Institute of Scrap Recycling Industries, Inc.
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Via Electronic Submission

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

Re: Comments on Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations. (RIN 3038-AD88, 77 Fed. Reg. 67866, November 14, 2012)

I. Introduction

The Institute of Scrap Recycling Industries (ISRI), on behalf of its members, respectfully submits these comments in response to the Notice of Proposed Rulemaking (the "Proposal") on Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations ("Enhanced Customer Protections"). ISRI's comments will be limited to (i) introducing the CFTC to the recycling industry and its significant role in commodity futures trading; (ii) discussing several critical issues that had not been addressed in the Proposal; and (iii) offering support for the Proposal for the Enhanced Customer Protections.

II. Institute of Scrap Recycling Industries

ISRI is a Washington, D.C. based trade association representing the scrap recycling industry. The industry is comprised of businesses engaged in the recycling of various commodities such as metals, plastics, glass, paper, rubber, textiles and electronics. Members of ISRI are involved in the processing, collection, trading and consuming of these commodities; for all intents and purposes the industry is the first link in the manufacturing chain. The scrap

recycling industry produced approximately $100 Billion worth of commodities last year, which is equal to roughly 0.6 percent of GDP,[1] and is similar in size to the nation's forestry and fishing industries combined, nearly all of the nation's professional sports teams and the toy industry. In 2011, scrap recycling brokers and processors provided in excess of 459,000 jobs directly and indirectly.[2] Hedging metals' prices on commodity futures exchanges as a risk mitigation tool is a critical component of the financial and risk management activities conducted by scrap metal recyclers ("Metals Recyclers").

In addition to the impact on the domestic economy, the value of scrap exported by the scrap recycling industry in 2011 increased 32% to approach $40 Billion in export sales to 161 Countries.[3] Likewise, by value, scrap exports are one of the top 5 exports from the United States.[4] Many of the commodities traded by Metals Recyclers are also traded on commodity futures exchanges throughout the world. Hedging is widely used as a risk mitigation tool against metals' price volatility and serves to provide liquidity for the metals recycling industry. Within the metals producing, consuming and scrap industries, there is often a significant time lapse that occurs from the time metal is produced, bought, sold, shipped and consumed by an end-user. This is especially cogent because so many metals are shipped all over the world. Specifically, these commodities, such as copper, aluminum, steel, zinc, and tin, among others, are critical raw materials for both emerging markets as well as mature economies.

The collapse of MF Global exposed several systemic problems within the commodity futures trading industry and its oversight regime. According to the Staff Report Prepared for Rep. Randy Neugebauer, Chairman of the Subcommittee on Oversight & Investigations, Committee on Financial Services, and dated November 15, 2012, there is still in excess of $665 Million missing from Commodity Customers' accounts used for foreign trading, and likely in excess of $100 Million still missing from domestic accounts.[5] Many Metals Recyclers, as well as their suppliers, customers and consumers continue to represent a significant portion of the missing ***$765+ Million.*** It is uncertain whether any of the remaining missing funds will be recovered; and much is now

[1] In 2011, ISRI retained the independent consulting firm of John Dunham and Assoc. to perform an economic impact analysis of the scrap recycling industry on the U.S. economy. The statistics are based on the Economic Impact of the Scrap Recycling Industry in the United States (2011), produced for ISRI, by John Dunham and Associates, 2011.
[2] Scrap Recycling Industry Impact Methodology Summary, John Dunham and Associates, 2011.
[3] The United States Census Bureau and the United States International Trade Commission.
[4] The United States Census Bureau and the United States International Trade Commission.
[5] Staff Report Prepared for Rep. Randy Neugebauer, Chairman, Subcommittee on Oversight & Investigations, Committee on Financial Services, 112th Congress, November 15, 2012, p 73-74.

tied up overseas in legal battles stemming from the MF Global insolvency proceedings.

III. Hedging: Risk Mitigation in the Scrap Metal Recycling Industry

The hedging of metals prices by Metals Recyclers is "bona fide hedging" as defined under the Act[6] and is in contrast to the often erroneous use and application of the term hedging to other financial investment instruments and activities. Bona fide hedging is encouraged in many industries especially with respect to agriculture, and energy. However, the metals industry, and more specifically, the scrap metal recycling industry has not heretofore provided its input on the many issues exposed by the collapse of MF Global.

As mentioned above, Metals Recyclers use hedging on the commodity futures exchanges to mitigate the risk of exposure to metals' pricing volatility**.** In addition to hedging on domestic exchanges, Metals Recyclers hedge a considerable volume of aluminum and other nonferrous metals through U. S. based FCMs on the London Metal Exchange. As a practical matter, Metals Recyclers hedge to ensure, on some level, that the risk of the transaction is removed. Metals Recyclers maintain Segregated Accounts comprised of commodity exchange mandated margin requirements, and cash proceeds typically resulting from changes in trading positions and/or market fluctuations. The margin requirements mandated by the commodity exchange serve as collateral for a Metals Recycler's trading activities. Inherently, the Metals Recycler, who is hedging, seeks to reduce the risk of exposure to the market and is not assuming risk with respect to its collateral account.

IV. Critical Open Issues

In order for the markets to function efficiently, commodity customers must have confidence and trust in the market's financial safeguards. Specifically, in the absence of an FDIC or SIPC insurance type of regime, market participants must have a level of trust and confidence that there will not be a repeat of the circumstances involved in the collapse of MF Global and Peregrine. We applaud the CFTC for taking such strong measures in connection with the Enhanced Customer Protections and we fully support all of the proposals contained in RIN 3038-AD88, 77 Fed. Reg. 67866, November 14, 2012. However, there remain critical open issues of concern to Metals Recyclers that we would ask the CFTC to consider. The open issues stem from a combination of the scope of

[6] 7 U.S.C § 6a.

investments that FCMs are still permitted to make under the Act and the "permitted language" in Commodity Customer Agreements (the "Agreements") that grant FCMs unreasonably wide latitude to use and invest Customer Funds.

The language that is typically found in Agreements permitting an FCM to use Customer Funds, at the FCM's discretion (or whim), is buried deep within the Agreement. In order to open a commodity trading account with a particular FCM, a Commodity Customer must comply with such a clause. Below is a clause taken from an FCM's Agreement packet and two examples are attached as **Exhibit A**.

Except as prohibited by Applicable Law, all collateral now or hereafter held or carried by the clearing firm (CF) for customer may, from time to time, without notice to customer, be pledged, hypothecated, loaned or invested by CF to or with CF or others, separately or with any other property. CF shall not be required to retain in its possession for delivery a like amount of, or to pay interest or to account to customer for any profits on, such property. All transactions for or on customers behalf may be included in a single account whether or not such transactions are segregated on CF's records into separate accounts, either severally or jointly with others.[7]

This common clause skirts the spirit of the Act by granting wide latitude to the FCM to use Customer Funds, which the Commodity Customer is required to post for initial and variable margin. Allowing an FCM unfettered use of Customer Funds without a mechanism for such funds to be guaranteed or insured exposes those Customer Funds to risk of loss. The Enhanced Customer Protections do take a significant step towards reducing that risk and potentially providing an early warning mechanism for alerting the CFTC, Commodity Customers, and other oversight entities of the possibility that certain precarious issues may arise. Yet, the Regulations still prohibit parking margin in a security account that is otherwise insured by SIPC or a bank account that is otherwise insured by the FDIC.

Often, unknowingly, Commodity Customers acquiesce to these clauses which are buried deep within a forty or fifty page Agreement. Recognizing that a Commodity Customer must understand the terms of the Agreement, if a Commodity Customer wanted to modify or did not want to grant the FCM the rights as stated in that clause, Commodity Customers are powerless to negotiate

[7] Similar, if not exact, language exists on Commodity Customer Agreements from all FCMs, including MF Global.

changes -- the Agreements are nothing less than contracts of adhesion with regard to all except, perhaps, the very largest Customers.

Below are some examples of terms or modifications to Commodity Customer Agreements that were actually proposed and rejected:

1) Require FCMs to provide an alternative to granting them discretionary ability to pool and invest Customer Funds with the full understanding that transaction costs may increase.
2) Allow segregated margin funds for hedge accounts to be swept nightly into a securities account that is insurable by SIPC, and/or a commercial bank account insured by the FDIC.
3) Allow U.S. Treasury Notes, a permissible instrument to post as margin, to be held in the name of the Commodity Customer, and perhaps consider permitting a UCC filing.
4) Modify the scope of SIPC to include Customer funds insured up to a statutory limitation.

As noted above, several of the aforementioned concepts were presented to FCMs in the period following the collapse of MF Global when Commodity Customers were seeking to re-open accounts which were previously at MF Global and that had been transferred to another FCM. The response from the FCMs was that the terms of the Agreements were non-negotiable. Admittedly, some or all of the above suggestions would require FCMs to modify or forego their ability to speculate with Commodity Customers' Segregated Accounts holding margin requirements. However, from a Customer's point of view, these suggestions would go a long way towards leveling the playing field.

The FCMs appear to have no incentive to encourage them to negotiate certain terms of the Agreements with Commodity Customers. Nor are there any consequences set forth that would penalize FCMs for coercing Commodity Customers to agree to those conditions. Likewise, there are no regulations that provide Commodity Customers with rights to decline those conditions or negotiate more mutually agreeable terms. As discussed above, Commodity Customers have attempted to negotiate modifications to these Agreements; however, the responses received indicate that the Commodity Customers, if they want to continue to have an open and active account, must acquiesce.

Many Metals Recyclers who, as mentioned above, have ***hundreds of millions of dollars or more*** still tied up in both the domestic and the U.K. MF Global cases

would clearly prefer that FCMs not have the ability to invest Customer Funds for the FCMs' benefit. The Customer Funds that are still unavailable from the MF Global case represent a significant level of working capital that may never be recovered. Although the Proposal seeks to create a higher level of trust and confidence that Customer Funds will not be put at risk by the FCMs, the Proposal contains no provisions that provide Commodity Customers with an option to "opt out" of granting FCMs access to their collateral.

We ask the CFTC to mandate that FCMs provide Commodity Customers the option to "opt out" of granting FCMs access to invest Customer Funds, yet permit those Commodity Customers to continue to actively trade. Alternatively, or in conjunction with an "opt out" provision we are asking the CFTC to consider further enhancements to customer protections that would provide FCMs with an incentive or some reasonable mechanism to negotiate and modify these terms of concern for those Commodity Customers that elect not to grant such wide latitude as is represented by the aforementioned Agreement clause. Examples of reasonable modifications are listed on the prior page.

V. "Enhanced Customer Protection Proposal" Comments

Within ISRI's governance regime, the Non-Ferrous Division (a group comprised of many businesses engaged in bona fide hedging) formed a sub-committee to study, review and comment on the Proposal from a Commodity Customer's perspective. We believe that the Enhanced Customer Protections, as proposed, provide a much higher level of customer protection. We recognize that many of the CFTC's requests for specific comments involve assessment of the projected costs that will be incurred by FCMs and we have elected not to comment on those requests. It is our position, from the Commodity Customers' perspective, that the Enhanced Customer Protections proposed by the CFTC and endorsed by Chairman Gensler[8] clearly serve to achieve their stated goals and on behalf of ISRI's members we support the Enhanced Customer Protections.

VI. Conclusion

As mentioned above, bona fide hedging employed as a risk mitigation tool protects Metals Recyclers against exposure to the volatility of metals pricing; similar in purpose and practice to hedging programs employed in the agriculture industry. Bona fide hedging programs are encouraged under the spirit of the Act.

[8]Summary of the Enhanced Customer Protections was compiled from the CFTC Release: PR6396-12 dated October 23, 2012, and Chairman Gensler's Statement of Support dated October 23, 2012.

Segregated Accounts were the mechanism used to hold initial and variable margin money required to be held on account as collateral with clearing firms. We ask the CFTC to give full and careful consideration to our requests concerning the critical open issues discussed in Section IV. We thank the CFTC for taking so many necessary steps to ensure that Commodity Customers' collateral held by FCMs is safe and secure. In order for the market to operate efficiently there must be confidence and mutual trust, neither of which exists right now as a lasting result of the collapse of MF Global and Peregrine.

Sincerely yours,

Scott J. Horne

Cc: Gary Gensler, Chairman, CFTC
Bart Chilton, Scott D. O'Malia, Jill E. Sommers, Mark Wetjen
Commissioners, CFTC
Gary Barnett, Director, Division of Swap Dealer and Intermediary
Oversight
Robin Wiener, President, ISRI
Jerry Simms, Chairman, ISRI
Doug Kramer, Chair – Elect, ISRI
Mark Lewon, Vice Chair, ISRI
Brian Shine, Secretary/Treasurer, ISRI
Matthew Heitmeier, Chair Non-Ferrous Division, ISRI. Director
NonFerrous Metals Marketing, Padnos
Joseph Pickard, Chief Economist/Director of Commodities, ISRI
Matthew Kripke, President, Kripke Enterprises.
Michael A. Eisner, President, Premier Metal Services, LLC
Mark A. Weintraub, In-house Counsel/Metals Trader, Premier Metal
Services, LLC.

EXHIBIT A

ACCOUNT AGREEMENT

1. ACCOUNT STATUS

This Account Agreement ("Agreement") sets forth the terms and conditions upon which R.J. O'Brien & Associates, LLC ("R.J. O'Brien") will accept and maintain for the undersigned Customer one or more accounts and act as broker or dealer for Customer in the execution and clearance of orders for transactions (whether domestic or foreign) involving the purchase and sale of futures contracts; options on futures contracts; commodities and forward contracts, security futures contracts ("SSF"); option, spot and forward foreign exchange transactions; exchange for physicals ("EFPs"); and any other cash transaction or derivative, or any similar instruments which may be purchases, sold or cleared by or through an FCM (individually, a "Contract" and collectively, "Contracts"). Customer hereby represents that all responses made in connection with the Account Application and this Agreement are complete and correct, and that R.J. O'Brien will be informed of any material change in such data, including financial information.

If this account has been introduced to us, all references to us in this Agreement shall include your broker, and your broker shall enjoy all benefits and rights hereunder. Customer agrees and acknowledges that broker and R.J. O'Brien may share information with each other regarding or relating to Customer and/or Customer's account (s). Customer warrants to R.J. O'Brien that if Customer is an individual or if this is a joint account, Customer (s) is of legal age and of sound mind. Unless otherwise indicated in the Application, no one except the Customer (s) identified in the Account Application has an interest in the account (s). Customer agrees to permit verification of relevant information by R.J. O'Brien through third parties (including credit reporting entities). In any event, this Agreement and the account (s) permitted hereunder become effective only upon acceptance by an authorized representative of R.J. O'Brien at its principal office in Chicago, Illinois.

2. ACCOUNT RISKS

A.) TRADING IN CONTRACTS IS HIGHLY SPECULATIVE AND IN NO SENSE MAY BE CONSIDERED A CONSERVATIVE INVESTMENT;

B.) BECAUSE OF THE LOW MARGIN DEPOSITS NORMALLY UTILIZED AND THE VOLATILE PRICE MOVEMENTS WHICH CAN OCCUR IN THE MARKETS FOR CONTRACTS, THE POSSIBILITY OF RAPID AND SUBSTANTIAL LOSSES IS CONTINUALLY PRESENT;

C.) TRADING IN CONTRACTS IS APPROPRIATE ONLY FOR THOSE PERSONS FINANCIALLY ABLE TO WITHSTAND SUBSTANTIAL LOSSES, SOMETIMES GREATLY EXCEEDING THE VALUE OF THEIR MARGIN DEPOSITS; AND

D.) NO ONE (INCLUDING FUTURES COMMISSION MERCHANTS , ASSOCIATED PERSONS, INTRODUCING BROKERS, FUND MANAGERS, COMMODITY TRADING ADVISORS OR POOL OPERATORS) CAN GUARANTEE PROFITS OR THE ABSENCE OF LOSSES. CUSTOMER AGREES TO PROMPTLY NOTIFY THE R.J. O'BRIEN COMPLIANCE DEPARTMENT IF ANY SUCH GUARANTEE IS SUGGESTED.

3. MARGINS

All checks and funds from Customer, to be credited to Customer's account(s), must be payable only to "R.J. O'Brien". Customer agrees at all times to maintain such margin in his account(s) as R.J. O'Brien may from time to time (at its sole discretion) require, and will meet all margin calls in a reasonable amount of time. Customer agrees that, if requested to do so, Customer will promptly wire-transfer such funds. Market conditions permitting, R.J. O'Brien agrees to make reasonable efforts to notify Customer of margin calls and/or deficiencies and to allow a reasonable period for Customer to provide funds.

FOR PURPOSES OF THIS AGREEMENT, A REASONABLE AMOUNT OF TIME SHALL BE DEEMED TO BE ONE (1) HOUR, OR LESS THAN ONE HOUR IF, IN R.J. O'BRIEN'S BUSINESS JUDGMENT, MARKET CONDITIONS WARRANT.

Customer further agrees that, notwithstanding anything in this Agreement to the contrary, in the event that the account (s) is under margined, has zero equity or is equity deficit at any time, or in the event that R.J. O'Brien is unable to contact Customer due to Customer's unavailability or due to a breakdown in electronic communications, R.J. O'Brien shall have the right to liquidate all or any part of Customer's positions through any means available, without prior notice to the Customer.

R.J. O'Brien may require margin in excess of that required by applicable law, regulation, exchange or clearinghouse minimums. Customer acknowledges that R.J. O'Brien has no obligation to establish uniform margin requirements among products or customers, that margins required by R.J. O'Brien may exceed the minimum margin requirements of the applicable exchange or clearinghouse, and that margin requirements may be increased or decreased from time to time in R.J. O'Brien's discretion, without advance notice to Customer. All deposits shall be deemed made only when cleared funds are actually received by R.J. O'Brien. If a check is not honored or paid by a bank upon presentment, R.J. O'Brien will immediately debit Customer's account for the amount of the returned check as well as any fees incurred.

Any failure by R.J. O'Brien to call for margin at any time shall not constitute a waiver of R.J. O'Brien's right to do so any time thereafter, nor shall such failure create any liability to the Customer. R.J. O'Brien shall not be liable to Customer for the loss or loss of use of any margin deposits option premiums, or other property, which is caused, directly or indirectly, by the failure or delay by any bank, trust company, exchange, clearing organization, other clearing broker or entity that is holding funds, securities, or other property to pay or deliver the same to R.J. O'Brien. R.J. O'Brien may, for any reason, require Customer to transfer its account (s) to another firm. If Customer does not transfer its positions promptly upon demand by R.J. O'Brien, R.J. O'Brien may liquidate the positions and Customer agrees to indemnify and hold R.J. O'Brien harmless from any and all losses resulting from such liquidation.

Customer acknowledges that R.J. O'Brien is hereby authorized, for its account and benefit, from time to time and without notice to Customer, either separately or with others, to lend, repledge, hypothecate or rehypothecate, either to itself or to others, any and all property (including but not limited to securities, commodities warehouse receipts or other negotiable instruments) held by Customer in any of its accounts and R.J. O'Brien shall not at any time be required to deliver to Customer such identical property but may fulfill its obligation by delivery of property of the same kind and amount.

Continued on Next Page.

9. Security Interest

Customer grants AACC a first lien and security interest in all monies, securities of any kind, open positions in Commodity Interests, documents representing title to commodities such as warehouse receipts and the commodities represented thereby and any other property of Customer (either individually or jointly with others) now or in the future held by AACC in the Account or otherwise in AACC's possession or control for any purpose, including safekeeping (collectively, the "Collateral"), to secure payment and discharge of all obligations of Customer to AACC or any affiliate of AACC, which Collateral is subject to the general lien of, and right of set-off by, AACC for any and all such obligations. Customer agrees to execute any and all documents including Uniform Commercial Code financing statements, as deemed necessary or appropriate by AACC to evidence or perfect its security interest in any Collateral. Customer has not granted and will not grant a security interest in the Collateral or it's Account (other than the security interest granted to AACC hereunder) to any other party without AACC's written consent.

Except as prohibited by Applicable Law, all Collateral now or hereafter held or carried by AACC for Customer may, from time to time, without notice to Customer, be pledged, hypothecated, loaned or invested by AACC to or with AACC or others, separately or with any other property. AACC shall not be required to retain in its possession for delivery a like amount of, or to pay interest or to account to Customer for any profits on, such property. All transactions for or on Customer's behalf may be included in a single Account whether or not such transactions are segregated on AACC's records into separate accounts, either severally or jointly with others.

10. Events of Default

The following events shall constitute an "Event of Default," as applicable: (a) Customer breaches, repudiates, or defaults in any way under this Agreement or any other agreement with AACC; (b) AACC, in its sole discretion, determines that it has sufficient grounds for insecurity with respect to Customer's performance of any obligation (including the obligation to deposit additional Collateral or margin) or Customer fails to provide assurance of performance of any obligation satisfactory to AACC; (c) Customer dies, becomes disabled, becomes incompetent or is subject to a rehabilitation, (d) Customer becomes subject to any bankruptcy, insolvency, receivership or similar action or proceeding; (e) Customer's Account is garnished or attached; (f) Customer takes any action to effect a dissolution, liquidation, reorganization, winding up of its affairs or any similar event; (g) AACC believes that any information or assertion provided or made to AACC is, or becomes, or will become, in any material way inaccurate or misleading; (h) Customer fails to deposit margin or make premium payments in accordance with the terms of this Agreement or to perform any of its other obligations hereunder, including those respecting delivery, exercise or settlement under any Commodity Interest held in the Account; or (i) AACC has reason to believe that any of the foregoing is likely to occur immediately.

11. Remedies Upon Default

Customer acknowledges and agrees that upon the occurrence of an Event of Default, or if AACC determines, in its sole discretion, that such action is necessary or advisable for AACC's own protection, AACC, may exercise any one or more of the following remedies, in addition to any other right or remedy available to it at law or in equity: (i) close out or hedge any open positions in Commodity Interests (in whole or in part) in Customer's Account in any manner AACC deems reasonable under the circumstances (including through use of exchange for related positions transactions in accordance with Exchange rules); (ii) apply any Collateral in the form of cash and liquidate or sell any or all non-cash Collateral and apply the proceeds thereof to offset Customer's obligations, (iii) borrow, lend, sell or buy any securities, commodities or other property for Customer's Account to cover or hedge any or all existing positions, (iv) place and/or establish spread transactions, (v) "roll" open positions forward, (vi) cancel any outstanding orders, commitments or obligations made by AACC on behalf of Customer; or (vii) terminate this Agreement, all without prior demand or notice to Customer. Any such sale, purchase, cancellation or other action may be made at AACC's sole discretion on the Exchange where such business is transacted, at public auction or by private sale, without advertising the same. Customer shall remain liable for the amount of