July 7, 2017

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street NW.
Washington, DC 20581

Re: Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments (RIN 3038-AE56)

Dear Mr. Kirkpatrick:

The Futures Industry Association ("**FIA**")[1] and Securities Industry and Financial Markets Association ("**SIFMA**")[2] are pleased to submit this letter in response to the proposal (the "**Proposal**")[3] by the Commodity Futures Trading Commission ("**Commission**") regarding chief compliance officer ("**CCO**") duties and annual report requirements for futures commission merchants ("**FCMs**"), swap dealers ("**SDs**"), and major swap participants ("**MSPs**") (collectively, "**Registrants**") set forth in Commission Regulations § 3.3 ("**Rule 3.3**"). We support the efforts of the Commission and its staff to review and revise Rule 3.3 with a view to promoting consistency (where appropriate) with parallel requirements adopted by other regulators, reducing undue regulatory burdens, and improving regulatory oversight.

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[1] FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA's member firms play a critical role in the reduction of systemic risk in global financial markets. For more information, visit http://www.fia.org.

[2] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[3] 82 Fed. Reg. 21,330 (May 8, 2017).

These objectives accord with the goal of the Commission's Project KISS initiative to simplify rules in order to make them less costly and less burdensome. Adopting the Proposal with the modifications we set out below would help advance this goal.

As described in greater detail below, we have identified additional steps the Commission should take to align Rule 3.3 with parallel rules adopted by the Securities and Exchange Commission ("**SEC**") for security-based swap ("**SBS**") dealers and major SBS participants (the "**SEC CCO Rule**")[4] and Financial Industry Regulatory Authority ("**FINRA**") for broker-dealers (the "**FINRA Annual Compliance Report Rule**").[5] By taking these steps, the Commission can clarify a CCO's role within a Registrant's overall organization, foster accountability for senior business management and supervisors, and reduce obstacles that Rule 3.3's existing requirements have posed to attracting and retaining highly qualified professionals to serve as CCOs. These steps also would help free up CCOs' compliance resources to do the important work of, among other things, monitoring, testing, and enhancing their compliance programs.

At the same time, the Commission should not harmonize Rule 3.3 with the SEC CCO Rule and FINRA Annual Compliance Report Rule in every respect. In particular, governance-related aspects of Rule 3.3 should take into account the broader range of business models, corporate forms and organizational structures represented among Registrants relative to SBS dealers and broker-dealers.

Also, both existing Rule 3.3 and the SEC CCO Rule present challenges and inconsistencies for Registrants subject to consolidated, group-wide prudential supervision and regulation (including the Volcker Rule). The Proposal provides an opportunity for the Commission instead to make Rule 3.3 consistent with the guidance and regulations applicable to those Registrants.

Further, in conjunction with revising Rule 3.3, the Commission or its staff should make appropriate updates to guidance regarding the rule. We have in particular suggested updates to staff guidance regarding the requirements for a CCO to prepare and sign an annual compliance report ("**CCO Annual Report**"), which are intended to foster consistency with the substance and policy supporting the Proposal's changes to those requirements.

Our comments on these matters are organized as follows. First, we address the duties of CCOs under Rule 3.3(d). Second, we cover the CCO Annual Report requirements in Rule 3.3(e) and (f). Third, we comment on the defined terms used in Rule 3.3, including "senior officer." Fourth, we address the application of Rule 3.3 to the Volcker Rule. Fifth, we address substituted compliance. Finally, we conclude by making suggestions relating to the compliance date for changes to Rule 3.3.

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4 See 17 C.F.R. § 240.15Fk-1.

5 See FINRA Rule 3130.

A. CCO Duties

As the Commission acknowledged when it adopted Rule 3.3, neither the rule nor the Commodity Exchange Act ("**CEA**") requires a CCO to be granted ultimate supervisory authority over a Registrant.[6] Rather, consistent with Commission Regulations §§ 23.602 and 166.3, Registrants typically vest supervisory authority in members of senior business management and business line supervisors. In turn, the CCO and members of the Compliance Department typically: promote a culture of compliance; establish standards designed to satisfy applicable laws and regulations; assist management in the development and review of a Registrant's policies and procedures; support the design and implementation of a Registrant's controls relating to regulatory requirements; assess the effectiveness of those controls in mitigating compliance risk through monitoring, risk assessments, surveillance, and testing; investigate, escalate, and report on non-compliance matters; manage regulatory examinations, inquiries, and other matters; and conduct education and training programs.[7] The CCO and members of the Compliance Department also advise the business and other control units (such as risk management and finance). Where appropriate, these other control units also support Registrants' compliance programs and control environment.

Over the years, the SEC and FINRA have taken steps to clarify the role of CCOs in a manner consistent with this relationship between the Compliance Department and the business and other control units.[8] When it adopted the SEC CCO Rule, the SEC also sought to clarify the role of CCOs in a manner consistent with FINRA standards.[9]

Although the Proposal would incorporate certain aspects of the SEC CCO Rule, it would continue to leave considerable ambiguity about the extent and nature of the CCO's responsibilities. In our members' experience, this ambiguity has made it more difficult to attract and retain highly qualified professionals as CCOs, lest they face liability that outstrips their role and authority within the broader organization. It also clouds accountability for senior business management and business line supervisors, who as first

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6 77 Fed. Reg. 20,128, 20,162 (Apr. 3, 2012).

7 For a more detailed description of the role of the Compliance Department within a financial services firm's compliance risk management framework—a framework that includes roles for all three lines of defenses (i.e., for businesses, control units (including but not limited to the Compliance Department), and the Internal Audit Department), see Board of Governors of the Federal Reserve System, Compliance Risk Management Programs and Oversight at Large Banking Organizations with Complex Compliance Profiles, Supervision and Regulation Letter 08-8 (Oct. 16, 2008) ("**SR 08-8**"); see also SIFMA, The Evolving Role of Compliance (Mar. 2013), available at http://www.sifma.org/issues/item.aspx?id=8589942363.

8 See, e.g., Supplementary Material .05 to FINRA Rule 3130; see also SEC Division of Trading and Markets, Frequently Asked Questions about Liability of Compliance and Legal Personnel at Broker-Dealers under Sections 15(b)(4) and 15(b)(6) of the Exchange Act (Sept. 30, 2013), available at https://www.sec.gov/divisions/marketreg/faq-cco-supervision-093013.htm.

9 See 81 Fed. Reg. 29,960, 30,055 (May 13, 2016).

line of defense "risk owners" that engage in the regulated activity should be primarily responsible for a Registrant's compliance.[10]

To address these issues, the Commission should make the clarifications described below. These clarifications would be consistent with CEA Section 4(k) because they mirror SEC CCO Rule provisions that the SEC found to be consistent with nearly identical statutory provisions of the Securities Exchange Act of 1934.[11]

1. Duty to Administer Compliance Policies and Procedures

The Proposal would amend Rule 3.3(d)(1)'s requirement that the CCO administer each of the Registrant's policies and procedures that are required to be established pursuant to the CEA and Commission regulations by clarifying that this responsibility extends solely to policies and procedures relating to the Registrant's business as an FCM, SD, or MSP, as applicable. We support this clarification, which, as noted by the Commission, tracks the CEA and the SEC CCO Rule.

The Proposal does not, however, define what specific responsibilities a CCO must fulfill to "administer" a Registrant's compliance policies and procedures. In addressing the same question in connection with the SEC CCO Rule, the SEC clarified that a CCO is responsible for:

> "(1) reviewing, evaluating, and advising the [SBS dealer or major SBS participant] and its risk management and compliance personnel on the development, implementation and monitoring of the policies and procedures of the [SBS dealer or major SBS participant], including procedures reasonably designed for the handling, management response, remediation, retesting and resolution of non-compliance issues as required by [the SEC CCO Rule]; and (2) reviewing, evaluating, following and reasonably responding to the development, implementation and monitoring of the [SBS dealer or major SBS participant]'s processes for (a) modifying its policies and procedures as business, regulatory and legislative changes dictate; (b) evidencing supervision by the personnel responsible for the execution of its policies and procedures; (c) testing the [SBS dealer or major SBS participant]'s compliance with, and the adequacy of, its policies and procedures; and (d) resolving, escalating and reporting issues or concerns."[12]

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[10] See, e.g., OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Integration of Regulations, 79 Fed. Reg. 54,518 (Sept. 11, 2014).

[11] See Proposal, 82 Fed. Reg. at 21,331.

[12] 81 Fed. Reg. 29,960, 30,057 (May 13, 2016).

This guidance generally tracks parallel FINRA guidance in connection with the FINRA Annual Compliance Report Rule.

To promote consistency with the SEC CCO Rule and FINRA Annual Compliance Report Rule and eliminate undue ambiguity presented by Rule 3.3, the Commission should adopt the same guidance as the SEC with respect to a CCO's "administration" duty under Rule 3.3(d)(1).

2. Duty to Resolve Conflicts of Interest

The Proposal would amend Rule 3.3(d)(2)'s requirement that the CCO, in consultation with the board of directors or senior officer, resolve any conflict of interest that may arise by clarifying that the CCO must take "reasonable steps" to resolve conflicts. The Proposal also offers guidance that this requirement should not be interpreted to require the CCO personally to resolve every potential conflict of interest that may arise or to require consultation with the board of directors or senior officer in each instance; rather, routinely encountered conflicts could be resolved in the normal course of business, consistent with the CCO's general administration of policies and procedures.[13] Further, the Proposal explains that "reasonable steps" to resolve conflicts of interest would likely include recommendation of actions to resolve the conflict, as well as the escalation and reporting of issues related to resolution, but not executing the business decisions to ultimately resolve the conflict.[14]

We support these clarifications. We agree with the Commission that they would help the CCO deploy his or her resources more effectively by working to resolve conflicts practically and within normal business operations procedures. The clarifications would also appropriately allocate responsibility for resolving conflicts between Compliance and business personnel.

We also recommend that the Commission adopt three additional clarifications relating to Rule 3.3(d)(2). First, consistent with the SEC CCO Rule, the Commission should amend Rule 3.3(d)(2) to cover solely "material" conflicts of interest. As explained by the SEC, adding a materiality qualifier, like adding "reasonable steps" language, helps to clarify the personal responsibility of the CCO in resolving conflicts of interest.[15] Adding this qualifier would thus make the rule text more consistent with the Commission preamble guidance (summarized above) that the CCO is not personally responsible for resolving every conflict of interest that may arise.

In addition, as the Commission has proposed to do in connection with other duties contained in Rule 3.3(d), the Commission should limit the CCO's conflict of interest responsibilities to conflicts of interest that may arise in connection with the Registrant's

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13 Proposal, 82 Fed. Reg. at 21,332.

14 Id.

15 81 Fed. Reg. 29,960, 30,056-57 (May 13, 2016).

business requiring registration as an FCM, SD, or MSP (e.g., swap dealing activity in the case of an SD). Other types of conflicts of interest fall outside the purview of the CCO's responsibilities and expertise.

Finally, the Commission should clarify that "resolution" of a conflict of interest encompasses either negation of the conflict of interest or mitigation of the conflict of interest (e.g., through disclosure, informational barriers or other means). We note that endorsing these mitigation measures would be consistent with the Commission's approach to addressing conflicts of interest in other areas, such as handling confidential counterparty information under Commission Regulations § 23.410(c),[16] disclosures under Commission Regulations § 23.431, and research-related and clearing-related conflicts of interest under Commission Regulations §§ 1.71 and 23.605.

3. Duty to Ensure Compliance

The Proposal would amend Rule 3.3(d)(3)'s requirement that the CCO "take reasonable steps" to ensure compliance with the CEA and Commission regulations relating to the SD's or MSP's swaps activities or to the FCM's business as an FCM by clarifying that this duty includes ensuring that the Registrant establishes, maintains, and reviews written policy and procedures reasonably designed to ensure compliance.

Although this clarification would bring Rule 3.3 into closer alignment with the SEC CCO Rule, important differences between the rules would remain. The SEC CCO Rule does not impose any general obligation on the CCO to "ensure compliance." Instead, the SEC implemented the statutory requirement that the CCO ensure compliance by requiring the CCO to "[t]ake reasonable steps to ensure that the registrant establishes, maintains and reviews written policies and procedures reasonably designed to achieve compliance."[17]

The Commission should modify Rule 3.3(d)(3) likewise to limit this prong of the CCO's duties to taking reasonable steps to ensure that the Registrant establishes, maintains, and reviews policies and procedures reasonably designed to achieve compliance with the CEA and Commission regulations relating to the Registrant's business requiring registration as an FCM, SD or MSP (e.g., swap dealing activity in the case of an SD). Otherwise, the proposed amendment would not accomplish the

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[16] See 77 Fed. Reg. 9,734, 9,754 (Feb. 17, 2012) ("Information barriers can be used to restrict the dissemination of information within a complex organization and to prevent material conflicts by limiting knowledge and coordination of specific business activities among different units of the entity. Examples of information barriers include restrictions on information sharing, limits on types of trading and greater separation between various functions of the firm. Such information barriers have been recognized in the federal securities laws and rules as a means to address or mitigate potential conflicts of interest or other inappropriate activities within an organization").

[17] See 17 C.F.R. § 240.15Fk-1(b)(2).

Commission's objective of addressing uncertainty as to the breadth of a CCO's required authority.

4. Duty to Remediate Noncompliance Issues

The Proposal would amend Rule 3.3(d)(4) and (5)'s requirement that a CCO establish procedures, in consultation with the board of directors or the senior officer, for (1) the remediation of noncompliance issues identified by the CCO and (2) the handling, management response, remediation, testing, and closing of noncompliance issues, by removing the superfluous consultation requirement, clarifying that the policies and procedures be "reasonably designed" to achieve the stated purpose, and including remediation of matters identified "through any means" by the CCO.

We support these changes, which help clarify Rule 3.3 and harmonize it with the SEC CCO Rule. The Commission should, in addition, amend Rules 3.3(d)(4) and (5) to clarify that the CCO's responsibility is to "take reasonable steps to ensure that the registrant" establishes procedures for the remediation of noncompliance issues and the handling, management response, remediation, testing and closing of noncompliance issues. This change is intended to reflect the fact, acknowledged by the Commission (elsewhere in the Proposal) and the SEC, that it is the responsibility of the Registrant, not the CCO in his or her personal capacity, to establish required policies and procedures.[18]

B. CCO Annual Report

1. Description Written Policies and Procedures, Assessment of Effectiveness and Areas for Improvement

The Proposal would amend the requirements in Rule 3.3(e)(1) and (2) by replacing the current requirement that, for each applicable Commission requirement, the CCO Annual Report identify a written policy or procedure ("**WPP**"), assess the WPP, and discuss related areas for improvement, with requirements for a summary of WPPs and detailed discussion of a Registrant's annual assessment and recommended improvements.

We support these proposed amendments to Rule 3.3. As the Commission observes, existing Rule 3.3(e)(2) tends to result in a less substantive, and more rote, discussion of WPPs, assessment of effectiveness, and areas for improvement. In particular, providing the level of rule-by-rule detail required by existing Rule 3.3(e)(2) has consumed an enormous amount of time and resources for CCOs and compliance personnel as they populate rule charts that often include thousands of individual entries corresponding to granular rule requirements. It would promote overall compliance if the CCO and compliance personnel could instead devote attention to issues and WPPs holistically, particularly since many issues affect compliance with multiple rules

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[18] Proposal, 82 Fed. Reg. at 21,333 n.35.

simultaneously and WPPs likewise often address multiple rules applicable to a particular desk, business line, or function.

Further, we assume that, if it adopts the Proposal, the Commission would consider its rulemaking to supersede those aspects of Staff Advisory No. 14-153 ("**Advisory 14-153**")[19] relating to Rule 3.3(e)(2)'s rule-by-rule assessment requirement. These aspects include guidance regarding Rule 3.3(e)(2) itself (e.g., the suggestion that a CCO Annual Report include a chart addressing each applicable Commission requirement) [20] and the guidance that the CCO Annual Report should contain a "second level narrative" under Rule 3.3(e)(1) that includes "a specific description of each WPP," which the staff described as "closely related" to existing Rule 3.3(e)(2).[21]

2. Description of Resources Set Aside for Compliance

The Proposal would amend Rule 3.3(e)(4)'s requirement that the CCO Annual Report contain a description of a Registrant's financial, managerial, operational, and staffing resources set aside for compliance with the CEA and Commission regulations by clarifying that the discussion is limited to resources allocated to the Registrant's business as an FCM, SD, or MSP. We support this clarification, which, as the Commission notes, is consistent with the SEC CCO Rule.

We also recommend that the Commission revise Advisory 14-153's guidance regarding Rule 3.3(e)(4). Advisory 14-153 recommends that the CCO Annual Report's description of resources include specific budget and staff numbers, including partial budget and staff allocations.[22] As with the rule-by-rule descriptions and assessments required under Rule 3.3(e)(2), preparing these numerical estimates also tends to distract from a more holistic analysis of the sufficiency of compliance resources. Also, preparing these numerical estimates can require making somewhat arbitrary assumptions about allocation of shared resources, which reduces the value this information might have for horizontal reviews by the Commission. It is also difficult to make direct comparisons across Registrants based solely on numerical budget or staffing information because of the diverse organizational structures represented among Registrants.

For these reasons, the Commission should make clear that Rule 3.3(e)(4) does not require the CCO Annual Report to contain the specific numerical estimates recommended by Advisory 14-153.

3. Content of the CCO Annual Report Certification

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19 Staff Advisory No. 14-153 (Dec. 22, 2014).

20 Id. at p. 4-7.

21 See id. at p. 4.

22 Id. at p. 7-8.

Consistent with the Commission's overall objective of aligning Rule 3.3 with the SEC CCO Rule, the Commission should amend the certification required by Rule 3.3(f)(3) to include a materiality qualifier, so that the certifier is solely responsible for ensuring that the information contained in the CCO Annual Report is accurate and complete "in all material respects."[23]

This qualifier addresses the concern that the person making the certification should not have to accept liability for immaterial misstatements or omissions in the CCO Annual Report given that, in any reasonably sizable organization, neither the certifier nor the senior-level personnel who might provide sub-certifications will be personally knowledgeable about every detail in the report. In these circumstances, imposing liability for immaterial inaccuracies and omissions has the effect of deterring highly qualified people from taking or staying in the CCO role.

Adding the qualifier should not impede the effectiveness of the CCO Annual Report requirement. In other contexts, materiality qualifiers apply in connection with information furnished to the Commission.[24] The SEC also concluded that adding a materiality qualifier would be appropriate to ensuring effective reporting with respect to compliance.[25] The SEC also did not consider a materiality qualifier to be inconsistent with its parallel statutory mandate.

4. Presentation to the Board of Directors, Senior Officer and Audit Committee

The Proposal would amend Rule 3.3(f)(1), which currently requires delivery of the CCO Annual Report to the Registrant's board of directors or senior officer, instead to require delivery to the board of directors, senior officer, and audit committee. The Commission explains that this amendment would align Rule 3.3(f) with the SEC CCO Rule.[26]

As noted above, however, Registrants represent a broader range of business models, corporate forms, and organizational structures than the SBS dealers subject to the SEC CCO Rule. Many entities that have to register as SBS dealers are stand-alone broker-dealers that are part of larger bank holding companies. In such circumstances, it may make sense for the board of directors of the stand-alone broker-dealer to receive the report, as that board is likely to be much closer to the related activities. In contrast, the board of directors of an SD that is a large, diversified commercial bank is likely to be far more removed from such day-to-day activities. As recently noted by the Treasury Department, "[T]here are over 800 provisions in law, regulation, and agency guidance

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23 See 17 C.F.R. § 240.15Fk-1(c)(2)(ii)(D).

24 See, e.g., CEA § 6(c)(2) (prohibiting a "false or misleading statement of a material fact" to the Commission or omission of "any material fact" (emphases added)).

25 81 Fed. Reg. 29,960, 30,060 (May 13, 2016).

26 Proposal, 82 Fed. Reg. at 21,334.

that impose obligations on bank Boards [and this] volume crowds out time that should be allocated to oversight of the enterprise's business risk and strategy."[27] Amending Rule 3.3 to add yet another board obligation would exacerbate this problem, contrary to the Treasury Department's recommendation to tailor board requirements and restore balance between regulators, the board, and bank management.

In addition, a Registrant's board and audit committee meeting schedule might not provide an opportunity for the board and audit committee to review the CCO Annual Report prior to the deadline for furnishing the CCO Annual Report to the Commission, which is 90 days after the end of the Registrant's fiscal year. The proposed amendments to Rule 3.3(f)(1) would pose additional costs, complexities and, possibly, conflicts for those Registrants.

Also, not every Registrant has a board of directors, much less an audit committee. For example, Registrants that are limited liability companies or limited partnerships often delegate management responsibility to a managing member or general partner, not a board of directors. It is not clear how these Registrants would satisfy amended Rule 3.3(f)(1).

Finally, we note that the CEA does not contain any requirement for who within a Registrant's organization must review the CCO Annual Report prior to a Registrant furnishing it to the Commission, nor are we aware of there being instances where existing Rule 3.3(f)(1) has failed to ensure adequate senior-level oversight of the CCO Annual Report.

For these reasons, the Commission should not adopt its proposal to amend Rule 3.3(f)(1) to require delivery of the CCO Annual Report to a Registrant's board of directors and audit committee in addition to its senior officer. Further, to better address the diverse range of Registrant business models, corporate forms, and organizational structures noted above, the Commission should revise Rule 3.3(f)(1) to permit delivery of the CCO Annual Report to a Registrant's governing body (within the meaning of Commission Regulations § 1.11 (for an FCM) or 23.600 (for an SD or MSP)), in lieu of a board of directors.

If, however, the Commission decides to adopt this proposed amendment, it should similarly clarify that the rule does not require a Registrant to establish a board of directors or audit committee. Rather, a Registrant should be able to satisfy the additional reporting requirements by furnishing its CCO Annual Report to (a) its governing body (within the meaning of Commission Regulations § 1.11 (for an FCM) or 23.600 (for an SD or MSP)), in lieu of a board of directors and (b) the most senior-level, independent

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[27] U.S. Department of Treasury, A Financial System that Creates Economic Opportunities: Banks and Credit Unions (June 2017), at p. 61, available at https://www.treasury.gov/press-center/press-releases/Documents/ A%20Financial%20System.pdf.

internal audit personnel with responsibility for the Registrant's business as an FCM, SD, or MSP, in lieu of an audit committee.

Additionally, if it adopts the proposed Rule 3.3(f)(1) amendments, the Commission should change them to accommodate existing meeting schedules by permitting a Registrant to submit its CCO Annual Report to the Registrant's board of directors and audit committee (or equivalent bodies, as noted above) at the next meetings of the board of directors and audit committee (or equivalent bodies, as noted above) subsequent to furnishing the CCO Annual Report to the Commission.

5. Shared CCO Annual Report Among Affiliates

In many cases, multiple affiliated entities have registered with the Commission as SDs. These entities also often share a common SD compliance program. As a result, often the same information is contained in the CCO Annual Report for each affiliated SD. To streamline preparation and review of CCO Annual Reports in these instances, the Commission should permit (but not require) flexibility in how reports of affiliated SDs address matters common across all the affiliated SDs.

C. Definitions

1. Senior Officer

The Proposal would amend Commission Regulations § 3.1 ("**Rule 3.1**") to define the term "senior officer" to mean "the chief executive officer [("**CEO**")] or other equivalent officer of a [R]egistrant."[28] Although this definition would be consistent with the parallel definition in the SEC CCO Rule,[29] the SEC's definition did not effectively address the different organizational structures present among Registrants, as described immediately below.

a. Application to Registrants Subject to Group-Wide, Consolidated Supervision

For those Registrants that are part of large banking organizations with complex compliance profiles, the Board of Governors of the Federal Reserve System (the "**Fed**") has provided extensive guidance on reporting lines and the need for appropriate oversight throughout the enterprise.[30] The Fed's guidance recommends that the overall organization's group-wide corporate compliance function—not business line management—have "ultimate authority regarding the handling of compliance matters and

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28 See Proposal, 82 Fed. Reg. at 21,331.

29 See id.

30 See, e.g., SR 08-8, supra Note 7.

personnel decisions and actions relating to compliance staff, including retaining control over the budget for, and remuneration of, all compliance staff."[31]

There is tension between the Fed's guidance and Rule 3.3's requirements that a Registrant's board of directors or CEO (or equivalent officer) designate the CCO, approve the CCO's compensation, and remove the CCO. Commission staff have helpfully sought to alleviate this tension by permitting a CCO to have multiple reporting lines,[32] but this guidance could not address the underlying structural tension between the current text of Rule 3.3 and the Fed's guidance. On the other hand, Rule 3.3 and the Fed's guidance share the same underlying goal, which is to promote the independence of compliance staff.

To remove this unnecessary tension, for a Registrant that is subject to group-wide, consolidated supervision with respect to compliance risk, the Commission should define "senior officer" to include a more senior officer within the Registrant's group-wide compliance, risk, legal or other control function who in turn reports to the holding company's board of directors or CEO (or equivalent officer).[33]

We note that we are not advocating to modify the requirement that a Registrant's board of directors (or equivalent body, as noted above) or CEO (or equivalent officer) receive the CCO Annual Report or the requirement that the board of directors (or equivalent body, as noted above) or CEO (or equivalent officer) meet with the CCO annually and at the CCO's election. Instead, we would propose that the Commission retain these interactions between the CCO and senior business management for the Registrant so that management has appropriate oversight of and accountability for compliance. Accordingly, if the Commission adopts our recommendation for defining the term "senior officer" for a Registrant subject to group-wide, consolidated supervision, for clarity it should modify the CCO Annual Report delivery requirement under Rule 3.3(f)(1) and the requirement that the senior officer meet with the CCO annually and at the CCO's election to refer to the Registrant's "CEO or equivalent officer" in lieu of the Registrant's "senior officer."

b. Application to Registrants with Multiple Business Lines

For many Registrants, the FCM or SD business is one of several business lines. For example, many SDs are global banks that, in addition to swap dealing, engage in a diverse range of consumer and commercial lending, corporate treasury, custody, and asset management businesses (among others). Other SDs are predominantly engaged in commercial activities in the agricultural or energy sectors. Many FCMs are dually-registered as broker-dealers and engage in a diverse range of securities market-making,

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31 Id.

32 Staff Advisory No. 16-62 (July 25, 2016).

33 We note that, for some Registrants (such as some foreign banking organizations), the relevant holding company might be an intermediate holding company, not the Registrant's ultimate parent company.

financing, underwriting, brokerage, and private placement businesses in addition to their FCM business.

For these Registrants, the CEO often does not have day-to-day involvement with the SD or FCM business. Requiring the CCO to consult with the CEO introduces unnecessary inefficiencies that can interfere with a CCO's need to obtain prompt and knowledgeable input from the senior officer. To make appropriately informed decisions, the CEO and CCO often need input from less senior business management closer to the FCM or SD business.

Commission staff have sought to address these issues through guidance recognizing that a CCO can, in addition to meeting annually with the board of directors or senior officer, consult more frequently with senior management who have more direct, relevant experience.[34] In our view, it would be appropriate to revise Rule 3.3 to bring it into line with the objectives underlying the staff's guidance. Specifically, the Commission should expand its interpretation of the phrase "other equivalent officer" to include the most senior officer of a Registrant with supervisory responsibility for all of the Registrant's business as an FCM, SD, or MSP, so long as that officer is a "principal" of the Registrant under Rule 3.1(a) and is not also a member of the Registrant's "business trading unit" or "clearing unit," as those terms are defined in Commission Regulations §§ 1.71, 23.600 and 23.605.

This clarification would make a senior officer who is closer to the FCM or SD business directly responsible for meeting with the CCO at least annually and at the CCO's election, receiving the CCO Annual Report and, for a Registrant that is not subject to group-wide, consolidated supervision, designating the CCO, approving the CCO's compensation, and removing the CCO. In so doing, the clarification would promote more effective consultation, supervision and accountability. At the same time, by prohibiting the officer from being a member of the business trading unit or clearing unit, the clarification would ensure that the CCO is independent from undue influence by business line personnel.

This clarification would also be consistent with the Commission's decision to permit the CCO to report to a senior officer of a division of a larger company when that division is registered as an SD pursuant to a limited SD designation.[35] In our view, however, the Commission should not limit this approach to limited purpose SDs. There may be circumstances where, even though a Registrant's SD business spans multiple divisions, its CEO is nonetheless insufficiently close to the Registrant's SD business to effectively perform the role that Rule 3.3 envisions for a senior officer. Also, limited designation is not available for FCMs, even though, as described above, FCMs face many of the same issues as SDs.

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34 Staff Advisory No. 16-62 (July 25, 2016).

35 See Proposal, 82 Fed. Reg. at 21,331.

2. Other Definitions

a. Complaint

Proposed Rule 3.3(d)(4) would require that the CCO be responsible for establishing, maintaining, and revising written policies and procedures reasonably designed to remediate noncompliance issues identified by the CCO through, among other means, a "complaint" that "can be validated."

Rule 3.1 does not define the term "complaint." However, Commission Regulations § 23.200(c) ("**Rule 23.200(c)**") defines that term, for purposes of SD/MSP recordkeeping requirements, to mean "any formal or informal complaint, grievance, criticism, or concern communicated to the [SD] or [MSP] in any format relating to, arising from, or in connection with, any trading conduct or behavior or with the [SD] or [MSP]'s performance (or failure to perform) any of its regulatory obligations, and includes any and all observations, comments, remarks, interpretations, clarifications, notes, and examinations as to such conduct or behavior communicated or documented by the complainant, [SD], or [MSP]."

We request that the Commission make four clarifications relating to this term. First, the Commission should amend the definition in Rule 23.200(c) to limit it to written complaints from a customer or counterparty. Second, the Commission should incorporate the amended Rule 23.200(c) definition by reference into Rule 3.1. In addition, the Commission should clarify that the complaint must reasonably relate to the performance of the Registrant's regulatory obligations rather than complaints from customers or counterparties related to commercial issues (e.g., for this purpose, a "complaint" should not include a concern that a counterparty did not receive as favorable a price as it did for its last transaction with an SD or that a counterparty's favorite coverage banker was not available to take part in a transaction). Finally, the Commission should add a definition to Rule 3.1 for a "complaint that can be validated," which should be defined as a "complaint that can be supported upon reasonable investigation."

These clarifications would help align the Commission's rules with the SEC CCO Rule, which defines a "complaint that can be validated" as a "written complaint by a counterparty involving the [SBS] dealer or major [SBS] participant or associated person of a [SBS] dealer or major [SBS] participant that can be supported upon reasonable investigation."[36] They also would provide a more objective test for the types of matters that require recordation and escalation to the CCO. Finally, the clarifications would be consistent with the requirement in Commission Regulations § 23.201(b)(3)(ii) that an SD or MSP provide each counterparty with an address to which it can direct complaints, which suggests that the Commission intends for complaints to be made in writing by counterparties.

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[36] See 17 C.F.R. § 240.15Fk-1(e)(3). FINRA Rule 4530 similarly addresses only written complaints from customers.

b. Material Noncompliance Issue

Proposed Rule 3.3(e)(5) requires the CCO Annual Report to contain a description of any material noncompliance issues identified and the corresponding action taken. Rule 3.1 does not define the term "material noncompliance issue," and Commission staff have previously advised that a Registrant should itself decide and explain in the CCO Annual Report what standard it uses to determine a noncompliance event's materiality.[37]

We continue to support the Commission's decision to require Registrants to define their own materiality standards. This approach accords with the need to account for the diverse range of businesses engaged in by Registrants. While many Registrants consider similar overall factors when evaluating materiality (e.g., whether a non-compliance issue has widespread or potential widespread impact to the Registrant, its customers or the markets or the issue arises from a material failure of the Registrant's systems, policies or practices involving numerous customers/counterparties, multiple errors or significant dollar amounts), a factor that might lead one Registrant to conclude that an issue is material might not lead to the same conclusion for a different Registrant.

D. Coverage of the Volcker Rule

In a footnote to the preamble of its release adopting Part 75 of the Commission's regulations, which implement Section 619 of the Dodd-Frank Act (commonly referred to as the Volcker Rule), the Commission took the position that the compliance requirements of Subpart D of Part 75 are included in the Commission's regulations that are to be addressed as part of the CCO duties and requirements (including the CCO Annual Report) applicable to an SD under Rule 3.3.[38] Commission staff later issued an advisory applying this interpretation to FCMs.[39] In neither case did the Commission or its staff provide additional explanation of what this interpretation required or afford the public an opportunity to comment on the interpretation.

Since this footnote is an interpretation of Rule 3.3—not the Volcker Rule or Part 75—the Proposal provides the Commission with an opportunity to revisit the footnote, without requiring the Commission to alter the Volcker Rule. Rather, as described below, revisiting the footnote would actually reinforce the compliance program envisioned by the Volcker Rule.

Specifically, the Volcker Rule calls for a firm-wide compliance program, with defined roles for firm-wide senior management, the CEO and the board of directors to establish and assess the effectiveness of the overall bank holding company group's

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37 Advisory 14-153 at p. 8.

38 79 Fed. Reg. 5,808, 6,020 n.2521 (Jan. 31, 2014).

39 See DSIO Staff Advisory, available at https://www.bridgingtheweek.com/ckfinder/userfiles/files/DSIO%20CCO%20Volcker%20Advisory.pdf.

compliance program.[40] Unlike the CEA compliance program envisioned by Rule 3.3, this Volcker Rule compliance program does not envision a separate role for the CCO. Also, the firm-wide scope of the Volcker Rule compliance program accords with the integrated application of the Volcker Rule to multiple legal entities within a bank holding company group. For example, the Volcker Rule's proprietary trading prohibitions generally apply at the level of a "trading desk," which the Commission and other relevant U.S. regulators have defined to encompass employees working on behalf of multiple legal entities.[41] In the context of this framework it is not appropriate to impose heightened duties on a CCO responsible solely for the FCM, SD, or MSP business of a single legal entity, since that CCO might not be in a position to address other affiliates' compliance with the Volcker Rule.

The Commission's interpretation has also created confusion for FCMs that are banking entities. The FCM business typically does not involve any proprietary trading or covered fund activities that are subject to the Volcker Rule.

In addition, the Commission's interpretation potentially conflicts with the separate management oversight and CEO attestation requirements of the Volcker Rule. In particular, Appendix B to Part 75 provides that the CEO of a banking entity must, annually, attest in writing to the Commission that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established under Appendix B and Commission Regulations § 75.20 in a manner reasonably designed to achieve compliance with Section 13 of the Bank Holding Company Act and Part 75. This attestation standard differs from the standard contained in the Rule 3.3(f)(3) certification, thus raising the question whether Registrants are subject to a different standard than other banking entities covered within the same group-wide Volcker Rule compliance program.

Moreover, given the presence of the existing Volcker Rule compliance program requirements (including the attestation requirement summarized above)—which were designed by the Commission and other relevant U.S. regulators specifically to address the particular policy objectives and related considerations raised by the Volcker Rule—it is not clear why it is necessary separately to apply Rule 3.3 to the Volcker Rule. Layering Rule 3.3 on top of Part 75's compliance program requirements results in unnecessary additional costs, confusion, and duplication, especially since (as noted above) an SD or FCM is rarely the only entity within a bank holding company group that is subject to the Volcker Rule.

Finally, as a matter of statutory and regulatory interpretation, it would seem that Rule 3.3 should only cover Commission regulations promulgated pursuant to the CEA. The relevant statutory provisions in Section 4s(k)(3)(A) of the CEA refer to "the compliance of the swap dealer or major swap dealer participant *with respect to this* Act

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40 See, e.g., 17 C.F.R. § 75, Appendix B, § III.

41 See 79 Fed. Reg. 5,808, 5,837 (Jan. 31, 2014).

(including regulations)" (emphasis added). The statutory basis of the Volcker Rule is Section 13 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.), not the CEA. Also, Rule 3.3 refers to requirements under the CEA and Commission regulations – not the CEA or Commission regulations – with the use of the conjunctive "and" instead of the disjunctive "or" suggesting that only those Commission regulations derived from the CEA should be covered by Rule 3.3. This interpretation accords with the fact that Commission regulations adopted pursuant to other statutes, such as Part 75, are also typically intended to complement parallel regulations adopted by other federal regulators. It would not be consistent with the desire for a consistent federal regulatory scheme in these areas to apply Commission-specific compliance program requirements to these regulations.

E. Substituted Compliance

Rule 3.3 is among the "entity-level" requirements for which the Commission permits non-U.S. SDs and MSPs to elect substituted compliance with comparable home country regulations.[42] The Commission has also made comparability determinations for some or most aspects of Rule 3.3 for Australia,[43] Canada,[44] the European Union,[45] Hong Kong,[46] Japan[47] and Switzerland.[48] The Commission based these comparability determinations on its assessment that the relevant foreign regulations are generally identical in intent to Rule 3.3. Since the Proposal would not alter the regulatory objectives or intent of Rule 3.3, but rather would solely clarify or streamline certain aspects of the rule, the Proposal should not lead the Commission to re-visit its comparability determinations. We therefore assume that those comparability determinations will continue to apply.

F. Compliance Date

In determining a compliance date for the Proposal (including any additional changes recommended by this letter), the Commission should take into account the fact that many Registrants with a December 31 fiscal year-end begin in earnest to prepare their CCO Annual Reports in the early to mid-Fall timeframe. Also, meeting schedules for boards of directors and their committees are typically set far in advance. Therefore, depending on when it adopts the Proposal, it might not be possible for all Registrants to satisfy amended CCO Annual Report requirements in connection with the report for their 2017 fiscal years. On the other hand, some Registrants might prefer to apply the

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42 See generally 78 Fed. Reg. 45,292 (July 26, 2013) (cross-border guidance).

43 78 Fed. Reg. 78,864 (Dec. 27, 2013).

44 78 Fed. Reg. 78,839 (Dec. 27, 2013).

45 78 Fed. Reg. 78,923 (Dec. 27, 2013).

46 78 Fed. Reg. 78,852 (Dec. 27, 2013).

47 78 Fed. Reg. 78,910 (Dec. 27, 2013).

48 78 Fed. Reg. 78,899 (Dec. 27, 2013).

amended requirements to their 2017 reports so that they can transition toward the more holistic assessment the Commission has proposed instead of the rule-by-rule assessment contained in existing Rule 3.3(e)(2). In light of these considerations, the Commission should provide flexibility allowing a Registrant to elect to accelerate compliance with amended CCO Annual Report requirements in connection with the 2017 fiscal year, but otherwise not require compliance with those requirements until the 2018 fiscal year.

Thus, for Registrants with fiscal years based on the calendar year, mandatory compliance should commence with respect to such Registrants' Annual Reports due to be filed March 31, 2019, but voluntary compliance should be permitted with respect to such Registrants' Annual Reports due to be filed March 31, 2018. For Registrants with fiscal years not based on the calendar year, mandatory compliance similarly should commence with respect to such Registrants' Annual Reports due to be filed on or after January 1, 2019, but voluntary compliance should be permitted with respect to such Registrants' Annual Reports due to be filed prior to that date.

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FIA and SIFMA appreciate the opportunity to comment on the Proposal and look forward to working with you. We would be pleased to provide further information or assistance at the request of the Commission or its staff. If you have any questions, or require any further information, please feel free to contact the undersigned.

Sincerely,

Kyle Brandon
Managing Director
SIFMA

Allison Lurton
Senior Vice President and General Counsel
FIA

cc: Honorable J. Christopher Giancarlo, Acting Chairman
Honorable Sharon Y. Bowen, Commissioner
Eileen Flaherty, Director, Division of Swap Dealer and Intermediary Oversight