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January 11, 2013

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

**RIN 3038–AD88**

***Enhancing Protections Afforded Customers and  
Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations***

Dear Mr. Secretary,

We appreciate the opportunity to comment on the Commodity Futures Trading Commission's (the "CFTC" or the "Commission") RIN 3038–AD88, *Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations* (the "Proposed Amendments").

We support the Commission's efforts through the Proposed Amendments to enhance customer protections and disclosures, strengthen risk management programs, and the examination procedures for futures commission merchants ("FCMs") and derivatives clearing organizations. However, we have a number of concerns with certain aspects of the Proposed Amendments relative to auditing and reporting by accountants. We believe that most of these concerns could be minimized by aligning, where practicable, the proposed rules for audits of FCMs with the requirements for audits of brokers and dealers in securities. Specifically, we believe that certain elements of the Proposed Amendments to §1.16, "Qualifications and Reports of Accountants" require revision or further clarification, and have summarized our observations and recommendations for your consideration below. We encourage the CFTC to coordinate and consult with the Public Company Accounting Oversight Board and the Securities and Exchange Commission in addressing our observations and recommendations.

**Qualifications of Accountants**

The Commission is proposing to amend §1.16(b)(1) to require that a public accountant be registered with the Public Company Accounting Oversight Board ("PCAOB" or the "Board") in addition to being in good standing with the relevant state licensing authorities. Also, a public accountant must have undergone an examination by the PCAOB, and any deficiencies noted during such examination must have been



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remediated to the satisfaction of the PCAOB within three years of that examination<sup>1</sup>. We support the Commission's goal of enhancing the competence of auditors and the quality of audits performed of FCMs. However, we have a number of concerns and questions regarding the effect of the Proposed Amendments on §1.16(b)(1).

#### *Required PCAOB Inspections*

We note that a requirement for a registered firm auditing an FCM to have undergone an inspection would make the rules governing the audits of FCMs more restrictive than those governing audits of brokers and dealers. It is not clear to us why a more restrictive requirement is warranted relative to the audits of FCMs. As such, we believe that by removing the requirement for the registered firm to have undergone an inspection, while maintaining the requirement for the firm to be registered with the PCAOB, would align the Proposed Amendments with the rules applicable to the audits of brokers and dealers.

#### *Inspection Deficiencies Remediation*

It is unclear in the Proposed Amendments how one would interpret the provision requiring "...any deficiencies noted during such examination must have been remediated to the satisfaction of the PCAOB within three years of that examination." For example, do the "deficiencies noted during such examination" refer to deficiencies identified in every audit inspected or only audits of issuers with an FCM subsidiary or dually-registered broker and dealer/FCM? Or, does this term relate to any defects or criticisms of a registered firm's quality control system identified by the PCAOB in the nonpublic portion of its inspection reports; the contents of which remain nonpublic unless the firm fails to address the criticisms to the Board's satisfaction within twelve months of the date of the report?

Additionally, it is unclear how a determination would be made that deficiencies had been "remediated to the satisfaction of the PCAOB", who would make this determination, and how an FCM would determine that the firm had complied with the proposed remediation requirements. If the Commission intends to rely on the PCAOB to indicate whether a registered firm is in compliance with this requirement, we are unsure how such indications could be formally provided, as there is currently no precedent for this.

Regardless of how this provision would be applied by the Commission (or if it can be successfully implemented based on the issues described above), it would result in qualification requirements for the auditors of FCMs that are more restrictive than the current requirements for auditors of issuers and non-issuer brokers and dealers. Accordingly, consistent with our overall recommendation and the recommendation in the immediately preceding section, we recommend that the language relating to PCAOB examinations and deficiencies be removed. By doing so, the Commission will have aligned the

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<sup>1</sup> See page 67937, Proposed Rule, Part I – General Regulations under the Commodity Exchange Act, §1.16(b)(1) *Qualifications of accountants*.



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qualifications for auditors of FCMs with the qualification requirements for auditors of brokers and dealers.

### **Reports of Accountants**

The Commission also is proposing to amend §1.16(c)(2) to require a public accountant to state in their audit opinion whether their audit was conducted in accordance with U.S. generally accepted auditing standards (“U.S. GAAS”) “after full consideration of the auditing standards adopted by the PCAOB...”<sup>2</sup>.

An auditing framework which allows a firm to conduct an audit in accordance with U.S. GAAS with “full consideration of auditing standards established by the PCAOB” does not currently exist, nor can we envision how such a framework could be developed and implemented. Moreover, it is unclear from the Proposed Amendments whether the terminology “full consideration of auditing standards established by the PCAOB” is intended to include only those standards that relate to auditing, or the broader set of PCAOB standards, including for example, those related to independence. In addition, in the Section by Section Analysis of Proposed Commission Regulations and Proposed Amendments to Existing Commission Regulations, Section E<sup>3</sup>, the Commission provides a discussion of the PCAOB’s standards relative to an auditor’s reporting on an entity’s internal control over financial reporting. It is unclear how these PCAOB standards would be considered (“and adhered to where applicable”<sup>4</sup>) in an audit of a FCM, which does not involve the auditor being engaged to audit and provide an opinion on the effectiveness of a FCM’s internal control over financial reporting.

Accordingly, we recommend that the Commission designate a single set of auditing standards to apply in the audits of FCMs, and that such designation be unambiguous to both auditors and the users of the auditor’s reports.

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<sup>2</sup> See page 67938, Proposed Rule, Part I – General Regulations under the Commodity Exchange Act, §1.16(c)(2) *Representations as to the audit*.

<sup>3</sup> See page 67878, Proposed Rule, Part II, E. – *Proposed Amendments to §1.16: Qualifications and Reports of Accountants*.

<sup>4</sup> *Ibid.*



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We appreciate the CFTC's careful consideration of our comments, and support the Commission's efforts. We would be pleased to answer any questions regarding this comment letter.

Very truly yours,

**KPMG LLP**

cc:

**CFTC**

Gary Gensler, Chairman  
Jill E. Sommers, Commissioner  
Bart Chilton, Commissioner  
Scott D. O'Malia, Commissioner  
Mark P. Wetjen, Commissioner  
Kevin Piccoli, Deputy Director

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