CME Group

June 30, 2023

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581
Via CFTC Comments Portal: https://comments.cftc.gov

RE: RIN 3038-AF21
Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants

Dear Mr. Kirkpatrick:

The Joint Audit Committee ("JAC"), a representative committee of Audit and Financial Surveillance Departments of U.S. futures exchanges and regulatory organizations,[1] appreciates the opportunity to comment on the proposed amended derivatives clearing organization ("DCO") risk management regulations to account for the treatment of separate accounts by Futures Commission Merchants ("FCMs").

Customer protection is the cornerstone of the futures industry, and it continues to be critical to ensure that the protections afforded under the customer protection regimes are as strong as they can be for market participants. The JAC, through its Self-Regulatory Organizations ("SROs"), operates a supervisory program which includes the examination of its FCM members to assess the member registrants' compliance with Commodity Futures Trading Commission ("CFTC" or the "Commission") regulations and SRO rules.

The JAC appreciates the Commission's efforts to codify previously issued guidance pursuant to CFTC Letter No. 19-17 ("NAL 19-17") and CFTC Letter No. 20-28 ("NAL 20-28") (collectively the "NALS") by issuing the Notice of Proposed Rulemaking to amend its Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants (the "NPR" or the "Proposal").[2] Under the Commission's Proposal, a clearing FCM may only offer separate account treatment if a DCO permits it and "if such clearing member's written internal controls

[1] The Joint Audit Committee is a representative committee of U.S. futures exchanges and regulatory organizations including Bitnomial, CBOE Digital Exchange, CBOT, CFE, CME, COMEX, IFUS, LMX, MGEX, NADEX, NFA, Nodal Exchange, NYMEX and SMFE. http://www.jacfutures.com
[2] 88 FR 22934 (April 14, 2023).

and procedures permit it to do so, and the DCO requires its clearing members to comply with conditions specified in proposed regulation § 39.13(j)(1) through (14), which are substantially similar to the conditions specified in CFTC Letter No. 19-17."[3] The Commission "preliminarily believes that proposed regulation § 39.13(j) relating to separate account treatment in connection with the withdrawal of customer initial margin is consistent with the customer protection and risk management goals of regulation § 39.13(g)(8)(iii)."[4]

However, due to the Commission's placement of the proposed amendment in a DCO risk management rule under Regulation § 39.13, the proposal imposes significant changes to the regulatory framework under which an FCM implements the separate account margining conditions as well as the regulatory construct for monitoring such FCM's compliance. The proposed regulation should also be vigorously examined for any confusion and uncertainty it raises concerning financial reporting and customer protections as required by CFTC Regulations in Part 1, Part 22 and Part 30. The JAC offers the following comments for consideration and provides comments to specific questions posed in the NPR in the Appendix attached to this letter.

I. Regulations providing for the treatment of separate accounts for margin disbursement purposes should reside in the Commission's FCM rules with amendments to associated CFTC Regulations in Parts 1, 22 and 30.

After careful analysis, if the Commission believes that the treatment of separate accounts should be allowed under certain conditions, it should consider amending its regulations over FCMs to permit any FCM to allow such treatment for all its futures, options on futures and cleared swaps customer trading activity. Furthermore, the conditions within proposed Regulation § 39.13(j) should be incorporated into all impacted CFTC regulations covering both DCOs and FCMs. Otherwise, the regulatory structure contemplated under the Proposal will result in fragmented oversight and may cause confusion and uncertainty over the most important goal – customer protection. Specifically:

a. Part 39 DCO regulations do not fall under the self-regulatory organization surveillance authority of the Joint Audit Committee

CFTC Regulation § 1.52 establishes standards and requirements under which SROs[5] must adopt rules prescribing minimum financial and reporting requirements for FCM members. In particular, the rule requires SROs to establish and operate a supervisory program to assess member FCMs' compliance with applicable SRO and Commission regulations including requirements for minimum net capital, the segregation of customer funds, risk management, financial reporting and recordkeeping. When an FCM is a member of more than one SRO, Regulation § 1.52 allows the SROs to delegate oversight responsibility to a designated self-regulatory organization ("DSRO") and establish a Joint Audit Committee to create an audit plan implemented consistently among the DSROs.

[3] NPR at 22937.
[4] *Id.*
[5] CFTC Regulation § 1.52(a)(2) defines a "self-regulatory organization" as a contract market as defined in § 1.3, or a registered futures association.

Accordingly, the JAC's supervisory program monitors FCMs for compliance with certain CFTC Part 1 regulations, as well as the customer protection rules within Parts 22 and 30 and does *not* include examining for compliance with DCO rules. An FCM is not subject to Part 39 regulations but would only be impacted by proposed Regulation § 39.13(j) if it is a clearing member of a DCO which, through the DCO's own rules, chooses to implement the Commission's separate account exception set forth in the Proposal. The NPR sets minimum requirements that a DCO would need to implement if it chooses to allow separate account treatment to its clearing FCMs under its rules. Each DCO may implement such requirements differently in its rules, and some DCOs may decide not to allow separate account treatment at all.

With the proposed requirements placed in Regulation § 39.13(j), each DCO that permits separate account treatment will be obligated to monitor its FCM clearing members for compliance with the conditions set forth in the Proposal as implemented in the DCO's own rules. As discussed further below, certain conditions within the Proposal contemplate that a clearing FCM will need to calculate certain separate account customer balances for capital and segregation differently than under Part 1, Part 22 and Part 30 regulations. However, the Commission did not propose amendments to those regulations. It seems clear that an impacted FCM would still be expected to prepare and file its financial statements with its SROs and the Commission as calculated under the existing requirements in Parts 1, 22 and 30 which the Commission is not proposing to amend. Accordingly, the JAC would continue to review and monitor an FCM's financial statements prepared in accordance with existing Part 1, Part 22 and Part 30 regulations, while the DCO adopting separate account treatment would be responsible to monitor an FCM's (different) financial computations prepared in accordance with proposed Regulation § 39.13(j).

b. The Proposal does not contemplate associated amendments to Parts 1, 22 and 30 of the CFTC Regulations

While the Proposal amends certain requirements over DCOs in Part 39, the Commission did not propose amendments to its customer protection rules in Part 1, Part 22, or Part 30 to incorporate risk mitigating requirements it implies are necessary for FCMs' treatment of separate accounts. Instead, all risk mitigating requirements the Commission implies are necessary to allow separate account treatment are only required by DCO rules of those DCOs permitting such treatment. The NPR requires a DCO to require its clearing FCMs permitting separate account treatment to compute certain items differently in its net capital, customer segregation, and cleared swap computations for compliance with Regulation § 39.13. Yet, the NPR does not require a clearing FCM to file any of these computations with the DCO or the Commission.

Specifically, as proposed, a DCO permitting separate account treatment would be required to implement rules to require a clearing FCM to calculate certain financial requirements on a separate account basis pursuant to conditions proposed in Regulation § 39.13(j)(5)-(10). These requirements are inconsistent with what is required for regulatory reporting by FCMs to the Commission and SROs under Parts 1 and 22. For example, if a clearing FCM was undercapitalized pursuant to proposed Regulation § 39.13(j)(5) due to a margin deficiency in a

separate account (for which if combined by beneficial owner as required under Regulation § 1.17[6] there would be no deficiency), there is no requirement in the Proposal that would compel the FCM to report to the DCO or Commission that it was undercapitalized. Moreover, as the clearing FCM remained properly capitalized under Regulation § 1.17, there would be no reporting requirements to the DSRO or Commission.

Under the NPR, a clearing FCM availing itself of separate account treatment for customers trading positions on a DCO permitting such treatment would be required to prepare two sets of calculations. One set of calculations would be prepared pursuant to all applicable existing requirements in Parts 1, 22, and 30 and filed with its SROs and the Commission in daily segregation statement filings and monthly Form 1-FR or FOCUS II Reports (that is, for example, calculating customer debit and deficit balances and undermargined capital charges on a beneficial owner combined account basis). These calculations are consistent with long-standing principles on which the Commission's customer protection rules and reporting requirements are based – that is, FCMs must prepare their customer protection calculations based on the manner in which their customer accounts would be treated in the FCM's bankruptcy under Part 190 of the CFTC Regulations.[7] Then a second set of calculations would be computed by clearing FCMs according to the Proposal on a separate account basis and maintained only for compliance with applicable DCO rules, although not reported to the DCO as there is no such requirement in the NPR. Presumably, the second set of calculations would be subject to periodic review by any DCO allowing separate account treatment under its rules, although as previously noted would not fall under the oversight program of the JAC.

Precedent exists for bifurcated reporting requirements. As an example, a DCO may require its clearing members to maintain adjusted net capital in amounts that exceed the CFTC's minimum net capital requirements.[8] In such cases, the clearing FCM files its required financial reports with the Commission and its SROs pursuant to CFTC Part 1 requirements, and the DCO requiring the higher minimum net capital requirement separately monitors its clearing member's compliance with this requirement. Nonetheless, the JAC believes that additional clarity on these different reporting requirements would be beneficial to affected participants.

c. The Proposal does not provide for separate account treatment to non-clearing FCMs and 30.7 customers

If the Commission believes that the Proposal is consistent with its goals of customer protection and risk management, then all FCMs should be permitted to offer such benefit to their customers and noncustomers, including Regulation § 30.7 customers. To address the inconsistency acknowledged in the NPR with respect to customers of non-clearing FCMs and § 30.7 customers carrying positions that are not cleared by a DCO, amendments to Part 1 of

[6] CFTC Regulation § 1.17(c)(5)(viii).
[7] As noted in the NPR at 22944, CFTC Regulation § 190.08(b)(2) provides that all separate accounts of a customer in an account class will be combined in a clearing FCM's bankruptcy.
[8] For example, CME Rule 970.A.1. requires clearing members to maintain minimum net capital requirements of at least $5 million while CFTC Regulation § 1.17(a)(1)(i) requires an FCM (that is not also registered as a swap dealer) to maintain adjusted net capital of at least $1 million.

the CFTC regulations could permit all FCMs to offer separate account treatment to all such customers.

Contrary to suggestions otherwise in the NPR,[9] SROs and the JAC cannot provide for separate account treatment for Regulation § 30.7 customers. Neither an SRO nor the JAC can change how customer balances are recorded in an FCM's financial statements, net capital computations, segregation statements, 30.7 secured statements or cleared swap customer segregation statements under Commission regulations. Further, it would be contradictory to believe that an SRO or the JAC could provide separate account treatment for non-DCO cleared positions but not for positions cleared through a DCO.

Regulatory Alerts issued by the JAC are intended to provide guidance to FCMs on existing CFTC regulations and SRO rules. Based on discussions with Commission Staff and because CFTC Letter No. 19-17 referenced secured statement reporting and Regulation § 30.7 in the conditions required for separate account treatment, the JAC issued JAC Regulatory Alert #19-06 to provide for the inclusion of § 30.7 positions in separate account treatment. Through JAC Regulatory Alert #20-02, the timeframe for inclusion was extended in accordance with CFTC Letter No. 20-28. However, as noted in JAC Regulatory Alert #20-02, which the Commission acknowledged in Footnote 49 in the NPR,[10] this guidance applied only until the earlier of either the expiry of the NALs or such time as the Commission amended Regulation § 39.13(g)(8)(iii). The JAC provided for the inclusion of the Regulation § 30.7 positions based on the belief that the CFTC would include § 30.7 positions in any proposed rulemaking. Accordingly, JAC Regulatory Alerts #19-06 and #20-02 will no longer be in effect once the Commission issues a final rule and separate account treatment would only be as provided for in the Commission's final rule. Absent amendments to Regulation § 30.7 by the Commission, § 30.7 customers with more than one account at an FCM will be treated for margin disbursement purposes as they would under Part 190 bankruptcy rules – on a combined basis.

II. Additional comments on the Proposal

a. The Commission should carefully consider any adverse customer protection impacts resulting from the NPR, including the impact of separate account treatment in a pro-rata distribution event of a clearing FCM bankruptcy. The NPR notes the additional risk inherent in disbursing funds to customers on a separate account basis. In the discussion of proposed Regulation § 39.13(j)(13), it is noted that this additional risk may be material to a customer's decision to do business with a clearing FCM availing itself of separate account treatment for its customers because "*…in the event that separate account treatment for some customers were to contribute to a loss that exceeds the FCM's ability to cover, that loss might affect the segregated funds of all of the FCM's customers in one or more account classes*."[11] The disclosure required in proposed Regulation § 39.13(j)(13) should be expanded not only to indicate that the clearing FCM permits separate account treatment but also to include a thorough discussion of the

[9] NPR at 22938.
[10] *Id.*
[11] NPR at 22944.

additional risks to the other customers as highlighted by the Commission in the Preamble discussion.[12]

Additionally, the Commission should consider including a discussion in the Preamble, or through separate guidance, addressing how separate account treatment may impact a pro-rata distribution in the event of a clearing FCM bankruptcy. For example, if on the day before a clearing FCM declares bankruptcy, the clearing FCM disburses funds to a customer receiving separate account treatment pursuant to proposed Regulation § 39.13(j) which would not have been available on a combined account basis (e.g., the account was in deficit on a combined basis), and there is a shortfall in customer funds, should the separate account potentially benefit from such disbursement to the detriment of other customers in a pro rata distribution?

b. The Commission's definition of a "one business day margin call" for purposes of proposed Regulation § 39.13(j)(4) may cause confusion with existing requirements governing margin calls. Specifically:
   i. In proposed Regulation § 39.13(j)(4), the CFTC provides various requirements to define "one business day margin call" specific to this regulation. It should be clarified that, without regard to proposed Regulation § 39.13(j)(4), a clearing FCM must continue to issue and age margin calls to separately margined accounts for all other purposes under CFTC regulations and SRO rules. For example, it is important the Commission clarify that proposed Regulation § 39.13(j)(4) does not impact existing regulations regarding the age of margin calls nor the clearing FCM's financial reporting, regardless of the time of day that the FCM issues the margin call or if the customer is located outside of the United States.
   ii. A clearing FCM applying separate account treatment will continue to be required to make a bona fide attempt to collect required margin from all U.S. and non-U.S. customers. Such required margin calls must be made by the clearing FCM within one business day after the occurrence of the event giving rise to the margin deficiency. That is, notwithstanding proposed Regulation § 39.13(j)(4), a margin call must be issued to the customer within one business day after the occurrence of the event giving rise to the margin deficiency even if such call cannot be made to the customer until after 11:00 a.m. ET, and even if such business day is not a business day in the jurisdiction in which the customer is located.
   iii. Footnote 63 of the NPR discusses that a "grace or cure period" would not be allowed under the proposed regulation for accounts that are receiving separate account treatment.[13] This statement incorrectly implies that an FCM may contractually agree to grace or cure periods for any customers that are not treated as separate accounts under the Proposal. The NPR may create confusion by incorrectly suggesting that accounts not utilizing separate account treatment may have contractual terms providing for longer than one business day to meet a margin call.[14] Therefore, the Commission should make clear that if an FCM and customer enter a contractual agreement to arrange for margin calls to be met in longer than one business day,[14] the FCM is not making a bona fide attempt to collect margin within one business day after the occurrence of the event giving rise to the margin deficiency.
   iv. As a result of some of these differences around the definition of a "one business day margin call", a clearing FCM may need to create a separate record to implement the requirements

[12] *Id.*
[13] NPR at 22941.
[14] Aside from reasonable, one-day administrative or operational exceptions.

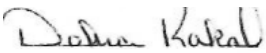
under proposed Regulation § 39.13(j)(4) and maintain such record to demonstrate compliance to its DCOs that allow separate account treatment.

c. A final rulemaking for treatment of separate accounts should include a clear discussion on how a clearing FCM should treat an account that holds positions both of a DCO that allows separate account treatment and of a DCO that does not allow separate account treatment. Presumably, if the account holds positions cleared by a DCO that does not allow separate account treatment, then the clearing FCM would be required to apply Regulation § 39.13(g)(8)(iii) under which all identically owned accounts of the customer must be combined for margin purposes. Such treatment would be the most conservative, would align with how the accounts would be treated in an FCM bankruptcy under Part 190 and corresponds to how the accounts are required to be treated in other CFTC regulations, including Regulation § 1.17 (for capital purposes regarding classification of debit/deficits, undermargined capital charges and risk based capital requirements), Regulation § 1.20 (for segregation in determining the customer liability), Regulation § 1.22 (residual interest compliance calculation), and Regulation § 22.2 (for cleared swaps segregation in determining the customer liability and LSOC compliance calculation).

d. The notifications in proposed Regulations § 39.13(j)(1)(iii), § 39.13(j)(1)(iv) and § 39.13(j)(14)(ii) should be made by a clearing FCM to any DCO permitting separate account treatment of which it is a clearing member and to the Commission but should not be required to be provided to the DSRO. As previously noted in the discussion in I.a. above, monitoring for compliance with the proposed separate account treatment does not fall under the oversight responsibilities of an SRO, DSRO, or the JAC. In addition, it would be illogical for a DCO to implement rules that would require a clearing FCM to notify its DSRO of activity specifically governed by the DCO's rules.

The JAC thanks the Commission for the opportunity to comment on the Proposal and would be happy to discuss any of our comments with the Commission. If you have any questions or comments, feel free to contact me at (312) 930-3235 or Debbie.Kokal@cmegroup.com.

On Behalf of the Joint Audit Committee,



Debra K. Kokal
Chairman

Appendix

Joint Audit Committee ("JAC") Responses to the CFTC Questions in the NPR

As proposed, Regulation § 39.13(j) would not be within the purview of the JAC. Nonetheless, based on the JAC's experience in performing financial surveillance and risk-based examinations, the JAC offers the following recommendations and comments on the CFTC's Proposal. Importantly, our comments are designed to ensure customer protections remain strong as DCOs monitor their clearing FCMs for compliance with the DCO's rules providing separate account treatment as permitted by proposed Regulation § 39.13(j).

Question 1: The Commission requests comment regarding whether it should consider any conditions additional to those contained in proposed regulation § 39.13(j) below, or modify or remove any of the conditions proposed herein.

JAC Recommendations and Comments:

As previously discussed:

- The notifications in proposed Regulations § 39.13(j)(1)(iii), § 39.13(j)(1)(iv) and § 39.13(j)(14)(ii) should be made by a clearing FCM to any DCO permitting separate account treatment of which it is a clearing member and to the Commission but should not be required to be provided to the DSRO. The monitoring for compliance with the proposed separate account treatment does not fall under the oversight responsibilities of an SRO, DSRO, or the JAC.
- Proposed Regulation § 39.13(j)(4) sets out various requirements to define "one business day margin call" specific to separate account treatment. The Commission should clarify that outside the context of separate account treatment, a clearing FCM must issue and age margin calls without regard to proposed Regulation § 39.13(j)(4). That is, proposed Regulation § 39.13(j)(4) does not impact the age of margin calls nor the clearing FCM's financial reporting obligations. A clearing FCM may need to maintain a separate record to implement the unique requirements for separate account treatment under proposed Regulation § 39.13(j)(4) to monitor compliance with DCO rules permitting separate account treatment.
- The disclosure required in proposed Regulation § 39.13(j)(13) should be expanded not only to indicate that the clearing FCM permits separate account treatment but also to include a thorough discussion of the additional risks to the other customers as highlighted by the Commission in the Preamble discussion.

New Recommendations and Comments:

- An additional condition should be added to proposed Regulation § 39.13(j) requiring a clearing FCM's risk-based capital requirement to be adjusted to capture the risk of accounts receiving separate account treatment.
- Proposed Regulation § 39.13(j)(4)(i) would allow an additional day for a separate account to meet the margin call when issued after 11:00 a.m. ET and still be considered a "one business day margin call". Given that customer protection and risk management are of the highest importance and the conditions are designed to be risk mitigating, the receipts in and disbursements out of separate accounts belonging to one beneficial owner should occur the same day. Accordingly, the

Commission should consider as a prudent risk-mitigating measure to require the timing of receipts in and disbursements out to be on the same business day for calls issued after 11:00 a.m. ET; that is, to disallow disbursements out to separate accounts until such calls are met as if made before 11:00 a.m. ET or on the next day.

- To ensure that any person is properly authorized to represent the customer, proposed Regulation § 39.13(j)(11) should be expanded to require a corporate resolution or similar document authorizing the representative at the customer to represent the customer if such customer is not an individual. Current and accurate information for the authorized representative of the customer is essential because of the need to contact a customer directly and promptly, particularly in times of stress, for funds as needed and to ensure the customer is aware that its accounts are being separately margined and what that means, especially in the event of a clearing FCM bankruptcy.
- In proposed Regulation § 39.13(j)(12), the required disclosure statement should be provided directly to the authorized representative of the customer as required in proposed Regulation § 39.13(j)(11) to ensure the customer has a complete understanding of how its accounts will be combined pursuant to Part 190 in the event of the clearing FCM's bankruptcy.
- Proposed Regulation § 39.13(j)(12) would require the clearing FCM to provide each customer using separate accounts with a disclosure that pursuant to Part 190 all separate accounts of the customer in each account class will be combined in the event of the clearing FCM's bankruptcy. The proposal includes in Regulation § 39.13(j)(12)(i) the requirement that the disclosure statement must be delivered separately to the customer. As this is a critical separate disclosure, the regulation should specify what is meant by "delivered separately" to ensure the underlying customer receives the disclosure.
- The Commission should consider adding a condition to proposed Regulation § 39.13(j) requiring that accounts which are treated as separate accounts be identified as "separate accounts," or with a similar label, in the clearing FCM's books and records including on the customer's statements. This naming convention would clearly identify to the customer its margining status as a "separate account." It would also assist clearing FCMs in meeting all reporting requirements required under proposed Regulation § 39.13(j), assist a DCO and/or a bankruptcy trustee in porting, and assist a DCO in monitoring for compliance with proposed Regulation § 39.13(j) and its rules regarding separate accounts.

Question 2: The Commission requests comment regarding 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 regulation § 39.13(g)(8)(iii) and proposed regulation § 39.13(j), directly to non-clearing FCMs or to FCMs that carry regulation § 30.7 customer accounts that are not cleared at a DCO that is registered with the Commission (or are so registered, but only subject to subpart D of part 39) . If so, who (e.g., SROs or the Commission) should take such action, and what should that action be? Would such actions risk causing actual or potential conflicts with the rules or practices of foreign clearing organizations or foreign contract markets? If so, please provide references.

JAC Recommendations and Comments:

As noted in section I.c. of the JAC's letter, to address the inconsistency acknowledged in the NPR with respect to customers of non-clearing FCMs and § 30.7 customers carrying positions that are not cleared by a DCO, amendments to Part 1 of the CFTC regulations could permit all FCMs to offer separate account

treatment to all such customers. Importantly, contrary to suggestions otherwise in the NPR, SROs and the JAC cannot provide separate account treatment for § 30.7 customers.

Question 3: The Commission requests comment regarding whether it should (i) consider any events beyond those enumerated in proposed regulation § 39.13(j)(1)(ii)(A) through (I) as inconsistent with the ordinary course of business for purposes of the application of proposed regulation § 39.13(j); (ii) change the specification of any of the events in proposed regulation § 39.13(j)(1)(ii)(A) through (I); or (iii) delete any of those events (because the proposed event is not inconsistent with the ordinary course of business).

JAC Recommendations and Comments:

A decrease in financial or operational resilience on the part of a clearing FCM often is reflected in its inability to comply with capital, segregation, and other reporting requirements. It follows that if a clearing FCM is not in compliance with either (1) CFTC capital, segregated, secured § 30.7, cleared swaps customer, residual interest or LSOC compliance requirements, or (2) the DCO financial computation requirements under proposed Regulations § 39.13(j)(5) through (10), it would be presumed to be outside the ordinary course of business absent facts and circumstances otherwise. Furthermore, the day-to-day operation of the clearing FCM's business relationship with its customer is often reflected in the state of the FCM's books and records – its ability to (1) timely and accurately record and reconcile customer trades, positions, and cash and collateral movements and (2) timely and accurately compute, record and confirm to customers their trading activity, open positions, account balances, margin requirements, and margin excess/deficiency. Thus, absent facts and circumstances otherwise, failure to make or keep current books and records as required under Commission Regulations[15] or a material inadequacy in internal controls[16] would not be consistent with the day-to-day operation of the clearing FCM's business relationship with its customer. While these situations are presumed to be "outside the ordinary course of business" within proposed Regulation § 39.13(j)(1)(ii), the Commission should consider making clear that the specified events that are inconsistent with the ordinary course of business include:

1. A clearing FCM does not maintain required CFTC capital, segregated funds, secured funds, cleared swaps customer funds, residual interest compliance or LSOC compliance, or does not comply with the DCO financial computation requirements under proposed Regulations § 39.13(j)(5) through (10).

2. A clearing FCM member does not maintain current books and records or has a material inadequacy in internal controls.

In addition, the Commission should consider a requirement that a clearing FCM offering separate account treatment provide notice to DCOs permitting separate account treatment of which it is a clearing member of the events specified in (1) and (2) above.

To assist the industry, because much has happened during the years since the NAL relief was initially issued, the JAC suggests that it might be helpful for the Commission to provide examples of non-enumerated events that would constitute "operating outside the ordinary course of business". This way

[15] CFTC Regulation § 1.12(c).
[16] CFTC Regulation § 1.12(d).

FCMs and their customers can better understand the circumstances in which separate account treatment is permitted and when it is not permitted.

Question 4: The Commission requests comment on whether proposed regulation § 39.13(j)(2) should require a clearing member to obtain from a customer or, as applicable, the manager of a separate account, any specific information or documentation relevant to determining the value of assets dedicated to a separate account, or, more broadly, any information relevant to determining the value of assets available to meet the obligations of the customer's accounts on a combined basis. The Commission further requests comment on whether it should prescribe a minimum requirement of how often such information should be obtained and/or updated.

JAC Recommendations and Comments:

We agree with the Commission that further clarity is needed on how clearing FCMs should determine the value of assets "dedicated" to the separate account it maintains for the customer. Additionally, such information should be updated on at least an annual basis and more often as facts and circumstances warrant.

Question 5: The Commission requests comment on whether the regulatory framework set forth in proposed regulation § 39.13(j)(4) appropriately balances practicability and burden with risk management. If not, what alternative approach should be taken? How would such an alternative approach better balance those considerations? In particular, the Commission requests comment on whether the proposed standard of timeliness for a one business day margin call set forth in proposed regulation § 39.13(j)(4)(i)–(iii) presents practicability challenges and, if so, what those challenges are, and how the proposed standard of timeliness could be improved.

JAC Recommendations and Comments:

As noted in section II.b. of the JAC's letter, clarity should be provided in the Preamble that proposed Regulation § 39.13(j)(4) does not impact the requirements of any other regulations of the Commission or SRO rules with respect to margin calls. For instance, the Commission should clarify that this codification does not affect (a) aging of margin calls, (b) the balances recorded in a customer's account, nor (c) the undermargined amount which an FCM must include in its residual interest compliance calculation and LSOC compliance calculation. This clarification is critical because the CFTC is providing more leeway in defining a one day margin call within proposed Regulation § 39.13(j)(4) than is provided otherwise in CFTC Regulations and SRO rules. Further, as noted previously, the Proposal may create additional recordkeeping requirements on a clearing FCM to implement and demonstrate compliance with the proposed Regulation § 39.13(j)(4).

The Commission should consider the risk added to the system when a margin disbursement is made from a separately margined account and the receipt of funds is delayed into another separate account of the same beneficial owner, especially if the call is made on a foreign holiday. For example, suppose Monday is a U.S. business day but a banking holiday in Japan. In such case, excess funds in U.S. dollars could be disbursed on Monday from a separate account, while a margin call to the separate account of the same beneficial owner in Japanese Yen could not be initiated for payment on that Monday and would not be required to be received until Thursday by 12:00 p.m. ET under the NPR. Under the Proposal, for accounts

receiving separate account treatment, a clearing FCM may disburse funds supported by a margin receipt that was not initiated (and could not be initiated) on the same day as the disbursement. By contrast, for accounts not receiving separate account treatment, the disbursement would not be allowed in those circumstances.

Question 6: With respect to the proposed standard of timeliness for a one business day margin call:
(a) Are there other currencies, besides JPY, where relevant banking conventions render payment before the second U.S. business day after a margin call is issued impracticable? If so, the Commission requests commenters to specifically identify any such currencies, and provide specifics about the operational issues involved for each.
(b) Should the Commission establish a mechanism (e.g., through action by Commission order, potentially with authority delegated to the Director of the Division of Clearing and Risk, or through action by DCOs) to address cases where the taxonomy of which currencies can practicably be paid on the same day/first U.S. business day/ second U.S. business day after a margin call is issued should be changed, due to changes in banking conventions or newly discovered information?
(c) The Commission requests comment on whether, and if so, how, proposed regulation § 39.13(j)(4) should explicitly address timing of payment of margin in the event of an unscheduled United States banking holiday (e.g., due to a national day of mourning).
(d) The Commission requests comment on whether, and if so, how, proposed regulation § 39.13(j) should explicitly address timing of payment of margin in the event of scheduled or unscheduled closures of United States securities markets.

JAC Recommendations and Comments:

Question 6 (a)

The JAC has no comment.

Question 6 (b)

Yes, the Commission should adopt a mechanism to provide timely and efficient changes to the payment timelines for meeting a one-day margin call for purposes of a clearing FCM's compliance with proposed Regulation § 39.13(j)(4). The authority should reside solely with the Commission to ensure consistency and avoid confusion as many separately margined accounts contain positions of more than one DCO.

Questions 6 (c) and (d)

If the Commission addresses unscheduled banking holidays or closures of the U.S. securities markets, to avoid any confusion the Commission should be clear that any such provisions apply only to determining if a margin call is considered a one-day margin call under proposed Regulation § 39.13(j)(4) and do not govern how such holidays or closures are considered for any other regulatory purpose.

Question 7: With respect to the criteria for extending payment of margin in EUR due to a banking holiday in the Eurozone pursuant to proposed regulation § 39.13(j)(4)(iv), the Commission requests comment on whether, and if so, how, the banking laws of national authorities within the Eurozone, operational issues, or other factors present practicability challenges to compliance. If commenters believe such challenges exist,

the Commission seeks comment on whether a different standard would be more practicable, while achieving the goal of preventing customers or investment managers from claiming an extension of time to pay margin due to banking holidays in a multiplicity of jurisdictions, or in (a) jurisdiction(s) with which such customer or investment manager has no significant commercial nexus.

JAC Recommendations and Comments:

Proposed Regulation § 39.13(j)(4)(iv) would establish a new recordkeeping requirement for clearing FCMs with respect to their separately margined accounts which will need to be built into an FCM's records and DCO's monitoring for compliance. To reiterate and emphasize, as explained in the JAC's response to Question 5 in this Appendix, this new requirement should not impact the requirements of any other CFTC Regulations or SRO rules with respect to margin calls. As further indicated in the JAC's response to Question 5, the Commission should consider if it is appropriate to provide an extra day for margin calls that are made on the foreign holiday. In that case, the customer cannot initiate payment on the day that other funds may be disbursed from a separate account. As previously stated, the Commission should be conscious of the risks added to the system by allowing funds to be disbursed in a currency from one separately margined account when the funds to be received into another separately margined account of the same beneficial owner are delayed.

Question 8: In anticipation of potential developments with respect to the use of central bank digital currencies or other digital assets, the Commission requests comment on whether and, if so, how, proposed regulation § 39.13(j)(4) should explicitly address the timing of payment of margin in digital assets.

JAC Recommendations and Comments:

The JAC has no comment.

Question 9: The Commission requests comment regarding whether there are any other international considerations, beyond the time required to process payment of margin in different currencies, that the Commission should take into account in establishing requirements for compliance with the "one business day" margin call standard for purposes of proposed regulation § 39.13(j)(4). If so, the Commission requests comment regarding how proposed regulation § 39.13(j) should be modified, if at all, to account for such considerations.

JAC Recommendations and Comments:

Refer to the JAC's response to Questions 5 and 7 in this Appendix.

Question 10: The Commission requests comment on whether it should prescribe specific steps that a DCO must require a clearing member to take to verify the identity of an authorized representative of a customer, and if so, what such steps should entail. The Commission further requests comment on the potential time and cost burden of such steps. Commenters are requested to provide quantitative data where available.

JAC Recommendations and Comments:

As previously noted in JAC's response to Question 1 in this Appendix, to ensure any person is properly authorized to represent the customer, proposed Regulation § 39.13(j)(11) should be expanded to require a corporate resolution or similar document authorizing the representative at the customer to represent the customer if such customer is not an individual. Current and accurate information for the authorized representative of the customer is essential because of the need to contact a customer directly and promptly, particularly in times of stress, for funds as needed and to ensure the customer is aware that its accounts are being separately margined and what that means, especially in the event of a clearing FCM bankruptcy.

Maintaining current contact information for authorized representatives of underlying customers with associated corporate resolutions or similar documentation should already be a part of a clearing FCM's policies and procedures. This requirement only would entail a required review and update of information on at least an annual basis which presumably most clearing FCMs would do already. Any additional cost should be minimal.

Question 11: The Commission requests comment on the appropriateness of its proposed approach of providing DCOs with discretion in determining whether a clearing FCM has applied separate account treatment consistently over time.

JAC Recommendations and Comments:

The JAC has no comment.

Question 12: The Commission requests comment on the extent to which DCOs, clearing members, and customers currently rely on the no-action position in CFTC Letter No. 19– 17 (including the extensions of time in CFTC Letters No. 20–28, 21–29, and 22–11) to permit and/or engage in separate account treatment. Commenters are requested to provide data where available (e.g., number of DCOs and/or clearing members that allow for separate account treatment, or size of clearing members providing for separate account treatment by customer funds in segregation or number of customers, as well as the nature and the extent of the costs that they would incur if the relevant no-action position were to be permitted to expire).

JAC Recommendations and Comments:

The JAC has no comment.

Question 13: The Commission requests comment, including any available quantifiable data and analysis, concerning the costs and benefits of the proposed regulation for DCOs, FCMs, and any other market participant(s), including regarding the extent to which market participants already enjoy any such benefits or incur any such costs.

JAC Recommendations and Comments:

The JAC has no comment.

Question 14: The Commission requests comment, including any available quantifiable data and analysis, concerning whether the tradeoff of costs and benefits of the proposed regulation for DCOs, FCMs, and any other market participant(s), could be improved by modifying the set of conditions set forth therein (i.e., by

deleting or modifying in a specified fashion any of the proposed conditions, or by adding specified additional conditions).

JAC Recommendations and Comments:

Allowing separate account treatment requires conditions that are stringent enough to mitigate to the maximum extent possible the additional risks to other customers of the clearing FCM that separate account treatment presents – this should be the highest priority.

Question 15: The Commission requests comment regarding whether there are FCMs which chose not to rely on the no-action position provided by CFTC Letter No. 19–17 due to the conditions required to rely on that position. The Commission further requests comment on how those conditions could be modified to mitigate the burden of compliance while achieving the goals of mitigating systemic risk and protecting customer funds.

JAC Recommendations and Comments:

The JAC has no comment.