

August 27, 2013

Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, DC 20581

Re: Notice of Proposed Rulemaking – Enhancing Protections Afforded  
Customers and Customer Funds Held by Futures Commission  
Merchants and Derivatives Clearing Organizations (RIN3038-AD88)

ISDA<sup>1</sup> writes once again in respect of the proposed rulemaking referenced above.<sup>2</sup> We have continued our consideration of the proposed amendment to 17 C.F.R. § 22.2(d) that would require a futures commission merchant that operationally commingles cleared swaps customer funds to ensure “at all times” its residual interest in its cleared swaps customer accounts exceed the aggregate margin deficits of its relevant customers (the “Residual Interest Proposal”). Although the comment period has passed, we hope the Commission is open to considering our further thoughts.

#### CEA Section 4d(f)(2)(B) Supports Current Practice, Not the Residual Interest Proposal

Our earlier comments, which we reaffirm, did not focus on the statutory basis for the Residual Interest Proposal. The Commission has stated<sup>3</sup> that the Residual Interest Proposal was necessary to give full effect to the use restriction of CEA section 4d(f)(2)(B). We think, however, that section 4d(f)(2)(B), fairly read, does not require the Residual Interest Proposal because the use restriction cannot apply until customer funds have been received by an FCM upon settlement. Rather, section 4d(f)(2)(B) supports current FCM rules under LSOC.

CEA section 4d(f)(2)(A) requires an FCM to “treat and deal with all money, securities, and property of any swaps customer received to margin, guarantee, or secure a swap cleared by or through a derivatives clearing organization (including money, securities, or property accruing

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<sup>1</sup> Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: [www.isda.org](http://www.isda.org).

<sup>2</sup> ISDA has submitted prior comment letters, dated February 15, 2013 and May 8, 2013, on the proposed rulemaking.

<sup>3</sup> See 77 F.R. 67866, 67895 (adopting the rationale of proposed changes to rules relating to futures) and 77 F.R. 67866, explaining the Commission's view of CEA 4(d)(a)(2), the futures analog to section 4d(f)(2)(B).

to the swaps customer as the result of such a swap) as belonging to the swaps customer.” Subsection (B) (the “use prohibition”) then states, “Money, securities, and property of a swaps customer described in [CEA section 4d(f)(2)(A)] shall be separately accounted for and shall not be commingled with the funds of the futures commission merchant or be used to margin, secure, or guarantee any trades or contracts of any swaps customer or person other than the person for whom the same are held.”

The meaning of subsection B is driven by the meaning of “property ... received” in subsection A. It seems clear that “received” in this context cannot be intended to include variation margin fluctuations pre-settlement because it is only upon settlement that an item of property will have been received by the FCM.

In CFTC Letter No. 12-31, Question 3.1, the CFTC staff elaborated upon the impact of the Part 22 rules on the payment and collection of variation margin. In so doing, the staff stated that it “is only when a settlement cycle<sup>4</sup> completes that variation margin is allocated and credited on a customer-by-customer basis and becomes part of that Cleared Swaps Customer’s Cleared Swaps Collateral.” The staff emphasized that this view was based on the “all ... property that [an FCM or DCO] receives” (emphasis in original) language of rule 22.1, the definition of “Cleared Swaps Customer Collateral”<sup>5</sup> that mirrors the “property ... received” language of subsection (A) of the statute (set out above). The staff also supported its view by reference to the language of rule 22.15 which restricts the use of “collateral required ... and collected.” In essence, the staff established an equivalence between “received” and “collected.”

ISDA’s view, the view expressed in Part 22 itself, and the staff’s previously stated view is that variation margin, pre-settlement, does not constitute property “received”. It therefore is not subject to the use restriction. The Residual Interest Proposal (insofar as it applies to variation margin deficits) would imbed in Part 22 a fundamentally inconsistent rule.

Sincerely,



Robert Pickel

Chief Executive Officer

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<sup>4</sup> We use the term “settlement cycle” to refer to the period of time between when a DCO determines and demands margin payments and the time at which such margin calls must be satisfied by the clearing member FCM.

<sup>5</sup> “Cleared Swaps Customer Collateral” means “all money, securities or other property received by a futures commission merchant or by a derivatives clearing organization from, for or on behalf of a Cleared Swaps Customer ... [i]ntended to ... margin, guarantee or secure a Cleared Swap ... [including] accruals, i.e., all money, securities or other property that a futures commission merchant or derivatives clearing organization receives ... for a Cleared Swaps Customer.”