



July 7, 2017

Via Electronic Mail

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, D.C. 20581

Re: *Chief Compliance Officer Duties and Annual Report Requirement for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments*

Dear Mr. Kirkpatrick:

TD Ameritrade Futures & Forex LLC ("TD Ameritrade Futures & Forex" or "the Firm") appreciates the opportunity to comment on the above referenced Rule Proposal ("Rule Proposal") by the Commodity Futures Trading Commission ("CFTC" or "Commission") to amend its Chief Compliance Officer ("CCO") duties and the corresponding annual report for regulated entities.¹ The Firm commends the CFTC for issuing a Rule Proposal that incorporates both its experiences and industry feedback since the adoption of the existing rules and seeks to clarify certain areas. The Firm greatly appreciates Acting Chairman Giancarlo's endeavors to obtain more of a principled-based approach when possible and reduce unnecessary burdens. As Acting Chairman Giancarlo noted in a speech this March, "this exercise is not about identifying existing rules for repeal or even rewrite. It is about taking our existing rules *as they are* and applying them in ways that are simpler, less burdensome and less of a drag on American economy."²

Regulation 3.1 - Definitions

TD Ameritrade Futures & Forex appreciates the CFTC's Rule Proposal to strengthen its customer protection regime by making the CCO independent through reporting lines. The Firm believes, however, when considering organizations with multiple financial entities and corporate-wide compliance programs, there may be other reporting structures that address the goals the Commission is trying to achieve.

¹ TD Ameritrade Futures and Forex LLC is a registered futures commission merchant. It is a wholly owned subsidiary of TD Ameritrade Holding Corporation.

² See Remarks of Acting Chairman J. Christopher Giancarlo before the 42nd Annual International Futures Industry Conference, "CFTC: A New Direction Forward", available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20>.

The Firm recommends that instead of requiring the CCO to report to the senior officer or the board of directors, the CFTC consider clarifying that the CCO must be in a position to make independent judgments to comply with laws, rules and regulations. For example, the CCO could report up through a variety of different independent channels, including an enterprise CCO, a Chief Risk Officer (“CRO”) or a General Counsel (“GC”). This structure allows for greater independence and takes into account a larger corporate organization.³ Further, if the futures CCO reporting line goes directly to the executive officers of a parent corporation, then the CCO of the futures entity is assured that his or her reporting structure is sufficiently independent, while taking into consideration the complexity of larger organizational structures. Indeed, in this scenario, the futures CCO will be in a larger corporate community which will support his or her independence. The Firm believes such a structure ensures the CCO is independent and cannot be simply overruled by the business. To ensure that the CEO or equivalent function has sufficient insight into compliance matters, the CFTC should mandate no less than annual meetings between the CCO and CEO, which must be documented.⁴

Additionally, requiring the CCO to report directly to the board of directors, as currently required by Rule 3.3(a)(1), may not result in the best reporting structure for the CCO. The board of directors of a company are not involved in the day-to-day management of the company and are, therefore, not equipped to address the nuanced compliance issues that may arise. Further, the concept of an additional supervisor as discussed in the Staff Advisory 16-62 does not do much to alleviate the difficulties of reporting to the board of directors.⁵ In the Firm’s experience, the best way to mitigate these potential problems is to allow the CCO to report up through either a global CCO, the CRO or the GC, all of which ensures an independent reporting structure and allows the CCO to make free and fair independent judgments.

Regulation 3.3(d)(3) – Ensuring Compliance

TD Ameritrade Futures & Forex supports the proposed definitional change to Regulation 3.3(d)(3). The Firm agrees with the CFTC that clarification regarding the CCO’s duty could harmonize futures regulatory requirements with securities regulatory requirements. The Firm recommends that the clarifying language be more aligned with the securities rule. Such language should state that the CCO is required to have processes in place for the registrant to establish, maintain, and review written policies and procedures which are reasonably designed to achieve compliance. This standard is consistent with FINRA Rule 3130, *Annual Certification of Compliance and Supervisory Processes*, that the member firm has in place processes to, “establish,

³ As Noted in the CFTC Staff Advisory No. 16-62, reporting up through the legal department would require the “Registrant should be prepared to articulate clearly the segregation of compliance and non-compliance functions” to avoid possibly compromising the attorney-client privilege, the work product doctrine, or other similar provisions. CFTC Staff Advisory No. 16-62 at FN 6, *available at* <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/16-62.pdf>.

⁴ FINRA Rule 3130, *Annual Certification of Compliance and Supervisory Processes*, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=6286, requires FINRA member firms’ chief executive officer hold at least one or more annual meeting with the chief compliance officer.

⁵ *See supra at Note 3.*

maintain and review policies and procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules and federal securities laws and regulations.”⁶ The current standard is more cumbersome and appears to place a much higher burden on the CCO than perhaps intended. This new standard allows firms the flexibility required under a principles-based requirement to achieve and maintain compliance.

Additionally, the Firm notes that officers within the business should be responsible for the creation and identification of the applicable written policy or procedure (“WPP”) that corresponds to the various rule requirements. If the business owners are responsible for the WPP, that will ensure that each individual is continually working towards maintaining effective and robust compliance, without placing the burden squarely with the CCO. The CCO should be responsible for putting a process in place for business officers to create these WPPs and to determine if the WPPs are reasonably designed to achieve compliance. The Firm is very supportive of the Rule Proposal’s changes in this manner.

Regulation 3.3(e) – Annual Report

TD Ameritrade Futures & Forex also supports the CFTC’s proposed change regarding the CCO Annual Report, specifically the proposal to now include a “detailed discussion of [the registrant’s] annual assessment and recommended improvements.”⁷ The Firm agrees with the CFTC that the new standard will promote a greater on-going self-evaluation and discussion between the various business personnel and the Compliance Department. The Firm believes that heightened dialogue between its business personnel and the Compliance Department is of far greater value to the CFTC, and will allow the Firm to provide an enhanced CCO Report, focusing on more of the Firm’s analysis and understanding of the rules. TD Ameritrade Futures & Forex supports the removal that each requirement must be addressed in the annual report. The Firm believes that removing this requirement will allow for more effective conversations to occur between its business partners and the Compliance Department, creating for a more holistic assessment of the Firm’s compliance.

Request for Review: Under Penalty of Law Standard

TD Ameritrade Future & Forex requests that the CFTC undertake a review and assessment of whether the “under penalty of law” standard is the correct standard for CCOs of futures commission merchants (“FCM”). Rule 3.3(d)(6) requires the CCO of a swap dealer, major swap participant, or FCM to “prepare, sign, and certify, under penalty of law, the annual report specified in section 4s(k)(3) of the [Commodity Exchange Act].”⁸ The Firm appreciates the CFTC’s belief that “limiting the CCO’s certification requirement with the qualifier ‘to the best of his or her knowledge and

⁶ See *supra* at Note 4.

⁷ *Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments*. 82 FR 21330 at 21334 (May 7, 2017).

⁸ *Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants; Final Rule*, 77 FR 20128 at 20190 (Apr. 3, 2012).

reasonable belief sufficiently mitigates commenters' liability costs concerns because the rule would not impose liability for compliance matters that are beyond the certifying officer's knowledge and reasonable belief at the time of certification."⁹ It has been, however, the Firm's experience that this limiting language does not sufficiently mitigate concerns about penalties that could be imposed on a CCO in the instance where officers in the business either implemented an ineffective policy or did not follow the firm's policy.

The statutory requirements attributable to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") are applicable to several, but not all, CFTC registrants. Included in the Dodd-Frank Act requirements that the CCO must certify under penalty of law are: derivatives clearing organizations¹⁰, swap data repositories¹¹, and swap dealers and major swap participants¹². Although the CFTC previously decided to extend the same requirement to CCOs of FCMs in order to harmonize the standard across registrants, TD Ameritrade Futures & Forex requests the CFTC examine this standard for FCMs, in light of its current Rule Proposal. Removing the "under penalty of law" standard for CCOs of FCMs would provide greater clarity and certainty for the individual in that role, while still achieving the goals previously established by the CFTC.

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In conclusion, the Firm believes that many of the CFTC's recent rule proposals have made significant positive changes in the futures industry. This Rule Proposal further bolsters the goals of the current requirements, but allows for necessary modifications given the CFTC's experience since the rules were originally adopted. TD Ameritrade Futures & Forex appreciates the opportunity to comment on the Rule Proposal. If you have any questions, please, contact me at (773) 435-3257.

Respectfully submitted,



James Mackenzie
Managing Director, TD Ameritrade Futures & Forex LLC

⁹ *Id.*

¹⁰ *See* section 725 of the Dodd-Frank Act.

¹¹ *See* section 728 of the Dodd-Frank Act.

¹² *See* section 731 of the Dodd-Frank Act.