**CHUBB GROUP OF INSURANCE COMPANIES**

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October 9, 2014

**Via E-Mail**
William M. Shea
Vice President
Financial Services Group
Legal & Claims Practice Group
Aon Risk Services Central, Inc.
200 East Randolph Street, 8th Floor
Chicago, IL 60601

RE: Insured: AF Global Corporation ("AF Global")
Policy No.: [redacted] (the "Policy")
Insurer: Federal Insurance Company ("Federal")
Policy Type: Forefront Portfolio 3.0 Policy/Crime Coverage Part
Matter: Fraudulent Request for Transfer of Funds
Ref. No.: [redacted]

Dear Mr. Shea:

Reference is made to your letter dated August 12, 2014, sent in response to my letter of July 7, 2014. Federal has carefully considered the issues raised in your letter and reaffirms its position that AF Global's loss is not covered by the Crime Coverage Section of the Policy issued to AF Global for the reasons previously advised.

Federal disagrees with your contention that Insuring Clause (D): Forgery Coverage is implicated by this matter. Your August 12 letter asserts that "[t]he Forgery by a Third Party in this incident was of a Financial Instrument." Federal is unaware of any authority to support your position that the e-mail you reference qualifies as a **Financial Instrument** (as that term is defined in the Policy). To be a **Financial Instrument**, the subject e-mail must be a check, draft, or a similar written promise, order or direction to pay a sum certain in money that is made, drawn by or drawn upon an **Organization** or by anyone acting as an **Organization**'s agent, or that is purported to have been so made or drawn. Your August 12 letter appears to argue that "[t]he email constituted an order or direction to pay" because Mr. Shapiro's May 21, 2014 e-mail contained wire transfer instructions as to where the funds (apparently discussed in a separate phone conversation between "Mr. Shapiro" and Mr. Wurm) were to be sent. This argument



**EXHIBIT D**

ignores the fact that what defines a **Financial Instrument** under the Policy is not merely the existence of a written promise, order or direction to pay, but a written promise, order or direction to pay that is "similar" to a "check" or "draft". In the context of a commercial crime policy, "checks" and "drafts" are widely understood to be types of negotiable instruments. They represent unconditional written orders or promises to pay a fixed amount of money on demand, or at a definite time, to a payee or bearer, and they can be transferred outside of the maker or drawer's control. The e-mail at issue in this matter -- which is not negotiable -- is in no way similar to these types of instruments. By way of example, Federal's counsel suggested that we refer you to *Vons Companies, Inc. v. Fed. Ins. Co.*, 57 F. Supp. 2d 933, 945 (C.D. Cal. 1998) *aff'd*, 212 F.3d 489 (9th Cir. 2000), particularly at page 945, wherein the Court stated that "coverage requires forgery of certain types of documents. It is not the same to say that the investors' reliance on the legitimacy of the invoices, purchase orders, and wire information is interchangeable with the forgery of a negotiable instrument or its equivalent. [T]he rationale behind making forgery a crime is the need of business to rely on negotiable instruments. [] As a result, the documents have traditionally been those with legal effect, documents that can be 'deposited.' The invoices and other documents here, are not of that type. There can be no doubt, moreover, that the policy unequivocally contemplates documents of the same type and effect as checks and drafts."[1]

Federal also disagrees with your argument that Insuring Clause (E): Computer Fraud Coverage is implicated by this matter. Your August 12 letter asserts that the subject e-mail to Mr. Wurm constitutes "an unauthorized introduction of instructions, programmatic or *otherwise*, which propagate themselves through a **Computer System**." Federal is not aware of any relevant authority to support the position that receipt of the subject e-mail constitutes an "unauthorized introduction of instructions…which propagate themselves through a **Computer System**." Federal's counsel has advised that the June 24, 2011 *Owens Schine* Memorandum of Decision referenced in your letter has no bearing on the present matter. Counsel has indicated that apart from the fact that *Owens Schine* addressed a materially different definition of "Computer Fraud" in an unpublished decision under Connecticut law, your August 12 correspondence also fails to identify that a subsequent Order was issued on or about April 18, 2012 (and entered on the *Owens Schine* docket on or about April 27, 2012) indicating that, among other things, the June 24, 2011 Memorandum of Decision upon which you rely was vacated.

Federal's counsel further advises that Federal's position that the term "unauthorized" in the definition of **Computer Violation** requires a hacking event -- in which someone obtains unauthorized access or entry to a computer -- is supported by a number of recent instructive decisions. In particular, Federal's counsel suggested we refer you to the following cases: *Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 38 Misc. 3d 859 (N.Y. Sup.

[1] In any event, Federal does not concede that the subject e-mail contains a **Forgery** as that term is defined by the Policy.

Ct. 2013), *aff'd*, 110 A.D.3d 434 (1st Dep't, 2013)(which, counsel advises us, at page 434 states that the "plain meaning of defendant's computer systems fraud rider, covering loss from a fraudulent 'entry of electronic data' or 'change of electronic data' within the insured's proprietary computer system, was intended to apply to wrongful acts in manipulation of the computer system, i.e., by hackers, and did not provide coverage for fraudulent content...."), *leave to appeal granted*, 23 N.Y. 3d 904 (2014); *Pestmaster Servs., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 2:13 cv-5039 (JFW MRWX), 2014 WL 3844627 (C.D. Cal. July 17, 2014)(which, counsel advises us, at page *7 indicates that the conduct at issue "does not constitute 'Computer Fraud' as defined by the Policy because the transfer of funds was at all times authorized and did not involve hacking or any unauthorized entry into a computer system"); and *Brightpoint, Inc. v. Zurich Am. Ins. Co.*, 2006 WL 693377 (S.D. Ind. 2006)(which, counsel advises us, at page *7 rejects the insured's argument that "all that is required in terms of [computer fraud] coverage is the use of a computer followed by a theft that is some way connected to the use of the computer").

Federal also maintains that the subject e-mail is not reasonably characterized as "an unauthorized introduction of instructions" -- to the extent that the purported "instructions" were "introduced" via a publicly accessible e-mail in-box. Further, there is no evidence that even suggests that the claimed "instructions" were capable of spreading on their own (i.e., they cannot "propagate themselves"). To the contrary, the facts indicate that the Insured's loss was caused by a social engineering ploy (as to which computer use was, at most, incidental), not "Computer Fraud", as that term is defined in the Policy.

Federal also disagrees with your contention that Insuring Clause (F): Funds Transfer Fraud Coverage is implicated by this matter. In order for the **Funds Transfer Fraud** Coverage to apply, fraudulent instructions to the bank must purport to have been issued by the Insured, but without the Insured's knowledge or consent. In this case, AF Global's proof of loss confirms that the instructions to the bank were in fact issued by AF Global -- not another party purporting to be AF Global -- and the instructions were issued with AF Global's knowledge and consent.

Finally, Federal respectfully disagrees with your conclusory assertion that any of the undefined terms in the Policy are ambiguous.

For the reasons outlined above and in our prior letter dated July 7, 2014, Federal maintains its declination of coverage for the claim submitted by AF Global under the Policy for the period October 31, 2013 to October 31, 2014.

Federal's position is based on the information received to date and is subject to further evaluation if additional information is provided by the Insured. Federal expressly reserves all

rights as provided under the Policy and at law, and neither this letter nor any subsequent investigation or inquiry is to be deemed an admission of liability or a waiver of any such rights.

Should you have any questions or concerns regarding this matter, please feel free to contact me at 412-456-8011 or at *brobbibaro@chubb.com*.

Very truly yours,
Chubb & Son
A division of Federal Insurance Company

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