

disclosure of such information is not required by law.

(b) A party requesting an exemption from public inspection for information submitted in writing shall clearly mark each page "BUSINESS CONFIDENTIAL" at the top, and shall submit a non-confidential summary of the confidential information. Such person shall also provide a written explanation of why the material should be so protected.

(c) A request for exemption of any particular information may be denied if it is determined that such information is not entitled to exemption under law. In the event of such a denial, the information will be returned to the person who submitted it, with a statement of the reasons for the denial.

Bennett M. Harman,

Acting Assistant United States Trade Representative for the Americas.

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 30, and 190

RIN 3038-AB31

Denomination of Customer Funds and Location of Depositories

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is adopting a new Rule 1.49 that permits futures commission merchants and derivatives clearing organizations, under certain conditions, to deposit customer funds in foreign depositories and in certain currencies other than United States dollars. The Commission is also adopting an amendment to Appendix B of its bankruptcy rules that governs the distribution of property where the bankrupt futures commission merchant or derivatives clearing organization maintains customer property in depositories outside the United States or in a foreign currency. This new distributional framework is intended to assure that customers whose funds are held in a United States depository will not be adversely affected by a shortfall in the pool of funds held in a depository outside the United States that is due to the sovereign action of a foreign government or court. The rule replaces Financial and Segregation Interpretation No. 12.

EFFECTIVE DATE: March 6, 2003.

FOR FURTHER INFORMATION CONTACT:

Lawrence B. Patent, Deputy Director, Compliance and Registration Section, or Michael A. Piracci, Attorney-Advisor, Division of Clearing and Intermediary Oversight, and for further information regarding amendments to appendix B of part 190, contact Robert B. Wasserman, Associate Director, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418-5430.

SUPPLEMENTARY INFORMATION:

I. Background

One of the most important functions of the Commodity Exchange Act (the "Act")¹ and the rules thereunder is the protection of customer funds. Section 4d(a)(2) of the Act requires that every futures commission merchant ("FCM"):

Treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such commission merchant or be used to margin or guarantee the trades or contracts, or to secure or extend the credit, of any customer or person other than the one for whom the same are held.

Prior to 1988, the Commission, and its predecessor agency, the Commodity Exchange Authority, had construed this provision to require that customer funds deposited with an FCM relating to trading on a domestic exchange be held in the United States ("U.S."), unless the funds were being held for a foreign-domiciled customer.² In light of the growing internationalization of the futures and options markets, the Commission in 1988 issued Financial and Segregation Interpretation No. 12 ("Interp. 12"),³ which provided that, under certain conditions, an FCM may deposit segregated funds of customers

domiciled in the U.S. in foreign depositories.

As stated above, when the Commission issued Interp. 12, it noted that the change in the Commission's interpretation concerning appropriate depositories for segregated customer funds was appropriate "in light of the growing internationalization of the futures and option markets."⁴ In the more than 14 years since Interp. 12 was issued, the futures and options markets, along with almost all other segments of the business world, have seen greater internationalization. As a result, there is an increased need and desire of certain customers to be able to more easily conduct business in currencies other than the U.S. dollar.

In the Commodity Futures Modernization Act of 2000 (the "CFMA"),⁵ Congress noted that "regulatory impediments to the operation of global interests can compromise the competitiveness of [U.S.] business" and that regulatory policy should be "flexible to account for rapidly changing derivatives industry practices."⁶ Due to restrictions placed on holding segregated funds offshore, U.S. markets and futures professionals may find themselves at a disadvantage to their foreign competitors. One of the purposes of the CFMA is to "enhance the competitive position of [U.S.] financial institutions and financial markets."⁷

Based upon the foregoing, on August 7, 2002, the Commission proposed the rule being adopted herein.⁸ The Commission received two comment letters on the proposed rule. The commenters were the National Futures Association ("NFA"), a registered futures association, and the Futures Industry Association ("FIA"), an industry trade association. Both commenters stated that they supported the proposed rule and amendments, but each suggested certain changes and clarifications that they believed would be appropriate. These suggestions, along with the Commission's assessment of these suggestions, are discussed more fully in conjunction with the discussion of the appropriate section of the rule and amendments.

⁴ *Id.* at 46912.

⁵ Appendix E of Pub. L. 106-554, 114 Stat. 2763 (2000).

⁶ Section 126(a) of the CFMA.

⁷ Section 2(8) of the CFMA.

⁸ 67 FR 52641 (Aug. 13, 2002).

¹ 7 U.S.C. 1 *et seq.* (2000).

² See Commodity Exchange Authority Administrative Determination No. 238 (Sep. 4, 1974); see also Foreign Options and Foreign Futures Transactions, 51 FR 12104, note 36 (Apr. 8, 1986); Leverage Transactions, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. ¶ 21,742 at p. 26,952, note 52 (May 25, 1983).

³ Financial and Segregation Interpretation No. 12—Deposit of Customer Funds in Foreign Depositories, 53 FR 46911 (Nov. 21, 1988). The document was published in the **Federal Register** as a Statement of Agency Interpretation. It was also published in the Commodity Futures Law Reporter at ¶ 7122 together with a series of Financial and Segregation Interpretations issued by the Commission's Division of Trading and Markets.