May 7, 2012

VIA ELECTRONIC MAIL

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, NW
Three Lafayette Centre
Washington, DC 20581
http://comments.cftc.gov

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Rule-comments@sec.gov

Re: Identity Theft Red Flag Rules (RIN: 3038-AD14; SEC File No. S7-02-12)

Dear Mr. Stawick and Ms. Murphy:

The Investment Adviser Association[1] welcomes the opportunity to comment on the Securities and Exchange Commission's (SEC) and Commodity Futures Trading Commission's (CFTC) (together the Commissions) joint proposed rules and guidance (Proposed Rule) [2] regarding prevention and detection of identity theft. The Proposed Rule implements section 1088 of the Dodd-Frank Act, which transferred authority over certain parts of the Fair Credit Reporting Act, section 615(e) (FCRA) from the Federal Trade Commission (FTC) to the SEC and CFTC for entities they regulate. We support the Commissions' implementation of the rules and guidance in a manner consistent with the FTC and other agencies' joint rulemakings in this area, with a few technical modifications suggested below.

[1] The Investment Adviser Association is a not-for-profit association that represents the interests of SEC-registered investment adviser firms. Founded in 1937, the IAA's membership consists of more than 500 advisory firms that collectively manage in excess of $10 trillion for a wide variety of individual and institutional investors, including private funds, pension plans, trusts, investment companies, endowments, foundations, and corporations. For more information, please visit our web site: www.investmentadviser.org.

[2] *Identity Theft Red Flag Rules,* 77 Fed. Reg. 13450 (March 6, 2012), *available at* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-5157a.pdf.

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Background

In 2007, the FTC, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration (together "the Agencies") issued joint rules and guidance to implement provisions of the FCRA regarding the detection, prevention, and mitigation of identity theft for entities that were subject to their authority. Because the FCRA did not grant the SEC and CFTC responsibility over the rules at that time, entities otherwise subject to the Commissions' jurisdiction determined whether they fell within the scope of the FTC's rules and, if so, came into compliance with those rules. In 2010, the Dodd-Frank Act amended the FCRA to transfer authority for the identity theft red flag rules to the CFTC and SEC with respect to entities under their respective jurisdictions.

To implement this transfer of authority, the Commissions have now proposed rules that are substantially similar to those adopted by the Agencies. They would require "financial institutions" and "creditors" that offer or maintain "covered accounts" and that fall under the jurisdiction of either the SEC or the CFTC to implement a program to prevent identity theft. The Commissions note that the Proposed Rule would "not contain new requirements not already in the Agencies' final rules, nor would they expand the scope of those rules to include new entities that were not already previously covered by the Agencies' rules." We support this approach and offer a few suggestions below to conform more closely the Commissions' proposed language to the FCRA and the Agencies' rules.

1. Scope section and definition of "financial institution"

The SEC in its proposed "scope" subsection would apply the red flags rules and guidelines to a "financial institution" or "creditor," as defined by the FCRA, that is also a broker-dealer, investment company, or investment adviser registered or required to be registered with the SEC. The SEC explains that these are the entities it regulates that are most likely to qualify as "financial institutions" or "creditors." As the SEC recognizes elsewhere in the proposing release, however, investment advisers are unlikely to be financial institutions or creditors.

Pursuant to FCRA section 603(t), a "financial institution" includes certain banks and credit unions, and "any other person that, directly or indirectly, holds a transaction account belonging to a customer." For these purposes, a "transaction account" means "a deposit or account on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone transfers, or other similar items for the purpose of making payments or transfers to third parties or others."[3]

Investment advisers are not banks or credit unions and do not hold transaction accounts, such as custodial accounts or accounts with check-writing privileges. Instead, any cash or

[3] Federal Reserve Act, section 19(b).

securities managed by investment advisers must be held in custody with financial institutions that are qualified custodians (broker-dealers or banks, primarily). Accordingly, we agree with the SEC's analysis "that most registered investment advisers are unlikely to hold transaction accounts and thus would not qualify as financial institutions."[4] Nonetheless, the SEC indicates that its proposal does not exclude investment advisers or any other entities regulated by the SEC because they "may" hold transaction accounts or otherwise meet the definition of "financial institution."[5] Although the SEC's proposed rule language appropriately would not subject entities that are not otherwise "financial institutions" to the rule requirements, we believe a cleaner approach would be to eliminate investment advisers from the entities specifically mentioned in the scope subsection.

The CFTC's proposed "scope" subsection "applies to financial institutions and creditors that are subject to" the Commission's enforcement jurisdiction under the FCRA. The CFTC proposal is worded to reference the potentially affected entities in the definition of "financial institution" and "creditor" (*i.e.*, "[f]inancial institution has the same meaning as in 15 U.S.C. 1681a(t) and includes any" FCM, CPO, CTA, or other CFTC-regulated entity that "directly or indirectly holds a transaction account belonging to a customer.").[6] We respectfully suggest that the CFTC instead take the approach of simply cross referencing the FCRA definitions of "financial institution" and "creditor." This approach is more consistent with the SEC's and other Agencies' language and permits all of the Agencies' rules automatically to sync should the FCRA definitions change in the future, without the need for further rulemaking.

2. The definition of "creditor"

Under the Proposed Rule, the Commissions propose to define the term "creditor" based on the definition provided in the FCRA. Pursuant to section 615(e)(4),[7] a "creditor" is a person that regularly extends, renews or continues credit, or makes those arrangements that "regularly and in the course of business…advances funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person." The Commissions properly recognize that the FCRA excludes from the definition of "creditor" a person that advances funds on behalf of a person for

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[4] Proposed Rule*,* 77 Fed.Reg.at 13453.

[5] We understand, for example, that an entity dually registered with the SEC as a broker-dealer and investment adviser may be a "financial institution" covered by the rule. However, that entity would already be subject to the red flag rules in its capacity as a broker-dealer. Other than with respect to entities that are registered, and serve, in multiple capacities, we are not aware of circumstances in which an investment adviser as such would hold a transaction account.

[6] CPOs and CTAs are engaged in the business of operating and managing assets for pools, and in the case of CTAs, other clients. They generally do not provide the services and functions of banks, credit unions or other financial intermediaries and do not hold "transaction accounts," and are therefore not "financial institutions" under the FCRA.

[7] FCRA section 615(e)(4) is based on the definition of "creditor" ascribed in the Equal Credit Opportunity Act ("ECOA"), section 702(e).

expenses incidental to a service provided by the creditor to that person.[8] Similarly, the Commissions explain the proposed definition of "creditor" would not include CTAs or investment advisers if they bill in arrears and do not "advance" funds to investors and clients.

The CFTC states that its definition would include certain entities, including CPOs and CTAs, "that regularly extend, renew or continue credit or make those credit arrangements." However, CPOs and CTAs generally do not extend credit. Accordingly, as discussed above, we recommend that the CFTC definition simply cross-reference the FCRA definition of "creditor" as amended by the Red Flag Program Clarification Act of 2010.[9]

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We appreciate the Commissions' consideration of our comments. Please contact me or Paul Glenn, IAA Special Counsel at (202) 293-4222 with any questions regarding these matters.

Respectfully submitted,

Karen L. Barr
General Counsel

cc: The Honorable Gary Gensler, Chairman
The Honorable Jill E. Sommers, Commissioner
The Honorable Bart Chilton, Commissioner
The Honorable Scott D. O'Malia, Commissioner
The Honorable Mark P. Wetjen, Commissioner

The Honorable Mary L. Schapiro, Chairman
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner

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[8] Proposed Rule, 77 Fed. Reg. at 13454.

[9] Pub. L. 111-319 (2010) (inserting new section 4 at the end of section 615(e) of the FCRA).