

February 13, 2013

Ms. Melissa Jurgens
Assistant Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

VIA ELECTRONIC MAIL

Re: *Notice of Proposed Rulemaking - Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations (RIN 3038-AD88)*¹

Dear Ms. Warfield:

On behalf of The Commercial Energy Working Group (the “Working Group”), Sutherland Asbill & Brennan LLP hereby submits these comments in response to the above-referenced proposed rules (the “Proposed Customer Protection Rules”) issued by the Commodities Futures Trading Commission (the “Commission”) in accordance with the Commodity Exchange Act (the “CEA”), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are energy producers, marketers, and utilities. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

The Proposed Customer Protection Rules respond to two recent events in which customer funds entrusted to futures commission merchants (“FCMs”) were inappropriately utilized by FCMs in contravention of the CEA and the Commission’s rules. As a result, when these FCMs (MF Global and Peregrine Financial Group) became insolvent, many of their non-defaulting customers suffered material economic losses that they never should have incurred. These events have placed a cloud over the regulatory regime for futures and cleared swaps, a cornerstone of which is the protection of customer funds from misuse by FCMs.

¹ See 77 Fed. Reg. 67866-67971.

The Working Group anticipates that its members will engage in cleared swaps through FCMs as the mandatory clearing requirements of the Dodd-Frank Act are implemented. In this regard, the Working Group endorses the Commission's proposals to increase transparency surrounding the financial condition and regulatory compliance of FCMs. The Working Group believes the Proposed Customer Protection Rules represent a very cost-effective approach to making FCMs more accountable to their customers by providing current information that will enable customers to conduct appropriate due diligence regarding prospective FCMs and to actively monitor the financial condition and regulatory compliance of the FCMs to which they have entrusted funds. In particular, the Working Group supports requirements that:

- FCMs post their margin segregation calculation on their Web sites on a daily basis;²
- FCMs prepare "Disclosure Documents" for disclosure on their Web sites with the information material to a customer's decision to entrust funds to and otherwise do business with the FCM, including information regarding the operations, financial condition, risk profile and affiliates of the FCM;³ and
- FCMs promptly update the Disclosure Documents "as and when necessary," taking into account any material change to their business operation, financial condition and other factors material to a customer's decision to entrust its funds and otherwise do business with the FCM.⁴

The Working Group believes the Proposed Customer Protection Rules could be further strengthened by:

- requiring FCMs to each month post on their Web site, as part of their Disclosure Documents, the Segregation Schedule, the Secured Account Schedule and the Cleared Swaps Segregation Schedule. The Web site should include the schedules for the most recent twelve months;⁵ and
- requiring FCMs to each month post on their Web site, as part of their Disclosure Documents, summary balance sheet and income statement information. The Web site should include such information for the most recent twelve months.⁶

² See Proposed Reg. § 1.55(o). Though the Working Group recognizes some minimal delay in the actual provision of data may be called for to allow FCMs to double check their calculations.

³ See Prop. Reg. § 1.55(i).

⁴ *Id.*

⁵ Under the Proposed Customer Protection Rules, these schedules are only available upon request to the Commission. See Fed. Reg. at 67872-67873.

⁶ Under the Proposed Customer Protection Rules, only the annual certified financial statement is required unless there has been a material change in the FCM's financial condition. See note 4, *supra*.

The Working Group notes that the FCMs would be required to provide the above information to the Commission and their designated self-regulatory organization. Thus, the additional cost of making this information available to the public should be nominal.

Again, the Working Group endorses the Commission's efforts to improve transparency of information regarding the financial condition and regulatory compliance of FCMs. The Working Group believes the Proposed Customer Protection Rules will greatly assist customers in performing the due diligence that is warranted in selecting and doing business with FCMs.

The Working Group supports appropriate regulation that brings transparency and enhances efficiency in the swap markets in the United States. The Working Group appreciates this opportunity to comment on the Request and offers its advice and experience to assist the Commission in implementing the Dodd-Frank Act.

Respectfully submitted,

/s/ David T. McIndoe

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Working Group*