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David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, DC 20581

COMMENT

Re: RIN 3038-AC66; Revised Adjusted Net Capital Requirements for Futures Commission Merchants and Introducing Brokers, 74 Fed. Reg. 21290 (May 7, 2009)

Dear Mr. Stawick:

The Capital Steering Committee (the "Committee") of SIFMA[1] appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC") proposal regarding proposed changes to the net capital requirements ("the proposal") for futures commission merchants ("FCMs") and introducing brokers ("B/Ds").

Overview

The Committee believes that the lack of any economic analysis offered for the CFTC proposal, and its inconsistency with the general thrust of, and a number of specific recommendations contained in, the Administration's proposal as outlined in the U.S. Treasury's recently released report, *Financial Regulatory Reform: A New Foundation* ("Treasury Report") argues against proceeding further with the proposal. We respectfully suggest that the CFTC refrain from taking action on it until such time as it has undertaken an analysis of the issue and coordinated its actions with the Treasury Report and the anticipated actions arising out of that document.

[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 600 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Below are some general observations on the proposal, followed by our specific responses to a number of questions posed in the release.

General Observations:

- No economic rationale for the substantial increase in capital requirements is provided in the release. We believe that an analysis demonstrating that the current capital requirements are insufficient should be a prelude to any proposal to increase capital requirements so substantially. We believe that such analyses are critical to a productive and informed dialogue between regulators and the industry with respect to the regulatory infrastructure, particularly in the case of determining regulatory capital standards.
- The Committee finds itself unable to take a position regarding the proposal to raise the required minimum dollar amount of adjusted net capital ("ANC") of FCMs from $250,000 to $1,000,000, or to increase the FCM capital requirement from 8 percent of the risk margin for positions in customer accounts and 4 percent of the risk margin for positions in non-customer accounts to 10 percent for both. In the absence of data and an analysis of the impact upon FCMs of the market disturbances of the last year, we are not in a position to know if those numbers are appropriate, too high, or too low.

- From our perspective, the Committee believes that the CFTC's current capital requirements appeared to function well during the Fall of 2008. We understand that the unwinding of Bear Stearns' and Lehman Brothers' futures businesses did not create any significant problems[2], and we know of no instance of an FCM failing during that period as the result of inadequate capital.

- In the current debates about future capital requirements, virtually all regulators have discussed the desirability of creating a "counter-cyclical" capital regime rather than a framework that accentuates market movements.[3] To adopt the current proposal at a point in time when it is premature to conclude that the economy has definitely rebounded and that the financial markets are in a recovery phase, is certainly inconsistent with that goal.

- The Administration has outlined a plan to publish a "fundamental reassessment of existing regulatory capital requirements" by December 31, 2009.[4] Larger FCMs – and their affiliates – are subject to the regulatory requirements of many different

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[2] It is our understanding that capital *per se* was not the primary problem at either Bear Stearns or Lehman Brothers, but instead problems with liquidity and funding. Insofar as the CFTC's proposals concern only minimum capital requirements and do not address either liquidity or funding, if in effect last year they do not seem likely to have had any significant impact in maintaining the solvency of those firms, or to have provided any additional protection for customer assets of their affiliated FCMs.

[3] "We also urge the BCBS to complete an in-depth review of the Basel II framework to mitigate its pro-cyclical effects." Treasury Report, p. 16

[4] Treasury Report, p. 11

domestic and foreign banking, securities, and futures supervisors. As a means of allowing firms to more efficiently plan for the deployment and usage of capital, we respectfully request that the CFTC withhold taking action on the proposal until after the publication of that report.

Specific Responses:

Below are specific responses to various issues contained in the CFTC proposal and the Solicitation of Comments.

Rule 1.17(a)(1)(i)(A) -- Increase in minimum ANC requirement from $250,000 to $1,000,000.

As mentioned above, in the absence of data and an economic analysis, we don't feel we are in a position to offer a firm opinion regarding the appropriateness of the increase. We will note that insofar as the proposing release suggests that the CFTC is significantly concerned by the concentration of customer assets at fewer and fewer firms, as a matter of first impression it would appear that raising the minimum ANC will exacerbate that concern, and drive further consolidation of the futures business.[5]

Rule 1.17(a)(1)(i)(B) Increase in minimum ANC from 8% of customer risk margin requirement plus 4% of non-customer risk margin requirement to 10% of the sum of the two requirements.

The lack of data and an empirical analysis prevents us from taking a definitive view. However, it is clear that a number of regulatory bodies are currently considering proposals that may force financial institutions to review their organizational structure and lines of business. In particular, the Treasury Report has focused attention on OTC derivatives and the harmonization of futures and securities regulation, and calls for stricter capital and liquidity requirements for Tier 1 Financial Holding Companies, a number of which are active participants in the futures markets. We would recommend deferring any substantive revision of Rule 1.17 until more clarity exists regarding potential revisions in the regulatory environment.

Rule 1.17(b)(2-4) and (7-10) -- Revision of definitions of "customer", "proprietary account", "noncustomer account", "customer account", and "risk margin", and addition of definitions of "cleared over the counter derivative positions", and "cleared over the counter customer".

The proposed revisions and additions of definitions appear appropriate given the CFTC's intention to address the clearance of OTC derivatives. That said, the revisions and new

[5] This point would also seem to run counter to some of the findings in the discussion of the "Cost-Benefit Analysis" in the proposing release. In particular, the statement that "The proposed amendments ... should have no effect on the following areas: efficiency, competitiveness or price discovery." While we concede that the CFTC must consider a variety of criteria and concerns in making its decisions, we do not see how quadrupling the minimum required ANC would have *no effect* on those areas.

definitions, and their potential impact on segregated funds and capital adequacy requirements, further suggest the merits of deferring revisions of CFTC Rule 1.17. At this point in time and with the regulatory landscape in such a state of flux, the Committee believes that it is difficult to impossible to estimate the potential impact of the proposed revisions of CFTC Rule 1.17 on those computations. Accordingly, we are unable to offer a definitive view on the appropriateness or relevance of the proposed changes in determining FCMs' capital requirements.

Rule 1.17 (c)(5)(x) -- Revision of definition of ANC to include a requirement for cleared OTC derivative positions.

The Committee believes including proprietary cleared OTC derivative positions in the determination of ANC is appropriate. We note that, as in the case of proprietary futures and granted options positions of FCMs, the CFTC intends to apply to cleared OTC derivative positions a deduction of 100% of the maintenance margin requirements for positions that are cleared by clearing organizations of which an FCM is a member, and a deduction of 150% of the maintenance margin requirements for positions that are cleared by clearing organizations of which an FCM is not a member. Once again, no analysis is supplied in support of this aspect of the proposal. However, given the distinctly different characteristics of listed futures and options on the one hand and OTC derivatives on the other (e.g., differences in liquidity; duration; complexity; etc.) it is not apparent to us that the application of identical requirements to both categories of instruments is necessarily appropriate.

Solicitation of Comments -- The CFTC has asked for comments regarding the "advisability of expanding ANC requirements for FCMs that are also securities brokers and dealers ('FCM/BDs'), by increasing their ANC by the amount of net capital required by SEC Rule 15c3-1(a)." The rationale offered is that "This would help ensure that the FCM/BD's capital requirements reflected more fully the scope of customer activity by both its securities and futures customers."

At the risk of seeming tiresome, we would again point out the lack of any data or factual examination supporting this suggestion. The Committee believes that the transfer and liquidation of clients' futures accounts were not significant issues in the unwinding of Bear Stearns and Lehman Brothers, suggesting that the CFTC's rule set appears to have been effective in preserving futures customers' assets. Additionally, the prevailing view is that consolidating the number of operating entities generally strengthens the risk management and internal controls of a firm. Under that view, regulations should provide an incentive for firms to do so. However, a regulation that would permit no reduction of capital requirements for firms to take actions that improve their risk profile and bolsters controls is militating against prudent management.

And as indicated above, in light of ongoing regulatory proposals in the U.S. and internationally to reassess the overall regulatory framework and capital requirements for financial institutions, it appears to us premature and inopportune for the CFTC to adopt such a proposal acting independently of other U.S. regulators. In particular, we strongly

urge the CFTC to work in close cooperation with the Securities and Exchange Commission in addressing the appropriate capital requirements for entities that are both FCMs and B/Ds. Such cooperation will be even more important if and when additional categories of financial instruments move from trading and clearing on a bilateral basis to other formats.

If there are any questions concerning our observations or if the CFTC wishes the Committee to expand upon them, please do not hesitate to contact me or our Committee staff advisor, Jerry Quinn, of the SIFMA staff. Thank you.

Sincerely,

Daniel McIsaac, Chair
Capital Steering Committee