Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street NW
Washington, DC 200581

January 17, 2024

Re: Investment of Customer Funds by Futures Commission Merchants and Derivatives Clearing Organizations RIN No. 3038-AF24

Dear Mr. Kirkpatrick:

The undersigned organizations write with grave concerns on the justification and potentially calamitous precedent contained in the Commodity Futures Trading Commission's (CFTC's) notice of proposed rulemaking for the Investment of Customer Funds by Futures Commission Merchants and Derivatives Clearing Organizations.[1]

The proposed rule would expand the list of permitted investments for customer funds under Regulation 1.25 to include foreign debt instruments of Canada, Japan, and the United Kingdom (along with France and Germany, which were approved in 2018). The expansion of permitted investments could put customers at undue financial risk — avoiding such risk was the rationale for prohibiting these transactions in 2011 after the MF Global meltdown. In addition, the text of the proposed exemption also suggests that revenue and profits of derivatives clearing organizations (DCOs) or futures commission merchants (FCMs) would fulfill the statutory requirement that approved products meet a public interest standard. This distorted interpretation is contrary to the plain language of the statute and sets a potentially dangerous precedent for subsequent determinations of permitted investments of customer funds. The CFTC must not embed revenues and profits of exchanges and brokers into the fabric of its definition of the public interest.

The proposed rule states that the expansion of permissible investments of customer funds is consistent with the public interest purposes of the Commodity Exchange Act because it "may provide more profitable investment options, allowing FCMs and DCOs to generate more income for themselves and their customers."[2] The proposed rule emphasizes that "FCMs and DCOs might have more investment options, some of which might be more profitable than the existing Permitted Investments."[3]

The CFTC did not include the revenues or profits of exchanges or dealers in the 2000 rule that first authorized sovereign debt instruments as fulfilling the public interest purpose.[4] The 2011 final rule that prohibited the investment of customer funds in sovereign debt instruments stated that "the

---

[1] Commodity Futures Trading Commission. Notice of Proposed Rulemaking. Investment of Customer Funds by Futures Commission Merchants and Derivatives Clearing Organizations. 88 Fed. Reg. 223. November 21, 2023 at 81236 et seq.
[2] 88 Fed. Reg. 223 at 81264.
[3] 88 Fed. Reg. 223 at 81267.
[4] CFTC. Final Rules Relating to Intermediaries of Commodity Interest Transactions. 65 Fed. Reg. 240. December 13, 2000 at 7793 et seq.

prohibition on investment in foreign sovereign debt will contribute to financial stability by increasing the safety of [customer] funds" that fulfills the public interest requirement because "the benefits to the public and market participants of this provision are significant."[5]

The intent of the public interest language in the Commodity Exchange Act is not to promote the financial interests of the exchanges or dealers but to protect the public and markets from fraud. The 1992 Futures Trading Act conference report clarified that the public interest includes "the national public interests noted in the Act, the prevention of fraud and the preservation of the financial integrity of the markets, as well as the promotion of responsible economic or financial innovation and fair competition."[6] The public interest purpose of promoting *responsible* innovation and competition cannot hinge on the profits of the exchanges and dealers as their economic interests are not inherently aligned with those of the public. Indeed, the premise that the Commodity Exchange Act's public interest provisions are designed to ensure profits is challenged by the fact that, until fairly recently, most DCOs were structured as not-for-profit entities.

We concur with Commissioner Christy Goldsmith Romero who concluded that the proposed rule could undermine the very purpose of the statute when she stated that:

> We should be very careful about drawing the *dangerous* conclusion that increased profits is a sufficient justification to satisfy the public interest factor. This conclusion could justify granting every requested exemption, which is surely not what Congress had in mind or the message that we should send. It is important to remember that broker and clearinghouse profit is not the goal for the CFTC, the Commodity Exchange Act or the public. Chasing profits could lead to risky investments, potentially putting customer funds at risk.[7]

The CFTC should act with great caution to expand the permitted investments of customer funds that could pose significant risks in foreign sovereign debt markets. The final rule must not entrench the profits of exchanges or dealers as meeting the public interest purpose of the Act. This would create a dangerous precedent that could facilitate the approval of financial products that do not protect consumers from fraud or safeguard the integrity of the markets.

Sincerely,

Americans for Financial Reform Education Fund
Consumer Federation of America
Food & Water Watch
Institute for Agriculture and Trade Policy
Public Citizen

---

[5] CFTC. Final Rule: Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions. 76 Fed. Reg. No. 243. December 19, 2011 at 78796.
[6] H.R. Rep. No. 978, 102d Cong., 2d Sess. 78. 1992. Described in CFTC final Rules Relating to Intermediaries of Commodity Interest Transactions. 65 Fed. Reg. 240. December 13, 2000 at 78007
[7] CFTC Commissioner Christy Goldsmith Romero. "The CFTC's Sacrosanct Responsibility to Safeguard Customer Funds to Protect Customers and Avoid Systemic Risk." November 3, 2023. Emphasis in original.