



January 9, 2012

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

Re: Notice of Proposed Rulemaking on Protection of Cleared Swap Customer Contracts and Collateral: RIN 3038-AC99 (the "Proposed Rules").¹

Dear Mr. Stawick:

We appreciate the opportunity to comment on the Proposed Rules of the Commodity Futures Trading Commission ("Commission") specifically as they relate to adoption of a regulatory model designed to protect the assets of cleared swaps customers. To afford customers with the greatest level of asset protection, we strongly urge the Commission to adopt the Physical Segregation Model discussed in the Proposed Rules.

BlueMountain Capital Management, LLC, Elliott Management Corporation, Moore Capital Management, LP, Paulson & Co. Inc., and Tudor Investment Corporation are alternative investment managers that collectively managed in excess of \$65 billion as of December 31, 2011 on behalf of thousands of investors, including pension funds, endowments, foundations, fund of funds, individuals, and corporations. We are jointly submitting this comment letter to the Commission in the interest of ensuring that the assets of our investors are afforded the greatest protection possible by the Commission via the subject rulemaking.

Proposed Rules

In its June 2011 Proposed Rules addressing the protection of customers' cleared swaps and collateral, the Commission analyzed a number of alternative models for collateral protection and ultimately proposed the Complete Legal Segregation Model, whereby customer collateral would be commingled into a single account (or several accounts) on an omnibus basis. One of the alternative models considered was the Physical Segregation Model, which would require that a separate individual account be established for each customer by FCMs and DCOs at third-party depositories. While the Commission acknowledged that Physical Segregation would afford the greatest protection to customers, this approach was nonetheless rejected based on a balancing of projected implementation and maintenance costs as compared to the enhanced benefits to customers.

¹ CFTC Proposed Rules: Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 76 Fed. Reg. 33818 (June 9, 2011).

However, the intervening failure of MF Global Inc. (“MF Global”) raises significant questions as to whether the Complete Legal Segregation Model adequately protects customer assets.

Physical Segregation Maximizes Customer Protection

We strongly support the Physical Segregation Model given the enhanced protection it provides for customer assets. We note that a number of comment letters on the Proposed Rules,² submitted before and after MF Global’s bankruptcy, have also voiced strong support for the Physical Segregation Model. While certain of these letters include specific detailed mechanics for implementing physical segregation that may or may not be operationally feasible at an acceptable cost, we nonetheless concur with their common basic premise that customers should be afforded the maximum protection available via physical segregation.

We do, however, believe that one critical clarification in the rulemaking is necessary to ensure the effectiveness of the Physical Segregation Model. Specifically, an FCM’s ability to give instructions to a depository to transfer customer assets from a customer account must be strictly limited such that the FCM may only (1) cause the return of customer assets directly to such customer based on standing wire instructions established with the depository and (2) cause the transfer of customer assets to the relevant corresponding individual customer account maintained by the DCO at its depository (in the Physical Segregation Model as contemplated by the Commission, each FCM and DCO would maintain separate individual customer accounts for the relevant assets). The only exception to these restrictions would involve a customer default to the FCM, in which case the FCM would have the right to transfer the customer’s assets from the customer account to its proprietary account if and as allowed under relevant documentation between the customer and the FCM and subject to the FCM giving written notice of the customer default to the relevant depository.³

By establishing separate customer accounts subject to the transfer restrictions described above, the ability of an FCM to improperly access or otherwise fail to segregate customer collateral, whether via mere oversight or an intentional act, would be significantly diminished. Additionally, customers must be given real-time “view only” access to their accounts via depository websites, which transparency would provide an additional layer of oversight that would not be possible with customer omnibus accounts. This critical benefit to customers - i.e. a greater assurance that their assets are and will remain in fact segregated - would of course supplement the other customer benefits arising from adoption of the Physical Segregation Model (e.g., the reduction of “Fellow-Customer Risk”), as the other comment letters cited have discussed in some detail.

² *See, e.g.*, Committee on Investment of Employee Benefit Assets (“CIEBA”) (December 22, 2011); State Street Corporation (December 14, 2011); Och-Ziff Capital Management Group (December 12, 2011); Fidelity Investments (December 8, 2011); and CIEBA (August 8, 2011).

³ A process also needs to be established for ensuring the timely and efficient transfer (“portability”) of customer swaps and collateral carried by a solvent, incumbent FCM to a successor FCM.

One such benefit that deserves specific mention is a significant improvement in recordkeeping at the customer account level. At present it is likely that records maintained by an FCM in the hectic days leading up to its insolvency may not be reliable and may require a detailed and thorough review after its insolvency. As a result, and as we have seen with respect to MF Global, the bankruptcy trustee for the insolvent FCM may be reluctant to return collateral to customers on a timely basis, with a further consequence that the portability of positions - a tenet that many market participants previously held as a cornerstone of the futures markets - may be severely compromised. Moreover, it is possible that customers may refuse to transfer collateral to FCMs if they believe that the FCM carrying their positions is facing liquidity concerns or may otherwise become insolvent. Separate customer accounts at a third party depository would have the additional benefit of improved recordkeeping immediately prior to an FCM's insolvency and would ensure a more orderly and efficient market as customers will be more willing to continue to transfer collateral in connection with their cleared swaps positions if they believe their assets are adequately protected.

As the Commission notes in its Proposed Rules, such protections and transparency are available today in the uncleared swaps market, where initial margin pledged by a counterparty to a swaps dealer may be segregated in a separate account in the name of the counterparty established with a third-party custodian. The initial margin in such custodial account may only be transferred out of the account to the swaps dealer upon a pledgor default; otherwise, the initial margin may only be transferred by the swaps dealer from the account directly back to the pledgor. In fact, Congress saw as critical the ability of market participants pledging initial margin on uncleared swaps to have such margin segregated and as a result mandated the offering of such arrangements in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Pursuant thereto, the Commission has filed a rule proposal⁴ that would require a swap dealer, upon request, to segregate uncleared swap initial margin of a counterparty in a separate account at an independent third-party custodian. Given the crucial role that central clearing will play in reducing systemic risk in the swaps market, we see no valid argument to suggest that customers to cleared swaps should be subject to weaker regulatory protections than those afforded counterparties to uncleared swaps.

Enhancing Protection of Futures Customers

We also believe that futures customers should be granted the same enhanced degree of asset protection. We recognize that prior to MF Global, the U.S. futures model for customer asset segregation had worked well for many years and that various FCM and DCO segregation processes are deeply ingrained in the futures markets. We also recognize that enhanced customer protection in the futures markets in the manner noted above may be costly and difficult to implement in the near term. Nonetheless, we strongly believe that regulatory changes similar to those outlined above are necessary to maximize asset protection for futures customers.

⁴ CFTC Proposed Rules: Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy; 75 Fed. Reg. 75432 (December 3, 2010).

Conclusion

The failure of MF Global and the extremely damaging impact on its futures customers have very clearly demonstrated the flaws in any segregation model that allows an FCM unrestricted access to customer assets, which are then exacerbated when such assets may be pooled by an FCM in a single omnibus account. We cannot stress strongly enough that by appropriate rulemaking the Commission must ultimately include the operational limitations described above in order to restrict an FCM's ability to transfer customer assets from a segregated customer account. The Physical Segregation Model, given its requirement for individual accounts, is best suited for the operational implementation of such transfer restrictions and provides the other significant benefits previously described.

Therefore, we urge the Commission to reexamine the significant benefits for not only cleared swaps customers, but also for U.S. central swaps clearing in general, that would result from adoption of a Physical Segregation Model for customer assets that strictly limits FCM access to such assets.

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We appreciate this opportunity to comment on the Proposed Rules and would welcome the opportunity to further discuss this matter with Commission staff.

Sincerely,



Moore Capital Management, LP
Anthony J. DeLuca
Chief Financial Officer

cc: David Rubenstein, BlueMountain Capital Management, LLC
Keith Horn, Elliott Management Corporation
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