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**By Electronic Mail – comments.cftc.gov**

June 30, 2023

Mr. Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street NW
Washington DC 20581

**Re: RIN 3038–AF21 – Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants – 88 Fed. Reg. 22934 (Apr. 14, 2023)**

Dear Mr. Kirkpatrick:

The Futures Industry Association[1] welcomes the opportunity to comment on the proposed amendments to Commission Rule 39.13[2] that will permit clearing FCMs to treat separate accounts of a single customer as accounts of separate entities for purposes of Commission Rule 39.13(g)(8)(iii) (the "**Proposed Rule**").[3] FIA strongly supports appropriate Commission action to codify the right of FCMs, currently set out in CFTC Letter No. 19-17 ("**Letter No. 19-17**"),[4]

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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, Brussels, Singapore and Washington DC. 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. 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 core constituency consists of firms that operate as clearing members in global derivatives markets, including firms registered with the Commodity Futures Trading Commission ("**Commission**" or "**CFTC**") as futures commission merchants ("**FCMs**").

2 17 CFR 39.13.

3 Commission Rule 39.13(g)(8)(iii) provides:

> (iii) *Withdrawal of customer initial margin.* A derivatives clearing organization shall require its clearing members to ensure that their customers do not withdraw funds from their accounts with such clearing members unless the net liquidating value plus the margin deposits remaining in a customer's account after such withdrawal are sufficient to meet the customer initial margin requirements with respect to all products and swap portfolios held in such customer's account which are cleared by the derivatives clearing organization.

4 CFTC Letter No. 19-17 (July 10, 2019) was to expire on June 30, 2021; CFTC Letter No. 20-28 (Sept. 15, 2020) extended the no-action position to December 31, 2021; CFTC Letter No. 21-29 (Dec. 21, 2021) extended the no-action position to September 30. 2022; CFTC Letter No. 22-11 (Sept. 15, 2022) extended the no-action position to the earlier of September 30, 2023, or the date of any final Commission action relating to Rule 39.13(g).

to continue to treat separate accounts of a single customer as accounts of separate entities for purposes of Commission Rule 39.13(g)(8)(iii). Such codification is essential to provide both FCMs and their customers with legal certainty with regard to the treatment of separate accounts.

Nonetheless, FIA does not support adoption of the Proposed Rule in its present form. As explained below, the Proposed Rule would impose prescriptive requirements in addition to those set out in Letter No. 19-17, which would increase the operational burdens on FCMs and disrupt well-established market conventions, without providing any corresponding benefit to FCMs or their customers. Further, and as important, we submit that rules governing the treatment of separate accounts do not belong in Part 39 and are more appropriately placed in Part 1 of the Commission's rules.

Before addressing the specific provisions of the Proposed Rule, we want to review briefly the background leading to the publication of Letter No. 19-17 and to remind the Commission of the alternative approach that FIA and ICE Clear U.S. encouraged the Commission to adopt in a petition for rulemaking shortly thereafter (the "**Petition**").[5]

**Background of Letter No. 19-17**

The terms and conditions set out in Letter No. 19-17 are derived in significant part from FIA's June 26, 2019 letter to the Division of Clearing and Risk ("**DCR**") and the then-Division of Swap Dealer and Intermediary Oversight ("**DSIO**"),[6] in which FIA urged DCR to adopt a no-action position confirming that FCMs may continue to margin different accounts of the same beneficial owner separately, notwithstanding the provisions of Commission Rule 39.13(g)(8)(iii).[7] It was FIA's position then, and it continues to be our position, that separately margined accounts do not expose an FCM to greater regulatory or financial risk.[8] In fact, the

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5 Letter from Walt L. Lukken, President and Chief Executive Officer, FIA, and Eamonn Hahessy, General Counsel and Chief Compliance Officer, ICE Clear U.S., to Christopher J. Kirkpatrick, Secretary of the Commission, dated January 22, 2020. Neither the Commission nor the staff ever took any formal action with regard to the Petition. For the Commission's convenience, we have attached a copy of the Petition hereto as Exhibit A, which sets out the basis for the Petition in detail.

6 Letter from Allison Lurton, General Counsel and Chief Legal Officer, FIA, to Brian A. Bussey, Director, Division of Clearing and Risk, and Matthew B. Kulkin, Director, Division of Swap Dealer and Intermediary Oversight, dated June 26, 2019.

FIA's letter also asked DSIO to adopt a separate no-action position granting FCMs time in which to review their various customer agreements to assure that none of them contained provisions that may be inconsistent with Commission Rule 1.56(b), 17 CFR 1.56(b), which, *inter alia*, provides that an FCM may not guarantee a customer against loss. This latter request for no-action is not at issue here.

7 17 CFR 39.13(g)(8)(iii).

8 In separate earlier conversations with representatives of the Joint Audit Committee, we had expressed concern that failure to permit separate account treatment could cause an institutional customer to prohibit its investment manager from opening an account with any FCM that already carried an account for that customer. Such a response would limit customer and investment manager choice and would interfere unnecessarily with an investment manager's ability to manage its clients' assets efficiently. Alternatively, an institution might elect to

opposite result is far more likely. Because FCMs have treated each separate account as a separate customer for risk management purposes, the FCM has necessarily assumed the beneficial owner has fewer assets than it may in fact have and has managed the risk of such separate account accordingly.

To this end, we described the written internal controls and procedures that our FCM member firms agreed they follow in managing the risk of such separately margined accounts (as well as all other customer accounts). We supported the adoption of a no-action position at the time, which as noted, incorporated many FCM internal controls and procedures, in order to assure legal certainty for our FCM member firms and their customers.

**FIA's 2020 Petition for Rulemaking**

Notwithstanding our initial support for Letter No. 19-17, we immediately set about to draft the Petition, with the goal of codifying its provisions, with certain significant exceptions. Importantly, rather than amend Commission Rule 39.13, the Petition proposed to amend Commission Rule 1.56 and Rule 1.11 (the "**Proposed Amendment**"). As we explained, because Part 39 of the Commission's rules relates to core principles for DCOs and the relief requested in the Petition affects the obligations of FCMs, we believed it would be more appropriate to place the Proposed Amendment in Part 1 of the Commission's rules, particularly Rule 1.56 and Rule 1.11.

The Petition proposed to amend Rule 1.56 to add a new paragraph (f) that would recognize the right of an FCM, subject to the conditions of proposed Rule 1.56(f), to enter into an agreement with its customer pursuant to which: (i) notwithstanding Rule 39.13(g)(8)(iii), the FCM may allow a customer to withdraw excess funds from a separate account while there is an outstanding margin call in another separate account; and (ii) the FCM agrees that it will not (in the absence of certain specified conditions that terminate the privileges described in the Proposed Amendment) use excess funds from one account to meet an obligation in another account without the consent of the customer. The Petition otherwise proposed no changes to Commission Rule 1.56.

In addition, the Petition proposed codifying the bulk of the terms and conditions in Letter No. 19-17 in a revised Rule 1.11, which requires each FCM that holds customer funds to "establish, maintain, and enforce a system of risk management policies and procedures designed to monitor and manage the risks associated with the activities of the [FCM] as such". By placing the essential terms and conditions of Letter No. 19-17 in Rule 1.11, the Petition sought to replace a prescriptive rule with a principles-based requirement more in line with the principles-based regulatory structure that otherwise defines the Commission's approach to regulation.[9]

create a separate legal entity for each of its accounts, which would increase the institution's initial and ongoing costs.

[9] As with other elements of Part 1, an FCM's obligations under Commission Rule 1.11 are subject to the oversight of the FCM's designated self-regulatory organization ("**DSRO**").

Specifically, the Petition proposed to redesignate subparagraph (e)(4), *Supervision of the Risk Management Program*, as subparagraph (e)(5) and to add a new paragraph (e)(4), *Enhanced Risk Management for Separate Accounts*. New subparagraph (e)(4) would reorganize and incorporate most, but not all, of the terms and conditions in Letter No. 19-17. After analyzing all of the terms and conditions, we proposed including in the codified version only those terms and conditions that provide actual benefit or enhancement relevant to any possible risk of separate account treatment, taking into account the burden each term imposes.[10]

Therefore, in lieu of the Proposed Rule, which would add a new Rule 39.13(j), we urge the Commission to start anew and propose amendments to codify the essential elements of Letter No. 19-17 in Part 1 of the Commission's rules, rather than Part 39.[11] As noted above, rules that affect the obligations of FCMs should be set out in Part 1 of the Commission's rules, not Part 39.[12] Furthermore, the placement of the risk management requirements for FCMs in Rule 1.11 (or elsewhere in Part 1) ensures that non-clearing FCMs and those that maintain accounts pursuant to Part 30 are able to provide consistent treatment to customers with the same enhanced risk management standards when separate account treatment is desired. In addition, placement of these requirements in Part 1 allows the FCM to control whether the enhanced standards and separate treatment are offered to a specific customer rather than requiring each DCO to manage and control whether the offering is permitted.

Finally, codifying the relevant provisions of Letter No. 19-17 in Part 1 would address a particularly troubling aspect of the Proposed Rule. The Commission indicates that proposed Rule 39.13(j) would vest each DCO with discretion to establish and enforce requirements for clearing FCMs that are in addition to or more stringent than those set forth in the Proposed Rule or to prohibit separate account treatment altogether.[13] The terms and conditions pursuant to which

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10 In this regard, we note in particular that proposed Rule 1.11(e)(4)(iv) would require that an FCM's policies and procedures should "assure that all calls for margin or other required deposits for any separate account of the same customer are *outstanding no more than one business day*, except as may result from administrative error or operational constraints" (emphasis supplied). This phrasing is consistent with Rule 1.17(c)(5)(viii), which provides that an FCM is not required to take a capital charge with regard to an undermargined customer account that is "outstanding no more than one business day".

11 Although our Petition proposed to amend Commission Rule 1.11 and Rule 1.56, we appreciate that the Commission may determine that it would be more effective and efficient to incorporate the relevant provisions of Letter No. 19-17 elsewhere in Part 1, either as a separate rule or within one or more current rules. For example, in lieu of codifying the essential terms and conditions of Letter No. 19-17 in Rule 1.11, the Commission may propose to amend: (i) Rule 1.17 to incorporate as appropriate the provisions of Proposed Rule 39.13(j)(5)-(7); (ii) Rules 1.20 and 22.2 to incorporate as appropriate the provisions of Proposed Rule 39.13(j)(8); (iii) Rules 1.22, 22.2, and 30.7 to incorporate as appropriate the provisions of Proposed Rule 39.13(j)(9); (iv) Rule 1.23 to incorporate as appropriate the provisions of Proposed Rule 39.13(j)(10); and (v) Rule 1.55 to incorporate as appropriate the provisions of Proposed Rule 39.13(j)(12). We would be pleased to consider alternatives that would result in placing the proposed amendments elsewhere in Part 1.

12 We recognize that, to adopt our recommended approach, the Commission would likely be required to withdraw the Proposed Rule and initiate a new Notice of Proposed Rulemaking. In the interim, the Commission should instruct the staff to further extend the current no-action position, which as noted earlier, will terminate September 30, 2023.

separate account treatment should be allowed or prohibited is a decision that the Commission should make. It is not appropriate to leave this decision to each DCO. FCMs collect customer margin across DCOs and, if a DCO were to deny its clearing member FCMs the right to provide its customers separate account treatment, or establish different standards, such FCMs would be effectively denied the right to provide separate account treatment for their customers.

As important, a principles-based regulatory approach would eliminate many of our concerns with the Proposed Rule, highlighted below.[14] Of particular concern, the Proposed Rule would, *inter alia*: (i) impose an arbitrary time by which an FCM must make margin calls, which may unnecessarily provide certain customers additional time within which to meet a margin call and, in addition, may require FCMs to renegotiate many of their customer agreements; (ii) establish time frames within which margin calls involving foreign currency must be met that do not comply with market settlement standards or deadlines; (iii) set non-commercial standards with regard to scheduled and unscheduled holidays, both US and non-US, that would require significant documentation and system changes without any corresponding benefit to FCMs or their customers; and (iv) impose additional, complicated recordkeeping requirements on FCMs. We do not believe that any of the burdensome, prescriptive proposed rules add any benefit and believe that principles-based rules to ensure proper risk management better suit all regulatory goals.

In the event the Commission does not adopt our suggested principles-based regulatory approach and elects instead to adopt the more prescriptive rules approach set out in the Proposed Rule, we provide the following comments on the Proposed Rule as currently written.[15] We strongly believe that each of the following issues must be addressed before the Commission takes final action on any rule. Although we support the effort to codify the essential terms of Letter No. 19-17, relied upon by many in the industry, we are concerned that the new requirements introduced in this rulemaking are both unnecessary and, in many cases, unworkable.

**Scope of the Proposed Rule**

Before turning to specific provisions of the Proposed Rule and certain of the Commission's questions with regard to the Proposed Rule, we note with approval (1) the Commission's statement in proposed subsection (j)(4) that its provisions would "apply solely for purposes of" this subsection, and (2) the Commission's confirmation in the accompanying Federal Register release that it is not otherwise proposing to prohibit contractual arrangements inconsistent with proposed regulation § 39.13(j)(4). That is, the requirements of the rule are intended to apply

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13 88 Fed. Reg. at 22937 (Apr. 14, 2023).

14 Placing the Proposed Amendments in Part 1 would also address the Commission's Question 2 in the Federal Register release accompanying the Proposed Rule, *i.e.*, whether any further action is necessary and appropriate to permit non-clearing FCMs to provide their customers separate account treatment.

15 In either case, we emphasize that the Commission should codify the essential terms of Letter No. 19-17 in Part 1 and not in Part 39.

only with respect to those customers that take advantage of separate account treatment authorized under the Proposed Rule.

Therefore, for example, an FCM that is ***not*** providing a customer separate account treatment would not be acting contrary to the Proposed Rule if the customer failed to meet a margin call on the same business day.[16] Further, an FCM and a customer would not be prohibited from establishing by contract a reasonable grace or cure period for reasons other than administrative error or operational constraint that would operate to allow margin payments to be due and payable later than the deadlines set forth in subsection (j)(4)(i) (but within a "reasonable time" as defined in the Margins Handbook).[17]

For convenience, our comments address the relevant provisions of the Proposed Rule in sequence. As will become clear, however, we are especially concerned about the provisions of proposed Rule 39.13(j)(4) regarding the collection of margin. The proposed rule would establish a standard that is both unnecessary and unnecessarily complex, would disrupt well-established market conventions regarding the payment of margin in foreign currencies, and would impose potentially burdensome recordkeeping requirements on FCMs.

**Specific Provisions of the Proposed Rule**[18]

**Proposed Rule 39.13(j)(1).** Turning to the Proposed Rule, we have no comment on the provisions of proposed Rule 39.13(j)(1)(i), which defines the term "separate account". Consistent with our views set out in the Petition, however, we oppose as unnecessary proposed Rule 39.13(j)(1)(ii), which defines the term "ordinary course of business" and describes events that are inconsistent with the ordinary course of business. As we explained in the Petition, subject to an FCM's own risk management requirements, as long as the customer timely meets its margin requirements and is not subject to a bankruptcy proceeding, an FCM should be permitted to treat the separate accounts of a customer as accounts of separate entities for purposes of Rule 39.13(g)(8)(iii).[19]

Further, we cannot support Proposed Rule 39.13(j)(1)(iii) and (iv), which require a clearing FCM to notify its DSRO and any DCO of which it is a clearing member promptly in writing, respectively, (1) upon the occurrence of any "non-ordinary course of business" events, or (2) when the FCM determines that the circumstances requiring the cessation of separate account treatment have been cured and, therefore, the FCM intends to resume separate account treatment.

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16 We appreciate that the residual interest requirements set out in Commission Rules 1.22(c)(3), 22.2(f)(6), and 30.7(f) provide FCMs an independent reason to encourage (or require) all customers to meet margin calls on the same business day on which the call is made.

17 The Margins Handbook was published by the Joint Audit Committee ("**JAC**") in 1999 and has not been substantially revised since.

18 Except as provided herein, we have no comments on several paragraphs of the Proposed Rule. Specifically, we have no comment on the provisions of paragraphs (5)-(10) and (12)-(14),

19 *Petition*, p. 6, fn. 17.

Proposed subparagraphs (iii) and (iv) would impose new filing requirements on FCMs not found in Letter No. 19-17, without any perceived benefit. In addition to imposing an unnecessary operational burden, the notice requirement implies that separate account treatment poses particular risk management challenges to FCMs and, indirectly, their customers, which is unfounded.[20] As noted earlier, it is our position that separately margined accounts do not expose an FCM to greater regulatory or financial risk. Since an FCM treats each separate account as a separate customer for risk management purposes the opposite result is far more likely.

**Proposed Rule 39.13(j)(2).** We believe proposed Rule 39.13(j)(2) is unnecessary. The proposed subsection requires an FCM to obtain from each customer or the manager of a separate account information sufficient to (i) assess the value of the assets dedicated to the separate account, and (ii) identify the direct or indirect parent company of the customer, if applicable.[21] Obtaining this information is consistent with proper risk management or otherwise required under applicable law (*e.g.*, 31 CFR 1010.230, beneficial ownership requirements for legal entity customers). Adding this requirement here may imply that an FCM has obligations with regard to customers that maintain separate accounts that it does not otherwise have with regard to all customers.

For the same reason, in response to the Commission's question, we would oppose any further amendment to this provision that would require an FCM to obtain any specific information or documentation or to prescribe the minimum time that an FCM must update such information. Separate accounts should be treated in a manner consistent with the FCM's existing risk management policies.

**Proposed Rule 39.13(j)(3).** We do not support proposed Rule 39.13(j)(3), which would require an FCM's internal risk management policies and procedures to provide for stress testing and credit limits for customers with separate accounts. We recognize that the proposed rule restates a current requirement under Letter No. 19-17. However, FCMs already have an obligation under Commission Rule 1.73 to provide for stress testing and credit limits for customers with separate accounts (and all customers). Further, because stress tests of separate accounts are based on the assets allocated to the separate account and not all of the underlying customer's assets, stress tests on a combined account basis provide no additional risk management benefit. There is no reason to impose a separate requirement here.

**Proposed Rule 39.13(j)(4).** We oppose proposed Rule 39.13(j)(4). As indicated above, the proposed rule would establish a standard that is both unnecessary and unnecessarily complex, would disrupt well-established market conventions regarding the payment of margin in foreign currencies, and would impose potentially burdensome recordkeeping requirements on FCMs.

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20 If the Commission nonetheless elects to adopt these notice requirements, we urge the Commission to confirm that the notice requirement under subparagraph (iv) is just that and that an FCM is under no obligation to wait for a response from its DSRO before resuming separate account treatment.

21 Subparagraph (j)(2)(ii) would impose a new requirement.

The proposed rule would establish as a governing principle that each separate account must be on a "one business day margin call," *i.e.*, assuming margin is called by a fixed time on the business day in question, "it must be met by the applicable customer no later than the close of the Fedwire Funds Service on the same United States business day".[22] We understand that the Commission's purpose in proposing subparagraph (j)(4) "is to establish requirements that reflect industry best practices among DCOs, clearing members, and customers",[23] and, as explained below, we agree that FCM "best practices" generally include requiring margin calls to be met either the same day the margin call is made or no later than the following business day.

However, FCM "best practices" also recognize that there must be exceptions to the general rule, *e.g.*: (i) for payments made in foreign currencies; (ii) for payments delayed as a result of a US or foreign holiday; and (iii) for payments delayed as a result of administrative error or operational constraint. Although the Commission accepts that such exceptions are appropriate, the exceptions set out in the Proposed Rule are both too narrow and too prescriptive.

Before commenting on the specific provisions of proposed Rule 39.13(j)(4), however, we believe it would be worthwhile to describe briefly the established rules and guidance governing the time by which an FCM must call its customers for margin and the time by which such margin must be paid.

Neither the Commodity Exchange Act ("**Act**") nor the Commission's rules specify when an FCM must make a margin call. The Margins Handbook, however, provides that "[r]equired margin calls shall be made within one business day after the occurrence of the event giving rise to the call."[24] Consistent with the Margins Handbook, Chicago Mercantile Exchange ("**CME**") Rule 930.E provides that margin calls "must be made within one business day after the occurrence of the event giving rise to the call"; ICE Futures US ("**IFUS**") Rule 5.03 is to the same effect. All customer accounts, therefore, are subject to a "one business day margin call."[25]

Further, neither the Act nor the Commission's rules specify a date by which a margin call must be met. The Margins Handbook provides that margin calls must be met within a "reasonable time", which is defined to be "less than five business days for customers and less than four business days for noncustomers and omnibus accounts . . . counted from and includ[ing] the day the account became undermargined."[26] CME Rules do not define a "reasonable time", but Rule

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22 Proposed Rule 39.13(j)(4)(i).

23 88 Fed. Reg. at 22941 (Apr. 14, 2023).

24 Margins Handbook, Chapter 4.

25 To this end, we understand that FCMs generally issue margin calls overnight, *e.g.*, between 2:00 am and 4:00 am (ET), after receiving margin parameter files from the relevant DCOs. If calls are made later in the day, it is likely because of an administrative error or operational constraint, *e.g.*, a delay in an exchange's processing, a delay in receiving margin calculations from an exchange, an FCM/ third-party vendor system issue. When the call can be made following such an event depends on the duration of the event.

26 Margins Handbook, Chapter 6.

930.K.1 provides that "the clearing member may deem one hour to be a reasonable time". IFUS Rule 5.01, on the other hand, follows the Margins Handbook's "reasonable time" definition.

Notwithstanding the considerable flexibility implied by the "reasonable time" standard set out in the Margins Handbook, CME Rule 930.K.1 and IFUS Rule 5.01, Commission rules provide a strong incentive for FCMs to require their customers to meet margin calls either the same day the margin call is made, *i.e.*, within one business day after the occurrence of the event giving rise to the call, and certainly no later than the following business day. As the Commission is aware, in accordance with the provisions of Rule 1.22(c), it is in each FCM's interest to require its customers to meet all margin calls within the residual interest deadline, *i.e.*, 6:00 p.m. Eastern Time each business day. Specifically, Commission Rule 1.22(c) requires an FCM, no later than the residual interest deadline, to maintain residual interest in its customer segregated account by an amount that is no less than the amount by which the account is undermargined.[27]

Moreover, Commission Rule 1.17(c)(5)(viii) requires an FCM to take a capital charge to the extent that a customer's margin call is outstanding more than one business day, *i.e.*, three days including the day on which an account becomes undermargined. Specifically, this rule provides that an FCM must deduct from its net capital "the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade or . . . clearing organization margin requirements applicable to such positions, after application of calls for margin or other required deposits which are outstanding no more than one business day". Consequently, in order to avoid taking a capital charge and to limit the amount of funds that must be held as residual interest, FCMs generally seek to assure that all margin calls are met no later than the second business day after the event giving rise to the call.

As the Commission itself has recognized in proposed Rule 39.13(j)(4), exceptions to the general rule, especially with regard to payments made in foreign currency, are both necessary and appropriate. The time by which it is reasonable to expect a margin payment to be completed is determined by a number of factors including the jurisdiction of the currency, the location of the customer, the location of the customer's investment manager, and/or the location of the customer's bank/custodian, any of which may have earlier mandated processing cut-off times than the currency itself.

FCMs have been successfully managing the risks of such customers, taking into account the particular circumstances of each, since well before Letter No. 19-17. The proposed rule, however, would deny an FCM the ability to manage properly its customers' risks. Instead, the proposed rule would impose an overly-prescriptive standard that, as noted above and discussed in detail below, is both unnecessary and unnecessarily complex, would disrupt well-established market conventions regarding the payment of margin in foreign currencies, and would impose

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[27] Commission Rule 22.2(f)(6) for cleared swaps and Commission Rule 30.7(f) for foreign futures and options impose similar requirements with regard to the obligation to maintain residual interest by an amount that is no less than the amount by which the account is undermargined. The residual interest requirement for cleared swaps is the point of daily settlement, *i.e.*, the start of the business day, rather than 6:00 p.m.

potentially burdensome recordkeeping requirements on FCMs, all without any perceived benefit to an FCM, it customers or the markets generally. We must continue to emphasize that separately margined accounts do not expose an FCM to greater regulatory or financial risk. In lieu of proposed Rule 39.13(j), therefore, we recommend that the Commission continue to rely on FCM risk management programs, subject to the oversight of each FCM's DSRO.

We turn now to a discussion of the subparagraphs of proposed Rule 39.13(j)(4).

Subparagraph (i) would establish a requirement that "if the margin call is issued by 11:00 a.m. Eastern Time on a United States business day, it must be met by the applicable customer no later than the close of the Fedwire Funds Service on the same United States business day." We appreciate that the proposed cut-off time was intended to provide certainty to FCMs and their customers by setting a time certain beyond which customers would be permitted to meet a margin call the next business day rather than the same business day. However, we submit that a fixed cut-off time applicable to all customers is simply unnecessary since, as discussed above, in the absence of an administrative error or operational constraint, FCMs generally make margins calls well before then.[28]

Moreover, establishing an 11:00 a.m. cut-off time would impose on FCMs a new recordkeeping requirement. That is, the FCM would be required to record the precise time that a margin call is issued and, likely, the precise time that the margin call is met. Further, we are aware that some FCMs have established an earlier or later cut-off time, depending on the location of the customer and the FCM's practices.[29] Adoption of the 11:00 a.m. cut-off time, therefore, would provide certain customers an argument that they should be provided an additional day to meet the call. Finally, adoption by the Proposed Rule of an 11:00 a.m. cut-off time would almost certainly require FCMs to renegotiate their agreements with their customers. Based on prior experience, renegotiating customer agreements is both difficult and time consuming, without providing any incremental benefit to the FCM's risk management program.

Consistent with our proposed Rule 1.11(e)(4)(iv) set out in the Petition, therefore, we believe the better course is to simply provide that each FCM's policies and procedures should "assure that all calls for margin or other required deposits for any separate account of the same customer are outstanding no more than one business day, except as may result from administrative error or operational constraints".

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[28] As noted earlier, the time by which an FCM is able to make a margin call following a delay caused by an administrative error or operational constraint will depend on the duration of the event.

[29] An FCM generally agrees to cut-off times that would allow the customer to meet a margin call the following business day in recognition of external factors beyond the FCM's control, *e.g.*, the nature of the asset manager's and underlying customer's business, the location of the asset manager or customer, and bank cut-off times in various jurisdictions. For example, once an asset manager receives a margin call the asset manager must: (i) balance all trades and positions; (ii) reconcile variation and initial margin amounts: (iii) instruct their custodian of the call amount to satisfy (if using a custodian), subject to custodian settlement cut-off times. Custodians must then instruct the customer's bank to wire funds, subject to the settlement bank's currency cut-off times.

With regard to proposed subparagraphs (ii) and (iii), we are pleased that the Commission recognizes that margin payments in foreign currencies generally cannot be completed on the same day that the margin call is issued. As noted, however, the time by which it is reasonable to expect that a margin payment may be completed is determined by a number of factors including the jurisdiction of the currency, the location of the customer, the location of the customer's investment manager, and/or the location of the customer's bank/custodian, any of which may have earlier mandated processing cut-off times than the currency itself.

The proposed amendment, therefore, is too restrictive. For example, we do not understand why the Commission has provided for a two-day settlement only with regard to Japanese Yen. Other APAC countries are subject to the same time zone limitations and should be included if the Commission moves forward with this provision. Receiving payments from jurisdictions other than Japan may also require a two-day settlement and is the industry settlement convention for these currencies.[30]

Rather than prescribe the specific currencies that are entitled to a one-day or two-day settlement, we encourage the Commission, instead, to incorporate into a final rule the policy set out in JAC Regulatory Alert #14-03, which focuses on the date payment is irrevocably initiated rather than the date that payment is received. Specifically, this Regulatory Alert provides that an FCM may consider a non-US Dollar deposit as "pending" in a customer's or noncustomer's account and include the deposit in the account's margin equity if: (i) the FCM assesses that it is prudent to do so based on the account's past history of satisfying margin calls and the operational and credit risk profile of the account owner; (ii) the account is on a one-day wire transfer basis (*i.e.*, the wire is initiated on day one of the margin call); (iii) the FCM has a sufficient basis to conclude that the wire was actually initiated; (iv) the FCM continues to age the pending non-US Dollar receipts and retains the ability to recognize a failed deposit immediately upon occurrence;[31] and (v) the FCM treats unsettled non-US Dollar disbursements from the account in the same manner.

To our knowledge, the procedures set out in Regulatory Alert #14-03 have worked well. There is no reason why it should not be available to separate accounts. Further, this procedure relieves the Commission of the unenviable task of constantly evaluating when a particular foreign currency is eligible for one-day or two-day settlement.

For similar reasons, we oppose the provisions of subparagraph (iv) governing the payment of margin in a foreign currency. With regard to the payment of margin in fiat currencies other than US Dollars, the Commission proposes that, if payment is delayed as the result of a banking holiday in the jurisdiction of issue of the currency, the time by which margin must be paid and still be considered in compliance with the requirements of the rule would be extended one

[30] In this regard, for example, we understand that the currencies of (i) Australia, (ii) Hong Kong, (iii) Hungary, (iv) Israel, (v) New Zealand, (vi) Singapore, (vii) South Africa, (viii) Turkish Lira, and (ix) Chinese Renminbi may require a two-day settlement.

[31] It is important to note that the obligation to continue aging pending non-US Dollar receipts applies for purposes of calculating both the FCM's residual interest obligations and its undermargined capital charges.

additional United States business day. For payments in Euro, the Commission further proposes that either the customer or the investment manager managing the separate account must designate one country within the Eurozone that they have the most significant contacts with for purposes of meeting margin calls, whose banking holidays shall be referred to for purpose of the rule. We believe this rule is arbitrary and unworkable and the Commission instead should rely of the FCMs' risk management policies and procedures.[32] If the Commission nonetheless concludes that specific guidance on this issue is necessary, we suggest in lieu of the above that the Commission provide that, in the event of a scheduled or unscheduled banking holiday in the jurisdiction of the currency, payment must be initiated on the next business day in that jurisdiction.

With regard to proposed subparagraph (v), we are pleased that the Commission has confirmed that a failure to deposit, maintain, or pay margin or option premium due to administrative error or operational constraints that a customer or investment manager acting diligently and in good faith could not have reasonably foreseen would not constitute a failure to comply with the requirements of the rule and that this provision was intended to provide an FCM "significant discretion . . . to assess the disposition of their customers while requiring that clearing FCMs act reasonably and on the basis of current and relevant information, diligently gathered".[33] However, the Commission then confuses its guidance by adding that such administrative error or operational constraint must be "unusual" and "unforeseen".[34] These are subjective standards that unnecessarily expose FCMs to Commission or SRO enforcement proceedings and should not be part of the administrative error or operational constraint definition. Moreover, as previously discussed, administrative errors and operational constraints frequently fall outside of the control of the FCM. An FCM should not be subject to administrative sanctions for matters over which the FCM has no control.

Subject to our comments above with regard to proposed subparagraphs (i) through (v), we do not oppose proposed subparagraph (vi), which provides that an FCM may not contractually agree to provide customers that elect separate account treatment with periods of time to meet margin calls that extend beyond the time periods specified in subparagraphs (i) through (v) of Rule 39.13(j)(4). For the avoidance of doubt, however, we note that this subparagraph would not prevent an FCM, consistent with subparagraph (v), from contractually agreeing to provide a customer an additional business day to meet a margin call in the event of administrative error or operational constraint.[35]

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[32] As noted earlier, there may be a circumstance in which the customer is located in one jurisdiction, the investment manager is located in another jurisdiction and the custodian is located in a third jurisdiction. A holiday in any one of these jurisdictions could make meeting a margin call within the required time-frame difficult.

[33] 88 Fed. Reg. at 22942 (Fn. 70) (Apr. 14, 2023). As noted above, a delay in the time by which an FCM makes a margin call would also likely be caused by an administrative error or operational constraint. The rule should acknowledge this circumstance as well.

[34] *Id.,* Fn. 69.

[35] 88 Fed. Reg. at 22941 (Fn. 63) (Apr. 14, 2023).

Finally, we understand that the definition of "United States business day" set out in proposed subparagraph (vii) is intended to encompass days on which banks and custodians are open in the US to facilitate payment of margin. We further recognize that Federal holidays under 5 USC 6103 and US bank holidays are the same. Nonetheless, we note that, on certain days, banks are open but many, if not all, futures markets, securities markets, money market mutual funds and, in particular, bond markets, are closed. This scenario commonly occurs on Good Friday but also occurs when Juneteenth, Independence Day and Christmas Day fall on Saturdays, which results in markets observing the holidays on the preceding Friday while banks remain open. On these days, customers may be unable to liquidate bonds or other securities necessary to meet variation margin calls, which would make it difficult to comply with the requirements of proposed Rule 39.13(j)(4).

In sum, we submit that the narrow, prescriptive exceptions to the "one business day" standard that the Commission has proposed do not "reflect industry best practices among DCOs, clearing members, and customers." In this regard, therefore, we would welcome the opportunity to meet with the Commission staff to better understand the Commission's concerns and to work with the staff in developing a rule that appropriately balances these concerns with the practical challenges that FCMs and their customers face in navigating a global marketplace.

**Proposed Rule § 39.13(j)(11).** Proposed Rule 39.13(j)(11) provides that, where the customer subject to separate account treatment has appointed a third party as the primary contact to the FCM clearing member, the clearing member must obtain and maintain current contact information of an authorized representative at the customer and take reasonable steps to verify that such person is in fact an authorized representative of the customer. Further, the FCM clearing member would be required to review and, if necessary, update such information no less than annually. FIA opposes this latter requirement. If a customer appoints a third party as the FCM's primary contact, that third party will be the customer's investment manager. An FCM is in regular, if not daily, contact with the investment manager and will always have investment manager's current contact information. There is simply no need to impose an additional operational and recordkeeping burden on the FCM to review and update this information on an annual basis. Moreover, we reject any suggestion that the Commission should prescribe specific steps that a DCO, in turn, should require a clearing member to take to verify the identity of an authorized representative of a customer. The process by which an FCM verifies the identity of an authorized representative of a customer should be left to the judgment of the FCM in the exercise of its risk management policies.

**Application to Non-Clearing Member FCMs.**

The Commission asks whether any further action is necessary and appropriate to apply the requirements DCOs are required to apply to their clearing members regarding customer withdrawal of initial margin under Rule 39.13(g)(8)(iii) and proposed Rule 39.13(j), directly to non-clearing FCMs or to FCMs that carry Rule 30.7 customer accounts that are not cleared at a DCO. As a matter of policy, FIA does not object to the Commission taking action to permit non-clearing member FCMs to provide qualified customers separate account treatment subject essentially to the same terms and conditions that govern clearing member FCMs. However, because a DCO does not have direct self-regulatory authority over non-clearing member FCMs, it is difficult to see how the Commission, in accordance with the Proposed Rule, can authorize non-clearing member FCMs to engage in this conduct without further action by the Commission. As noted above, however, codifying the essential elements of Letter No. 19-17 in Part 1 would address this issue.

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Thank you for your consideration of these comments. If the Commission or any member of the staff have any questions regarding the matters discussed herein or need any additional information, please contact me at alurton@fia.org or 202.772.3057.

Respectfully submitted,

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