, OCC and FTC rules, the language of the proposed rule slightly diverges from that of its sister agencies. The CFTC's definition of "affiliate" in proposed section 162.2(a) is "any company that is *under* common ownership or common corporate control with a covered affiliate." (emphasis added). The analogous FTC, OCC and SEC rules define the term someone differently, to include "any company that is *related by* common ownership or common corporate control."[7] In the interest of preserving consistency among guidance from federal agencies, SIFMA recommends deleting "under" and replacing it with "related by." Otherwise, the divergence from highly similar rules will unduly emphasize this term, and create confusion about the difference between the "related by" and "under."

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6 *See* 17 C.F.R. § 162, Supplementary Information, at 47.

7 *See* 16 C.F.R. § 680.3(b); 12 C.F.R. § 41.3(b); 17 C.F.R. § 248.120(a) (emphasis added).

B. The Definition of "Consumer" Should Be Clarified to Indicate That Individuals Who May Provide Individually Identifiable Information for Non-Consumer Purposes Are Not "Consumers."

SIFMA believes that the Commission should clarify the definition of "consumer" in proposed section 162.2(f) to ensure that the definition is not over-inclusive; the definition should not include individuals such as market makers, individual floor brokers, locals, etc., whose individually identifiable information may be collected in furtherance of market-related transactions for non-consumer purposes (i.e., individuals whose information is *not* collected to determine eligibility for personal, family, or household purposes). To avoid improper over-inclusion, SIFMA recommends employing a definition similar to that in Title V of the Gramm-Leach-Bliley Act,[8] to define "consumer" as "an individual who obtains, from a covered entity, financial products or services which are to be used primarily for personal, family, or household purposes, and also means the legal representative of such an individual." Alternatively, SIFMA suggests that the Commission retain the current definition, but add a qualifying statement that the definition does not include individuals such as market makers, individual floor brokers or locals whose individually identifiable information is not collected to determine eligibility for personal, family, or household purposes.

C. The Erroneous Phrase, "For Market Purposes," Should be Corrected to "For Marketing Purposes."

It appears that the proposed rule mistakenly includes the word "market," where it should state, "marketing."[9] The proposed rule currently reads, "The consumer is provided a reasonable opportunity and a reasonable and simple method to opt out, or prohibit the covered affiliate from using eligibility information to make solicitations *for market purposes* to the consumer" (emphasis added). Based on the frequency of the term "for marketing purposes" throughout the proposed rule, SIFMA believes that the phrase "for market purposes" is a typographical error. Accordingly, SIFMA suggests changing "market" to "marketing" to conform with the phrase "marketing purposes" used elsewhere in the rule and by sister agencies.

D. The Burden Estimate Should Be Refined In Light of Additional Anticipated Costs.

The Commission estimates that there will be approximately 3,172 CFTC registrants who would be required to collect information and keep records for the purposes of providing opt-out notices to consumers at a maximum of at least every five years. The Commission estimates that this proposed collection will involve 0.01 burden hours per report or record. The number of opt-out notices estimated per five year period is 412,000. So, for the affiliate marketing rules, the Commission estimates 13,068.64 burden hours in aggregate for each five year period.[10]

SIFMA is concerned that the Commission's figures underestimate the costs of providing notice. In particular, the estimates fail to account for burden hours associated with (i) monitoring the

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8 S*ee* 15 U.S.C. § 6809(9).

9 *See* proposed section 162.3(a)(2)).

10 *See* 17 CFR Part 162, Supplementary Information, at 47.

opt-out notice process; (ii) addressing consumer questions and concerns about opt-out notices; and (iii) adjusting records where a consumer changes his or her mind about his or her election to opt in or out. Accordingly, we recommend that CFTC revisit and refine its cost-benefit analysis relative to the proposal.

E. The Examples Provided Should be Consistent with Examples in Analogous Agency Rules.

SIFMA believes that the examples of acceptable practices included in the preamble and proposed rule are very helpful to firms because they present practical situations that firms may encounter. To maximize their benefit and to promote consistency, SIFMA requests that, where other federal agencies have included examples in the text of rules, the Commission similarly incorporate examples into the final rule (rather than simply leaving them in the Federal Register preamble). Conversely, where sister agencies have excluded examples in the text of the rule, SIFMA suggests that the Commission follow suit. Regardless of whether the example is in the rule or the preamble, SIFMA suggests that the Commission indicate that the examples are merely illustrative of acceptable practices and are not prescriptive. The CFTC could also make clear that examples and practices developed in connection with the analogous rules of sister agencies should be considered as potential guidance for the CFTC rule.

For example, analogous FTC, SEC and OCC rules provide an example in the definition of "solicitation."[11] We believe that it would be helpful to include this example in the CFTC rule so that the Commission's rules comport with those of its sister agencies, and to ensure that the omission of the example is not deemed unduly significant.

Conversely, SIFMA notes that the definition of "eligibility information" in the proposed rules includes a list of examples not provided in analogous FTC, SEC and OCC rules.[12] We understand that similar language was included in the preamble to the SEC's rules, but we do not believe that this language should be included in the text of the CFTC's rule because it is incomplete. In that regard, "an affiliates' own transaction or experience information" is not *always* "eligibility information"; it is only "eligibility information" if it otherwise would be considered consumer report information. In the context of the preamble, the language can provide clarification; but in the context of the actual rule, it may be inaccurate. Therefore, SIFMA suggests that the Commission move this sentence from the text of the rule to the preamble to comport with the other agencies' rules. Finally, SIFMA notes that the verb "includes" in this example should be replaced with "include," for grammatical agreement with the subject, "Examples."

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11 *See, e.g.,* 16 C.F.R. § 680.3(k) (FTC rule) ("For example, television, general circulation magazine, and billboard advertisements do not constitute solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications."); see also 17 C.F.R. § 248.120(o)(3); 12 C.F.R. § 41.20(b)(5)(iii).

12 *See* 17 C.F.R. § 162.2(k) ("Examples of the type of information that would fall within the definition of eligibility information includes an affiliate's own transaction or experience information, such as information about a consumer's account history with that affiliate, and other information, such as information from credit bureau reports or applications.").

IV. The Effective Date Should Be Somewhat Later To Ensure a Reasonable Time for Compliance.

The Commission proposes to make the regulations effective on July 21, 2011. Given that the publication date of the final rule is not known yet, SIFMA is concerned that this timeframe will not provide a reasonable amount of time for covered entities to address and implement the new rules – particularly in light of the fact that covered entities' resources must also be committed to reviewing, commenting on, and implementing the plethora of new proposals following enactment of the Dodd-Frank Act. To ensure a reasonable amount of time for compliance, SIFMA proposes that the Commission extend the compliance date to nine months after the date of publication in the Federal Register.

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SIFMA appreciates the CFTC's consideration of its views and concerns on the regulations. If you have any questions, please call me at 202-962-7385.

Respectfully submitted,

Melissa MacGregor
Managing Director and Association General Counsel

cc: Alan Charles Raul, Sidley Austin LLP
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