



2001 Pennsylvania Avenue NW
Suite 600
Washington, DC 20006
Tel +1 202.466.5460

By Electronic Submission

October 17, 2018

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
Suite 3E-218
400 7th Street SW
Washington DC 20219

Ann E. Mishback, Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Avenue NW
Washington DC 20551

Robert E. Feldman, Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street NW
Washington DC 20429

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

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street NW
Washington DC 20549-1090

Re: **Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds**

Ladies and Gentlemen:

The Futures Industry Association (“**FIA**”)¹ is pleased to submit these comments with respect to the proposed amendments to the rules implementing section 13 of the Bank Holding Company Act (“**BHCA**”), which the Board of Governors of the Federal Reserve System (“**Board**”), the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Securities and Exchange Commission and the Commodity Futures Trading Commission (each, an “**Agency**”, and collectively, the “**Agencies**”) adopted in 2013 (“**Rules**”).² Section 13, commonly known as the

¹ FIA is the leading global trade organization for the futures, options, and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA’s membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry. FIA’s mission is to support open, transparent and competitive markets; protect and enhance the integrity of the financial system; and promote high standards of professional conduct.

² 83 Fed. Reg. 33432 (July 17, 2018).

“**Volcker Rule**”, contains certain restrictions on the ability of a banking entity and nonbank financial company supervised by the Board to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund. A majority of FIA’s member firms that are registered with the Commodity Futures Trading Commission (“**Commission**” or “**CFTC**”) as futures commission merchants (“**FCMs**”) are “banking entities”, as defined under the Rules. FIA’s membership also includes commercial firms that rely on other banking entities to help support covered funds’ financing of capital-intensive projects. FIA, therefore, has a significant interest in the Rules as applied.³

The proposed amendments are intended, in part, to clarify the activities in which banking entities may engage that are prohibited under the Rules. Among such activities identified in the Federal Register release accompanying the proposed amendments are clearing services provided by FCMs to covered funds for which affiliates of the FCM are engaged in the services identified in Commission Rule 75.14(a), *e.g.*, serving, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to the covered fund.

In this regard, however, the Agencies note that, in 2017, the Commission’s Division of Swap Dealer and Intermediary Oversight (“**Division**”) issued a letter to an FCM in which the Division stated that it would not recommend that the Commission take an enforcement action against the FCM, if the FCM were to provide clearing services to a covered fund notwithstanding Commission Rule 75.14(a).⁴ The other Agencies further note that the Commission has indicated its desire to extend the relief granted in Letter No. 17-18 to all FCMs that provide futures, options and swaps clearing services to customers of affiliates.⁵

The other Agencies observe that FCM clearing services to covered funds do not appear to be the type of activity that was intended to be limited under section 13 of the BHCA and, therefore, the other Agencies would not object if the Commission were to extend the relief in Letter No. 17-18 to all FCMs.⁶ The Agencies then ask several questions with respect to FCM clearing services. We respond to these questions below.⁷

In summary, FIA agrees that the provision of FCM clearing services to covered funds is not the type of activity that was intended to be prohibited under the Volcker Rule. Indeed, restricting FCM activities in this way could cause covered funds to lose certain risk management efficiencies and could otherwise adversely affect covered funds’ operations. We, therefore, support Commission action to extend the relief provided in CFTC Letter 17-18 to all FCMs, preferably through an

³ Commission Rule 75.2(b), 17 CFR § 75.2(b). For convenience, this letter will refer only to the Rules as promulgated by the Commission.

⁴ CFTC Letter No. 17-18 (Mar. 29, 2017).

⁵ 83 Fed. Reg. 33432, 33437 (July 17, 2018).

⁶ *Id.*

⁷ FIA’s letter is limited to addressing the three questions herein.

amendment to Rule 75.14, which would specifically authorize an FCM to provide clearing services with respect to covered funds. An amendment to Rule 75.14 would provide greater legal certainty to the market than would a simple extension of the existing no-action relief.⁸

Question 194. Are the clearing services provided by an FCM to its customers a relationship that would give rise to the policy concerns addressed by § ____.14(a) of the Rules?

Response. We do not believe that the provision of clearing services gives rise to policy concerns addressed by § ____.14(a). As the Agencies note, the provision of clearing services is a facilitation service that does not implicate a relationship that might evade the prohibition against acquiring or retaining an interest in or sponsoring a covered fund. An FCM that provides clearing services earns fees but is not in a position to profit from any gain or loss that the covered fund may have on its cleared positions.

We further note that, in accordance with the provisions of Commission Rule 1.56, an FCM may not, and may not represent that it will, guarantee a customer against loss, limit the loss of a customer, or not call for or attempt to collect initial and maintenance margin as established by the rules of the applicable exchange. Consequently, an FCM is prohibited under Commission rules from “bailing out” a covered fund that incurs losses arising from the covered fund’s cleared derivatives trading activities.

Finally, as described in Letter No. 17-18, granting this relief to all FCMs would prevent potential disruption to FCM operations and client relationships. If covered funds are required to transfer their accounts to unaffiliated FCMs, such funds could lose access to tested clearing processes and systems, lose certain operational and risk management efficiencies, and potentially be exposed to higher credit risk.

Question 195. Does the no-action relief provided by the CFTC staff together with the statement herein provide sufficient certainty for market participants regarding the application of § ____.14(a) of the 2013 final rule to FCM clearing services?

Response: Although FIA welcomes the Commission’s stated intent to extend the relief provided in CFTC Letter 17-18 to all FCMs and the other Agencies’ support of this action, the means by which the Commission will extend this relief is unclear. We note that, by its terms, the no-action letter is addressed solely to the FCM that requested the relief and is not binding on the Commission or Commission staff other than the Division.⁹ Further, the Division of Swap Dealer and Intermediary Oversight reserves the right, “at its discretion” to “modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided.” Consequently, we do not believe an extension of the no-action position to all FCMs would provide the high level of legal certainty that we believe FCMs and other market participants would require.

⁸ As appropriate, the parallel rules of the other Agencies should be similarly amended.

⁹ Similarly, a Commission no-action position would not be binding on the other Agencies.

We considered whether the Commission could extend relief to all FCMs by adopting an order under the provisions of section 4(c) of the Commodity Exchange Act (“CEA”). The Commission’s authority under section 4(c), however, is limited to granting exemptions from relevant provisions of the CEA and, therefore, the Commission would not appear to be authorized to grant an exemption from section 13 of the BHCA. In these circumstances, we believe the better course of action would be for the Commission to amend Rule 75.14 to authorize an FCM to provide clearing services with respect to covered funds. Such an amendment would provide FCMs and the markets generally a high level of legal certainty that FCM clearing services are not prohibited under the Rules.¹⁰

Question 196. If the exemptions in section 23A of the Federal Reserve Act and the Board’s Regulation W¹¹ are made available under a modification to § ___.14 of the 2013 final rule, what would be the effect, if any, for FCM clearing services? Would incorporating those exemptions further support the relief provided by the CFTC? If so, how?

Response. If the exemptions in Section 23A and the Board’s Regulation W are made available under a modification to § ___.14(a), we believe the primary effect would be to provide legal support for the position that FCM clearing services are not “covered transactions” as defined in Section 23A. By providing such legal support, such an exemption would supplement the CFTC’s no-action relief.

Separately, the continued availability of financing through covered funds is an important issue to FIA’s commercial firms in connection with capital-intensive projects. For example, many large energy projects are financed by private equity funds. The funds, in turn, often hedge their financing of the projects by entering into derivatives transactions with banks (*e.g.*, they may enter into futures or swaps to lock in oil or gas prices). The ability of funds to offset the risks associated with their financing activities is especially important for projects in Latin America and other parts of the world that face economic, social and political instability. Our members that are active in commodities markets fear that they will not have access to critical financing for these projects if the Volcker Rule prohibits or restricts private equity funds from transactions or relationships with banks that facilitate their attendant hedging activities. We, therefore, ask you to consider the wide range of needs serviced by covered funds when finalizing the Rules.

* * * *

¹⁰ We note that the Agencies have authorized prime brokerage transactions under the Rules, albeit subject to certain conditions not relevant here. Commission Rule 75.14(a)(2)(ii), 17 CFR § 75.14(a)(2)(ii).

However the Commission elects to proceed, and assuming the Agencies promulgate final rules, we would encourage the Agencies to reaffirm in the Federal Register release accompanying the final rules their support of the Commission’s action and state unequivocally that the provision of FCM clearing services is not prohibited under the Volcker Rule.

¹¹ 12 CFR § 223.

October 17, 2018

Page 5

Thank you for your consideration of these comments. If you have any questions regarding the matters discussed herein or need any additional information, please contact Allison Lurton, FIA's General Counsel and Senior Vice President, at alurton@fia.org or 202.466.5460.

Sincerely,

A handwritten signature in cursive script that reads "Walt L. Lukken".

Walt L. Lukken
President and Chief Executive Officer