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By Commission Website

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Melissa Jurgens
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, D.C. 20581

Re: RIN 3038-AD88, "Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations" (77 Federal Register 67866 (November 14, 2012))

Dear Ms. Jurgens:

New York Portfolio Clearing, LLC ("NYPC") appreciates the opportunity to submit the following comments regarding the above-referenced notice of proposed rulemaking by the Commodity Futures Trading Commission (the "Commission").

NYPC is a registered derivatives clearing organization ("DCO") that is owned equally by NYSE Euronext and The Depository Trust & Clearing Corporation ("DTCC"). NYPC clears U.S. dollar-denominated interest rate futures contracts and cross-margins eligible positions against U.S. Treasury and other fixed income securities and repurchase agreements cleared by DTCC's subsidiary, Fixed Income Clearing Corporation.

As a general matter, NYPC is supportive of the Commission's stated objective for the proposed rulemaking of enhancing customer protections. However, given the different roles that futures commission merchants ("FCMs") and DCOs play in the market infrastructure of the futures industry, NYPC believes that certain of the requirements contained in the Commission's proposed rulemaking, although potentially suitable in the FCM context, would be inappropriate if applied to DCOs.

For example, under proposed regulation 1.20(g)(4)(iii), the Commission would require each DCO to deposit FCM customer funds only with a depository that provides the Commission with direct, read-only access to the DCO's account information on a 24-hour a day basis. However, given the manner in which FCM customer funds are held by DCOs at depositories, NYPC does not believe that such read-only access to DCOs' accounts would further the Commission's stated objective of allowing "Commission staff to review an FCM's segregated account balances reported by depositories and to compare those balances to the FCM's reported account balances either as part of a review of the firm,

or in circumstances where the Commission is concerned about the financial condition of the firm."[1] As a general matter, DCOs, like NYPC, hold funds on behalf of all of their FCM clearing members' customers in segregated accounts that are not further subdivided at the depository level by either individual FCM clearing member or by underlying customer. The allocation of the total amount of customer funds between FCM clearing members is recorded, not at the depository level, but rather on the books and records of the DCO itself. As such, the account information to which the Commission would have direct, read-only access to at a DCO's depository under the proposed rulemaking would not provide the level of detail that would permit reconciliation between either the DCO's FCM clearing members or those clearing members' underlying customers. As an alternative, the Commission could, within its existing authority under regulation 1.31, simply require a DCO to produce books and records indicating a particular FCM clearing member's customer segregated account balance held by that DCO on an as needed basis.

Another area of the Commission's proposed rulemaking where the distinctions between the roles of FCMs and DCOs in the futures industry market infrastructure warrant different regulatory considerations relates to the written acknowledgment letters that FCMs and DCOs must obtain from depositories with which they deposit customer funds. First of all, the language in the form of written acknowledgment letter in Appendix A to proposed regulation 1.20, which the Commission is proposing would be applicable to both FCMs and DCOs, would include references to "a self-regulatory organization of which *we* are a member".[2] Given that, unlike FCMs, DCOs are not members of any self-regulatory organization, NYPC would propose that such language be removed from the form of acknowledgment letter for DCOs, given its inapplicability and the potential for confusion on the part of DCOs' depositories.

In addition, NYPC does not believe that the language in the Commission's proposed form of written acknowledgment letter requiring depositories to agree to immediately release FCM customer funds upon instruction of the director of the Division of Clearing and Risk or the director of the Division of Swap Dealer and Intermediary Oversight or their designees[3] is necessary or appropriate in context of DCOs' FCM customer accounts at depositories, and should be removed from the form of acknowledgment letter for DCOs. First of all, as previously discussed, at a given depository, a DCO typically holds all of its FCM clearing members' customer funds in a segregated account without further subdivision at the depository level by either individual FCM clearing member or by underlying customer. To the extent the DCO needed to transfer some or all of a defaulting FCM clearing member's customer funds to another FCM clearing member of the DCO, such transfer would be effectuated in the form of a bookkeeping entry on the DCO's books and records and, depending upon the number of depositories used by the DCO to hold FCM clearing member customer funds and other relevant considerations, may not require any movement of funds at the depository level. Moreover, in a situation where a DCO needed to withdraw some or all of a defaulting FCM clearing member's customer funds out of a particular depository, the proposed form of acknowledgment letter would

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[1] See 77 Federal Register 67886.

[2] See 77 Federal Register 67941–42 (emphasis added).

[3] See 77 Federal Register 67942.

expressly permit and indemnify such depository from liability for allowing the DCO to make such type of withdrawal,[4] thereby making intervention on the part of Commission staff unnecessary in that situation as well.

Along with being unnecessary for the reasons described above, NYPC believes that the language in the proposed form of written acknowledgment letter requiring depositories to agree to immediately release FCM customer funds upon instruction of the director of the Division of Clearing and Risk or the director of the Division of Swap Dealer and Intermediary Oversight or their designees is inappropriate in the context of DCOs, as it could be interpreted as being inconsistent with a DCO's rights and responsibilities, particularly in the event of an FCM insolvency. For example, in the case of DCOs, like NYPC, that clear only futures and not swaps, such DCOs would, under Part 190 of the Commission's regulations, have access to the entire amount of customer funds posted to the DCO by a defaulting FCM clearing member in order to satisfy obligations owing to the DCO from the customer origin. Authorizing Commission staff to order the movement of such customer funds out of the DCO's account in contravention of the DCO's rights and without the DCO's consent could create a significant amount of uncertainty for DCOs, particularly with respect to their risk modeling and risk management practices.

Moreover, allowing Commission staff to unilaterally order the movement of FCM's customer funds out of a DCO's account would appear to be inconsistent with the DCO's responsibility to safeguard the assets posted to it by its clearing members, including FCM customer funds, under DCO Core Principle F of the Commodity Exchange Act ("Treatment of Funds"), which states in pertinent part that "[e]ach derivatives clearing organization shall hold member and participant funds and assets in a manner by which to minimize the risk of loss or of delay in the access by the derivatives clearing organization to the assets and funds", as well as Principle 16 ("Custody and Investment Risks") of the CPSS-IOSCO Principles for Financial Market Infrastructures ("FMIs"), which states in pertinent part of explanatory note 3.16.1 that assets that have been posted by participants to secure their obligations to an FMI "should generally be held in a manner that assures the FMI of prompt access to those assets in the event that the FMI needs to draw on them."

Additionally, we urge the Commission to make clear that, to the extent permitted by Commission regulations, DCOs have the right to transform the FCM customer funds they hold in the form of non-cash assets into cash to satisfy liquidity needs related to the customer account of a defaulting FCM clearing member not only through the sale of such assets, but also through the use of liquidity arrangements, such as lines of credit and repurchase agreements, as necessary in light of market conditions. Specifically, NYPC recommends that the Commission modify the last sentence of the second paragraph of the form of written acknowledgment letter in Appendix A to proposed regulation 1.20 as follows:

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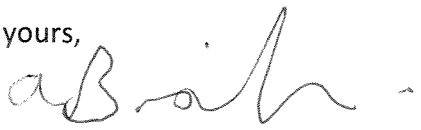
[4] See 77 Federal Register 67942 ("You may conclusively presume that any withdrawal from the Account(s) and the balances maintained therein are in conformity with the Act and CFTC regulations without any further inquiry, provided that you have no notice of or actual knowledge of, or could not reasonably know of, a violation of the Act or other provision of law by us; and you shall not in any manner not expressly agreed to herein be responsible for ensuring compliance by us with the provisions of the Act and CFTC regulations.")

"The prohibitions contained in this paragraph do not affect your right to recover funds advanced by you in the form of cash transfers, lines of credit, repurchase agreements or other similar liquidity arrangements in lieu of the liquidation of non-cash assets held in the Account(s) for purposes of variation settlement or posting initial (original) margin with respect to the Account(s)."

Finally, proposed regulations 1.20(d)(7) and 1.20(g)(4)(vi) would require FCMs and DCOs to file new acknowledgement letters in the event of a change in the name or business address of a depository holding FCM customer funds or the account number(s) under which FCM customer funds are held within 120 days of any such change. In order to protect FCMs and DCOs from running afoul of these proposed requirements and to avoid the necessity of implementing an onerous periodic validation process with depositories, NYPC recommends that the Commission consider adding language into the form of written acknowledgement letter requiring that depositories provide written notice to the FCM or DCO as soon as practicable but in no event later than 30 days after any change in the name or business address of the depository or the account number(s) under which FCM customer funds are held at the depository that would require the parties to execute a new acknowledgment letter under Commission regulation 1.20.

NYPC appreciates the opportunity to submit these comments in connection with the proposed rulemaking. If the Commission has any questions concerning the matters discussed in this letter, please contact the undersigned (at 212-855-5250 or sbroderick@nypclear.com) or Laura C. Klimpel, NYPC's General Counsel (at 212-855-5230 or lklimpel@nypclear.com).

Very truly yours,



Alexander Broderick
Chief Executive Officer

cc: Honorable Gary Gensler, Chairman
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott D. O'Malia, Commissioner
Honorable Mark P. Wetjen, Commissioner

Ananda Radhakrishnan, Director, Division of Clearing and Risk
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Phyllis P. Dietz, Deputy Director, Division of Clearing and Risk
Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight
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