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NATIONAL FUTURES ASSOCIATION

July 7, 2003

By E-mail (regcomments@fincen.treas.gov)

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, Virginia 22183

Attention: Section 352 CTA Regulations

Dear Sir or Madam:

National Futures Association (NFA), a registered futures association under the Commodity Exchange Act and a self-regulatory organization for the United States Futures Industry, appreciates the opportunity to address the United States Department of Treasury – Financial Crimes Enforcement Network's proposed rulemaking to require certain CTAs to establish anti-money laundering programs. NFA is responsible for overseeing the regulatory requirements for its Commodity Trading Advisor (CTA) Members that are also registered with the Commodity Futures Trading Commission (CFTC).

NFA fully supports FinCEN's continuing efforts in the fight against international money laundering and terrorist financing. NFA, along with the CFTC, has devoted significant resources to establishing anti-money laundering program requirements for futures commission merchants (FCMs) and introducing brokers (IBs) and assessing these firms' compliance with the requirements. NFA stands ready to assist the CFTC and FinCEN in developing and implementing appropriate requirements for CTAs. Our specific comments on the AML program requirements for CTAs are set forth below.

At the outset, NFA would like to emphasize that a CTA's business is distinct from typical financial institutions under the BSA – institutions that accept funds and move money around as part of their services. A CTA's business does not include any type of cash receipt function. A CTA is prohibited under the Commodity Exchange

Act (CEA) from accepting funds or even checks made out to the carrying FCM. As discussed more fully below, a CTA also has very limited, if any, access to detailed information on money movement within a client's account.

NFA agrees with FinCEN's decision to delegate examination authority of these requirements to the CFTC. The CFTC possesses the subject matter expertise over the operations of a CTA and, with NFA's assistance, has the infrastructure and resources needed to carry out the examination function. Moreover, NFA has the staff resources to work with our CTA Members in assisting them in developing and implementing effective anti-money laundering programs.

NFA also fully supports the proposed exemption from these requirements for CTAs that do not direct client accounts. As noted in the proposing release, CTAs that do not direct the trading in client accounts do not have the type of relationship with a client that would provide them with an opportunity to observe behavior or transactions that are indicative of money laundering or terrorist financing. The burden of imposing anti-money laundering program requirements on these CTAs would far outweigh any benefit realized. NFA applauds FinCEN for recognizing this distinction and proposing the appropriate carve out.

NFA also strongly supports the proposal's provision that permits CTAs to exclude from their anti-money laundering program any pooled investment vehicle they advise that is required to have an anti-money laundering program under the Bank Secrecy Act (BSA). NFA fully supports this provision and agrees that it will prevent overlap and redundancy. As discussed more fully below, however, NFA believes that this same logic should be applied to a certain extent to accounts held or carried at a FCMs, which have previously been required to adopt an anti-money laundering program under the BSA.

The proposing release identified a number of areas of vulnerability for a CTA, including checks or wires into the account drawn from third parties, deposits and subsequent withdrawals to third party accounts or accounts in high risk countries and deposits in the form of cash. NFA agrees that each of these examples could be indicative of money laundering or terrorist financing. However, in many instances, a CTA does not have information that would allow it to determine the source or destination of funds or whether any deposits or transfers were unusual. For example, a CTA receives duplicate customer account statements that show the date and amount of wire activity but these do not show any other details regarding wire activity. As a result, as currently proposed, CTAs would have a new obligation to obtain additional

information to monitor cash flows, and FCMs where accounts are held, would have a new obligation to provide detailed cash flow information to CTAs.

Since all CTA client directed accounts are carried at an FCM, placing a responsibility upon CTAs to monitor cash flow activity creates extensive overlap with the obligations of FCMs to monitor this same activity in a customer's account. In fact, NFA's Interpretive Notice for FCM and IB Anti-Money Laundering requirements specifically directs FCMs to give heightened scrutiny to wire transfer activity. In doing so, FCMs are required to monitor for sudden, extensive or unexplained wire activity, transfers to third parties without an apparent business purpose, and transfers to/from certain countries identified as high risk or uncooperative. In fact, NFA recommends that FinCEN clarify that a CTA does not have any direct responsibility for monitoring cash flow activity. A CTA should be able to rely upon the FCM to carry out this responsibility and should not have any obligation to inquire into the FCM's procedures for handling this function. Obviously, however, if a CTA becomes aware of any unusual wire activity in one of its client accounts, it should report this matter to the FCM carrying the account and the appropriate regulatory authority and be protected from civil liability for doing so.

Similarly, the release indicates that CTAs should assess the reasonableness of a customer's frequent additions and withdrawals based on its existing knowledge of a client's personal finances and business operations. In situations where the CTA has the relationship with the customer, NFA agrees that a CTA should carry out this function. In some circumstances, however, a CTA's services are actually marketed to the client by the FCM carrying the account. Again, in this situation, the FCM would have more direct knowledge of those facts.

The proposal indicates that FinCEN is considering whether CTAs should be subject to customer identification and verification requirements. NFA believes that, in those situations where the CTA solicits and/or has the ongoing relationship with the customer, the CTA's anti-money laundering program should have a customer identification and verification component. Moreover, once a CTA adopts the AML compliance program requirements of 31 U.S.C. 5318(h), FCMs should be able to reasonably rely upon CTAs to carry out these functions where the CTA solicits and/or has the ongoing relationship with the customer. In fact, NFA encourages FinCEN to finalize this proposal as soon as possible. CTAs are often the entity with the closest relationship to the customer and FCMs should be able to reasonably rely on the CTA to carry out portions of the Customer Identification Program (CIP) when that is the case. Under the CIP Final Rules, however, an FCM will be able to do this only if the CTA is required to have an AML program under 31 U.S.C. 5318(h). NFA recommends that FinCEN consider permitting FCMs to rely on CTAs while this proposal is being finalized

in those situations where the CTA, due to its ongoing relationship with the customer, is the entity in the best position to handle responsibilities related to customer identification and verification.

Finally, NFA notes that at the same time FinCEN issued proposed rules regarding CTAs, it also proposed a similar rule for investment advisers (IAs). In the IA release, FinCEN excluded smaller, state registered IAs with less than $30 million under management that do not register with the SEC. In proposing this exemption, FinCEN stated "because these excluded firms unlike many 'financial institutions' such as banks or broker-dealers do not accept funds or hold financial assets directly, and have relatively few (or no) assets under management, these firms are unlikely to play a significant role in money laundering."[1] Since the IA exclusion appears to be based on vulnerabilities to money laundering rather than registration status, NFA believes that if FinCEN grants this exclusion to IAs, it should consider whether an exclusion should also be granted to CTAs for certain components – employee training and independent audit – of the required AML program. However, if a CTA is the entity with the closest relationship to the customer, the CTA should be responsible for carrying out portions of the CIP.

In conclusion, FinCEN acknowledges in the proposing release that the proposed rule is designed to give CTAs flexibility to tailor their programs to their specific circumstances. Given the distinct nature of a CTA's business compared to other financial institutions under the BSA (no cash receipt component), this flexibility takes on added importance. NFA encourages FinCEN to recognize that a CTA's AML program may be much more limited in nature than those of other financial institutions under the BSA. NFA also urges FinCEN to give full consideration to industry comment on the proper balancing of responsibilities between FCMs and CTAs.

[1] *See Anti-Money Laundering Programs for Investment Advisers,* 68 FR 23646 at 23,648 (May 5, 2003).

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Thank you for your consideration of NFA's comments on this proposal. If you have any questions, please do not hesitate to contact me at (312) 781-1413 or by e-mail at tsexton@nfa.futures.org or Carol Wooding at (312) 781-1409 or by e-mail at cwooding@nfa.futures.org.

Sincerely,

Thomas W. Sexton
Vice President and General Counsel

cc: Terry Arbit
Patrick McCarty
Edward Riccobene

/nam(Ltrs:Financial Crimes.caw)