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COMMENT

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 RECORDS SECTION

OFFICE OF THE SECRETARIAT

November 12, 1999

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 (3)

Ms. Jean A. Webb
 Secretary to the Commission
 Commodity Futures Trading Commission
 1155 21st Street NW
 Washington DC 20581

**Re: Use of Electronic Signatures by Customers,
 Participants and Clients of Registrants, 64 Fed.Reg.
 47151 (August 30, 1999)**

Dear Ms. Webb:

The Futures Industry Association ("FIA") is pleased to submit the following comments on the proposed amendments to the Commodity Futures Trading Commission's ("Commission's") regulations that would allow the use of electronic signatures in lieu of manual signature for certain purposes. FIA, a not-for-profit corporation, is a principal spokesman for the futures industry. Its members include approximately sixty of the largest futures commission merchants ("FCMs") in the United States. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than eighty percent of all customer transactions executed on United States contract markets.

FIA welcomes and strongly supports the Commission's decision to recognize electronic signatures for purposes of complying with those provisions of the Commission's rules that require registrants to obtain signatures from a commodity customer, commodity pool participant or commodity trading advisor client (each, a "customer"). Further, FIA endorses the Commission's determination to adopt as its own the definition of "electronic signature" contained in the *Uniform Electronic Transactions Act*. With the ever-increasing use of electronic communications to engage in all forms of international commerce, including derivatives transactions, a uniform definition of this term is essential. We therefore urge the Commission, following completion of the comment period, to act promptly to confirm the authority of registrants to accept electronic signatures in lieu of manual signatures.

Notwithstanding our support for the essential purpose of the proposed rule, however, FIA respectfully requests that the Commission reconsider the provisions of proposed rule 1.4(a)(i) and (ii), as well as rule 1.4(b).¹ For the reasons explained below, we believe these provisions are unnecessary from a regulatory perspective. More important, they risk creating ambiguity with respect to the rights and obligations of customers and registrants alike.

As the Commission observed in the *Federal Register* release accompanying the proposed rules, neither the Commodity Exchange Act ("Act") nor the Commission's rules currently govern the manner by which registrants and their customers enter into a contractual relationship. This is left to applicable state contract law. Moreover, although the Commission's rules require a customer to receive and, in particular cases, sign certain ancillary documents described in the *Federal Register* release, the Commission has not prescribed the procedures by which a registrant must obtain and retain such signatures.

Similarly, the Commission should not prescribe the procedures by which a registrant obtains and retains a customer's electronic signature. Yet, that is precisely what the Commission is proposing to do in proposed rule 1.4. FIA does not question that an electronic signature should comply with applicable federal law or that a registrant should adopt procedures designed to achieve purposes similar to those set forth in proposed rule 1.4(a)(ii). We simply question why the Commission believes it is necessary to impose such requirements by regulation in these circumstances.²

The Commission's proposal appears to assume that a registrant's regulatory obligations and its obligations to customers that execute documents electronically are somehow greater than or different from a registrant's obligations with respect to customers that manually execute account agreements and related documents. FIA does not agree with this assumption. To the contrary, as we have previously advised the Commission, although technology may change the manner in which registrants and their customers relate to and communicate with each other, it does not alter the fundamental nature of the relationship, or the respective rights and obligations, of the parties.³ FIA is concerned that, by implying a different standard, the proposed rules create regulatory ambiguity and expose registrants to unnecessary legal risk.

¹ As discussed below, the Commission could consider, in the alternative, withdrawing the proposed rule in favor of an advisory simply affirming the authority of registrants to accept electronic signatures.

² In this regard, FIA believes that additional safeguards to "counteract any loss of security that may result from elimination of such vestiges of non-electronic commerce as manual signatures" are unnecessary. Nor does the Commission have cause to prescribe additional safeguards to establish at the outset the identity of the person who will use the identification procedure. These matters should be left to the discretion of registrants to address in accordance with their own supervisory procedures.

³ Letter to Jean A. Webb, Secretary to the Commission, from John M. Damgard, President, Futures Industry Association, dated September 30, 1998, commenting on the Commission's *Concept Release on the Placement of a Foreign Board of Trade's Computer Terminals in the United States*, 63 *Fed.Reg.* 39779 (July 24, 1998).

FIA also opposes proposed rule 1.4(b), which would require a registrant to disclose to a customer that an electronic signature may not be sufficient for purposes of federal or state law. We fail to see the regulatory purpose that is served by providing such disclosure to customers. The various Commission rules that require specific customer acknowledgement, which are described in the *Federal Register* release accompanying the proposed rules, are all designed to protect a customer by assuring that the customer has received specific disclosures or that the customer has specifically authorized certain activities relating to the customer's account. In this regard, therefore, the Commission's rules create regulatory, not contractual, obligations.

The electronic signatures authorized by the proposed rules would satisfy the Commission's regulatory goals just as surely as a manual signature. That some state laws might not recognize electronic signatures for certain purposes in no way undermines the Commission's authority to permit such signatures for purposes of the Commission's regulatory program. The proposed disclosure, however, would undermine a registrant's ability to rely on such signatures by suggesting that a customer might have a basis for disclaiming responsibility for the customer's obligations to the registrant.⁴

Separately, the Commission asks whether the Commission should impose a waiting period before trading can commence if an account has been opened electronically. The purpose of this waiting period would be two-fold. First, it might protect potential customers from "unscrupulous and deceptive sales tactics." Second, it would protect FCMs from additional risks that may result from a customer being able to trade almost immediately. No such waiting period is necessary.

As a general matter, a customer will not be entitled to trade or to purchase a futures contract or an interest in a commodity pool until the FCM or commodity pool operator has conducted a credit, risk or other customer review in accordance with its standard procedures. Moreover, to the extent that certain registrants may engage in unscrupulous sales practices, electronic signatures will not significantly facilitate their conduct. As for protecting FCMs from unscrupulous customers, this simply is not an appropriate regulatory purpose.

The Commission also asks whether the Commission should expressly provide that the rules of a self-regulatory organization ("SRO") must be consistent with the Commission's rules. FIA strongly believes that SROs should defer to the Commission in this regard. The prospect that an electronic signature would be acceptable for purposes of trading on one contract market and not on another is unacceptable. Rulemaking in this regard is unnecessary, however. Instead, FIA would encourage the SROs to coordinate with the Commission on this issue.

⁴ From the registrant's perspective, having presented a customer with an account agreement and related documents for electronic signature, the registrant would be foreclosed from asserting before any legal forum that the registrant would not then bound by the provisions of these documents.

In a recent speech before the Chicago-Kent College of Law Derivative and Commodities Law Institute, Chairman Rainer indicated that the Commission would soon "embark on a process that may result in a major deregulation of the financial futures markets." Although the focus of the Commission's attention apparently will be the exchange markets initially, the Commission should not adopt a contrary position in connection with its regulation of Commission registrants. Consistent with the principles set forth in Chairman Rainer's speech, the Commission's regulations should impose no greater burdens than are necessary to implement the Commission's statutory purpose. In this regard, therefore, FIA respectfully submits that the proposed rule should be significantly revised. As revised, the rule should do no more than define the term "electronic signature" and authorize registrants to accept electronic signatures in lieu of manual signatures. A suggested form of the revised rule is enclosed as Appendix A of this letter.

In the alternative, FIA respectfully suggests that the Commission consider withdrawing the proposed rulemaking and, instead, issuing an advisory. An advisory would provide regulatory certainty for registrants, while assuring the Commission sufficient flexibility to address issues relating to electronic signatures that are certain to arise as the law in this area continues to evolve.⁵ The advisory could simply state:

Certain provisions of the Commission's rules require a registrant, in appropriate circumstances, to obtain from a commodity customer, commodity pool participant or a commodity trading advisor client a document signed by such person. These rules include, but are not limited to, Commission rules 1.55 (Distribution of Risk Disclosure Statement), 1.65 (Bulk Transfers), 30.6 (Foreign Futures and Foreign Options Disclosure), 33.7 (Options Disclosure), 180.3 (Pre-Dispute Arbitration Agreement), 190.6 (Transfers), and 190.10 (Disclosure for Non-Cash Margin), 17 CFR §§1.55, 1.65, 30.6, 33.7, 180.3, 190.6 and 190.10. This advisory is to confirm that a registrant will be deemed to have complied with the signature requirements of these rules if, in lieu of a manual signature, the registrant obtains from such commodity customer, commodity pool participant or a commodity trading advisor client an electronic signature. In this connection, and consistent with the provisions of the *Uniform Electronic Transactions Act*, the term "electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent of signing such record.

⁵ In this connection, FIA notes that on Tuesday, November 9, 1999, the House of Representatives passed a bill designed to assure that electronic signatures would be legally binding. A companion bill is pending in the Senate.

**Futures Industry Association
Proposed Rule Relating to Electronic Signatures**

§1.4 Use of electronic signatures.

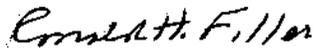
(a) A registrant shall be deemed to have complied with any provision of this Chapter I that requires a registrant to obtain from a commodity customer, commodity pool participant or a commodity trading advisor client a document signed by such person, if such document has been signed by means of an electronic signature.

(b) For purposes of this section 1.4, the term "electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent of signing such record.

Ms. Jean A. Webb
November 12, 1999
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FIA appreciates the opportunity to comment on the proposed rules. If you have any questions regarding this letter, please feel free to contact Barbara Wierzynski, FIA's General Counsel, at (202) 466-5460 or me at (212) 526-0236.

Very truly yours,



Ronald H. Filler
President
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