Commodity Markets Council
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July 11, 2023

Via E-Mail to rule.comments@sec.gov
Securities and Exchange Commission
100 F St, NE
Washington, DC 20549-1090
ATTN: Vanessa A. Countryman, Secretary

Re: SEC Proposal: "Safeguarding Advisory Client Assets";
File Number S7-04-23

Dear Ms. Countryman:

The Commodity Markets Council (CMC) is the leading Washington DC based trade association that brings agriculture and energy traders together with commodity exchanges. Its members include commercial end-users that utilize the futures and swaps markets for agriculture, energy, metal, and soft commodities. Its industry member firms also include regular users and members of swap execution facilities (SEFs) as well as designated contract markets (DCMs), such as the Board of Trade of the City of Chicago, Inc., Chicago Mercantile Exchange Inc. (CME), ICE Futures US, Minneapolis Grain Exchange, and the New York Mercantile Exchange, Inc. Along with these market participants, CMC members also include regulated derivatives exchanges, futures commission merchants (FCMs) and price reporting agencies. The businesses of all CMC members depend upon the efficient and competitive functioning of the risk management products traded on DCMs, SEFs, and over-the-counter (OTC) markets.

CMC has some significant concerns with the Securities and Exchange Commission's (SEC) proposed rule for the custodying of customer assets. The proposed rule would require an investment adviser to implement certain procedures for client's

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physical assets that are both redundant and impractical. We believe that some aspects of this rule are unworkable, unnecessary, and will result in increased costs for clients.

CMC would like to voice its support for certain comments from the Futures Industry Association (FIA), the Managed Funds Association (MFA), and the American Bankers Association (ABA) comment letters on the rule (paraphrased below):

- FCMs are already subject to a comprehensive customer protection regime under applicable law and regulation. This rule would require investment advisors to obtain reasonable assurances in writing from an FCM as qualified custodians, which is redundant or impractical when applied to FCMs, as segregation requirements for FCMs are already addressed by the Commodity Futures Trading Commission (CFTC).
- The expanded scope of the definition of client assets in this rule would restrict client's access to spot markets. Currently, dually registered commodity trading advisors and investment advisers participate in commodity markets through futures contracts and underlying spot markets, but this rule would restrict their clients from accessing spot markets.
- The cost-benefit analysis of lumping FCMs into this rule is flawed. A proper cost-benefit analysis would seek to identify the marginal value of the proposal in view of CFTC rules already applicable to FCMs compared to this proposed rule. This proposal does not take this into account and would impose substantial costs on DCMs, investment advisers, and their respective customers with no benefit to advisory clients or other market participants.
- The independent verification requirement in the rule is unworkable for derivative contracts and commodity trading. Requiring an independent accountant to verify transactions and to receive and give notice of any

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discrepancies would impose significant costs and new complexities which could significantly slow down trading and materially increase the cost of commodities for end-users.

- The SEC lacks the proper authority to enact this rule proposal. The Investment Advisers Act of 1940 contains no provision that delegates to the Commission the authority to alter sensitive aspects of the operations of custody banks, such as balance sheet structure and risk management, and courts have made it clear that an agency cannot indirectly regulate through rules governing private contracts where it lacks the authority to regulate directly.

Thank you for your consideration of our comments.

Sincerely,

Ken Batteh

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