February 15, 2013

Via Electronic Submission

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

Re: Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, RIN 3038-AD88

Dear Ms. Jurgens:

This letter is submitted by BMO Harris Bank N.A. ("BMO Harris Bank"), Barclays Bank PLC, New York Branch, The Bank of New York Mellon and Brown Brothers Harriman & Co. in response to the request for comment by the Commodity Futures Trading Commission (the "CFTC") on the proposed rules concerning, among other issues, acknowledgement letters from depository institutions for customer segregated funds (the "Proposed Rules").[1] BMO Harris Bank, individually and on its own behalf, submitted a comment letter on the prior proposed rulemaking (the "Prior Proposed Rules")[2] on standardized acknowledgement letters and BMO Harris Bank, individually and on its own behalf, hereby reaffirms its positions in that comment letter.[3]

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1 CFTC, *Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations*, 77 Fed. Reg. 67866 (Nov. 14, 2012).

2 CFTC, *Acknowledgment Letters for Customer Funds and Secured Amount Funds*, 75 Fed. Reg. 47738 (Aug. 9, 2010).

3 *See* Letter to Mr. David A. Stawick, Secretary of the CFTC, from Mr. Scott M. Ferris, Managing Director of Harris N.A., dated September 8, 2010.

In relevant part, the Proposed Rules relate to the acknowledgement letters required to be obtained by futures commission merchants ("FCMs") and derivatives clearing organizations ("DCOs") from depository institutions wherein such FCMs or DCOs deposit customer segregated funds pursuant to Section 4d of the Commodity Exchange Act ("CEA"). The Proposed Rules include standard forms of acknowledgement letters included as: (1) Appendix A to Section 1.20 of the Proposed Rules (the "1.20 Proposed Letter"); (2) Appendix to Section 1.26 of the Proposed Rules; and (3) proposed Appendix E to Part 30 of the CFTC's regulations. This comment letter only discusses issues concerning the 1.20 Proposed Letter. However, comments made and issues raised herein are equally applicable to the proposed form letters in (2) and (3) above.

The signatories to this letter serve as depository and custodian banks. We are fully committed to the derivatives settlement business as we serve as depositories and custodians for many FCMs. The banks signing this letter have a significant amount of experience in this line of business and certain signatories have been engaged in this business for over three decades. Certain signatories also serve as settlement banks for exchanges and clearing houses, including the Chicago Mercantile Exchange and the Intercontinental Exchange. In connection with our respective roles as settlement banks and custodian banks, we have each provided our respective FCM clients and DCO clients with acknowledgment letters required under Section 4d of the CEA.

We fully support the general purpose and intent of the Proposed Rules and believe the adoption of a prescribed form for the acknowledgment letters will help facilitate a more efficient process for the establishment and maintenance of customer segregated accounts by FCMs and DCOs and serve to clarify the rights and responsibilities of depository institutions holding customer segregated funds. However, we are concerned that certain requirements and ambiguities in the 1.20 Proposed Letter may undermine the ability of depository institutions to service customer segregated accounts in accordance with long-standing industry practice and could have a negative impact on the depository institutions, the DCOs, the DCOs' clearing members, the FCMs, and the FCMs' customers. These detrimental effects could also have an adverse impact on markets generally. In response to these concerns, we have provided in this letter suggested text to be included in any final version of the 1.20 Proposed Letter.[4]

Standard of Liability

With respect to the standard of liability of the depository institution under Section 1.20 of the CFTC's regulations, the 1.20 Proposed Letter provides the following

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[4] The blackline attached hereto as Exhibit A shows our aggregate proposed changes to the 1.20 Proposed Letter.

text, which would constitute a representation from the FCM or DCO to the depository institution:

> 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.[5]

We acknowledge that a depository institution should not benefit from the conclusive presumption of the letter to the extent it executes instructions that the depository institution actually knows to be in violation of the segregation requirements under the CEA. However, we do not believe that depository institutions should be required to take on potential liability for, and thereby insure against, any violation by an FCM or DCO of a provision of the CEA or any other provision of law.

The first underlined clause in this text could potentially expose a depository institution to liability for a violation of the CEA or any other provision of law committed by an FCM or DCO customer. Such clause would likely be read to greatly expand the duty of depository institutions beyond existing requirements and beyond what is practicable by imposing a new duty to monitor and ensure legal compliance by FCMs and DCOs. Indeed, a standard based on what the depository institution could not reasonably know would likely be read to inherently require depository institutions to perform some undefined level of diligence into an FCM's or DCO's compliance with the CEA and all other provisions of law by reviewing all information to which it could reasonably have access.[6] Requiring a depository institution to obtain from each FCM or DCO customer all information that it could reasonably obtain and review for purposes of confirming the FCM's or DCO's compliance with all provisions of law is beyond what depository institutions are expected to do by their regulators, their customers and the marketplace. Depository institutions cannot efficiently or effectively monitor all relevant activities of

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5 77 Fed. Reg. at 67942 (emphases added).

6 Although the text of the letter states that the depository is not required to make "any further inquiry," such statement is modified by the proviso that follows such language (including the "reasonabl[e] know[ledge]" clause) and would only apply if the proviso is satisfied (and the corresponding required diligence is performed) in order to determine if the depository can rely on the presumption that withdrawals comply with law.

their FCM or DCO customers. The above-described diligence process would inherently involve some amount of speculation on the part of the depository institution and, in the event that a violation is committed by an FCM or DCO, would be subject to second guessing by outside parties after the fact.

This potential liability would shift significant risk in the marketplace to depository institutions. Because U.S. banking institutions, in particular, are subject to safety and soundness regulation by their respective prudential regulators, such risk shifting would create a new risk that would need to be considered by such depository institutions, as well as their regulators. We believe that the CFTC should consult with the prudential regulators prior to adopting rules that would require depository institutions to take on this potential liability. The 1.20 Proposed Letter would impose a much greater risk and potential liability for depository institutions holding customer segregated accounts than has been imposed in the past. Each affected depository institution would be required to evaluate whether this increased risk is outweighed by the benefits of providing these services to FCMs and DCOs.

Moreover, even with enhanced due diligence procedures, it is unlikely that depository institutions can effectively monitor compliance by FCMs or DCOs with the CEA as well as with any other provision of law. A depository institution does not have, and is not well-positioned to secure information necessary to determine whether the FCM or DCO is in compliance with the requirements of the CEA or other provisions of law. A particular depository institution generally has access only to cash account balance information and non-cash asset information held in customer segregated accounts maintained at that institution. A depository institution would not be privy to the data supporting the FCM's segregated funds and excess funds computations, which are derived from the FCM's own customers' trading activity and the aggregate of all of the FCM's segregated funds held at all of the various depositories utilized by such FCM. Instead, a depository institution could only rely on representations from the FCM as to the underlying facts necessary to determine compliance with the CEA and other provisions of law. Further, to effectively monitor compliance with law in the manner required would necessitate access to the up-to-date segregation computation by the FCM, which would be operationally impractical, if not impossible. Regardless of the information a depository institution has, in order to ensure compliance effectively, a depository institution would be required to analyze all such information received from the FCM, together with all other information the depository institution has, and engage in due diligence processes in which it currently does not engage. It would be a new process and requirement related to a body of law that depository institutions, particularly in their capacity as custodians, are not familiar with and would be in contrast with current best practices in the banking industry. Such diligence, for the reasons stated above, is unlikely to be effective in uncovering wrongdoing, particularly the type of wrongdoing that we understand this language is intended to address.

The CFTC and the FCM's designated self-regulatory organization ("SRO") will have access to much of the same information as the depository institution (especially given the fact that the depository institution would agree to make such information available to the CFTC and the relevant SROs in the 1.20 Proposed Letter). In addition, they would have the statutory and regulatory authority and tools to enforce the provisions of the CEA. That is, the CFTC and the designated SRO have better tools, and are in a much better position, to ensure compliance with the CEA and other provisions of law.[7] Depository institutions, by contrast, are not in a position to monitor effectively its customers' compliance with non-bank-related laws.

In addition, the aforementioned diligence processes that would be necessary for each transaction in a customer segregated account would be complex and time-consuming, and would likely delay transfers or withdrawals from the segregated customer account when the speed of the transfer is critical. In addition to potentially slowing down the FCMs ability to transact efficiently, such new processes would likely substantially increase the expenses and costs incurred by depository institutions as a result of maintaining customer segregated accounts. Such expenses and costs would likely be passed on to FCMs and DCOs and, in turn, to the clients of the FCMs and DCOs.

Finally, the second underlined clause could be read to further greatly expand the scope of potential liability imposed on depository institutions. The phrase "violation of the [CEA] or other provision of law" is much more expansive in scope than the current and well-accepted segregation requirements of Section 4d of the CEA (which is the subject of the Proposed Rules and the 1.20 Proposed Letter) or even the CEA itself. For the reasons described above, depository institutions are not well positioned to ensure an FCM's or a DCO's compliance with the CEA. It is even more problematic to

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[7] The CFTC can acquire information by way of subpoena pursuant to Section 6 of the CEA. In addition, the CFTC can request information from or relating to FCMs as their primary regulator. This information would include the customer segregated account balance information (available pursuant to Section 1.20 of the Proposed Rules) as well as information relating to the positions held by an FCM on behalf of a customer (available from the relevant DCO or upon request of the CFTC to the FCM itself, as the primary regulator of both categories of entity).

In addition, the National Futures Association (the "NFA"), which is the designated SRO for many FCMs, recently adopted new rules relating to the financial practices of FCMs with respect to excess segregated funds. *See* Submission pursuant to Section 17(j) of the CEA by the NFA, dated May 29, 2012 (such rules became effective on September 1, 2012) (such rules, the "NFA Seg Rules"). The NFA Seg Rules provide the NFA with greater transparency into its members' compliance with the customer funds segregation requirements of the CEA and implicitly indicate NFA's belief that it is well positioned to monitor for potential violations.

effectively require that the depository institution ensure the FCM's or DCO's compliance with all other laws, most having nothing to do with the deposit of customer funds.[8]

To address the foregoing concerns, we respectfully request that the CFTC adopt the following language to be incorporated in any final version of the 1.20 Proposed Letter:

> 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, in the ordinary course of your business as a depository, you have no actual notice of or actual knowledge of a violation by us of any provision of the Act or the CFTC regulations that relates to the segregation of customer funds; 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.

Permitted Liens and Offset Rights

With respect to liens and offset rights permitted under Section 4d of the CEA, the 1.20 Proposed Letter provides the following text:

> You further acknowledge and agree that the Funds in the Account(s) shall not be subject to any right of offset or lien for or on account of any indebtedness, obligations or liabilities we may now or in the future have owing to you. This prohibition does not affect your right to recover funds advanced in the form of cash transfers you make in lieu of liquidating non-cash assets held in the Account(s) for purposes of variation settlement or posting initial (original) margin.[9]

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8 A more unreasonable result would be if the bank has knowledge of a violation of a law that is unrelated to segregated accounts (or even banking itself) by an FCM or DCO customer, such knowledge would destroy the presumption that the withdrawal or transfer is in conformity with the CEA and CFTC Regulations.

9 77 Fed. Reg. at 67941 (emphases added).

The first sentence of this text essentially codifies the long-standing interpretation of, and practice under, Section 4d of the CEA, pursuant to which a depository institution may not exercise any rights against a customer segregated account to satisfy any obligations of the FCM or DCO. However, the second sentence of this text is new and appears to limit permissible liens only to those liens taken in connection with advancing funds for cash transfers to meet variation settlement or posting initial (or original) margin. This second sentence also implicitly limits the ability of the depository institution to have a right of set off against multiple accounts.

Without the right to take a lien on the customer segregated account to secure an obligation of the customer segregated account or the right to set off between multiple customer segregated accounts, a depository institution may not be willing to provide any form of intra-day advances to the customer segregated account (*i.e.*, advances for the benefit of the FCM's or DCO's customers). These intra-day liquidity arrangements are operationally and administratively efficient for FCMs and DCOs and their respective customers. Without liens and rights of set off, depository institutions may not be in a position to provide liquidity. An FCM or DCO would likely have to keep a substantial buffer of its own funds in the segregated customer account to pre-fund fully these everyday transactions and the obligations related thereto.[10] Any such pre-funding requirement may reduce the ability of FCMs, particularly small- to middle-sized FCMs (whose client base includes farmers and small businesses), to enter into everyday transactions for the customer segregated account[11] and, therefore, such FCMs may be hampered in their daily functioning and even excluded from the industry to the extent that they cannot rely on their depository institutions to advance liquidity to support everyday transactions in the customer segregated accounts.

In a comment letter from 2009 (the "FRBC Comment Letter"),[12] the staff of the Federal Reserve Bank of Chicago recognized that this limitation could significantly restrict the types of transactions that depository institutions could enter into on behalf of

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10 While large, bank-affiliated FCMs may be able to use their own excess funds held at the depository to meet the liquidity shortages, such requirements will tie up the assets used by these large FCMs as excess segregated funds. As a consequence of this potential requirement of the 1.20 Proposed Letter, FCMs and DCOs will likely have less liquidity available to them.

11 Unlike large, bank-affiliated FCMs, these small- to middle-sized FCMs generally do not have access to the liquidity to pre-fund all of the transactions entered into for the benefit of their customer segregated accounts.

12 *See* comment letter from Mr. David A. Marshall, Federal Reserve Bank of Chicago, to Mr. David A. Stawick, Secretary of the CFTC, dated September 8, 2010, for a discussion of specific transactions that would be prohibited if the text of this second sentence is not appropriately modified.

the customer segregated accounts. For example, a depository institution holding customer segregated funds in US dollars in one account could not set off amounts owed to that account with amounts due to an account holding customer segregated funds in another currency.[13] FCM or DCO customers of depository institutions may also have multiple customer segregated accounts in US dollars at the same depository institution. The above text in the 1.20 Proposed Letter would appear to limit the ability of a depository institution to set off amounts between the various customer segregated accounts of a single FCM or DCO, which, in turn, would limit the ability of each customer segregated account to engage in transactions without the FCM or DCO depositing additional buffer amounts in each customer segregated account. In addition, an FCM or DCO is permitted to purchase certain highly liquid securities (such as US Treasury securities) pursuant to Section 1.25 of the CFTC's regulations.[14] Transactions in these securities generally settle versus payment in the course of the business day. If the customer segregated cash account does not have adequate funds available at that time of settlement, absent pre-funding by the FCM or DCO, the depository institution would be required to advance funds for the purchase of the security on the day of settlement (*i.e.*, intraday). The depository institution would likely not be in a position to advance funds since it would not be able to place a lien on a customer segregated safekeeping account to secure the purchase of a permitted investment instrument on behalf of the customer segregated account.

There appears to be confusion in the marketplace as to the way liens and rights to set off are utilized with respect to customer segregated accounts. With respect to the Prior Proposed Rules, certain comment letters focused on prohibiting liens being placed on the customer segregated account to secure the repayment of any obligation of the FCM or DCO (*i.e.*, liens for the benefit of the FCM or DCO in its proprietary capacity).[15] We understand the CFTC's concerns with such liens and rights of set off and

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[13] This limitation could limit a depository's ability to advance funds in one currency to meet margin requirements in various other currencies.

[14] 17 C.F.R. § 1.25.

[15] In the release accompanying the Prior Proposed Rules, the CFTC responded to one comment letter that noted that depository institutions will "frequently contract with an FCM depositor to advance monies to the FCM intraday, with the understanding that the FCM will deposit in the customer segregated account prior to the end of the business day (or by the start of the next business day), sums sufficient to repay the advance." *See* comment letter from Arthur Hahn, Partner at Katten Muchin Rosenman LLP, to Mr. David A. Stawick, Secretary of the CFTC, dated April 8, 2009. This comment letter requested that the CFTC confirm that, "in the event that the FCM fails to repay the advance in a timely manner, or in the event of the FCM's bankruptcy, a [d]epository is entitled to recourse against the customer funds account for the amount of such funds advanced." *Id.* The CFTC responded that it "believes that Section 4d of the [CEA] does not permit such an arrangement because the advance is made to the FCM account holder and Section 4d expressly

agree that such liens should be prohibited. However, the transactions (and related liens and rights to set off) of concern to us, which were discussed in the FRBC Comment Letter and are referenced herein, are entered into by the customer segregated account itself for the benefit of the customers. Furthermore, the funds are actually advanced to the customer segregated account, not to the FCM or DCO to support its proprietary activities.[16] Therefore, because the lien on the customer segregated account secures the repayment of money advanced to the customer segregated account (and not to the FCM or DCO in any proprietary capacity), these arrangements do not conflict with the requirements of Section 4d of the CEA.

We ask that the CFTC confirm in any final version of the 1.20 Proposed Letter that liens on, and the rights to set off between, customer segregated accounts will be permitted to the extent such liens or rights to set off are used to secure the repayment of funds advanced for the benefit of the customers whose funds are in the customer segregated account. To address the foregoing concerns, we respectfully request that the CFTC adopt the following language to be incorporated in any final version of the 1.20 Proposed Letter:

> You further acknowledge and agree that the Funds in the Account(s) shall not be subject to any right of offset or lien for or on account of any indebtedness, obligations or liabilities we (in our proprietary capacity and not for the benefit of our customers whose funds are in the Account(s)) may now or in the future have owing to you. This prohibition does not affect your right to impose a lien with respect to, set off or otherwise recover funds advanced to the Account(s) for the benefit of the customers whose funds are held in the Account(s).

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prohibits "any person, including * * * any depository, that has received any money, securities, or property for deposit in a [customer segregated account], to hold, dispose of, or use any such money, securities, or property as belonging to the depositing [FCM] or any person other than the customers of such [FCM].'" Prior Proposed Rules, 75 Fed. Reg. at 47740.

16 With respect to a lien placed on a customer segregated account to secure the obligations of the customer segregated account, for example, to purchase a U.S. Treasury security (delivery versus payment), funds must be available in the FCM's customer segregated cash account to settle the security transaction. The security will then be delivered into the customer segregated (safekeeping) account. Depository institutions generally will only advance the funds to be placed in the FCM's customer segregated (cash) account that purchases the security if the depository is able to take a lien against the customer segregated (safekeeping) account for the repayment of the funds it advances on behalf of the customer segregated account to purchase the security.

Immediate Release of Funds

With respect to the immediate release of customer segregated funds by the depository institution pursuant to Section 4d of the CEA, the 1.20 Proposed Letter provides the following text:

> You acknowledge and agree that the Funds in the Account(s) shall be released immediately, subject to the requirements of U.S. or non-U.S. law as applicable, upon proper notice and instruction from an appropriate officer or employee of us or from the director of the Division of Clearing and Risk of the CFTC, the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC, or any successor divisions, or such directors' designees.
>
> We will not hold you responsible for acting pursuant to any instruction from the CFTC or the self-regulatory organization upon which you have relied after having taken reasonable measures to assure that such instruction was provided to you by the director of the Division of Clearing and Risk of the CFTC, the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC, or any successor divisions, or such directors' designees, or any appropriate official of a self-regulatory organization of which we are a member.[17]

In the absence of further guidance or clarification, the use of the term "immediately" may subject a depository institution to potential claims by either FCMs, DCOs or the CFTC in the event that there is a delay in the transfer of customer funds, even if such delay is the result of reasonable actions on the part of the depository institution or events beyond the control of the depository institution.

In the release accompanying the Proposed Rules, the CFTC noted that "anything less than the term 'immediate' could leave the timing open to interpretation, which could cause delays in the transfer of funds and have a potential impact on safety and soundness of customer funds and positions."[18] In this regard, the CFTC noted that customer funds in the Segregated Account have always been subject to withdrawal

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17 77 Fed. Reg. at 67942 (emphases added).

18 77 Fed. Reg. at 67885.

immediately upon demand by the FCM or DCO.[19] This statement is not entirely true. Even with respect to demands by the FCM or DCO, withdrawals by the FCM or DCO will always be subject to the terms agreed to between the FCM or DCO and the depository institution, including, without limitation, measures undertaken to verify the withdrawal instructions. Therefore, there may be a period of time between when instructions are received and the execution thereof by the depository institution.

For most depository institutions, an FCM or DCO would be required to follow applicable security policies and procedures in order to initiate a withdrawal of customer funds. Banks are required by law to have policies and procedures in place to ensure the security of transfers of funds. Instructions for the release or transfer of funds in the customer segregated account must be given by an individual that is authorized in advance by the account holder. Certain security procedures must be followed in order for the depository institution to release the funds, including, for example, requiring a second predetermined person to approve the wire of the funds. Any official at the CFTC who would be giving the instructions (or confirming the wire instructions) to release these funds must be authorized individually and, typically, in advance of giving such instructions and would be subject to the depository institution's security policies and procedures.

Furthermore, as mentioned above, instructions to transfer funds must come from an individual with proper security access to the account. Generally, proper security access would include having password (and possibly PIN) access to the account. This access is granted by the account owner (in this case the FCM or DCO) and must be granted in advance of such person giving instructions to transfer any funds. We agree with the CFTC that the CFTC should not have to look to a distressed FCM or DCO for access to transfer funds in the account. Therefore, we recommend that an additional agreement be added to this section of the 1.20 Proposed Letter. The FCM or DCO and each depository institution would agree that the FCM or DCO provides irrevocable direction to the depository institution granting the CFTC account security access in order for the CFTC's staff to instruct the transfer or release of customer segregated funds in a customer segregated account. We have proposed language below that provides for this agreement.

To address the foregoing concerns, we respectfully request that the CFTC adopt the following language to be incorporated in any final version of the 1.20 Proposed Letter:

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[19] *See id.* ("In this regard, the [CFTC] notes that customer funds in the Segregated Account have always been subject to withdrawal immediately upon demand by the FCM.").

> You acknowledge and agree, and we hereby acknowledge and agree, that the CFTC has the irrevocable authority to cause, on an ongoing basis, each of the director of the Division of Clearing and Risk of the CFTC, the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC, or any successor divisions, or such directors' designees as may be specified in written instructions to have proper security access to the account and the authority to effect transactions to, from and in the Account(s), subject to your applicable policies and procedures. You acknowledge and agree that the Funds in the Account(s) shall be released as soon as practicable after you have taken reasonable steps to verify the authority for the instructions, subject to your applicable policies and procedures and the requirements of U.S. or non-U.S. law as applicable, upon proper instruction from any such authorized individual.
>
> We will not hold you responsible for acting pursuant to any instruction from the CFTC or the self-regulatory organization upon which you have relied after having taken reasonable measures to assure that such instruction was provided to you by the director of the Division of Clearing and Risk of the CFTC, the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC, or any successor divisions, or such directors' designees, or any appropriate official of a self-regulatory organization of which we are a member.

Read-only Access

With respect to read-only access to the account balance information of accounts holding customer segregated funds, the 1.20 Proposed Letter provides the following text:

> You further agree that you will provide the CFTC and our designated self-regulatory organization with the necessary software, a user log-in, and password that will allow the CFTC and our designated self-regulatory organization to have read-only access to the accounts listed above on your

> Web site or via an alternative electronic medium on a 24-hour a day basis.[20]

We agree with the CFTC that the CFTC staff and each designated SRO's staff should have ready access to the account balance information of FCMs or DCOs holding customer segregated accounts at a depository institution. We further agree that the CFTC and SRO staffs should have that access directly from the depository institutions and they should not have to rely on the FCM for this information.

As a drafting matter, we note that the FCM or DCO must authorize the depository institution to provide access to the CFTC and each designated SRO. It would be convenient to provide for this authorization in this acknowledgement letter. Therefore, we respectfully ask that the CFTC include such authorization in any final version of the 1.20 Proposed Letter and we have suggested text to this effect below. In addition, the depository institution and CFTC staff would be required to comply with depository institution security policies and procedures when providing access to this information to individual members of the CFTC's staff. Finally, many banks do not provide twenty-four hour access to online account information due to system management constraints.[21] We, therefore, respectfully request that the CFTC acknowledge this fact by not explicitly requiring access to online account information on a "24-hour a day basis."

We note that the CFTC staff has indicated during industry discussions that the CFTC and SROs would require access to both end-of-day and intraday account balance information. Intraday balances are subject to change on a real-time basis, given the number of transactions occurring in the account. Therefore, the intraday account balance information may change immediately after the time it is provided to the CFTC or SROs, especially in the event that there are pending transactions.

To address the foregoing concerns, we respectfully request that the CFTC adopt the following language to be incorporated in any final version of the 1.20 Proposed Letter:

> You further agree that you will provide the CFTC and our designated self-regulatory organization, and we hereby authorize you to provide the CFTC and our designated self-regulatory organization, with access to the account balance

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20 77 Fed. Reg. at 67942 (emphasis added).

21 For example, a bank typically will have to deny access to account balance information during times when information technology systems are subject to maintenance.

information for the Account(s) listed above in a manner reasonably acceptable to the staff of the CFTC and in conformance with applicable law and your applicable security policies and procedures.

* * *

Conclusion

We appreciate the opportunity to comment on the Proposed Rules and the 1.20 Proposed Letter and stand ready to provide any further assistance that may be helpful to the CFTC in its consideration of these issues. Should you have any questions, please feel free to contact Scott Ferris at (312) 461-2665, Kevin T. Murphy at (212) 526-9431, Stephen Brennan at (212) 635-8020 or Frank Perrone at (212) 493-7970.

Sincerely,

Scott M. Ferris
Managing Director
BMO Harris Bank N.A.

Stephen C. Brennan
Managing Director
The Bank of New York Mellon

Kevin T. Murphy
Director
Barclays Bank PLC, New York Branch

Frank A. Perrone
Senior Vice President
Brown Brothers Harriman & Co.

cc: The Hon. Gary Gensler, Chairman
The Hon. Jill E. Sommers, Commissioner
The Hon. Bart Chilton, Commissioner
The Hon. Scott D. O'Malia, Commissioner
The Hon. Mark P. Wetjen, Commissioner
Mr. Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight
Mr. Ananda Radhakrishnan, Director, Division of Clearing and Risk
(Commodity Futures Trading Commission)

(Attachment)

EXHIBIT A: PROPOSED CHANGES TO 1.20 PROPOSED LETTER

[Date]

[Name and Address of Bank, Trust Company, Derivatives Clearing Organization or Futures Commission Merchant]

We refer to the Segregated Account(s) which [Name of Futures Commission Merchant or Derivatives Clearing Organization] (''we'' or ''our'') have opened or will open with [Name of Bank, Trust Company, Derivatives Clearing Organization or Futures Commission Merchant] (''you'' or ''your'') entitled:

[Name of Futures Commission Merchant or Derivatives Clearing Organization] [if applicable, add ''FCM Customer Omnibus Account''] CFTC Regulation 1.20 Customer Segregated Account

Account Number(s): [ ]

You acknowledge and agree that we have opened or will open the above-referenced Account(s) for the purpose of depositing, as applicable, money, securities and other property (collectively the ''Funds'') of our customers who trade commodities, options, swaps, other cleared OTC derivatives products and other products, as required by Commodity Futures Trading Commission (''CFTC'') Regulations, including Regulation 1.20, as amended; that the Funds held by you, hereafter deposited in the Account(s) or accruing to the credit of the Accounts, will be separately accounted for and segregated on your books from our own funds and all other accounts maintained by us in accordance with the provisions of the Commodity Exchange Act, as amended (the ''Act''), and Part 1 of the CFTC's regulations, as amended; and that the Funds must otherwise be treated in accordance with the provisions of the Act and CFTC regulations.

Furthermore, you acknowledge and agree that such Funds may not be used by you or by us to secure or guarantee any obligations that we might owe to you, nor may they be used by us to secure credit from you. You further acknowledge and agree that the Funds in the Account(s) shall not be subject to any right of offset or lien for or on account of any indebtedness, obligations or liabilities we (in our proprietary capacity and not for the benefit of our customers whose funds are in the Account(s)) may now or in the future have owing to you. This prohibition does not affect your right to impose a lien with respect to, set off or otherwise recover funds advanced ~~in the form of cash transfers you make in lieu~~to the Account(s) for the benefit of ~~liquidating non-cash assets~~ the customers whose funds are held in the Account(s~~) for purposes of variation settlement or posting initial (original) margin.~~).

In addition, you agree that the Account(s) may be examined at any reasonable time by an appropriate officer, agent or employee of the CFTC or a self-regulatory organization of which we are a member, and this letter constitutes the authorization and direction of the undersigned to permit any such examination or audit to take place. You agree to respond promptly and directly to requests for confirmation of account balances and other account information from an appropriate officer, agent, or employee of the CFTC or a self-regulatory organization of which we are a member, without further notice to or consent from the futures commission merchant or

derivatives clearing organization, as applicable. You also agree that, immediately upon instruction by the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC or the director of the Division of Clearing and Risk of the CFTC, or any successor divisions, or such directors' designees, or any appropriate official of a self-regulatory organization of which we are a member, you will provide any and all information regarding or related to the Funds or the Accounts as shall be specified in such instruction and as directed in such instruction. You further agree that you will provide the CFTC and our designated self-regulatory organization ~~with the necessary software, a user log-in~~, and ~~password that will allow~~we hereby authorize you to provide the CFTC and our designated self-regulatory organization ~~to have read-only~~ , with access to the ~~accounts~~account balance information for the Account(s) listed above ~~on~~in a manner reasonably acceptable to the staff of the CFTC and in conformance with applicable law and your ~~Web site or via an alternative electronic medium on a 24-hour a day basis~~applicable security policies and procedures.

You acknowledge and agree, and we hereby acknowledge and agree, that the ~~Funds in~~CFTC has the ~~Account(s) shall be released immediately, subject~~irrevocable authority to ~~the requirements of U.S. or non-U.S. law as applicable, upon proper notice and instruction from~~cause, on an ~~appropriate officer or employee of us or from~~ongoing basis, each of the director of the Division of Clearing and Risk of the CFTC, the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC, or any successor divisions, or such directors' designees as may be specified in written instructions to have proper security access to the account and the authority to effect transactions to, from and in the Account(s), subject to your applicable policies and procedures. You acknowledge and agree that the Funds in the Account(s) shall be released as soon as practicable after you have taken reasonable steps to verify the authority for the instructions, subject to your applicable policies and procedures and the requirements of U.S. or non-U.S. law as applicable, upon proper instruction from any such authorized individual.

We will not hold you responsible for acting pursuant to any instruction from the CFTC or the self-regulatory organization upon which you have relied after having taken reasonable measures to assure that such instruction was provided to you by the director of the Division of Clearing and Risk of the CFTC, the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC, or any successor divisions, or such directors' designees, or any appropriate official of a self-regulatory organization of which we are a member.

In the event that we become subject to either a voluntary or involuntary petition for relief under the U.S. Bankruptcy Code, we acknowledge that you will have no obligation to release the Funds held in the Account(s), except upon instruction of the Trustee in Bankruptcy or pursuant to the Order of the respective U.S. Bankruptcy Court. Notwithstanding anything in the foregoing to the contrary, nothing contained herein shall be construed as limiting your right to assert any right of set off against or lien on assets other than assets maintained in the Account(s), nor to impose such charges against us or any proprietary account maintained by us with you. Further, it is understood that amounts represented by checks, drafts or other items shall not be considered to be part of the Account(s) until finally collected. Accordingly, checks, drafts and other items credited to the Account(s) and subsequently dishonored or otherwise returned to you, or reversed, for any reason and any claims relating thereto, including but not limited to claims of alteration or forgery, may be charged back to the Account(s), and we shall be responsible to you as a general

endorser of all such items whether or not actually so endorsed. 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, in the ordinary course of your business as a depository, you have no actual notice of or actual knowledge of~~, or could not reasonably know of,~~ a violation by us of ~~the Act or other~~any provision of ~~law by us~~the Act or the CFTC regulations that relates to the segregation of customer funds; 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. You may, and are hereby authorized to, obey the order, judgment, decree or levy of any court of competent jurisdiction or any governmental agency with jurisdiction, which order, judgment, decree or levy relates in whole or in part to the Account(s). In any event, you shall not be liable by reason of any such action or omission to act, to us or to any other person, firm, association or corporation even if thereafter any such order, decree, judgment or levy shall be reversed, modified, set aside or vacated.

The terms of this letter agreement shall remain binding upon the parties, their successors and assigns, including for the avoidance of doubt, regardless of the change in name of any party. This letter agreement supersedes and replaces any prior agreement between the parties in connection with the Account(s), including but not limited to any prior acknowledgment letter, to the extent that such prior agreement is inconsistent with the terms hereof. In the event of any conflict between this letter agreement and any other agreement between the parties in connection with the Account(s), this letter agreement shall govern with respect to matters specific to Section 4d of the Act and the CFTC's regulations, as amended. This letter agreement shall be governed by and construed in accordance with the laws of [Insert governing law] without regard to the principles of choice of law. Please acknowledge that you agree to abide by the requirements and conditions set forth above by signing and returning the enclosed copy of this letter. You further acknowledge and agree to provide a copy of this fully executed letter directly to the CFTC (via electronic mail to acknowledgmentletters@cftc.gov) and our designated self-regulatory organization.

[Name of Futures Commission Merchant or
Derivatives Clearing Organization]
By:
Print Name:
Title:
ACKNOWLEDGED AND AGREED:
[Name of Bank, Trust Company,
Derivatives Clearing Organization or Futures
Commission Merchant]
By:
Print Name:
Title:
Contact Information: [Insert phone number
and email address]
DATE: