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February 13, 2012

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

**Re: Comments on Interpretation of "Actual Delivery"
RIN 3038-AD64**

Dear Mr. Stawick:

We thank the Commodity Futures Trading Commission ("Commission") for the opportunity to provide comments on the proposed Interpretation ("Interpretation") of the term "actual delivery" as contained in section 2(c)(2)(D)(ii)(III)(aa) of the Commodity Exchange Act ("CEA") pursuant to section 742(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").

Some introductory points are appropriate for context. First, the comments that follow are submitted on behalf of dealers ("Companies") in precious metals that sell their products for full price only. The Companies do not sell metals on a leveraged, margined or financed basis. Second, we counsel the Companies on compliance issues involving the Model State Commodity Code ("Code"). The undersigned participated in the drafting and development of the Code. The Companies' comments are submitted from the perspective of businesses that wish to comply with the Code, as well as the new CEA provisions (although the CEA provisions do not apply to the Companies' businesses). It is important to the businesses of the Companies going forward that those concepts the Code and CEA have in common be as coordinated and up-to-date as possible.

"28 Days"

The Companies' first comment concerns the "28 days" component of "actual delivery" that runs throughout the Examples contained in the Interpretation. While a pivotal component of "actual delivery," there was no indication in the Interpretation as to what event started the time period. In Code section 1.04(a)(2), the 28 day period begins with the "payment in good funds of any portion of the purchase price...." by a purchasing customer. Some clarification to that effect

in the Interpretation would provide certainty to the Commission, private business, consumers and the courts, and seems simple enough to specify.

It may benefit interpretation of both Code and CEA provisions to clarify further whether it is the point of payment by the customer or the point of receipt by the vendor that "starts the clock" running. Wire transfers or funds already on account make the distinction somewhat moot. However, in those circumstances where physical delivery of payment by mail, fed ex or some other means is utilized, receipt by the vendor is the preferable point in time to start the "clock."

"Depository"

The Companies' second comment involves the "depository" concept for third party delivery as set forth in Example 2. It appears as if the "depository" provisions of the Interpretation were drawn all but verbatim from section 1.04(a)(2) of the Code (which, in turn, was drafted by state and Commission personnel in 1985). The Companies are not particularly troubled by the "financial institution" or "storage facility licensed or regulated by the United States or any agency thereof" options, although the Companies question whether the "storage facility" option has any utility at all.

That said, the Companies believe that limiting other acceptable depositories to those whose warehouse receipts are recognized for delivery by a Commission-designated contract market is a concept that has long outlived its usefulness. Qualifying depositories on the basis of their issuing warehouse receipts acceptable to a Commission-designated contract market (commodities exchange) may have been a satisfactory guideline in 1985, but no longer. There are not many such depositories, the concept of warehouse receipts was supplanted by electronic records long ago, and the definition excludes both U.S. and non-U.S. depositories that provide equal or even superior safety and are often more desirable to U.S. metals purchasers. Metals dealers in the U.S. and around the globe have responded to the demands of many U.S. customers in non-Code states by providing for delivery to non-U.S. depositories, particularly those in Canada, Australia, the U.K., Switzerland and Germany.

When the Code was adopted, states needed a no-cost, "bright line" test for which depositories could be trusted. They did not have the resources or experience to devise a regimen for determining which depositories should or should not be allowed to act as Code depositories. Further, in 1985, the thought of an offshore depository was frightening. States insisted that the depositories be here in the United States, where they could be audited by regulators and dependable private sector auditors, and that someone else in authority do the selecting.

If they were not then, these notions are today, at a minimum, parochial and quaint. The idea that only U.S. institutions selected by Commission-designated contract markets can be relied upon is simply unfounded. That anything can be accomplished by a regulator inspecting and auditing a depository is unrealistic. Further, it makes little if any sense, for example, that under the draft Interpretation and the Code, while storage at Brinks New York is lawful, storage

at Brinks Zurich is not. It makes even less sense that, under the Interpretation and the Code, storage in government-owned and operated depositories, as in Canada and Australia, is not permissible. The premise may have been valid in 1985; today, it is a relic, and completely unresponsive to the reality of the desires, even demands, of U.S. consumers.

The Companies submit that the truest test for reliability of a depository worldwide is the market itself. Where do those in commerce store their metal? Any audited depository with a record of holdings of at least $1 billion for the past five years should pass the test. Alternatively, or perhaps additionally, depositories in nations with commodities regulators that have in place memoranda of understanding with the Commission should be considered acceptable as well. Finally, it should be noted that, under the Code, depositories designated by the state securities administrator were also included. Given that financial institutions chartered and regulated by state authorities are already incorporated under the Commission definition of "financial institution," depositories authorized by state securities authorities should be granted the same recognition.

The Commission should amend its Interpretation to allow for additional U.S. and non-U.S. storage, as should the Code states. While by no means an exclusive list of potential alternatives for designation, the Companies urge the Commission to adopt broader parameters for permissible depositories that still address most regulatory concerns. It would only compound the problems caused by the current Code provisions for the Commission to embed the current, antiquated concepts in its Interpretation.

Full Price Purchases

As stated previously, the Companies do not offer any leveraging, margined or financed purchases. The Companies are full-price dealers. Notwithstanding this fact, Example 5 gives rise to some concerns and a request for clarification.

Suppose a full-price dealer ("Dealer") holds itself out on the Internet as a seller and purchaser of precious metal, but does not otherwise solicit such purchases or sales. Suppose further that the Dealer takes a purchase order (full price) for gold from a U.S. customer and receives good funds from the customer for the entire amount of the gold purchased. Within 28 days, the Dealer must and will cause gold to be held in the customer's name (in allocated or unallocated storage) at a (qualifying) third party depository and provide (qualifying) title to the customer. Suppose further that, before the expiration of that 28 day period and thus before the Dealer is obligated under the Code (and under the draft Interpretation) to deliver title to the customer and cause the metal to be held in the customer's name at the depository, the price of gold drops or rises, and the customer asks the Dealer to sell the gold he purchased that has yet to be delivered. It is the Dealer's practice to honor such sell orders and repurchase the gold for the price as of the time of the order.

The Companies understand and appreciate the Commission's desire definitively to preclude "Zelener"-type contracts involving any commodity, foreign currency, precious metal or

otherwise. The Companies further understand that a predicate for jurisdiction under CEA section 2(c)(2)(D)(ii)(III)(aa) is that the commodity be sold on a leveraged, margined or financed basis. That qualification alone would appear to exclude the Companies, their businesses and the transactions they effect for customers from Commission jurisdiction generally, and specifically, under the hypothetical setoff transaction described above.

Even so, the Commission made more generalized statements in the Interpretation that it would look "beyond the four corners of contract documents," and employ a "functional approach" in construing arrangements. Further, in Example 5 itself, the Commission warns that "actual delivery" under CEA section 2(c)(2)(D)(ii)(III)(aa) may not have occurred if the goods and title have yet to be delivered to the purchaser even if the transaction constitutes an enforceable obligation of the seller to deliver.

The Companies, metals customers dealing with full-price U.S. dealers, and both U.S. and non-U.S. full-price dealers alike would benefit greatly from assurance from the Commission that Example 5 is not intended to signal that the Commission intends to assert jurisdiction over, and thus prohibit, such a perfectly valid and lawful offset cash transaction under CEA section 2(c)(2)(D)(ii)(III)(aa) as we described above.

It is a modern market reality that dealers may very well provide for delivery of title and depository allocation long before the conclusion of the 28 day period. In such a circumstance, the customer would have good and valid title plus actual possession by means of verifiable third party delivery *before* the end of the 28 day period. In such a case, even under Example 5, with delivery of title and metal, the Commission has no jurisdiction. Once delivery of title and metal is achieved, the offset cash transaction is and must remain perfectly lawful.

Is it the Commission's position that a dealer's accommodation of a customer's request for an offsetting sale received *prior to* delivery of title and depository allocation within 28 days of the customer's purchase will cause the original, full-price purchase to become a prohibited transaction? If so, the Companies must strenuously object.

From the Companies' perspective, such a position is both wrong and inappropriate. It would:

(i) impose an unwarranted burden on the customer seeking to mitigate losses or lock in profits;

(ii) constitute an unfair and retroactive trap for companies otherwise excluded from Commission jurisdiction; and

(iii) be officious and cumbersome, imposing unnecessary time and costs on customers with no complementary benefit or protection.

If the Companies understand the Commission position correctly, to accommodate the customer desiring offset before delivery of title and depository allocation, to be lawful under Example 5, the dealer would be forced to first convey title and cause allocation at a depository in the customer's name for the sole purpose of then immediately having the customer re-convey title and order the depository to reallocate the metal back to the Dealer, all to effect the repurchase. That makes little sense to the Companies.

Further, the Commission elected not to issue any draft interpretation of how it intends to construe CEA section 2(c)(2)(D)(ii)(III)(bb). It appears to the Companies that the offset transaction described would fit comfortably within that exclusion as well. In either case, the Companies urge the Commission to clarify that it does not intend to construe CEA section 2(c)(2)(D)(ii)(III)(aa) as precluding offsetting transactions as described.

Once again, we and the Companies appreciate the Commission's affording us this opportunity to provide comments, and we and they stand ready to address any questions the Commission may have in response.

Respectfully,

Rothgerber Johnson & Lyons LLP

Philip A. Feigin

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