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January 17, 2024

Mr. Christopher Kirkpatrick
Secretary
US Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Investment of Customer Funds by Futures Commission Merchants and Derivatives Clearing Organizations (RIN 3038–AF24)

Dear Mr. Kirkpatrick:

The Investment Company Institute[1] appreciates the opportunity to comment on the recent amendments proposed by the Commodity Futures Trading Commission (CFTC or "Commission") to its regulations governing the safeguarding and investment of funds deposited by customers to margin futures, foreign futures, and cleared swap transactions ("Customer Funds"). The Proposal primarily would amend Regulation 1.25 under the Commodity Exchange Act (CEA), which specifies permitted investments ("Permitted Investments") by futures commission merchants (FCMs) of Customer Funds and by derivatives clearing organizations (DCOs) of Customer Funds that FCMs post with them as margin for their customers' positions.[2] ICI members—regulated funds[3] ("funds") and their advisers—are customers of FCMs or direct

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $31.9 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.5 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

[2] Investment of Customer Funds by Futures Commission Merchants and Derivatives Clearing Organizations, 88 Fed. Reg. 81236 (Nov. 21, 2023) ("Proposing Release" or "Proposal"), *available at* https://www.govinfo.gov/content/pkg/FR-2023-11-21/pdf/2023-24774.pdf.

[3] The term "regulated fund" refers to both US investment companies, such as mutual funds, ETFs, and other funds regulated under the Investment Company Act of 1940, and non-US regulated funds. "Non-US regulated funds" refers to funds organized or formed outside the US that are substantively regulated to make them eligible for sale to retail investors, such as funds domiciled in the European Union and qualified under the UCITS Directive (EU Directive 2009/65/EC, as amended), Canadian investment funds subject to National Instrument 81-102, and investment funds subject to the Hong Kong Code on Unit Trusts and Mutual Funds.

participants in DCOs. Accordingly, our members have a strong interest in the protection of customer collateral and funds held by FCMs and DCOs. In addition, ICI members manage government money market funds (MMFs) and short-term Treasury exchange-traded funds ("Treasury ETFs"), instruments the Commission proposes to include as Permitted Investments for purposes of Regulation 1.25.

We support including government MMFs and Treasury ETFs as Permitted Investments. These investments are consistent with the regulatory objective of Regulation 1.25 to limit Permitted Investments to safe, short-term investments "consistent with the objectives of preserving principal and maintaining liquidity."[4] We believe, however, that certain of the CFTC's conditions proposed for Treasury ETFs to qualify as Permitted Investments should be broadened to better to achieve Regulation 1.25's regulatory objectives. Further, the proposed concentration limits for both government MMFs and Treasury ETFs, in particular the issuer limitations, are overly restrictive and not properly calibrated to balance the CFTC's underlying policy objectives with potential risk concerns. Collectively, these conditions and limitations would unduly restrict the ability of FCMs and DCOs to utilize government MMFs and Treasury ETFs as Permitted Investments. Our comments below focus on these issues and recommend targeted revisions to Regulation 1.25.

I. Treasury ETFs as Permitted Investments

ICI supports the Proposal, based on the petitions of Invesco and FIA-CME,[5] to include as Permitted Investments under Regulation 1.25 certain Treasury ETFs that satisfy enumerated conditions. We agree with the CFTC that inclusion of Treasury ETFs "would promote responsible economic and financial innovation and fair competition [while being] consistent with the objective of Regulation 1.25 and the public interest[.]"[6] We recommend, however, revisions to certain of the proposed conditions for Treasury ETFs to better reflect SEC regulation of ETFs and existing ETF market structure. These revisions respond to questions raised by the Commission in the Proposing Release and would better accomplish the CFTC's regulatory objectives, including increasing diversification of "high quality collateral" under Regulation 1.25.[7]

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[4] Regulation 1.25(b).

[5] FIA-CME, Petition for Order under Section 4(c) of the Commodity Exchange Act (May 24, 2023), *available at* https://www.cftc.gov/media/9531/FIA_CMEPetition_Regulation125_052423/download; FIA-CME, Supplement to Petition for Order under Section 4(c) of the Commodity Exchange Act (Sept. 22, 2023), *available at* https://www.cftc.gov/media/9536/FIALetterSupplementing_Regulation125_092223/download; and Invesco, Petition for Rulemaking under Commodity Futures Trading Commission Regulation 1.25 (Sept. 28, 2023), *available at* https://www.cftc.gov/media/9541/Invesco_CFTCPetition_Regulation125_092823/download.

[6] Proposing Release at 81264 (internal quotations omitted).

[7] *Id.* at 81248.

A. FCMs and DCOs should not need to be APs

The proposed condition that deviates the most from existing ETF market structure is the requirement for the FCM or DCO to be an authorized participant (AP) of the Treasury ETF. ICI strongly urges the CFTC to revise this condition so that an FCM or DCO may *either* be an AP of the Treasury ETF *or* have entered into an agreement with an AP to execute agency transactions on the FCM's or DCO's behalf. Requiring FCMs and DCOs to become APs of Treasury ETFs would present substantial operational challenges, particularly for DCOs, and could potentially undermine the CFTC's policy goals for the Proposal.[8] In analogous situations, both cited by the CFTC in the Proposing Release, where Treasury ETFs have been granted approval to satisfy regulatory requirements—margin collateral by CME Clearing and net capital calculations by the SEC—AP registration by the market entity holding the ETF shares was not required.[9]

The Commission proposes this condition for two reasons: 1) so that customer funds need not be transferred to a third-party AP, thus allowing customer funds to stay in a segregated account with a permitted depository; and 2) so that the FCM or DCO more readily will be able to complete the redemption and liquidation of the ETF shares within one business day, as required by Regulation 1.25.[10] However, as the Commission acknowledges, these concerns may be addressed through other means. For example, the FCM or DCO could arrange redemptions with an agency AP on a delivery-versus-payment basis so that the ETF shares would not need to be submitted until the cash (or in-kind securities, if allowed) was received by the FCM or DCO.[11] Market-based solutions, such as submitting letters of credit to the AP, alternatively could resolve potential exposure concerns that an AP could have if engaging in redemption transactions before receiving

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[8] As the CFTC seems to acknowledge, there appears to be an open question as to whether DCOs can even be APs. *See id.* at 81252 ("Can DCOs be authorized participants of Qualified ETFs?"). Regarding FCMs, while FCMs can be APs (and many are), some FCMs may take the view that being an AP is not consistent with their business model or they may not want to take on the additional regulatory, compliance, and operational costs of becoming an AP. To the extent DCOs can be APs, the same issues would also apply to DCOs. For example, an AP is typically registered as a broker-dealer. If an FCM or DCO is not already registered as a broker-dealer, the costs associated with FINRA and SEC registration as a broker-dealer may not justify the ability to engage in Treasury ETF transactions as an AP. Further, as an AP, there is also potential underwriter liability, if deemed a statutory underwriter of the ETF, that the FCM or DCO may not want to take on.

[9] *See* CME Advisory Notice, Modifications to Schedule of Acceptable Performance Bond—Addition of Short-Term U.S. Treasury ETFs (Aug. 2, 2022), *available at* https://www.cmegroup.com/content/dam/cmegroup/notices/clearing/2022/08/Chadv22-293.pdf (amending the list of acceptable collateral to include certain Treasury ETFs and requiring, among other conditions, that such ETFs be redeemable by an AP without requiring any specific market participant pledging or holding the collateral to be an AP); SEC No-Action Letter, Net Capital Treatment of Certain US Treasury Exchange-Traded Funds (June 2, 2022), *available at* https://www.sec.gov/divisions/marketreg/mr-noaction/2022/finra-060222-15c3-1.pdf (permitting a broker-dealer to count shares of certain Treasury ETFs towards its net capital requirements so long as, among other conditions, the broker-dealer is merely *able* to redeem the shares of the ETF through an AP without requiring the broker-dealer to *be* an AP).

[10] Proposing Release at 81251.

[11] *Id.*

the ETF shares. Further, with respect to the CFTC's concerns about prompt redemption, ETF market structure is built on assurance of delivery—if delivery is delayed, an FCM or DCO can seek damages from the AP under normal processes. Allowing the FCM or DCO to enter into an agreement with the agency AP, with such agreement containing provisions regarding delivery-versus-payment and ensuring delivery with specified damages if delivery is delayed, would fully address the CFTC's underlying concerns without creating operational challenges for FCMs and DCOs.

B. Treasury ETFs should not be required to redeem in cash

The CFTC should revise its condition that would require Treasury ETFs to redeem in cash to be Permitted Investments. Instead, the CFTC should permit redemptions to be in 1) cash *or* 2) in-kind with a same-day redemption option. A primary advantage of ETFs is that they offer investors more efficient tax treatment. An ETF's ability to redeem shares in-kind permits it to defer tax realization for remaining shareholders in the ETF, thus reducing capital gains payments and related distributions, as compared to redeeming shares for cash. Requiring a Treasury ETF to redeem shares in cash will not only potentially reduce the benefits of deferred tax treatment to a Treasury ETF's shareholders but may limit the potential universe of Treasury ETFs that may constitute Permitted Investments, thus reducing diversification opportunities for FCMs and DCOs.

The CFTC proposes this condition because it is concerned that "in-kind redemptions may introduce a time lag between the redemption of the ETF shares and the ultimate liquidation of the shares, as the assets received in in-kind redemptions would need to be sold or otherwise converted into cash to complete the liquidation of the ETF shares, hindering the ability to liquidate the ETF shares within one business day, as required by Regulation 1.25(b)(1)."[12] While we agree with the CFTC's focus on liquidity, we believe this objective can be addressed through other means. To facilitate next day liquidation of the underlying securities, several ETFs, including several Treasury ETFs,[13] have a T+0 redemption cycle. Under this arrangement, the ETF has flexibility to deliver in-kind securities on the day of the trade so that the securities can be sold the next business day. As noted by the CFTC, CME Clearing allows Treasury ETFs that redeem in-kind to be pledged as performance bond.[14] An additional condition required by CME Clearing is that the ETF offers same-day (T+0) redemptions, which addresses the CFTC's stated

[12] *Id.* at 81251.

[13] *E.g.*, Invesco Short Term Treasury ETF, Prospectus at 4 (December 20, 2023), *available at* https://connect.rightprospectus.com/Invesco/TADF/46138G888/P; and Goldman Sachs Access Treasury 0-1 Year ETF, Statement of Additional Information at B-100 (Dec. 29, 2023), *available at* https://www.gsam.com/bin/gsam/servlets/LiteratureViewerServlet?pdflink=%2Fcontent%2Fdam%2Fgsam%2Fpdfs%2Fus%2Fen%2Fprospectus-and-regulatory%2Fstatement-of-additional-information%2Fetf-combined-access-sai.pdf&RequestURI=/content/gsam/us/en/advisors&sa=n.

[14] CME Advisory Notice, *supra* note 9.

concern in the Proposing Release regarding the T+1 sale of the underlying securities.[15] While Treasury ETFs should have the option to redeem in cash, additional flexibility for Treasury ETFs offering an in-kind T+0 settlement cycle would satisfy the Commission's concerns regarding next day liquidation of the underlying securities while still accomplishing the Commission's policy objectives.

C. The proposed threshold for portfolio investment in eligible US Treasury securities should not require amendment of existing Treasury ETF investment policies or registration statement disclosure and should be expanded to include cash

While ICI does not oppose a portfolio threshold for a Treasury ETF to be a Permitted Investment, it is critical that any final portfolio requirement for eligible Treasury ETFs not unnecessarily require amending the ETF's stated investment policies or registration statement disclosure. Additionally, ICI recommends that any final portfolio requirement for Treasury ETFs be expanded to permit cash in addition to eligible Treasury securities as there may be times when ETFs need flexibility to maintain enhanced cash positions, particularly if offering cash redemptions.

Many ETFs, including certain Treasury ETFs, have adopted an 80% investment policy pursuant to SEC regulations. Rule 35d-1 ("Names Rule") under the Investment Company Act of 1940 ("1940 Act") requires a fund to have adopted a policy "to invest, under normal circumstances, at least 80% of the value of its assets in investments in accordance with the investment focus that the fund's name suggests."[16] Because 80% has been the historical minimum, some Treasury ETFs with names utilizing the word "Treasury" have established an investment policy of investing at least 80% of the ETF's portfolio in Treasury securities. If such an investment policy was adopted as a fundamental investment policy, changing the investment policy would require a shareholder proxy vote, which is costly and burdensome to obtain.

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[15] If the CFTC includes Treasury ETFs providing T+1 cash redemptions as Permitted Investments, it should remove the condition that the ETF be acceptable by a DCO as performance bond. CME Clearing, which is currently the only DCO that allows Treasury ETFs as performance bond, requires that a Treasury ETF offer same-day redemptions, whether the redemption is in-kind or cash. *See* CME Advisory Notice, *supra* note 9. While ICI believes that CME Clearing provides a workable solution for in-kind redemptions by requiring in-kind ETF redemptions to be same day, requiring same-day redemptions for Treasury ETFs redeeming in cash is unnecessarily restrictive.

[16] Rule 35d-1 under the 1940 Act (amended December 10, 2023). Further, prior to the adoption of Rule 6c-11 under the 1940 Act, many index ETF exemptive orders issued by the SEC included a representation that the ETF would invest at least 80% of its assets in component securities of the respective underlying index. *See, e.g.*, American Century ETF Trust, et al., Amended and Restated Application for an Order under Section 6(c) of the Investment Company Act of 1940, File No. 812-14794 (Oct. 31, 2017), *available at* https://www.sec.gov/Archives/edgar/data/52388/000168035917000598/amercentindetf40appa10312017.htm ("Each Fund, or its respective Master Fund, will invest at least 80% of its assets . . . in Component Securities of its respective Underlying Index . . . ."). Many ETFs implemented this requirement into their compliance policies and disclosure documents.

The Commission's proposed portfolio test for Treasury ETFs is not inconsistent with a Treasury ETF having an 80% policy, as the Commission's test would establish a higher threshold for the actual composition of the portfolio.[17] For the avoidance of doubt, we recommend that the CFTC explicitly confirm that it is establishing a portfolio test for a Treasury ETF to be a Permitted Investment, which would not require such Treasury ETF to change any existing investment policy or associated disclosure.[18] Additionally, any final portfolio requirement should include cash as satisfying the threshold, as there may be times when it is beneficial to the ETF, such as during periods of market volatility, to have the flexibility to hold cash, particularly if offering cash redemptions.

D. Redemption exceptions for MMFs under Regulation 1.25(c)(5)(ii) should be extended to Treasury ETFs

Regulation 1.25 currently includes a provision that permits MMFs to postpone redemption and payment under specified circumstances, consistent with Section 22(e) of the 1940 Act and Rule 22e-3 thereunder. We recommend that the CFTC revise this provision to also make postponement of redemption and payment, under the same circumstances, available to Treasury ETFs, as ETFs are equally able to rely on Section 22(e). Many ETFs include disclosure in their registration statements regarding the ability to suspend redemption and payment consistent with Section 22(e). While these circumstances are rare, it is important that, to be consistent with the 1940 Act and ETFs' disclosures, the CFTC expand Regulation 1.25(c)(5)(ii) to include Treasury ETFs.

II. Concentration Limits

The CFTC proposes to limit the scope of MMFs as Permitted Investments to government MMFs, within the meaning of Rule 2a-7 under the 1940 Act, that do not elect to apply a discretionary liquidity fee ("Permitted Government MMFs"). Additionally, the Commission proposes to impose stricter concentration limits on Permitted Government MMFs under the rule and apply the same limits to Treasury ETFs. These proposed concentration limits are overly restrictive, and do not accurately reflect the low risk and high liquidity of Permitted Government MMFs and

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[17] To ensure compliance with the Commission's proposed condition, FCMs and DCOs would be required to monitor the Treasury ETF's portfolio. If the portion of the ETF's assets invested in eligible Treasury securities falls below the threshold, the FCM or DCO would not be permitted to make additional investments of Customer Funds in the ETF.

[18] Even though certain Treasury ETFs may have an 80% minimum investment policy in eligible Treasury securities, portfolio holdings are likely much higher, as there are additional limitations on investments not counting towards the 80% minimum. *See* Investment Company Names, 88 Fed. Reg. 70436, 70465 (Oct. 11, 2023), *available at* https://www.govinfo.gov/content/pkg/FR-2023-10-11/pdf/2023-20793.pdf ("[A] fund that complies with the [80% requirement of the Names Rule] but makes a substantial investment that is 'antithetical' to the fund's investment focus would have a materially deceptive or misleading name . . . . To the extent a fund uses its 20% basket to invest in assets that are materially inconsistent with the investment focus or risk profile reflected by the fund's name, the fund's name would be materially deceptive or misleading under section 35(d).").

Treasury ETFs, especially relative to other Permitted Investments.[19] As discussed further below, we recommend that the Commission revise the issuer-based concentration limits for Permitted Government MMFs and Treasury ETFs to be 25%, consistent with the current concentration limit for US agency obligations. Failing to appropriately calibrate the proposed concentration limits will result in the reduced utility of Permitted Government MMFs and Treasury ETFs for many FCMs and DCOs, especially smaller firms,[20] and will undermine the Commission's stated policy objectives of increasing diversification of Permitted Investments.

A. The proposed 5% issuer limitation on a single Permitted Government MMF or Treasury ETF is arbitrary

Currently, Regulation 1.25 provides that an FCM or DCO may invest up to 100% of the Customer Funds it holds into a single MMF that invests only in US government securities if the MMF has at least $1 billion in assets and a management company that manages at least $25 billion in assets. The Commission proposes to remove this category of MMFs as a Permitted Investment[21] and, instead, only allow Permitted Government MMFs and, with regard to large Permitted Government MMFs, impose an asset-based concentration limit of 50% of Customer

[19] For example, holding a Permitted Government MMF or Treasury ETF offers greater diversification, liquidity, and less idiosyncratic risk than holding a subset of the underlying investments directly. Further, most government MMFs that engage in repurchase transactions have access to the Federal Reserve Bank of New York's Overnight Reverse Repo Facility (ON RRP). *See* Board of Governors of the Federal Reserve System, Monetary Policy--Policy Tools--Overnight Reverse Repurchase Agreement Facility (updated Jan. 3, 2018), *available at* https://www.federalreserve.gov/monetarypolicy/overnight-reverse-repurchase-agreements.htm. Some estimates show that a vast majority of some MMFs' holdings have consisted of repo activity involving the ON RRP. *See* Federal Reserve Bank of Kansas City, Many Money Market Funds Have Invested Heavily In the Fed's Overnight Reverse Repurchase Facility (June 2, 2023), *available at* https://www.kansascityfed.org/research/charting-the-economy/many-money-market-funds-have-invested-heavily-in-the-feds-overnight-reverse-repurchase-facility/.

[20] The CFTC states that diversifying the assets and instruments that can be held as Permitted Investments will "provide potential benefits to FCMs, particularly smaller FCMs, that don't have the internal operations and resources to effectively manage direct investments in other Permitted Investments, such as U.S. government securities, U.S. agency obligations, and municipal securities." Proposing Release at 81264. However, making the issuer limit 5% for Permitted Government MMFs and Treasury ETFs undermines this goal. With an asset-based limit of 50% for Permitted Government MMFs, unless the FCM has the ability and desire to undertake the costly enhancements to its internal operations so it can trade in Treasury securities directly, it is limited to investing in Treasury securities through a Treasury ETF. However, as the CFTC notes, currently only five Treasury ETFs would satisfy the proposed conditions. Proposing Release at 81250 n.180. With a 5% issuer limitation, that would only permit the FCM or DCO to invest 25% of Customer Funds in Treasury ETFs; when combined with Permitted Government MMF investments, that would only cover 75% of Customer Funds. To achieve the CFTC's stated policy goal of alleviating burdens for smaller FCMs that do not have the "internal operations and resources to effectively manage direct investments" in Treasury securities, the CFTC should raise the single issuer concentration limits for Permitted Government MMFs and Treasury ETFs as we recommend.

[21] The CFTC is also proposing to remove prime MMFs from the list of Permitted Investments.

Funds held and a single issuer limit of 5%, with up to 25% per family of issuers.[22] Treasury ETFs would be treated similarly.

The CFTC asserts that its proposed asset-based concentration limit of 50% is "consistent with the concentration limits applicable to U.S. agency obligations, which along with U.S. Treasury securities, are a permitted underlying instrument for Permitted Government MMFs."[23] Given the potential relative risk and liquidity profiles of Permitted Government MMF and Treasury ETF portfolio holdings, ICI does not object to the CFTC's proposal to make the asset-based concentration limits for those instruments consistent with those for US agency obligations. However, in proposing an issuer-based concentration limit, the CFTC does not look to the current concentration limit for US agency obligations, but instead arbitrarily limits investment in a single Permitted Government MMF or Treasury ETF to 5%. We object to the proposed 5% issuer-based concentration limit for Permitted Government MMFs and Treasury ETFs and urge the CFTC to instead adopt a 25% issuer-based concentration limit for these investments, based on reasoning that is consistent with the CFTC's reasoning for its proposed asset-based concentration limits and aligned with the current issuer-based concentration limit for US agency obligations.

B. The Commission's stated concerns regarding Permitted Government MMFs and Treasury ETFs do not support stricter concentration limits

The CFTC's explanation for proposing a 5% issuer-based concentration limit on Permitted Government MMFs is that:

> [it] is concerned that MMFs, like any institution relying on electronic communications, are susceptible to cyber-attacks and operational incidents that may adversely impact their normal operating capabilities, including delaying or otherwise preventing them from processing redemption requests of FCMs and DCOs in a timely manner.[24]

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[22] These limitations would apply to Permitted Government MMFs with $1 billion or more in assets and with a management company having $25 billion or more in assets under management. Smaller Permitted Government MMFs (*i.e.*, those with less than $1 billion in assets or with a management company having under $25 billion in assets under management) would have an asset-based concentration limit of 10%. Single issuer and family concentration limits would be the same for smaller and larger Permitted Government MMFs. Treasury ETFs would be treated similarly. *See* Proposing Release at 81256-59.

[23] *Id.* at 81256. The CFTC reasons that "the scope of underlying instruments in which a [Permitted Government MMF] would be allowed to invest is broader than that of the MMFs currently excluded from the concentration limits" and thus it is appropriate to lower the concentration limit to be consistent with the US agency obligations in which such funds may also invest. *Id.*

[24] *Id.* More generally, the Commission asserts that its "experience administering Regulation 1.25" supports amending the concentration limits as it proposes. *Id.* Beyond the examples discussed below, which are inapposite, the Commission does not provide further support for this assertion.

The Commission cites as support for its concerns no cyber-related incidents involving Permitted Government MMFs but, instead, the cyber attack against ION Cleared Derivatives, a third-party service provider of cleared derivatives order management, order execution, trading, and trade processing that it does not directly regulate.[25] While we agree that cybersecurity is an important concern, it is a concern across the financial services industry for *every* market participant—there is nothing unique in this regard about MMFs and similar concerns may be raised by other Permitted Investments. Further, MMFs and their advisers are subject to SEC regulatory requirements that address these concerns, including requirements for business continuity plans.[26]

As support for the CFTC's concerns regarding potential operational risks that Permitted Government MMFs may pose, it cites the 2008 incident in which the Reserve Primary Fund "broke the buck" when its shares fell from a net asset value of $1.00 to $.97.[27] This example is inapposite as the Reserve Primary Fund was a prime MMF that held a range of privately issued debt in its portfolio, including commercial paper issued by Lehman Brothers. As a prime MMF, that fund would not have satisfied the underlying holding requirements of a Permitted Government MMF.

Government MMFs, as defined in Rule 2a-7 under the 1940 Act, are among the most stable and liquid short-term investments.[28] Under Rule 2a-7, these funds must invest at least 99.5% of their investment portfolio in cash, government securities, and repurchase transactions that are fully collateralized by government securities. The CFTC would further limit MMFs, for purposes of Permitted Investments, to those that do not elect to apply a discretionary liquidity fee under Rule 2a-7. While the scope of investments by Permitted Government MMFs includes US agency

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[25] *Id.* at n.238. We note that Chair Behnam has testified that "[c]urrent law could not have prevented the ION incident," citing concerns about third-party service providers not regulated by the Commission, rather than heavily regulated entities such as registered funds. Testimony of Rostin Behnam Chairman, Commodity Futures Trading Commission, Oversight of the Commodity Futures Trading Commission, US. Senate Committee on Agriculture, Nutrition, & Forestry 4 (Mar. 8, 2023), *available at* https://www.agriculture.senate.gov/imo/media/doc/26f6da8f-fe4d-7d3f-c303-007236f3af30/Senate_Testimony_3-8-2023%20Final.pdf.

[26] The SEC has long taken the view that registrants must have contingency plans to ensure their continued operations in the event of any business outage, including those resulting from a cybersecurity event. *See* Compliance Programs of Investment Companies and Investment Advisers, 68 Fed. Reg. 74714, 74716 (Dec. 24, 2003), *available at* https://www.govinfo.gov/content/pkg/FR-2003-12-24/pdf/03-31544.pdf (requiring that an adviser adopt policies and procedures addressing business continuity plans); *also* Business Continuity Planning for Registered Investment Companies, IM Guidance Update No. 2016-04 (June 2016), *available at* https://www.sec.gov/files/im-guidance-2016-04.pdf ("[Pursuant to Rule 38a-1 under the 1940 Act, in] the staff's view, fund complexes should consider how to mitigate exposures through compliance policies and procedures that address business continuity planning and potential disruptions in services (whether provided internally at the fund complex or externally by a critical third-party service provider) that could affect a fund's ability to continue operations[.]"). Business continuity plans, which often cover cybersecurity incidents, can provide continuity for MMF communications to continue during a business continuity event.

[27] Proposing Release at n.239.

[28] As acknowledged by the Commission, government MMFs under Rule 2a-7 "are less susceptible to runs and have seen inflows during periods of market instability." *Id.* at 81270.

obligations, Permitted Government MMFs are more akin to the "pure" government MMFs currently excluded from concentration limits than to Prime MMFs, which may, consistent with the restrictions of Rule 2a-7, invest in a broader variety of instruments that may include privately issued short-term securities. We agree with the CFTC's assertion, in proposing similar conditions for Treasury ETFs and Permitted Government MMFs, that such ETFs share many characteristics with Permitted Government MMFs,[29] and therefore recommend a 25% issuer-based concentration limit for both Permitted Government MMFs and Treasury ETFs, rather than the 5% the CFTC proposes.

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We appreciate the opportunity to comment on the CFTC's proposal. If you have any questions, please contact Sarah Bessin at sarah.bessin@ici.org, or Kevin Ercoline at kevin.ercoline@ici.org.

Regards,

/s/ Sarah A. Bessin

Sarah A. Bessin
Deputy General Counsel

/s/ Kevin Ercoline

Kevin Ercoline
Assistant General Counsel

cc: The Honorable Rostin Behnam
The Honorable Kristin N. Johnson
The Honorable Christy Goldsmith Romero
The Honorable Summer K. Mersinger
The Honorable Caroline D. Pham

Amanda L. Olear, Director, Market Participants Division

Commodities Futures Trading Commission

[29] *Id.* at 81249 ("The Commission preliminarily believes that to the extent ETFs meet the proposed conditions, the ETFs would be comparable to Permitted Government MMFs whose interests currently qualify as Permitted Investments under Regulation 1.25(a).").