



Futures Industry Association

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November 20, 2012

Via Email and Hand Delivery

Gary Barnett
Director
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Request for no-action relief from compliance with certain requirements of CFTC regulation 3.3 relating to the form and content of the annual report

Dear Mr. Barnett:

The Futures Industry Association (FIA),¹ on behalf of its futures commission merchant (FCM) member firms, is writing to request no-action relief from certain requirements of section 3.3 of the regulations promulgated by the Commodity Futures Trading Commission (Commission) under the Commodity Exchange Act (Act). FIA respectfully requests that the staff of the Division of Swap Dealer and Intermediary Oversight (Division) provide assurance that it will not recommend that the Commission initiate enforcement action against an FCM for failure to comply with section 3.3 if the written report prepared by the FCM's chief compliance officer (CCO) for a fiscal year ending on or before March 31, 2013 is limited in its scope to addressing compliance with the Commission's customer protection rules in the manner set forth herein. The relief requested would be limited to those FCMs that are currently regulated by a U.S. prudential regulator or are registrants of the Securities and Exchange Commission (SEC), and therefore are subject to the September 30, 2012 compliance date for section 3.3.

Section 3.3 of the Commission's regulations requires the CCO of an FCM to, among other things, (1) prepare and sign a written report that covers the most recently completed fiscal year of the FCM and addresses the issues set forth in the regulation, (2) provide such

¹ FIA is the leading trade organization for the futures, options and over-the-counter cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearinghouses, our member firms play a critical role in the reduction of systemic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions.

FIA's core constituency consists of futures commission merchants, who are the majority of clearing members of the U.S. exchanges, handling more than 90% of the customer funds held for trading on U.S. futures exchanges.

annual report to the FCM's board of directors or senior officer, and (3) furnish the report to the Commission not more than 90 days after the FCM's fiscal year end and simultaneously with the submission of Form 1-FR-FCM, the Financial and Operational Combined Uniform Single Report (FOCUS Report) or the financial condition report pursuant to section 4s(f) of the Act, as applicable. The annual report must meet the requirements set out in section 3.3(e) and include a certification by the FCM's CCO or chief executive officer (CEO) that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the information contained in the annual report is accurate and complete.

The adopting release states that FCMs that were registered with the Commission as of June 4, 2012 and either are currently regulated by a U.S. prudential regulator or are SEC registrants must comply with section 3.3 by September 30, 2012.² However, the Commission has not provided any guidance as to the coverage period for the first annual report or the date by which it must be furnished to the Commission. The National Futures Association (NFA) has advised its members that the first annual report must cover the period from October 1, 2012 through the date of the FCM's fiscal year end and be furnished to the Commission no later than 90 days after the end of such period.³ This would mean that FCMs with fiscal years ending December 31, for example, would be required to furnish a report to the Commission in the first quarter of 2013 covering the period from October 1, 2012 through the end of 2012; FCMs with fiscal years ending March 31 would be required to submit a six-month report in the second quarter of 2013.

As we stated during our telephone conference calls with Frank Fisanich, Chief Counsel of the Division, on October 17, 2012 and with you on November 5, 2012, many FCM CCOs will have difficulty preparing and furnishing to the Commission a report that meets the requirements of section 3.3(e) and (f) by the first or second quarter of 2013. Before September 30, 2012, FCMs were not required to designate a CCO, and consequently, the CCO position is a new role at most FCMs. Many CCOs will have occupied that position for just a few months prior to the time they will be required to prepare the first annual report. Given the broad scope of the requirements for the annual report, CCOs will need time to establish an infrastructure to evaluate the adequacy of the FCM's policies that cover each applicable regulatory requirement, to prepare the annual report, and to ensure that they have appropriate support for the required certification. Moreover, significant new requirements for FCMs have recently become effective, including, for example, new rules relating to segregation of customer funds and secured amounts. Firms need time to develop and test new procedures and controls to comply with these new requirements. Finally, as the Commission implements the clearing requirement by issuing clearing determinations, the mix of products cleared by many FCMs is likely to shift, in some cases, dramatically, towards swaps. Changes to FCMs' policies and procedures will undoubtedly be necessary to deal with the new mix of products and customers and changes to clearinghouse rulebooks. This will also take time. Given the difficulty and impracticability of full compliance

² Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20128, 20166 (April 3, 2012).

³ National Futures Association, Notice I-12-21 (September 14, 2012) (online at <http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4108>).

with section 3.3 by many FCMs, we respectfully submit that the relief requested herein is appropriate and warranted.

You indicated on our November 5th call that, in light of the foregoing concerns, the Division would be willing to consider a request for no-action relief allowing FCMs to submit reports for the current fiscal year that are limited in scope to addressing the Commission's customer protection rules.

We also believe that the requirement that the annual report be furnished to the Commission simultaneously with the submission of any Form 1-FR-FCM or FOCUS Report would be unnecessarily burdensome for FCMs that are also registered with the SEC as securities brokers or dealers (BD). Commission rules require these dually registered FCMs to submit Form 1-FR-FCM or the FOCUS Report no later than the time permitted for BDs to file an annual audit report under the SEC's rules, which is 60 days after the date of the BD's audited financial statements.⁴ Consequently, dually registered FCMs will be required to submit their FCM CCO annual reports within the same timeframe.⁵ We note that the requirements of section 3.3(e) and (f) are very similar to the annual compliance report requirements under numerous self-regulatory organization (SRO) and exchange rules applicable to BDs. In order to comply with the SRO and exchange requirements, dually registered FCMs already have in place sub-certification processes, meetings involving senior executives and other processes that they could use in preparing and supporting the certification of the FCM CCO annual report. Typically, all of these processes take place approximately one month after the time when the same protocol would need to occur in connection with the FCM CCO annual report, if that report is required to be submitted simultaneously with Form 1-FR-FCM or the FOCUS Report.⁶ Extending the filing deadline to 90 days after the fiscal year end would allow dually registered FCMs to realize significant efficiencies in the preparation and certification of these reports.

While we recognize that there are substantial benefits to be had from harmonizing the deadlines for dually registered FCMs to submit reports required under Commission rules with the SEC's deadlines for BDs to file reports containing the same or similar information, we note that the FCM CCO annual report is a compliance report, not an audit or financial report. It contains different types of information, and the processes used in creating it are different from those used in creating an audit or financial report. Hence, the potential for efficiencies resulting from harmonization of its submission deadline with that of the BD annual audit report is limited.

⁴ See 17 C.F.R. §§ 1.10(b)(1)(ii), 1.10(h) and 240.17a-5(d)(5).

⁵ The Commission has issued a rulemaking proposal that would require all FCMs to file Form 1-FR-FCM and the CCO annual report within 60 days after the year-end. *See* Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, Commodity Futures Trading Commission, Notice of Proposed Rulemaking, RIN 3038-AD88 (October 23, 2012).

⁶ For example, Financial Industry Regulatory Authority (FINRA) rule 3130 requires the CEO of each FINRA member to certify annually that the member has in place processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable FINRA rules, Municipal Securities Rulemaking Board (MSRB) rules and federal securities laws and regulations, and that the CEO has conducted one or more meetings with the CCO in the preceding 12 months to discuss such processes. FINRA members must ensure that the annual certification is effected no later than on the anniversary date of the previous year's certification. Most FINRA members obtain this certification from the CEO in mid- or late-March.

We respectfully submit that it would be more appropriate to harmonize this filing deadline with the timing of comparable SRO and exchange compliance report requirements.

Further, while we understand the Commission's desire to obtain information for the full year, we believe that it would be more appropriate to require CCOs only to certify as to the accuracy and completeness of information pertaining to periods after when they took office. Accordingly, we respectfully request that the Division accept an annual report that covers the full year, but includes a certification limited to the time period after the September 30, 2012 compliance date for section 3.3.

In light of the foregoing, we respectfully request that the Division confirm that it will not recommend enforcement action against an FCM for failure to comply with section 3.3 if the written report prepared by the FCM's CCO for a fiscal year ending on or before March 31, 2013 does not satisfy the requirements of section 3.3(e) in their entirety, so long as it satisfies the following requirements, in lieu thereof:

1. The report contains the information outlined in Annex II hereto (including the certification in the appendix).
2. The report covers the full fiscal year of the FCM, but the certification is limited to the period from the October 1, 2012 through the FCM's fiscal year end.
3. The report addresses the Commission's customer protection rules as noted in Annex I hereto. "Customer protection rules" generally include rules pertaining to customer money, securities and property, minimum financial and related reporting requirements and recordkeeping requirements.
4. The report is provided to the FCM's board of directors or senior officer and furnished to the Commission no later than 90 days after the FCM's fiscal year end. In order to permit FCMs that are also broker-dealers to leverage existing infrastructure for the FINRA annual report, there is no requirement that this be done simultaneously with the submission of Form 1-FR-FCM, the FOCUS Report or the financial condition report.

The relief requested would be limited to those FCMs that are currently regulated by a U.S. prudential regulator or are SEC registrants, and therefore are subject to the September 30, 2012 compliance date for section 3.3.

We believe that the granting of relief on this basis is consistent with the purpose and intent of section 3.3, is warranted and appropriate under the circumstances, for the reasons set forth above, will provide the Commission with adequate information regarding each FCM's compliance infrastructure and status and will facilitate the development by the FCMs of systems and procedures that are fully compliant with section 3.3. We therefore respectfully request the confirmation requested above.

Gary Barnett, Director

November 20, 2012

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Thank you for your consideration of this matter. If you have any questions, please do not hesitate to call the undersigned at (202) 466-5460.

Sincerely,

A handwritten signature in cursive script that reads "Barbara B. Wierzynski".

Barbara Wierzynski

General Counsel

Cc: Frank Fisanich, Chief Counsel
Ward Griffin, Assistant Chief Counsel

(Enclosures)

CERTIFICATION AND UNDERTAKING

I hereby (i) certify that the material facts set forth in the attached letter dated November 20, 2012 are true and complete to the best of my knowledge and (ii) undertake to ensure that the Commission staff is informed promptly in writing if at any time prior to issuance of a response to such letter any material representation made in such letter ceases to be true and complete.



Barbara Wierzynski

CUSTOMER PROTECTION RULES

The following sections of the Commission's regulations will be considered customer protection rules for all FCMs: 1.10, 1.11, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 1.18, 1.20, 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, 1.27, 1.28, 1.29, 1.30, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36, 1.37, 1.38, 1.39, 1.49, 1.55, 1.58, 1.68, 30.5, 30.6, 30.7, 30.9 and 33.10.

The following sections of the Commission's regulations will be considered customer protection rules only for FCMs that provide retail foreign exchange services: 5.2, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13, 5.14, 5.15, 5.17 and 5.18.

The following sections of the Commission's regulations will be considered customer protection rules only for FCMs that provide single stock futures: 41.41, 41.42, 41.43, 41.44, 41.45, 41.46, 41.47, 41.48 and 41.49.

FUTURES COMMISSION MERCHANT ANNUAL REPORT

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| 1. Introduction/Executive Summary <ul style="list-style-type: none">• Description of FCM Business, identification of CEO and CCO.• Time Period of Report: Full fiscal year of the FCM (12 months). |
| 2. Policies and Procedures Reasonably Designed to Ensure Compliance with Customer Protection Rules (Appendix 1) <ul style="list-style-type: none">• Identification and description of Customer Protection Policies and Procedures• Assessment of effectiveness of such Policies and Procedures as of the FCM's fiscal year end.• Discussion of areas for improvement of aforementioned Policies and Procedures. |
| 3. Material Noncompliance Issues and Corresponding Actions Taken In Relation to Customer Protection Rules <ul style="list-style-type: none">• Description of material noncompliance issues• Corrective actions |
| 4. [CEO]/Chief Compliance Officer (CCO) Certification(s) |

EXHIBITS:

Appendix 1 : [CEO]/CCO Certification(s)

Appendix 1

Certification

I, _____[Name], do hereby certify as follows:

1. I am the [Chief Compliance Officer][Chief Executive Officer] of [_____], (the "Firm");
and
2. That, to the best of my knowledge and reasonable belief and under penalty of law, the information contained in the attached annual report pertaining to the period from October 1, 2012 through [*fiscal year end*] is accurate and complete.

Signed this ____ day of _____, 20__

[Firm]

[Name]