



2001 K Street NW, Suite 725
North Tower
Washington, DC 20006
202-466-5460

By Electronic Mail – rule-comments@sec.gov

December 7, 2020

Ms. Vanessa Countryman
Secretary of the Commission
Securities and Exchange Commission
100 F Street, NE
Washington DC 20549

Re: Proposed Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection with the Portfolio Margining of Swaps and Security-Based Swaps That Are Credit Default Swaps – File Number S7-13-12

Dear Ms. Countryman:

The Futures Industry Association (“we” or “FIA”) is submitting this letter to the Securities and Exchange Commission (“SEC”) in support of the SEC’s proposed order (“**2020 Proposed Order**”)¹ to supersede and replace its 2012 order (“**2012 Order**”) granting exemptive relief in connection with the portfolio margining of cleared credit-based swaps and security-based swaps (“CDS”). The existence of a vital and efficient cleared CDS market that operates within a single framework for both swaps and security-based swaps (“SBS”) is essential to market participants and their ability to safely and efficiently hedge and manage risk. FIA applauds the SEC for its thoughtful consideration of the market’s experience and demands in connection with the 2012 Order and supports the SEC’s approach of seeking to preserve the *status quo* while making changes that will further enhance the market’s efficient operation. FIA welcomes the SEC’s changes contained in the 2020 Proposed Order that demonstrate further coordination and comity with regulation of the cleared swaps markets by the Commodity Futures Trading Commission (“CFTC”).

It is critical that the SEC remains cognizant of the significant time and expense BD/FCMs, their customers and the clearing houses have already invested towards creating a safe and attractive model for the clearing of all CDS, as well as developing the various risk, operations and compliance infrastructures needed to implement that model. Our comments are directed primarily at improvements that would refine the existing portfolio margining framework for cleared CDS and address the costs and operational challenges related to implementing any such improvements. In particular, our comments focus on reducing the operational complexity and expense associated with unnecessary changes and achieving further alignment of the regulatory regime amongst CDS products, which has now operated successfully (including during the COVID-19 related volatility) for close to a decade. Within this scope we address the issues listed below:

¹ *Proposed Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Portfolio Margining of Swaps and Security-Based Swaps that are Credit Default Swaps*, 85 Fed. Reg. 70657 (Nov. 5, 2020). The 2020 Proposed Order would update the SEC’s 2012 *Order Granting Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-based Swaps*, Exchange Act Release No. 68433 (Dec. 12, 2012), 77 Fed. Reg. 75211 (Dec. 19, 2012).

- elimination of conditions relating to expanding the CDS portfolio margining program to securities accounts;
- modifications to narrow the scope of subordination requirements; and
- reforming the approach to quantitative requirements under risk models.

FIA and its Members

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 CFTC as futures commission merchants ("**FCMs**"). The majority of these FCMs, including the 25 largest FCMs measured by adjusted net capital, are also registered as broker-dealers with the SEC ("**BD/FCMs**"). Currently, all clearing of single-named CDS, which are a type of SBS, for U.S. customers is facilitated by our members that have built systems, account structures and risk management programs in order to provide clients with access to cleared markets, as described in more detail below. We expect that these same entities will continue to play a central role in providing access to the cleared SBS markets, and, therefore, they have a keen interest in the results of the 2020 Proposed Order.

Clearing Agencies/DCOs Should not be Required to Offer an SEC SBS Account as an Alternative to a CFTC Cleared Swaps Account

FIA welcomes the SEC's observations, based on its market monitoring, that because of the greater efficiencies and cost reductions available under the current CDS portfolio margining program, market participants have not expressed a desire to portfolio margin cleared CDS in an SEC SBS account.

Since the initial BD/FCM staff letters were issued in 2013, market participants have been clearing all cleared CDS in a CFTC cleared swaps account under the CDS portfolio margining program. This program has encouraged the clearing of CDS by permitting efficiencies and cost reductions that better reflect the overall risks presented by a CDS portfolio. The program has been effective in accommodating the portfolio margining needs of market participants who must react nimbly to dynamic market conditions, risk management and hedging requirements and evolving portfolio compositions. Given that this program is now well established, FIA agrees with the SEC's assessment that there is a lack of market interest in exploring a new arrangement to portfolio margin cleared CDS in an SEC SBS account. Therefore, in response to question 6 of the request for comment, FIA supports the proposed elimination of conditions relating to expanding the CDS portfolio margining program to securities accounts.

More generally, we are not aware that any clearing house registered as a joint Clearing Agency/Derivatives Clearing Organization ("**Clearing Agency/DCO**") or as a Clearing Agency (together with Clearing Agency/DCOs, "**CCPs**") currently makes available any securities or SBS account for the clearing of single-name CDS as part of a CDS portfolio margining program or otherwise, and therefore the clearing of single-name CDS, which has been identified as imperative² is currently, and for the foreseeable future, only possible through the cleared swaps customer accounts at both CCPs and BD/FCMs.

² See joint letter from MFA, SIFMA, and ISDA, dated December 16, 2015, committing to clearing single-name CDS, available at: <https://www.managedfunds.org/wp-content/uploads/2015/12/12.16.2015-Single-Name-CDS-Release.pdf>.

For all the reasons set out in our prior letter to the SEC³ and those of the industry more generally⁴, as echoed in the proposed removal of conditions set out at (a)(1) and (a)(2) of the 2012 Order, we would encourage the SEC to support this model rather than requiring the market to establish an untested CDS clearing model for single-name CDS for which there is currently no market infrastructure and which would be extremely costly to create. FIA therefore respectfully requests that the SEC affirms that, in all circumstances, single-name CDS may be cleared through a CFTC cleared swaps account, and be subject to the margin and risk management regime proposed in the 2020 Proposed Order, provided all conditions set out in the 2020 Proposed Order, as amended pursuant to the comments herein, are otherwise satisfied.

Proposed Modifications to the Requirements to the Non-Conforming Subordination Agreements to More Closely Align with Customer Protection Objectives

FIA generally believes that the modifications to the conditions applicable to the non-conforming subordination agreements under conditions set out at (b)(1)(ii) and (b)(2)(ii) of the 2012 Order as set forth in the 2020 Proposed Order are appropriate. However, in response to question 5 of the request for comment, we believe that the language should be further tailored to ensure that it only requires the subordination of a customer's claims for assets subject to a portfolio margining arrangement and not other claims the customer may have against the BD/FCM, such as, for example, separate claims the customer may have as a securities customer in relation to a securities account. We therefore propose the following changes to the condition set out at (b)(1)(ii) of the 2020 Proposed Order:

as well as an affirmation by the cleared swaps customer that solely with respect to the distribution of "customer property" as defined in SIPA or 11 U.S.C. 741 and, for the avoidance of doubt, without prejudice to its entitlement to "customer property" as defined in 11 U.S.C. 761, its claims against the BD/FCM for such money, securities or property will be subordinated to the claims of securities customers and security-based swap customers.

We believe furthermore that, as suggested in the preamble to the 2020 Proposed Order, the proposed changes, as amended above, would provide accurate and helpful clarifications that would be consistent with the expectations of the rights and obligations of customers in the event of a BD/FCM insolvency. We agree that

³ See letter from FIA to SEC, dated November 19, 2018, in response to SEC's "Capital, Margin and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker Dealers," available at: <https://www.sec.gov/comments/s7-08-12/s70812-4663029-176523.pdf>.

⁴ See joint letter from MFA, the American Council of Life Insurers, and AIMA to SEC Chairman White and CFTC Chairman Gensler, dated May 10, 2013, with a request for action by both commissions to improve coordination and to facilitate portfolio margining for customers in the cleared CDS market, available at: <https://www.managedfunds.org/wp-content/uploads/2013/05/CDS-Customer-Portfolio-Margining-Final-MFA-Coalition-Letter.pdf> (the "Buy-Side Coalition Letter"); MFA letter in response to the SEC "Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Portfolio Margining of Swaps and Security-Based Swaps", 77 Fed. Reg. 75211 (Dec. 19, 2012), filed with the SEC on February 11, 2013, available at: <https://www.managedfunds.org/wp-content/uploads/2013/02/SEC-Portfolio-Margining-Exemptive-Order-MFA-Final-Letter.pdf>; MFA letter to the SEC on ICE Clear Credit's petition for an order permitting portfolio margining of single-name credit default swaps and broad-based indices, filed with the SEC on June 13, 2012, available at: <https://www.managedfunds.org/wp-content/uploads/2012/06/SEC-Comment-Letter-in-Support-of-ICE-Portfolio-Margining-Petition-Final-MFA-Letter.pdf>; MFA letter to the CFTC on ICE Clear Credit LLC's petition dated October 4, 2011 for an order permitting portfolio margining of swaps and security-based swaps, filed with the CFTC on December 21, 2011, available at: <https://www.managedfunds.org/wp-content/uploads/2011/12/CFTC-Comment-Letter-in-Support-of-ICE-Portfolio-Margining-Petition-Final-MFA-Letter.pdf>; and MFA letter to the CFTC on ICE Clear Europe Limited's petition dated May 31, 2012 for an order permitting commingling of customer funds and portfolio margining for swaps and security-based swaps, filed with the CFTC on December 14, 2012, available at: <https://www.managedfunds.org/wp-content/uploads/2012/12/CFTC-Comment-Letter-in-Support-of-ICE-Clear-Europe-Petition-Final-MFA-Letter.pdf>.

without these clarifications, the subordination provisions based on the 2012 Order might be construed as being inconsistent with the customer protection principles under the Commodity Exchange Act and the Securities Exchange Act. In question 5 of the request for comment, however, the SEC recognizes that if this modification were made to the order, requiring BD/FCMs to amend all their existing agreements with cleared swaps customers and affiliates participating in the portfolio margining program could be a significant burden. FIA appreciates the SEC's recognition of this burden and confirms that analyzing in each case whether, as a technical matter, a change to existing documentation would be warranted (noting that documents may form part of other clearing arrangements, which in any event would be subject to applicable law) would be a costly and complex exercise. If required, a bilateral amendment to existing agreements with relevant cleared swaps customers and affiliates would, as the SEC has itself recognized, be onerous to both BD/FCMs and their customers.

FIA instead recommends that the SEC confirm that the modifications in the 2020 Proposed Order are merely clarifications of its intention for the 2012 Order, and that it expects that existing customer documentation entered into in compliance with the 2012 Order be interpreted accordingly. It would be helpful if, when finalizing the 2020 Proposed Order, the SEC would confirm that any risk of ambiguity in the event of a proceeding for a BD/FCM under the Securities Investor Protection Act would adequately be addressed through a form of notice that BD/FCMs could make available to customers on the BD/FCM's website or otherwise. We believe this approach strikes the right balance between the significant burden on the market to renegotiate subordination agreements and the benefits of the clarification. Except as provided above, and in response to question 6 of the request for comment, no further or additional disclosure should be required of BD/FCMs. In addition, FIA requests that the SEC confirm that where disclosure or documentation was put in place in compliance with the 2012 Order, no further documentation or disclosure is required under the 2020 Proposed Order, notwithstanding that such existing documentation or disclosure might refer to the 2012 Order.

FIA Supports the SEC's Proposed Standards for Internal Risk Management Programs

FIA is appreciative of the SEC's response to FIA's prior comments regarding minimum margin levels – in particular, our comments relating to requiring higher levels of margin than those required by the DCO pursuant to the margin requirements of the CFTC, which are based on standards that have been recognized by international regulators, as well as, our comments relating to the requirement for a unique margin model that goes beyond what the BD/FCM's own risk management would require. We agree with the SEC's preliminary view that it can promote the prudent operation of the BD/FCMs through a process of approving their internal risk management programs. This could increase transparency for market participants in terms of being able to anticipate margin requirements generated by their cleared CDS portfolios, as Clearing Agency/DCOs generate the regulatory margin requirements.⁵

However, to give effect to this approach and to allow for consistency across the market, we suggest an approach that demonstrates further coordination with the CFTC. An important step in this regard would be to permit BD/FCMs to rely on the Clearing Agency/DCO's margin methodology, which is subject to supervision by the CFTC and SEC, unless one of its supervisor has a reasonable basis for concluding that the methodology underestimates the risk or is otherwise inconsistent with the internal risk management program. In response to question 11 of the request for comment, FIA agrees that it is appropriate to deem a BD/FCM to have an internal risk management program that has been approved by the SEC or SEC staff, as required by paragraph (b)(3) of the 2020 Proposed Order, if it has received prior approval of its margin methodology in connection with the 2012 Order, without requiring any further modifications to their risk management programs or approvals by the SEC.

⁵ 85 Fed. Reg. 70657 at 70662.

Ms. Vanessa Countryman
Secretary
December 7, 2020
Page 5

FIA requests that the SEC consider revising the 2020 Proposed Order to allow for deference where warranted, recognizing that this will further the SEC's aim in its regulation of the cleared SBS market.

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FIA appreciates the opportunity to submit these comments for the SEC's consideration. We look forward to addressing these and any other portfolio margin rules with the SEC in greater detail. If members of the SEC or its staff have any questions or need any additional information regarding the matters discussed herein, please contact Allison Lurton, FIA's General Counsel and Chief Legal Officer at (202) 772-3057 or alurton@futuresindustry.org.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Allison Lurton".

General Counsel and Chief Legal Officer
Futures Industry Association