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COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 22, 30, and 39

RIN 3038-AF21

Regulations to Address Margin Adequacy and to Account for the Treatment of Separate Accounts by Futures Commission Merchants

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is amending its regulations, adopted under the Commodity Exchange Act (CEA), to require a futures commission merchant (FCM) to ensure a customer does not withdraw funds from its account with the FCM if the balance in the account after the withdrawal would be insufficient to meet the customer's initial margin requirements; and relatedly, to permit an FCM, subject to certain requirements, to treat the separate accounts of a single customer as accounts of separate entities for purposes of certain Commission regulations.

DATES: *Effective date*: This rule is effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Compliance dates: The compliance date for FCMs that are clearing members of a derivatives clearing organization (DCO) as of the date of publication of this rule in the Federal Register shall be **[INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The compliance date for all other FCMs shall be **[INSERT DATE 365 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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I. BACKGROUND

A. The Commission's Customer Funds Protection Regulations

Protection of market participants from misuses of customer assets and avoidance of systemic risk are two of the fundamental purposes of the CEA.[1] The Commission has promulgated regulations designed to protect customer assets, including regulations designed to ensure that FCMs appropriately margin customer accounts and are not induced to cover one customer's margin shortfall with another customer's funds. The Commission has also promulgated regulations designed to diminish the risk that a customer default in its obligations to an FCM that is a clearing member of a DCO (clearing FCM) results in the clearing FCM in turn defaulting on its obligations to a DCO, which could adversely affect the stability of the broader financial system.

Section 4d(a)(2) of the CEA and regulation § 1.20(a) require an FCM to separately account for, and segregate from its own funds, all money, securities, and property it has received to margin, guarantee, or secure the trades or contracts of its commodity customers.[2] Additionally, section 4d(a)(2) of the CEA and regulation § 1.22(a) prohibit an FCM from using the money, securities, or property of one customer to margin or settle the trades or contracts of another customer.[3] This requirement is designed to prevent an FCM from treating customers disparately and to mitigate the risk that the FCM will not maintain sufficient funds in segregation to pay all customer claims if the FCM becomes insolvent.[4] Section 4d(a)(2) of the CEA and regulations §§ 1.20 and 1.22 effectively require an FCM to add its own funds into segregation in an amount equal to the sum of all customer undermargined amounts, including customer account deficits, to prevent the FCM from being induced to use one customer's funds to margin or carry another customer's trades or contracts.[5]

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[1] Section 3(b) of the CEA, 7 U.S.C. 5(b).
[2] 7 U.S.C. 6d(a)(2); 17 CFR 1.20(a).
[3] 7 U.S.C. 6d(a)(2); 17 CFR 1.22(a).
[4] Prohibition of Guarantees Against Loss, 46 FR 11668, 11669 (Feb. 10, 1981).
[5] 7 U.S.C. 6d(a)(2); 17 CFR 1.20; 17 CFR 1.22; Prohibition of Guarantees Against Loss, 46 FR at 11669.

Section 5b of the CEA,[6] as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[7] sets forth eighteen core principles with which DCOs must comply to register and maintain registration as DCOs with the Commission. In 2011, the Commission adopted regulations for DCOs to implement Core Principle D, which concerns risk management.[8] These regulations include a number of provisions that require a DCO to in turn require that its clearing members take certain steps to support their own risk management to mitigate the risk that such clearing members pose to the DCO.

One such regulation, § 39.13(g)(8)(iii), provides that a DCO shall require a clearing member to ensure that a customer does not withdraw funds from its account with the clearing member unless the net liquidating value plus the margin deposits remaining in the customer's account after the withdrawal would be sufficient to meet the customer initial margin requirements with respect to all products and swap portfolios held in the customer's account that are cleared by the DCO.[9] Regulation § 39.13(g)(8)(iii) thus establishes a "Margin Adequacy Requirement" designed to mitigate the risk that a clearing FCM fails to hold customer funds sufficient to cover the required initial margin for the customer's cleared positions.[10] In light of the use of omnibus margin accounts, in which the funds of multiple customers are held together, this safeguard is necessary to avoid the misuse of customer funds by mitigating the likelihood that the clearing FCM will effectively cover one customer's margin shortfall using another customer's funds.[11]

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[6] 7 U.S.C. 7a-1.
[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).
[8] Section 5b(c)(2)(D) of the CEA, 7 U.S.C. 7a-1(c)(2)(D); Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334, 69335 (Nov. 8, 2011).
[9] 17 CFR 39.13(g)(8)(iii).
[10] For purposes of this final rule, the Commission uses the term "Margin Adequacy Requirement" to refer to this requirement, which applies indirectly to clearing FCMs via the operation of DCO rules, and the analogous requirement set forth in regulation § 1.44(b) which will apply directly to all FCMs.
[11] Section 3(b) of the CEA, 7 U.S.C. 5(b).

In adopting the Margin Adequacy Requirement of regulation § 39.13(g)(8)(iii), the Commission stated[12] that the regulation was consistent with the definition of "Margin Funds Available for Disbursement" in the Margins Handbook[13] prepared by the Joint Audit Committee (JAC), a representative committee of U.S. futures exchanges and the National Futures Association (NFA).[14] The Commission noted that although designated self-regulatory organizations (DSROs) reviewed FCMs to determine whether they appropriately prohibited their customers from withdrawing funds from their futures accounts, it was unclear to what extent that requirement applied to cleared swap accounts when such swaps were executed on a designated contract market (DCM) that participated in the JAC.[15] The Commission also noted that clearing members that cleared only swaps that were executed on a swap execution facility were not subject to the requirements of the JAC Margins Handbook or review by a DSRO.[16]

Thus, although regulation § 39.13(g)(8)(iii) was also designed to apply these risk mitigation and customer protection standards to futures and swap positions carried in customer accounts by clearing FCMs, Commission regulations do not apply a Margin Adequacy Requirement to non-clearing FCMs. Furthermore, regulation § 39.13(g)(8)(iii) does not require DCOs to apply a Margin Adequacy Requirement to the positions carried

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[12] Derivatives Clearing Organization General Provisions and Core Principles, 76 FR at 69379.
[13] Joint Audit Committee Margins Handbook, available at *http://www.jacfutures.com/jac/MarginHandBookWord.aspx*.
[14] JAC, JAC Members, available at *http://www.jacfutures.com/jac/Members.aspx*. Self-regulatory organizations, such as commodity exchanges and registered futures associations (*e.g.*, NFA), enforce minimum financial and reporting requirements, among other responsibilities, for their members. *See* regulation § 1.3, 17 CFR 1.3. Pursuant to regulation § 1.52(d), when an FCM is a member of more than one self-regulatory organization, the self-regulatory organizations may decide among themselves which of them will assume primary responsibility for these regulatory duties and, upon approval of such a plan by the Commission, the self-regulatory organization assuming such primary responsibility will be appointed the designated self-regulatory organization for the FCM. 17 CFR 1.52(d).
[15] Derivatives Clearing Organization General Provisions and Core Principles, 76 FR at 69379.
[16] *Id.*

by a clearing FCM that are not cleared at a registered DCO (*e.g.*, most foreign futures and foreign option positions).[17]

B. The Divisions' No-Action Position

On July 10, 2019, the Division of Swap Dealer and Intermediary Oversight (DSIO) (now Market Participants Division (MPD)) and the Division of Clearing and Risk (DCR) (collectively, the Divisions) published CFTC Letter No. 19-17, which, among other things, provides staff guidance with respect to the processing of margin withdrawals under regulation § 39.13(g)(8)(iii) and announced a conditional and time-limited no-action position for certain such withdrawals.[18] The advisory followed discussions with, and written representations from, the Asset Management Group of the Securities Industry and Financial Markets Association (SIFMA-AMG), the Chicago Mercantile Exchange (CME), the Futures Industry Association (FIA), the JAC, and several FCMs, regarding practices among FCMs and their customers related to the handling of separate accounts of the same customer.[19]

CFTC Letter No. 19-17 used the term "beneficial owner" synonymously with the term "customer," as "beneficial owner" was, in this context, commonly used to refer to the customer that is financially responsible for an account. Additionally, as discussed further below, in the customer relationship context, FCMs often deal directly with a commodity trading advisor acting as an agent of the customer rather than with the

[17] The term "foreign futures" means any contract for the purchase or sale of any commodity for future delivery made, or to be made, on or subject to the rules of any foreign board of trade. Regulation § 30.1(a), 17 CFR 30.1(a). The term "foreign option" means any transaction or agreement which is or is held out to be of the character of, or is commonly known to the trade as, an "option," "privilege," "indemnity," "bid," "offer," "put," "call," "advance guaranty" or "decline guaranty," made or to be made on or subject to the rules of any foreign board of trade. 17 CFR 30.1(b).
[18] CFTC Letter No. 19-17, July 10, 2019, available at *https://www.cftc.gov/csl/19-17/download* as extended by CFTC Letter No. 20-28, Sept. 15, 2020, available at *https://www.cftc.gov/csl/20-28/download*; CFTC Letter No. 21-29, Dec. 21, 2021, available at *https://www.cftc.gov/csl/21-29/download*; CFTC Letter No. 22-11, Sept. 15, 2022, available at https://www.cftc.gov/csl/22-11/download; CFTC Letter No. 23-13, Sept. 11, 2023, available at *https://www.cftc.gov/csl/23-13/download*; and CFTC Letter No. 24-07, June 24, 2024, available at *https://www.cftc.gov/csl/24-07/download*.
[19] *See, e.g.*, SIFMA-AMG letter dated June 7, 2019 to Brian A. Bussey and Matthew B. Kulkin (SIFMA-AMG Letter); CME letter dated June 14, 2019 to Brian A. Bussey and Matthew B. Kulkin (CME Letter); and FIA letter dated June 26, 2019 to Brian A. Bussey and Matthew B. Kulkin (First FIA Letter).

customer itself. For the avoidance of confusion (*e.g.*, with regard to the terms "owner" or "ownership," as those terms are used in Forms 40 and 102,[20] or parts 17-20,[21] or with regard to the term "beneficial owner," as that term may be used by other agencies), this final rule uses only the term "customer," except where directly quoting or paraphrasing a source that uses the term "beneficial owner."

The written representations preceding the issuance of CFTC Letter No. 19-17 included letters filed separately by SIFMA-AMG, CME, and FIA (collectively, the "Industry Letters"). Citing regulation § 39.13(g)(8)(iii)'s requirements related to the withdrawal of customer initial margin, and JAC Regulatory Alert #19-02 reminding FCMs of those requirements,[22] SIFMA-AMG and FIA explained that provisions in certain FCM customer agreements provide that certain accounts carried by the FCM that have the same customer are treated as accounts for different legal entities (*i.e.*, "separate accounts").[23]

As FIA explained, there are a variety of reasons why a customer may want separate treatment for its accounts under such an agreement.[24] For instance, an institutional customer, such as an investment or pension fund, may allocate assets to investment managers[25] under investment management agreements that require each investment manager to invest a specified portion of the customer's assets under management in accordance with an agreed trading strategy, independent of the trading

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[20] *See* CFTC, CFTC Form 40, Statement of a Reporting Trader, available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@forms/documents/file/cftcform40.pdf*; *see also* CFTC, Ownership & Control Reporting, available at https://www.cftc.gov/Forms/OCR/index.htm (discussing Ownership and Control Reporting under Form 102).

[21] *See* 17 CFR parts 17 (covering reports by reporting markets, FCMs, clearing members, and foreign brokers), 18 (reports by traders), 19 (reports by persons holding reportable positions in excess of position limits and by merchants and dealers in cotton), and 20 (large trader reporting for physical commodity swaps).

[22] JAC, Regulatory Alert #19-02, May 14, 2019, available at *http://www.jacfutures.com/jac/jacupdates/2019/jac1902.pdf*.

[23] SIFMA-AMG Letter; First FIA Letter.

[24] First FIA Letter.

[25] The Industry Letters sometimes used the terms "investment manager" and "asset manager" interchangeably.

that may be undertaken for the customer by the same or other investment manager(s) acting on behalf of other accounts of the customer.[26] Under such a circumstances, an investment manager, in order to implement its trading strategy effectively, may want assurance that the portion of funds it has been allocated to manage is entirely available to the investment manager, and will not be affected by the activities of other investment managers who manage other portions of the customer's assets and maintain separate accounts at the same FCM.

Additionally, as FIA explained, a commercial enterprise may establish separate agreements to leverage specific broker expertise on products or to diversify risk management strategies.[27] In such cases, each separate account may be subject to a separate customer agreement, which the FCM in many cases negotiates directly with the customer's agent, which is often an investment manager.[28]

SIFMA-AMG and FIA asserted that, subject to appropriate FCM internal controls and procedures, separate accounts should be treated as separate legal entities for purposes of regulation § 39.13(g)(8)(iii); *i.e.*, separate accounts should not be combined when determining an account's margin funds available for disbursement.[29] SIFMA-AMG and FIA maintained that such separate account treatment should not be expected to expose an FCM to any greater regulatory or financial risk, and asserted that an FCM's internal controls and procedures could be designed to assure that the FCM does not undertake any additional risk as to the separate account.[30] The Industry Letters included a number of examples of such controls and procedures.[31]

In its letter, SIFMA-AMG suggested that it would be possible to allow for separate account treatment without undermining the risk mitigation and customer

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] SIFMA-AMG Letter; First FIA Letter.
[30] SIFMA-AMG Letter; First FIA Letter.
[31] SIFMA-AMG Letter; First FIA Letter; CME Letter.

protection goals of regulation § 39.13(g)(8)(iii).[32] SIFMA-AMG recognized that there may be some instances, such as a customer default, in which separate account margining would no longer be prudent.[33] SIFMA-AMG stated that an FCM could agree to first satisfy any amounts owed from agreed assets related to a separate account, and continue to release funds until the FCM provided the separate account with a notice of an event of default under the applicable clearing account agreement, and determined that it is no longer prudent to continue to separately margin the customer's accounts, provided that such actions are consistent with the FCM's written internal controls and procedures.[34] SIFMA-AMG further stated that, in such instance, the FCM would retain the ability to ultimately look to funds in other accounts of the customer, including accounts under different control, and the right to call the customer for funds.[35] CME similarly asserted that disbursements on a separate account basis should not be permitted in certain circumstances, such as financial distress, that fall outside the "ordinary course of business."[36] Although CME asserted that the plain language of regulation § 39.13(g)(8)(iii) unambiguously forbids disbursements on a separate account basis, CME noted that it would be amenable to the Commission amending the regulation to permit such disbursements, subject to certain such risk-mitigating conditions.[37]

SIFMA-AMG and FIA requested that DCR confirm that it would not recommend that the Commission initiate an enforcement action against a DCO that permits its clearing FCMs to treat certain separate accounts of a customer as accounts of separate entities for purposes of regulation § 39.13(g)(8)(iii),[38] and confirm that a clearing FCM

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[32] SIFMA-AMG Letter.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] CME Letter.
[37] *Id.*
[38] FIA specifically noted that such a no-action position could be conditioned on the FCM maintaining certain internal controls and procedures. First FIA Letter.

may release excess funds from a separate customer account notwithstanding an outstanding margin call in another account of the same customer.[39]

In CFTC Letter No. 19-17, DCR stated that, in the context of separate accounts, the risk management goals of regulation § 39.13(g)(8)(iii) may effectively be addressed if a clearing FCM carrying a customer with separate accounts meets certain conditions, which were derived from the Industry Letters and specified in CFTC Letter No. 19-17.[40] DCR stated that it would not recommend that the Commission take enforcement action against a DCO if the DCO permits its clearing FCMs to treat certain separate accounts as accounts of separate entities for purposes of regulation § 39.13(g)(8)(iii) subject to these conditions.[41] The no-action position extended until June 30, 2021, in order to provide staff with time to recommend, and the Commission with time to consider, a rulemaking to implement on a permanent basis requirements related to separate account treatment.[42] CFTC Letter No. 20-28, published on September 15, 2020, extended the no-action position until December 31, 2021 due to challenges presented by the COVID-19 pandemic.[43] CFTC Letter No. 20-28 stated that if the process to consider codifying the no-action position provided for by CFTC Letter No. 19-17 was not completed by that date, the Divisions would consider further extending the no-action position.[44] The Divisions have continued to extend the no-action position in CFTC Letter No. 19-17 as they have worked toward a final rule. The no-action position currently expires on the earlier of June 30, 2025 or the effective date of this final rule.[45]

C. The Commission's First Proposal

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[39] SIFMA-AMG Letter; First FIA Letter; *see also* CME Letter.
[40] CFTC Letter No. 19-17.
[41] *Id.*
[42] *Id.*
[43] CFTC Letter No. 20-28.
[44] *Id.*
[45] CFTC Letter No. 24-07.

On April 14, 2023, the Commission published in the Federal Register a notice of proposed rulemaking designed to codify the no-action position in CFTC Letter No. 19-17 (First Proposal).[46] The First Proposal proposed to amend regulation § 39.13 to allow a DCO to permit a clearing FCM to treat the separate accounts of customers as accounts of separate entities for purposes of regulation § 39.13(g)(8)(iii), if such clearing member's written internal controls and procedures permitted it to do so, and the DCO required its clearing members to comply with risk-mitigating requirements based on the conditions in CFTC Letter No. 19-17.

The requirements for separate account treatment in the First Proposal were substantially similar to the conditions in CFTC Letter No. 19-17. However, certain such proposed requirements reflected modification of the no-action conditions on which they were based, including additional reporting requirements for clearing FCMs required to cease disbursements on a separate account basis, an explicit process for clearing FCMs to resume disbursements on a separate account basis, and provisions designed to further clarify the requirement that separate accounts be on a one business day margin call.

The Commission originally proposed to codify the no-action position in CFTC Letter No. 19-17 in part 39 to hew closely to the operation of the no-action position itself. Under the First Proposal, DCOs would be able to permit clearing FCMs to engage in separate account treatment, provided such clearing FCMs complied with certain requirements, which DCOs would be required to monitor and enforce through their rules.

The comment period for the First Proposal was extended once at the request of a commenter and closed on June 30, 2023.[47] The Commission received comments from

[46] Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants, 88 FR 22934 (Apr. 14, 2023) (First Proposal).
[47] Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants, 88 FR 39205 (June 15, 2023).

twelve commenters.[48] Although commenters generally supported codifying the no-action position in CFTC Letter No. 19-17, six commenters[49] contended that the Commission should codify the no-action position in its part 1 FCM regulations (where it would apply directly to all FCMs) rather than in its part 39 DCO regulations (where it would apply only to clearing FCMs, through the instrumentality of DCO rules). Other commenters did not opine on whether the proposed codification should be in part 1 versus part 39.

D. The Commission's Second Proposal

On February 20, 2024, the Commission voted to approve withdrawal of the First Proposal and publish a notice of proposed rulemaking to codify a Margin Adequacy Requirement similar to that of regulation § 39.13(g)(8)(iii), along with the no-action position in CFTC Letter No. 19-17, in part 1 of its regulations, whereby it would be applicable to all FCMs (Second Proposal).[50] In the Second Proposal, the Commission discussed and addressed comments received in response to the First Proposal, including the comments that informed the Commission's decision to withdraw the First Proposal and instead propose to codify the no-action position of CFTC Letter No. 19-17 in part 1.

The notice of proposed rulemaking and withdrawal were published in the Federal Register on March 1, 2024. The Commission is finalizing the Second Proposal, with modifications responding to the comments received. The bulk of the final rule will be contained in new regulation § 1.44. However, as explained below, the Commission is also finalizing supporting amendments in regulations §§ 1.3, 1.17, 1.20, 1.32, 1.58, 1.73, 22.2, 30.2, 30.7, and 39.13 to facilitate implementation of regulation § 1.44. The

[48] The American Council of Life Insurers, CME, FIA, Intercontinental Exchange, Inc., the JAC, MFA (formerly Managed Funds Association), NFA, SIFMA-AMG, Symphony Communications Services, LLC, and three individuals.
[49] CME, FIA, Intercontinental Exchange, Inc., the JAC, NFA, and SIFMA-AMG.
[50] Regulations to Address Margin Adequacy and To Account for the Treatment of Separate Accounts by Futures Commission Merchants, 89 FR 15312 (Mar. 1, 2024) (Second Proposal). The Second Proposal also contained supporting amendments in parts 1, 22, 30, and 39.

Commission is additionally finalizing amendments to address inadvertent inconsistencies in existing regulations.[51]

Regulation § 1.44 is comprised of eight subsections. Regulation § 1.44(a) defines key terms solely for purposes of regulation § 1.44. Regulation § 1.44(b) incorporates, for all FCMs, and for all accounts,[52] the same Margin Adequacy Requirement that DCOs are obligated in regulation § 39.13(g)(8)(iii) to require their clearing FCMs to apply. Regulation § 1.44(c) makes clear that an FCM can provide disbursements on a separate account basis only during the "ordinary course of business," a term that is defined in proposed regulation § 1.44(a). Regulation § 1.44(d) explains how FCMs may elect to engage in separate account treatment for one or more customers. Regulation § 1.44(e) enumerates the events that are inconsistent with the ordinary course of business for purposes of regulation § 1.44 and contains requirements for FCMs related to cessation of disbursements on a separate account basis upon the occurrence of such events, and resumption of separate account disbursements upon the cure of such events. Regulation § 1.44(f) contains the requirement that each separate account be on a "one business day margin call" and sets out provisions designed to establish how a one business day margin call is to be made and met for purposes of regulation § 1.44. Regulation § 1.44(g) sets forth capital, risk management, and segregation calculation requirements for FCMs with

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[51] These are changes to regulation § 1.3 (to clarify that Saturday is not a business day); regulation § 1.17(b) (to reorganize the wording of the definition of the term "business day" for capital purposes to be consistent with the wording in the amendments to regulation § 1.3, to clarify that the definition of the term "risk margin" includes both customer and noncustomer accounts, and to change the term "FCM" to read "futures commission merchant"); regulations §§ 1.20(i), 30.7(f)(2), and 22.2(f) (to revise the regulatory description of the calculation of the total amount of funds that an FCM must hold in segregation for futures customers, Cleared Swaps Customers, and 30.7 customers, respectively, to align such description with the Commission's financial forms and the instructions to such forms, reorganizing regulations § 22.2(f)); regulation § 1.58(a) and (b) (to clarify that gross margining requirements for omnibus accounts carried for one FCM at another FCM apply to Cleared Swaps as well as to futures and options on futures); and § 30.2(b) (to clarify that, in the context of the exclusion for applying certain regulations to persons and transactions subject to the requirements of part 30, existing regulations §§ 1.41, 1.42, and 1.43 (which were added in the 2021 part 190 bankruptcy rulemaking) are not excluded). These changes are discussed in greater detail in the relevant sections below.

[52] Regulation § 1.44(a) defines "account" to include futures accounts and Cleared Swaps Customer Accounts, both of which terms are defined in regulation § 1.3, and 30.7 accounts. A 30.7 account means any account maintained by an FCM for or on behalf of 30.7 customers to hold money, securities, or other property to margin, guarantee, or secure foreign futures or foreign options. 17 CFR 30.1(g).

respect to accounts for which the FCM has elected separate treatment. Lastly, regulation § 1.44(h) articulates information and disclosure requirements for FCMs that engage in separate account treatment.

II. REGULATIONS

Section 8a(5) of the CEA[53] authorizes the Commission "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of" the CEA. The Commission is promulgating these rules pursuant to section 8a(5) as reasonably necessary to effectuate sections 4d(a)(2) and 4d(f)(2) of the CEA,[54] providing for the segregation and protection of, respectively, futures customer funds and Cleared Swaps Customer Collateral, and section 4(b)(2)(A) of the CEA,[55] providing for the safeguarding of customers' funds in connection with foreign futures and foreign option transactions. The Commission is also promulgating these rules as reasonably necessary to effectuate section 4f(b) of the CEA, which requires an FCM to meet minimum financial requirements prescribed by the Commission as necessary to ensure that the FCM meets its obligations.[56] Moreover, the Commission is promulgating these rules as reasonably necessary to accomplish the purposes of the CEA as set forth in section 3(b);[57] specifically, "the avoidance of systemic risk" and "protect[ing] all market participants from … misuses of customer assets."

Accordingly, the Commission believes that the amendments adopted herein relating to the Margin Adequacy Requirement, and the modification of this requirement to permit, subject to certain further conditions, separate account treatment in connection with the withdrawal of customer initial margin, support the customer funds protection

[53] 7 U.S.C. 12a(5).
[54] 7 U.S.C. 6d(a)(2) and (f)(2).
[55] 7 U.S.C. 6(b)(2)(A).
[56] 7 U.S.C. 6f(b).
[57] 7 U.S.C. 5(b).

and risk management provisions and purposes of the CEA. As further described below, the Commission also believes that preventing the undermargining of customer accounts and mitigating the risk of a clearing member default, or the default of a non-clearing FCM, and the potential for systemic risk in either scenario, is effectively addressed by the standards set forth in this final rule.

All FCMs are currently subject to a detailed set of requirements designed to provide effective protection for customer funds. These include, for futures accounts, regulations §§ 1.20 (requiring segregation of customer funds), 1.22 (requiring, *inter alia*, residual interest to cover undermargined amounts), and 1.23 (requiring FCMs to maintain residual interest in segregated accounts up to a targeted amount that they determine based on specified considerations), as well as similar regulatory obligations with respect to Cleared Swaps Customer Accounts (respectively, regulations §§ 22.2(d) and (f) and 22.17), and 30.7 accounts (regulation § 30.7).

Regulation § 39.13(g)(8)(iii) provides, through the Margin Adequacy Requirement, an additional layer of protection for customer funds, but only with respect to FCMs that are clearing members of DCOs. Prior to this final rule, there was no analogous Margin Adequacy Requirement applicable to FCMs that are not clearing members of DCOs. As discussed above, regulation § 39.13(g)(8)(iii) is designed to mitigate the risk that a clearing member fails to hold, from a customer, funds sufficient to cover the required initial margin for the customer's cleared positions and, in light of the use of omnibus margin accounts, avoid the misuse of customer funds by reducing the likelihood that the clearing member will cover one customer's margin shortfall using another customer's funds.[58] Accordingly, regulation § 39.13(g)(8)(iii) provides risk mitigation benefits for DCOs, clearing FCMs, and customers. The effect of the staff no-action position in CFTC Letter No. 19-17 is to allow DCOs to permit clearing FCMs to

[58] Section 3(b) of the CEA, 7 U.S.C. 5(b).

engage in separate account treatment for purposes of that provision, but subject to conditions designed to maintain the provision's risk mitigating effects.

By establishing requirements for separate account treatment for all FCMs through the addition of a similar Margin Adequacy Requirement to part 1, the Commission seeks to replicate the regulatory structure presented by the interaction of regulation § 39.13(g)(8)(iii) and the no-action position of CFTC Letter No. 19-17 for all FCMs, and further the customer fund protection and risk mitigation purposes of the CEA[59] by implementing measures designed to further ensure that all FCMs, whether clearing or non-clearing, do not create or exacerbate an undermargining scenario.

The requirements for separate account treatment established herein are designed to (i) ensure that FCMs carry out separate account treatment in a consistent and documented manner; (ii) monitor customer accounts on a separate and combined basis; (iii) identify and act upon instances of financial or operational distress that necessitate a cessation of disbursements on a separate account basis; (iv) provide appropriate disclosures to customers[60] regarding separate account treatment; and (v) apprise their DSROs when they apply separate account treatment or when an event has occurred that would necessitate cessation of disbursements on a separate account basis.[61]

The amendments are designed to extend the customer protection and risk management benefits of regulation § 39.13(g)(8)(iii) to all FCMs and all of their customer accounts, and to provide an alternative means of achieving those risk

[59] Section 3(b) of the CEA, 7 U.S.C. 5(b) (It is the purpose of the CEA to ensure the financial integrity of all transactions subject to this Act and the avoidance of systemic risk and to protect all market participants from misuses of customer assets").

[60] In this final rule, references to a "customer" are to a direct customer of the FCM in question. Thus, where non-clearing FCM *N* clears through clearing FCM *C*, a customer (including a separate account customer) of *N* is not considered a customer of *C*.

[61] For the avoidance of doubt, the final rule permits an FCM to decide to engage in separate account treatment for a set of customers. It neither requires an FCM to engage in such treatment nor requires a customer of an FCM that decides to engage in separate account treatment for certain customers to choose to have its accounts with such FCM treated as separate accounts of separate entities. Thus, separate account treatment should involve an affirmative decision by both the FCM and the customer.

management goals if the FCM elects to permit customers to maintain separate accounts.[62] Additionally, as discussed further below in the cost benefit considerations, because a number of clearing FCMs have already implemented the conditions set forth in CFTC Letter No. 19-17, some FCMs will have already implemented, in significant part, the requirements established herein.

The Commission received comment letters in response to the Second Proposal from the JAC, FIA, SIFMA-AMG, CME, Intercontinental Exchange, Inc. (ICE), the Options Clearing Corporation (OCC), and MFA (formerly Managed Funds Association). Commenters supported the Commission's proposal to codify the no-action position of CFTC Letter No. 19-17 and the Commission's proposed approach to base that codification in part 1. Certain commenters commented on the substantive requirements proposed, as well as how the proposed requirements may interact with one another and with other Commission regulations, and suggested modifications to the Second Proposal. The Commission addresses these comments in the discussion below. Additionally, the Commission posed specific questions for comment in the Second Proposal. Although in three instances commenters responded explicitly to these questions,[63] FIA noted that it considers its comment letter responsive to Questions 1-4, 6, and 7 in its discussion of proposed amendments to regulation § 1.17 and proposed regulation § 1.44(d), (f), and (h), including proposed requirements for the disclosure of information in the Disclosure Document required by regulation § 1.55(i).[64]

Questions 1 and 2 concerned the Second Proposal generally. In Question 1, the Commission requested comment regarding whether, in light of changes made in the Second Proposal relative to the First Proposal, the Commission should consider any

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[62] As a result, regulation § 1.44 prohibits the application of portfolio margining or cross-margining treatment *between* separate accounts of the same customer, but would not prohibit the application of such treatments *within* a particular separate account of a customer.
[63] FIA (Question 4), the JAC (Question 5) and CME (Question 8).
[64] FIA Comment Letter.

requirements for separate account treatment additional to those contained in regulation § 1.44 as proposed or modify or remove any of the proposed requirements. In Question 2, the Commission requested comment regarding whether the interaction between regulation § 1.44(g)-(h) as proposed and other regulations under parts 1, 22, and 30 affected by the proposed requirements (*e.g.*, regulations §§ 1.17, 1.20, 1.22, 1.23, 1.32, 1.55, 1.58, 1.73, 22.2, 30.2, and 30.7) was sufficiently clear. No commenters responded explicitly to these questions, although, as indicated above, certain comments addressed the thematic issues these questions raise.

A. Amendments to Regulation § 1.3

The definitions contained in regulation § 1.3 are key to understanding and interpreting the Commission's regulations, including part 1 FCM regulations. The Commission believes the provisions of regulation § 1.44 require an amendment to regulation § 1.3.

The Commission proposed to amend the definition of "business day" in regulation § 1.3. Prior to this final rule, regulation § 1.3 provided, in relevant part, that "business day" meant any day other than a Sunday or holiday. The term "business day" is intended to encompass days on which banks and custodians are open in the United States to facilitate payment of margin. For the avoidance of doubt, "holiday" in this context refers to holidays in the United States. The Commission proposed to modify the definition of "business day" in regulation § 1.3 to confirm that the term encompasses any day other than a *Saturday*, Sunday, or holiday.

The Commission notes that, in actual practice, Saturdays are generally not treated as business days in the markets,[65] by market participants, or for regulatory purposes.[66]

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[65] It is true that some markets are moving toward 24/7 operation. The Commission will continue to monitor these developments, and consider further rulemaking in this area as appropriate. Nonetheless, a definition of business days that includes Saturday, but not Sunday, does not reflect present or plausible future reality.

[66] For instance, Saturdays are treated as non-business days for purposes of swaps reporting under parts 43 and 45 of the Commission's regulations, 17 CFR 43.1; 17 CFR 45.2, execution of confirmations by swap

The Commission proposed to amend the definition of "business day" in regulation § 1.3 to conform to that reality. In connection with the proposed amendments to regulation § 1.3, in Question 3 of the Second Proposal, the Commission requested comment regarding whether its proposal to revise the definition of "business day" in regulation § 1.3 would result in any adverse consequences for any market participants. The Commission did not receive any comments with respect to the proposed amendment to the definition of "business day" in regulation § 1.3 or explicitly in response to Question 3. Accordingly, the Commission is adopting the amendment to the definition of "business day" in regulation § 1.3 as proposed.

B. Amendments to Regulation § 1.17

Regulation § 1.17 establishes minimum financial requirements for FCMs. Regulation § 1.17(a)(1)(i) provides that each person registered as an FCM must maintain adjusted net capital equal to, or in excess of, the greatest of: (1) $1 million (or $20 million if the FCM is also registered as a swap dealer); (2) eight percent of the total "risk margin" required on the positions in customer and noncustomer accounts[67] carried by the FCM; (3) the amount of adjusted net capital required by NFA as a registered futures association; or (4) for an FCM registered as a securities broker or dealer with the Securities and Exchange Commission (SEC), the amount of net capital required by SEC rule § 15c3-1.[68] For purposes of regulation § 1.17(a)(1)(i), the term "risk margin" is defined by paragraph (b)(8) of that regulation to generally mean the level of maintenance margin or performance bond required for customer and noncustomer positions established by the applicable exchanges or clearing organizations.

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dealers, 17 CFR 23.501(c)(5)(ii), and under the Commission's part 39 DCO regulations, 17 CFR 39.2 (defining an intraday business day period). *See also, e.g.*, CFTC, Guidebook for Part 17.00: Reports by Reporting Markets, Futures Commission Merchants, Clearing Members, and Foreign Brokers, at 18, May 30, 2023 (noting that for purposes of part 17.00 reports, "reporting entities may elect to not consider Saturdays to be a business day, as Saturday is not commonly known as such").

[67] The term "noncustomer account" generally means the accounts of affiliates of an FCM or employees of an FCM. *See* 17 CFR 1.17(b)(4).

[68] 17 CFR 240.15c3-1.

The Commission proposed several amendments to regulation § 1.17 to reflect the regulatory capital treatment of separate accounts that would result from the implementation of proposed regulation § 1.44, including the requirements contained in regulation § 1.44(g)(3), discussed below. As a general matter, the proposed amendments to regulation § 1.17 were designed to ensure that FCMs manage risk with respect to separate accounts consistently, and cannot revert to calculating minimum financial requirements on a combined account basis where such calculations would tend to reflect less risk and reduced financial requirements for a customer than if each of the customer's separate accounts were treated as an account of a distinct customer without regard to the same customer's other separate accounts.

Consistent with that intent, the Commission proposed to expand the list of modifiers to the definition of the term "risk margin" for an account by adding proposed paragraph (b)(8)(v) to regulation § 1.17, providing that if an FCM carries separate accounts for separate account customers pursuant to regulation § 1.44, then the FCM shall calculate the risk margin pursuant to regulation § 1.17(a)(1)(i)(B)(*1*) as if each separate account is owned by a separate entity.

The Commission notes that, under the amendments as proposed, risk margin would be calculated on an individual basis for each separate account. Calculating risk margin separately for each separate account would eliminate the potential for portfolio margining offsets based on positions between separate accounts of the same separate account customer,[69] which would either increase, or leave unchanged, the total risk

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[69] As noted in regulation § 39.13(g)(4), a DCO may allow reductions in initial margin requirements for related positions if the price risks with respect to such positions are significantly and reliably correlated. This includes cases where (A) The products on which the positions are based are complements of, or substitutes for, each other. An example might be long versus short positions in oil and natural gas, both of which may be used for generating energy. However, portfolio margining is applicable only to accounts for the same customer. *See* regulation § 39.13(g)(8)(i) (requiring collection of initial margin on a gross basis for each clearing member's customer accounts). So, if a customer has, in a single account, both long oil positions and short natural gas positions, then the customer may benefit from a reduction in initial margin requirements for the two risk-offsetting positions. However, if those positions are in different separate accounts of the customer under this this final rule, then the positions would not lead to an initial margin reduction as the positions would not be margined on a combined or portfolio basis.

margin requirement, and thus the minimum adjusted net capital requirement, for an FCM providing separate account treatment.[70] The proposed addition of paragraph (b)(8)(v) to regulation § 1.17 was intended to further clarify that, pursuant to the Commission's FCM capital rule, an FCM that elects to permit separate account treatment must compute the risk margin amount for separate accounts as if each account is an account of a separate entity.

In proposing to amend the definition of the term "risk margin" in regulation § 1.17(b)(8) to reflect separate accounts, the Commission noted that such amendment, and the resulting potential increase in an FCM's minimum adjusted net capital requirement under regulation § 1.17(a)(1)(i), would also affect other regulations that impose obligations on FCMs based on their level of adjusted net capital.[71] The Commission also noted that the proposed amendments to the minimum capital requirements would affect an FCM's obligation to provide certain notices to the Commission and to the FCM's DSRO under regulation § 1.12.[72]

The Commission additionally proposed to amend regulation § 1.58 to provide that, where a clearing FCM carries an omnibus customer account for a non-clearing FCM, and the non-clearing FCM applies separate account treatment, then such non-clearing FCM must calculate initial and maintenance margin for purposes of regulation §

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[70] As noted above, per regulation § 1.17(a)(1)(i), the adjusted net capital requirement for an FCM is the greatest of several calculations, one of which is eight percent of the total risk margin requirement as defined in regulation § 1.17(b)(8). Thus, a calculation that would increase, or leave unchanged, the risk margin requirement would correspondingly increase, or leave unchanged, the adjusted net capital requirement.

[71] For example, regulation § 1.17(h) conditions an FCM's ability to repay or prepay subordinated debt obligations on the FCM maintaining an amount of adjusted net capital that, after taking into effect the amount of the subordinated debt payment and other subordinate debt payments maturing within a set time period, exceeds the FCM's minimum adjusted net capital requirement by 120 percent to 125 percent, as specified in the applicable provision of regulation § 1.17(h). *See, e.g.,* 17 CFR 1.17(h)(2)(vii) which generally provides, subject to certain conditions, that an FCM may not make a prepayment on an outstanding subordinated debt obligation if such payment would result in the FCM maintaining less than 120 percent of its minimum adjusted net capital requirement.

[72] *See, e.g.,* 17 CFR 1.12(a), which requires an FCM to provide notice to the Commission and the FCM's DSRO if the FCM's adjusted net capital at any time is less than the minimum required by regulation § 1.17.

1.58(a) separately for each separate account. These proposed amendments to regulation § 1.58 are discussed further below.

Second, the Commission proposed to amend regulation § 1.17(c)(2), which defines "current assets" that an FCM may recognize and include in computing its net capital. Regulation § 1.17(c)(2) currently defines "current assets" to include cash and other assets or resources commonly identified as those that are reasonably expected to be realized in cash or sold during the next 12 months. However, regulation § 1.17(c)(2)(i) provides that an FCM must exclude from current assets any unsecured receivables resulting from futures, Cleared Swaps, or 30.7 accounts that liquidate to a deficit or contain a debit ledger balance only, provided, however, that the FCM may include a deficit or debit ledger balance in current assets until the close of business on the business day following the date on which the deficit or debit ledger balance originated (provided, in turn, that the account had timely satisfied the previous day's deficits or debit ledger balances).

The Commission proposed to amend regulation § 1.17(c)(2)(i) to provide explicitly that if an FCM carries separate accounts for separate account customers pursuant to proposed regulation § 1.44, then the FCM must treat each separate account as an account of a separate entity for the calculation of net capital, with certain limitations if deficits or debit ledger balances were not satisfied across the separate accounts of one separate account customer in accordance with the one business day requirements. As proposed, amended regulation § 1.17(c)(2)(i) would provide that the FCM must exclude each unsecured separate account that liquidates to a deficit or contains a debit ledger balance only from current assets in its calculation of net capital, provided, however, that if the separate account is subject to a call for margin by the FCM, it may be included in current assets until the close of business on the business day following the date on which the deficit or debit ledger balance originated, provided that the separate account timely

satisfied a previous day's deficit or debit ledger balance in its entirety. As proposed, amended regulation § 1.17(c)(2)(i) further provides that, if the separate account does not satisfy a previous day's deficit or debit ledger balance in its entirety, then the deficit or debit ledger balance for the separate account, and any other deficits or debit ledger balances of the separate account customer in other separate accounts carried by the FCM, shall not be included in current assets until all such calls are satisfied in their entirety. The Commission's proposed amendments were intended to provide the same capital treatment to separate accounts as is currently provided customer accounts that liquidate to deficits or contain debit ledger balances, and to be consistent with corresponding conditions to the no-action position in CFTC Letter No. 19-17.[73]

Third, the Commission proposed to amend regulation § 1.17(c)(4), which defines the term "liabilities" for purposes of an FCM calculating its net capital. Regulation § 1.17(c)(4) generally defines the term "liabilities" to mean the total money liabilities of an FCM arising in connection with any transaction whatsoever, including economic obligations of an FCM that are recognized and measured in conformity with generally accepted accounting principles. Regulation § 1.17(c)(4) also provides that for purposes of computing net capital, an FCM may exclude from its liabilities funds held in segregation for futures customers, Cleared Swaps Customers, and 30.7 customers, provided that such segregated funds are also excluded from the FCM's current assets in computing the firm's net capital.

The Commission proposed to amend regulation § 1.17(c)(4)(ii) to explicitly provide that an FCM that carries the separate accounts of separate account customers pursuant to proposed regulation § 1.44 must compute the amount of money, securities,

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[73] CFTC Letter No. 19-17. The letter provides that an "FCM shall record each separate account independently in the FCM's books and records, *i.e.*, the FCM shall record separate accounts as a receivable (debit/deficit) or payable with no offsets between the other separate accounts of the same customer." *Id.* (Condition 6). The letter also provides that "the receivable from a separate account shall only be considered secured (a current/allowable asset) based on the assets of that separate account, not on the assets held in another separate account of the same customer." *Id.* (Condition 7).

and property due to a separate account customer as if each separate account of the separate account customer is a distinct customer. The Commission further proposed to amend regulation § 1.17(c)(4)(ii) to provide that an FCM, in computing its net capital, may exclude funds held in segregation for separate account customers from the FCM's liabilities, provided that funds held in segregation for separate account customers are also excluded from the FCM's current assets. The purpose of the proposed amendment is to ensure that an FCM, in computing its net capital, reflects separate accounts in a consistent manner in determining its total current assets and liabilities.

Fourth, the Commission proposed to amend regulation § 1.17(c)(5), which defines the term "adjusted net capital." Regulation § 1.17(c)(5)(viii) provides, in relevant part, that adjusted net capital means net capital minus, among other items detailed in regulation § 1.17(c)(5), the amount of funds required in each customer account to meet maintenance margin requirements of the applicable board of trade or, if there are no such maintenance margin requirements, clearing organization margin requirements applicable to the account's positions. FCMs are allowed to apply (that is, to reduce the amount of this deduction from capital by) "calls for margin or other required deposits which are outstanding no more than one business day."[74] However, once a customer fails to meet a margin call within one business day, the FCM loses that one business day period for receiving any of that customer's future margin calls, until the point in time at which the customer is no longer undermargined.[75]

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[74] 17 CFR 1.17(c)(5)(viii).

[75] Thus, if, due to activity on Monday, Customer A is undermargined by $150, and the FCM calls Customer A for that margin on Tuesday, then the FCM does not need to deduct that $150 from its net capital in computing its adjusted net capital, so long as the margin call is met by the close of business on Wednesday. Moreover, if Customer A, due to activity on Tuesday, is undermargined by an additional $100, and the FCM calls for that additional $100 on Wednesday, then the FCM does not need to deduct that additional $100 on Wednesday. If Customer A meets the $150 call by close of business Wednesday, and the $100 call by close of business on Thursday, then no deduction need be taken for either the $150 or the $100 margin calls. However, if Customer A fails to meet Tuesday's $150 call by close of business on Wednesday, then the FCM must deduct *both* the $150 from Tuesday *and* the $100 from Wednesday (thus a total of $250), as well as any future undermargined amounts *until* Customer A cures its entire undermargined amount. Again, once a customer fails to meet a margin call within one business day, the

The Commission proposed to amend regulation § 1.17(c)(5)(viii) to provide that an FCM that carries separate accounts for a separate account customer pursuant to proposed regulation § 1.44 must compute the amount of funds required to meet maintenance margin requirements for each separate account as if the account was owned by a distinct customer. However, if a margin call for any separate account of a separate account customer is outstanding for more than one business day, then (consistent with the treatment of multiple margin calls for a single customer described in the previous paragraph), no margin call for that separate account customer will benefit from the one business day period until the point in time at which all margin calls for the separate accounts of that separate account customer have been met in full.

As discussed further below in the context of proposed regulation § 1.44(f), the concepts of margin calls that are outstanding no more than one business day (for purposes of § 1.17(c)(5)(viii)) and meeting a one business day margin call (for purposes of § 1.44(f)) are separate and distinct. It is possible that a separate account customer may meet the test for the first, but not the second, or may meet the test for the second, but not the first.

The proposed amendments to regulation § 1.17 also include certain technical changes designed to improve clarity and promote consistency with other Commission regulations.[76]

FCM loses the one business day period for that customer to meet any of its future margin calls, until the point in time at which the customer is no longer undermargined.

[76] *E.g.*, changes to punctuation and substitution of "level of maintenance margin or performance bond required for the customer *and* noncustomer positions" for "level of maintenance margin or performance bond required for the customer *or* noncustomer positions" with respect to the meaning of risk margin for an account. *See, e.g.*, regulation § 1.17(b)(8). The Commission is further replacing the term "FCM" in regulation § 1.17(b)(8) with "futures commission merchant." The Commission is also reorganizing paragraph § 1.17(c)(5)(viii) into sub-paragraphs (A), (B), (C), and (D) to enhance clarity. The Commission is also reorganizing the wording of the definition of the term "business day" in regulation § 1.17(b)(6) to read "any day other than a Saturday, Sunday, or holiday" rather than "any day other than a Sunday, Saturday, or holiday." This change would align the wording in this provision with the wording of the term "business day" in regulation § 1.3.

Commenters did not object to the Commission's proposed addition of paragraph (b)(8)(v) to regulation § 1.17, the Commission's proposed amendments to regulation § 1.17(c)(4)(ii), or the technical amendments that the Commission proposed to regulation § 1.17. FIA welcomed the Commission's proposal to amend regulation § 1.17 to require FCMs that carry separate accounts to calculate the risk margin component of the FCM's regulatory capital requirement as if the separate accounts are owned by separate entities.[77] The JAC did not object to the proposed amendments to regulation § 1.17(c)(2)(i), but contended that the amendments would introduce a change from the current requirements related to the treatment of separate account debits and deficits in CFTC Letter No. 19-17 by requiring FCMs to look across all separate accounts of a separate account customer when determining one day debits or deficits to be considered current assets for net capital, rather than making that determination solely on the basis of each of the separate account customer's separate accounts individually.[78] The JAC noted that FCMs may require time to update their regulatory systems and records to comply with the amendments as proposed.[79]

The JAC also recommended that the Commission clarify how an FCM should consider whether a separate account timely satisfied the previous day's debit or deficits in its entirety, noting that, if margin calls are only considered satisfied when receipts are settled for purposes of proposed regulation § 1.17(c)(2)(i), then margin calls met in non-USD in one separate account may affect the current or noncurrent classification of a debit or deficits in all separate accounts of a separate account customer.[80] As discussed further below, JAC guidance provides that FCMs, subject to certain conditions, may apply margin equity credit to an account for certain pending non-USD transactions. The JAC

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[77] FIA Comment Letter.
[78] JAC Comment Letter.
[79] *Id.*
[80] *Id.*

noted that, depending on how margin calls are considered satisfied, the proposed amendments may require FCMs permitting separate account treatment to consider additional capital needs.[81]

With respect to the proposed amendments to regulation § 1.17(c)(5)(viii), the JAC agreed that proposed regulation § 1.17(c)(5)(viii)(A) (requiring that if one margin call is noncurrent, then all margin calls are noncurrent), is consistent with how, pursuant to the JAC's guidance, FCMs currently calculate noncurrent margin calls and account for noncurrent margin calls for purposes of determining capital charges. The JAC did not take a position with respect to the proposed amendments to regulation § 1.17(c)(5)(viii)(B), but urged the Commission (if adopting the amendments as proposed) to highlight in its final rulemaking that the amendments would require that, if a margin call for any separate account of a separate account customer is outstanding for more than one business day, then the calculation of current calls used in computing the separate account's undermargined capital charge must account for the age of *all* margin calls in *all* separate accounts of the separate account customer. The JAC noted that the resulting look-across to all margin calls in all separate accounts of a separate account customer could result in significant capital charges for FCMs even where each separate account is meeting its calls on a one business day basis as required by proposed regulation § 1.44(f), due to the additional time for compliance with the one business day margin requirement provided for holidays and foreign currency wires as proposed in accordance with the practices followed under CFTC Letter No. 19-17.[82]

Additionally, as the JAC noted in its comments with respect to the proposed amendments to regulation § 1.17(c)(2)(i), JAC Regulatory Alert #14-06 provides that, when calculating the undermargined capital charge and consistent with the treatment for

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[81] *Id.*
[82] *Id.*

residual interest, an FCM may consider pending non-USD deposits, ACH payments, and checks as received, subject to certain conditions.[83] The JAC requested that the Commission confirm that pending non-USD deposits would be permitted to be considered as received in computing the undermargined capital charge for all customers under proposed regulation § 1.17(c)(5)(viii)(A) and (B).[84]

The JAC also noted that, as the Commission has not proposed to modify regulation § 1.17(c)(5)(ix), requiring undermargined capital charges for noncustomer and omnibus accounts, the JAC will assume that FCMs will still be able to apply treatment for pending deposits as set forth in JAC Regulatory Alert #14-06 to noncustomers and omnibus accounts, unless the Commission amends the provision or confirms otherwise.[85]

Additionally, the JAC requested that the Commission confirm that for purposes of the undermargined capital charge for a customer account under regulation § 1.17(c)(5), maintenance margin requirements include the risk component only, and non-cash collateral should be valued at market value less applicable haircuts, including for separate account customers.[86] The JAC stated that performing such margin calculations differently in order to comply with different regulatory reporting requirements may prove burdensome for FCMs that permit separate account treatment.[87]

FIA contended that the proposed amendments to regulation § 1.17(c)(2)(i) and regulation § 1.17(c)(5)(viii) are inconsistent with the principle of separate account margining and how clearing FCMs have understood the conditions of CFTC Letter No.

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[83] *Id.* Specifically, JAC Alert #14-06 provides that, at an FCM's discretion, it may consider a non-USD deposit as pending in a customer's account and included 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 1-day wire transfer basis (i.e., the wire is initiated on Day 2), (iii) the FCM has a sufficient basis that the wire was actually initiated, (iv) the FCM continues to age the pending non-U.S. Dollar receipts and retains the ability to recognize a failed deposit immediately upon occurrence, and (v) the FCM treats unsettled non-U.S. Dollar disbursements from the account in the same manner." JAC Regulatory Alert #14-06, Nov. 4, 2014, available at *http://www.jacfutures.com/jac/jacupdates/2014/jac1406.pdf*.
[84] JAC Comment Letter.
[85] *Id.*
[86] *Id.*
[87] *Id.*

19-17.[88] FIA argued that, for purposes of calculating both current assets under regulation § 1.17(c)(2)(i) and charges against net capital for undermargined accounts under regulation § 1.17(c)(5)(viii), the Second Proposal would effectively require FCMs to suspend the ordinary course of business for purposes of both calculations in the event that any separate account fails to satisfy its previous day's deficit or debit ledger balance in its entirety within one business day (for purposes of the calculation of current assets) or within the close of business at the end of the second business day following the call (for purposes of the undermargined capital charge).[89] FIA noted that, on the basis of the conditions of the no-action position in CFTC Letter No. 19-17,[90] FCMs calculate current assets and undermargined capital charges for each separate account as if each such account were owned by a separate entity, and do not look across to other separate accounts of the same customer for purposes of either calculation, unless the FCM is suspending the ordinary course of business for any such account.[91]

FIA asserted that these proposed revisions to regulation § 1.17 would be costly for FCMs, which would be required to rebuild operational and reporting systems, and to rewrite underlying programming code, to perform the necessary look-across of all of the separately margined accounts for the same separate account customer whenever the separate account customer fails to timely satisfy the previous day's deficit/debit ledger balance in its entirety for the current asset calculation, or fails to settle a margin call by the end of the day after the call for the undermargined capital charge calculation.[92]

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[88] FIA Comment Letter.
[89] *Id.*
[90] Specifically, requirements that FCMs electing separate account treatment (i) record each separate account independently in the FCM's books and records, including by recording each separate account as a receivable (debit/deficit) or payable with no offsets between the other separate accounts of the same customer; and (ii) reflect the receivable from a separate account as secured (as a current/allowable asset) based on the assets of that separate account rather than on the assets held in another separate account of the same customer.
[91] FIA Comment Letter.
[92] *Id.*

FIA also argued that these proposed revisions to regulation § 1.17 would be punitive for FCMs, because they would impose capital costs on FCMs without regard to any related financial or operational risk. FIA included in its comment letter an example illustrating how an FCM could be required to take a significant capital charge due to a failure to meet a margin call timely in one separate account, even if the separate account customer's other separate accounts, managed by other investment managers, have margin calls that have not yet aged to a point that the FCM would be required to take a capital charge under existing regulation § 1.17.[93] FIA noted that a recent survey of its members showed that, although the percentage of required margin for separate accounts to total customer margin requirements varied from less than one percent to over 20%, members uniformly reported material potential capital implications measured by amount of margin required for a single beneficial owner across its separate accounts.[94]

FIA recommended that the Commission modify its proposed amendments to regulation § 1.17 to require a look-across of all of a separate account customer's separate accounts only where the ordinary course of business has been suspended for the separate account customer.[95] FIA further recommended that such look-across be made subject to the requirements defining the Commission's proposed one business day margin call requirement in proposed regulation § 1.44(f) so that FCMs can continue taking the benefit of current assets and avoiding charges against capital while client settlement in non-USD for separate accounts is pending.[96]

Like the JAC, FIA discussed the application of margin equity credit to accounts for pending non-USD margin deposits under JAC guidance.[97] FIA noted this practice appears to be in tension with the Commission's proposed amendments to regulation §

[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*

1.17 and urged the Commission to clarify that the Second Proposal was not adopted with the intention of prohibiting such current treatment of pending non-USD transfers for purposes of computing undermargined capital charges.[98]

In proposing to codify the no-action position of CFTC Letter No. 19-17 in part 1 of its regulations, the Commission considered the way in which it would need to modify existing provisions of part 1 to facilitate separate account treatment for FCMs. With respect to the calculation of current assets as set forth in regulation § 1.17(c)(2)(i) and the undermargined capital charge as set forth in regulation § 1.17(c)(5)(viii), the Commission proposed a more conservative approach to risk management that would trigger inclusion of debits or deficits (with respect to proposed regulation § 1.17(c)(2)(i)) or outstanding margin calls (with respect to proposed regulation § 1.17(c)(5)(viii)) across a separate account customer's separate accounts when a margin call made of such separate account customer for purposes of either regulation is not satisfied timely. Although CFTC Letter No. 19-17, which applied directly to DCOs, did not speak explicitly to how FCMs should treat separate accounts for purposes of these regulations, its provisions call for DCOs to require FCMs to subject accounts receiving separate treatment to heightened scrutiny and enhanced risk management practices, particularly with respect to timely receipt of margin.

The Commission has considered the JAC's and FIA's assertions that the proposed amendments to regulation § 1.17(c)(2)(i) and regulation § 1.17(c)(5)(viii) would represent a deviation from how FCMs have generally understood and applied the conditions of CFTC Letter No. 19-17. The Commission further acknowledges that a separate account customer's untimely payment of margin with respect to a separate account for purposes of regulation § 1.17(c)(2)(i) or regulation § 1.17(c)(5)(viii) does not necessarily indicate that the separate account customer is out of the ordinary course of

[98] *Id.*

business, as set forth in proposed regulation § 1.44(a), with respect to that separate account or any other separate account of such customer. It follows that a separate account for which payment of margin is untimely for purposes of regulation § 1.17(c)(2)(i) or regulation § 1.17(c)(5)(viii) may not be indicative of financial or operational distress in the same manner as would untimely payment of margin for purposes of regulation § 1.44. Unlike regulations § 1.17(c)(2)(i) and § 1.17(c)(5)(iii), which require an FCM to reserve capital when the aggregate of a customer's accounts are, respectively, in debit/deficit or undermargined beyond a defined period of time to protect the FCM against potential losses or price exposure if the liquidation of the customer's positions is required, regulation § 1.44 is designed to build in allowances to account for delays resulting from differences in time zones as well as international banking conventions in establishing requirements for meeting a one business day margin call. The Commission accordingly appreciates, and finds persuasive, FIA's comments to the effect that the proposed look-across of separate accounts of a separate account customer who does not timely meet a margin call for purposes of regulation § 1.17(c)(2)(i) or § 1.17(c)(5)(viii) may prove costly to implement and operationally disruptive to deploy. The Commission also appreciates the JAC's comments regarding the potential implementation and compliance burden that the proposed requirements would pose for FCMs.

Accordingly, the Commission is adopting the amendments to regulation § 1.17 as proposed, but with two modifications. First, the Commission is removing language from the proposed amendments to regulation § 1.17(c)(2)(i) that would have provided that, if a separate account does not meet a previous day's margin call for a deficit or debit balance, the FCM shall exclude all separate accounts of that separate account customer carried by the FCM that have a deficit or debit ledger balance from current assets under regulation § 1.17(c)(2)(i). Second, the Commission is modifying the language of proposed regulation

§ 1.17(c)(5)(viii)(B) to provide that, if a call for margin or other required deposits for any separate account of a particular separate account customer is outstanding for more than one business day, then all outstanding margin calls for *that separate account* shall be treated as if the margin calls are outstanding for more than one business day, and shall be deducted from net capital until all such calls have been met in full. In this manner, where a separate account customer's separate account does not meet a previous day's margin call for a deficit or debit balance under regulation § 1.17(c)(2)(i), or has a margin call or other required deposits outstanding for more than one business day under regulation § 1.17(c)(5)(viii), then the FCM shall treat the separate account on a standalone basis in determining current assets or the undermargined capital charge, and need not look across to debits or deficits, or outstanding margin calls, in the separate account customer's other separate accounts.

As previously discussed, the Commission believes that separate account treatment results in a conservative capital treatment due to the impact of removing portfolio margining across separate accounts, including in the calculation of the required capital based on risk margin separately for each separate account. Even during a period outside the ordinary course of business when disbursements on a separate account basis are suspended, the Commission believes that net capital treatment may in most instances continue to be more conservative by maintaining separate treatment of separate accounts for net capital calculation purposes. In consideration of the comments received regarding the operational difficulties which FCMs may face from being required to consolidate the treatment of separate accounts for net capital calculations and the likely conservative effect of maintaining separate treatment, the Commission is adopting the final rules as modified, and further clarifies that even during a period of a suspension of disbursements on a separate account basis, an FCM must continue separate treatment for net capital calculations. However, should an FCM itself cease treating the separate accounts

separately, such as by initiating any cross-default remedies across the separate accounts of a separate account customer (thus indicating the FCM is exercising legal remedies to collapse separate accounts for the purpose of collection against the separate account customer), then continued separate net capital treatment by the FCM of such accounts would no longer be appropriate, as an FCM's exercise of cross-default remedies that combine separate accounts would be inconsistent with an FCM's continued election of separate account treatment.

The Commission additionally considered the JAC's and FIA's comments with respect to the treatment of pending non-USD transfers. As the JAC and FIA noted, JAC Regulatory Alerts #14-03 and #14-06 permit FCMs to apply margin equity credit to an account for pending non-USD transfers for certain purposes and subject to certain conditions. As the JAC noted, the guidance provided by JAC Regulatory Alert #14-03 and #14-06 provides that, due to the inherent delays in the settlement of certain foreign currency transfers, in determining a customer's or noncustomer's margin status (under JAC Regulatory Alert #14-03) or residual interest requirement (under JAC Regulatory Alert #14-06), an FCM may, at its discretion, consider unsettled non-USD transactions as pending in a customer's or noncustomer's account and include 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 the day the margin call is issued); (iii) the FCM has a sufficient basis to believe that the wire was actually initiated; (iv) the FCM continues to age the pending non-USD receipts and retains the ability to recognize a failed deposit immediately upon occurrence; and (v) the FCM treats unsettled non-USD disbursements from the account in the same manner.[99]

[99] *See* JAC, JAC Regulatory Alert #14-03, May 21, 2014, available at *http://www.jacfutures.com/jac/jacupdates/2014/jac1403.pdf*; JAC, JAC Regulatory Alert #14-06, Nov. 4, 2014, available at *http://www.jacfutures.com/jac/jacupdates/2014/jac1406.pdf*.

Although the Commission did not discuss treatment of pending non-USD transfers in the First Proposal, in the Second Proposal, or in CFTC Letter No. 19-17, as discussed below, commenters raised questions related to the treatment of pending non-USD transfers in several contexts, which the Commission has focused on in developing this final rule.

In the Second Proposal, the Commission noted that it sought to enact a narrow codification, with respect to all FCMs, of the no-action conditions of CFTC Letter No. 19-17.[100] In particular, the Commission does not seek to disrupt current, established margining practices at FCMs, except where explicitly stated in this final rule. In considering the JAC's and FIA's comments with respect to the treatment of pending non-USD transfers, the Commission considers, in light of this objective, that currently, and for the past ten years, subject to JAC guidance, a number of FCMs have treated as received certain pending non-USD transfers (*i.e.*, those that are consistent with that guidance) for certain purposes.

As the third condition, the FCM must also have a sufficient basis to believe that the transfer was actually initiated for immediate settlement (including, as the Commission understands, that the transfer was actually initiated on the required one-day basis). The Commission notes that, as each condition for the treatment of pending non-USD transfers is a separate condition, the Commission expects that in order to meet this third condition, an FCM would rely on evidence beyond the factors identified in the first condition (*i.e.*, the account's past history of satisfying margin calls and the operational and credit risk profile of the account owner). Further to this point, the requirement that the FCM have a sufficient basis to believe that the transfer was *actually* initiated indicates that an FCM would be expected to identify a sufficient, factual basis to support its conclusion that a *specific* transfer was initiated for immediate settlement consistent with the banking practices relative to the jurisdiction from which the transfer originated. The Commission

[100] Second Proposal, 89 FR at 15317.

expects that such sufficient factual support would include at minimum an affirmative, written representation from the customer that the specific transfer had actually been initiated.[101] The fourth condition requires the FCM to continue aging pending non-USD receipts and have the ability to recognize a deposit failure immediately when it occurs, both of which are critical to complying with the requirements of regulation § 1.17 (among other Commission regulations) that require an FCM to be able to accurately age outstanding margin calls. In particular, a transfer that does not arrive by the day it is expected (consistent with banking practices relative to the jurisdiction from which the transfer originated) should be considered to have failed. The fifth condition requires consistent treatment of pending non-USD transfers in an account: to the extent an FCM treats pending non-USD deposits as received for certain purposes, it must similarly treat pending non-USD disbursements as disbursed.

The Commission has considered the history of FCMs' treatment of pending non-USD transfers under the JAC guidance. Among other information, the Commission has considered, with respect to separate accounts under the terms of the no-action position, the criteria applied to such treatment under the JAC guidance, the potential risks and benefits of such treatment for FCMs and customers, and the Commission's objectives in codifying the no-action position of CFTC Letter No. 19-17. The Commission confirms that it does not intend for the final rule to preclude FCMs from considering pending non-USD transfers as received for purposes of computing the undermargined capital charge pursuant to regulation § 1.17(c)(5), consistent with the JAC guidance as described above.[102] In doing so, however, the Commission notes that it expects that DSROs will

[101] The Commission notes that a pattern wherein funds are not timely received despite such representations would undermine the satisfaction of the first condition; *i.e.*, the account's past history of satisfying margin calls.

[102] The Commission additionally confirms that the final rule is not intended to preclude FCMs from treating as received pending non-USD transfers, subject to the same five conditions listed in JAC Regulatory Alerts #14-03 and #14-06 discussed above, for purposes of calculating undermargined capital charges for noncustomer and omnibus accounts under regulation § 1.17(c)(5)(ix). As the JAC noted in its comment letter, the Commission did not propose to amend this provision.

diligently monitor their FCMs to ensure compliance with the criteria for such treatment, and will take appropriate supervisory steps where they find failures to comply with such criteria, with particular focus on the requirement that an FCM have a sufficient basis to believe that a non-USD transfer classified as pending was *in fact* initiated, and the requirement that an FCM treat pending non-USD disbursements in a manner consistent with its treatment of pending non-USD receipts.

Lastly, to respond to the JAC's request for clarification on the subject, the Commission confirms that, for purposes of the undermargined capital charge for a customer account under regulation § 1.17(c)(5), maintenance margin requirements include the risk component only. The Commission further confirms that in computing the value of the margin deposits of an account, including accounts of separate account customers, non-cash collateral should be valued at market value less applicable haircuts.

C. Amendments to Regulations §§ 1.20, 1.32, 22.2, and 30.7

As previously stated, protecting market participants from misuses of customer assets is one of the fundamental purposes of the CEA.[103] Regulations §§ 1.32, 22.2(g), and 30.7(l) are designed in part to further this purpose by requiring each FCM carrying accounts for futures customers, Cleared Swaps Customers, or 30.7 customers, respectively, to perform a daily computation of, and to prepare a daily record demonstrating compliance with, the FCM's obligation to hold a sufficient amount of funds in designated customer segregated accounts to meet the aggregate credit balances of all of the FCM's futures customers, Cleared Swaps Customers, and 30.7 customers.[104]

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[103] Section 3(b) of the CEA, 7 U.S.C. 5(b); *see also, e.g.*, CEA section 4d(a)(2), 7 U.S.C. 6d(a)(2); CEA section 4d(f)(2), 7 U.S.C. 6d(f)(2); CEA section 4b(2)(A), 7 U.S.C. 6b(2)(A).

[104] Each FCM that carries accounts for futures customers, Cleared Swaps Customers, and 30.7 customers is required to prepare daily statements demonstrating compliance with the applicable segregation requirements. For futures customers, the FCM must prepare a daily Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges (17 CFR 1.32(a)) ("Futures Segregation Statement"); for Cleared Swaps Customers, the FCM must prepare a daily Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under section 4d(f) of the CEA (17 CFR 22.2(g)(1)-(4)) ("Cleared Swaps Segregation

An FCM is required to prepare the daily segregation calculations reflecting customer account balances as of the close of business each day, and to submit the applicable segregation statements electronically to the Commission and to the FCM's DSRO by noon the next business day.

The Commission proposed to amend regulations §§ 1.32, 22.2, and 30.7 to provide that an FCM that permits separate accounts pursuant to regulation § 1.44 must perform its daily segregation calculations, and prepare its daily segregation statements, by treating the accounts of separate account customers as accounts of separate entities. The amendments add new paragraph (l) to regulation § 1.32, new paragraph (g)(11) to regulation § 22.2, and new paragraph (l)(11) to regulation § 30.7. The purpose of the amendments is to establish the manner in which these existing segregation and reporting obligations apply to FCMs that permit separate accounts pursuant to regulation § 1.44. Regulations §§ 1.32, 22.2, and 30.7 require an FCM to prepare one daily segregation computation, and submit one segregation schedule, for the funds of its futures customers, Cleared Swaps Customers, and 30.7 customers, respectively. The amendments to regulations §§ 1.32, 22.2(g), and 30.7(l) provide that an FCM that permits separate accounts, in preparing such computation and segregation schedule, is required to record each separate account as if it were an account of a separate entity, and include all separate accounts with other futures accounts, Cleared Swaps Customer Accounts, and 30.7 accounts, as applicable, carried by the FCM that are not separate accounts.

In addition, the amendments provide that an FCM, in computing its segregation obligations, may offset a net deficit in a particular separate account customer's separate account against the current value, net of specified haircuts, of any readily marketable

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Statement"); and for 30.7 customers, the FCM must prepare a daily Statement of Secured Amounts and Funds Held in Separate Accounts for 30.7 Customers pursuant to regulation 30.7 (17 CFR 30.7(l)(1)). The statements listed above are part of the Commission's Form 1-FR-FCM, which contains the financial reporting templates required to be filed by FCMs.

securities held by the FCM for the separate account customer, provided that the readily marketable securities are held as margin collateral for the specific separate account that is in deficit. Readily marketable securities held for other separate accounts of the separate account customer may not be used to offset the separate account that is in deficit.[105] The amendments to regulations §§ 1.32, 22.2(g), and 30.7(l) with respect to the offsetting of a net deficit in a customer's account by the value of readily marketable securities, less applicable haircuts, held in the customer's account are consistent with how an FCM currently offsets a net deficit in a customer's account that is margined by securities. In addition, the amendments are consistent with the separate account conditions to the no-action position in CFTC Letter No. 19-17.[106]

The Commission also proposed to amend regulation § 22.2(f) to revise the regulatory description of the stated calculation of the total amount of funds that an FCM is required to hold in segregation for Cleared Swaps Customers. The amendment: (i) corrects an error included in the drafting of the description of the calculation when the regulation was originally adopted in 2012; and (ii) aligns the regulatory text describing the segregation calculation set forth in regulation § 22.2(f) with the calculation performed on the Cleared Swaps Segregation Statement that is submitted to the Commission each day by FCMs with Cleared Swaps Customers pursuant to regulation § 22.2(g). The amendment applies across FCMs with Cleared Swaps Customers, whether or not such FCMs maintain separate accounts.

The segregation calculation required by regulation § 22.2(f) is intended to ensure that an FCM holds, at all times, a sufficient amount of funds in segregation to cover its total financial obligation to all Cleared Swaps Customers. Compliance with the

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[105] *I.e.*, if separate account customer *S* has separate accounts *A* and *B*, then readily marketable securities held for separate account *A* could not be used to offset a deficit in separate account *B*, and vice versa.

[106] *See* CFTC Letter No. 19-17 (providing, among other conditions for separate account treatment, that "[e]ach receivable from a separate account shall be 'grossed up' on the applicable segregation, secured or cleared swaps customer statement; thus, an FCM shall use its own funds to cover the debit/deficit of each separate account.").

segregation requirements helps ensure that an FCM is not using the funds of one Cleared Swaps Customer to cover a deficit in the Cleared Swaps Customer Account of another Cleared Swaps Customer, and further helps ensure that an FCM holds sufficient funds in segregation to transfer the Cleared Swaps Customer Accounts, including the Cleared Swaps and the Cleared Swaps Customer Collateral, to a transferee FCM if the transferor FCM becomes insolvent.

To achieve the regulatory objective noted above, regulation § 22.2(f)(2) currently requires an FCM to calculate its minimum segregation requirement as the sum of the net liquidating equities of each Cleared Swaps Customer Account with a positive account balance carried by the FCM. The net liquidating equity of a Cleared Swaps Customer Account is explicitly calculated as the sum of the market value of any funds held in the Cleared Swaps Customer Account of a Cleared Swaps Customer (including readily marketable securities), as adjusted positively or negatively by, among other things, any unrealized gains or losses on open Cleared Swaps positions, the value of open long option positions and short option positions, fees charged to the account, and authorized withdrawals. To the extent that the calculation results in a net liquidating equity that is positive, the Cleared Swaps Customer Account has a credit balance.[107] To the extent that the calculation results in a net liquidating equity that is negative, the Cleared Swaps Customer Account has a debit balance.[108] Regulation § 22.2(f)(4) provides that an FCM must hold, at all times, a sufficient amount of funds in segregation to meet the total net liquidating equities of all Cleared Swaps Customer Accounts with credit balances, and further provides that the FCM may not offset this total by any Cleared Swaps Customer Accounts with debit balances.

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[107] 17 CFR 22.2(f)(3).
[108] *Id.*

With respect to Cleared Swaps Customer Accounts with debit balances, regulation § 22.2(f)(5) further requires the FCM to include in the total funds required to be held in segregation all debit balances to the extent secured by readily marketable securities held for the particular Cleared Swaps Customers that have debit balances. The required addition of debit balance accounts in regulation § 22.2(f)(5) was intended to be consistent with the long-standing Futures Segregation Statement contained in the Form 1-FR-FCM and the Form 1-FR-FCM Instructions Manual.[109] An error, however, was made in drafting the description of the details of the segregation calculation in current regulation § 22.2(f)(5). Specifically, as noted above, regulation § 22.2(f)(5) requires an FCM to include in the total segregation requirement any Cleared Swaps Customer Accounts with debit balances that are secured by readily marketable securities. However, the full value of the readily marketable collateral is part of the calculation of the net liquidating equity of the account. Therefore, a Cleared Swaps Customer Account with a debit balance would never have additional readily marketable securities available to offset a debit balance.[110]

The segregation calculation required under regulation § 1.32 for futures accounts, and the Commission's Form 1-FR-FCM and related Form 1-FR-FCM Instructions Manual, differs from the description as currently written in regulation § 22.2(f)(4) and (5) with respect to the offsetting of debit balances by readily marketable securities. Specifically, an FCM is required to calculate the net equity of each futures customer

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[109] In adopting the final regulation § 22.2(f), the Commission stated that proposed regulation § 22.2(f) set forth an explicit calculation for the amount of Cleared Swaps Customer Collateral that an FCM must maintain in segregation that did not materially differ from the calculation of the amount of funds an FCM is required to hold in segregation under the Form 1-FR-FCM for futures customers. The Commission adopted final regulation § 22.2(f) as proposed. Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions; Final Rule, 77 FR 6336, at 6352-6353 (Feb. 7, 2012).

[110] For example, if a Cleared Swaps Customer Account was comprised of cash of $300, securities of $200, and an unrealized loss on open Cleared Swaps of $600, the account would have a net equity debit balance of $100 under regulation § 22.2(f). There are no additional securities that the FCM may use to secure the $100 debit balance and, therefore, the FCM is required to increase its segregation requirement by $100 to ensure that there are sufficient funds in segregation to cover the FCM's obligation to all Cleared Swaps Customers with a credit balance.

excluding the value of any noncash collateral held in the account.[111] If the calculation results in a debit balance, the FCM is permitted to offset the debit balance by the fair market value of any readily marketable securities (after application of applicable securities haircuts set forth in the regulation).[112]

As noted above, the amendments to regulation § 22.2(f)(4) and (5) are intended to correct the description of the segregation calculation and to make it consistent with: (i) how FCMs calculate their total Cleared Swaps segregation obligations under regulation § 22.2(g), (ii) how FCMs report their total segregation requirements on the Cleared Swaps Segregation Statement, and (iii) the segregation calculation requirements for futures accounts under regulation § 1.32. Thus, the amendments are not expected to have any effect on FCMs and their current practices.

In addition, the Commission proposed to amend regulations §§ 1.20(i) and 30.7(f), which require an FCM carrying futures accounts and 30.7 accounts, respectively, to calculate its total segregation requirements in a manner that is consistent with current regulation § 22.2(f). As with the amendment to regulation § 22.2(f), the amendments to regulations §§ 1.20(i) and 30.7(f) apply across FCMs that maintain futures customer accounts or 30.7 customer accounts, respectively, whether or not such FCMs maintain separate accounts. The Commission adopted current regulations §§ 1.20(i) and 30.7(f) in

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[111] The Form 1-FR-FCM Instructions Manual provides that a customer account is in deficit when the combination of the account's cash ledger balance, unrealized gain or loss on open futures contracts, and the value of open option contracts liquidates to an amount less than zero. The manual explicitly provides that "[a]ny securities used to margin the account are not included in determining a customer's deficit." 1-FR-FCM Instructions Manual, p. 10-2. Accordingly, an FCM would exclude the value of any readily marketable securities from the calculation of the customer's account balance. The 1-FR-FCM Instructions Manual is available on the Commission's website at: www.cftc.gov/sites/default/files/idc/groups/public/@iointermediaries/documents/file/1fr-fcminstructions.pdf.

[112] 17 CFR 1.32(b). Applying the calculation in regulation § 1.32 to Cleared Swaps, if a Cleared Swaps Customer Account was comprised of cash of $300, securities of $200, and an unrealized loss on open Cleared Swaps of $600, the account would have a net equity debit balance of $300, as the value of the securities is not included in the calculation ($300 cash less $600 in unrealized losses, results in a $300 debit balance). The FCM may offset the $300 debit balance by $170, which represents the value of the readily marketable securities held in the account as collateral ($200 fair market value of the securities, less a $30 haircut). The FCM is then required to include $130 in its segregation requirement, which represents the amount of the unsecured debit balance remaining in the customer's account (*i.e.*, $300 debit balance, less $170 value of the securities after haircuts).

2013. The final regulations, however, did not include the provision set forth in regulation § 22.2(f)(5) requiring an FCM to include any secured debit balances in its segregation requirement. This omission was unintentional, as the Commission expressed its intent to "mirror" the requirements of regulation § 22.2(f) in regulation § 1.20(i) (and effectively regulation § 30.7(f)).[113]

To address the omission, the Commission proposed to amend regulations §§ 1.20(i) and 30.7(f) to reflect the requirement that an FCM include any unsecured customer debit balances, calculated consistent with the amendments to regulation § 22.2(f)(4) and (5) that are discussed above, in the calculation of its futures and foreign futures and foreign options segregation requirement. The amendments to regulations §§1.20(i) and 30.7(f) accurately describe and reflect the existing segregation calculations for futures, foreign futures, and Cleared Swaps as originally intended. The amendments to regulations §§ 1.20(i) and 30.7(f) are not expected to have any impact on FCMs as the firms currently calculate their segregation requirements by including customer unsecured debit balances.

The Commission did not receive any comments with respect to the proposed amendments to regulations §§ 1.20, 1.32, 22.2, and 30.7. Accordingly, the Commission is adopting the amendments to regulations §§ 1.20, 1.32, 22.2, and 30.7 as proposed.[114]

D. Regulation § 1.44(a)

The Commission structured proposed regulation § 1.44 so that FCMs would be required to avoid returning margin to customers when doing so would create or

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[113] Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations*,* 78 FR 68506, 68543 (Nov. 14, 2013) (discussing the Commission's intent to adopt regulation § 1.20(i) consistent with the corresponding requirements in regulation § 22.2(f)); *id.* at 68576 (discussing the Commission's intent for the daily segregation calculation for 30.7 accounts to be consistent with the requirements for the daily segregation calculations for futures customer funds in regulation § 1.32).

[114] The Commission is making technical changes in the final amendments with respect to regulations §§ 1.20(i)(5)(ii), 1.32(b), 22.2(f)(5)(ii), and 30.7(f)(2)(v)(B) to correct the citation to the SEC regulation defining "ready market" (§ 240.15c3-1(c)(11) rather than § 241.15c3-1(c)(11)).

exacerbate a margin deficiency in the customer's account; however, the proposed regulation then would allow FCMs to provide for separate account treatment within the Commission's broader regulatory framework for FCMs. As such, regulation § 1.44, as proposed, contains certain terms that are designed to operate in a specific manner with respect to regulation § 1.44, but that do not apply, or do not apply in the same way, with respect to other of the Commission's FCM regulations. The Commission therefore proposed to add new regulation § 1.44(a) to define certain terms only for purposes of regulation § 1.44. The Commission believes that regulation § 1.44(a) is reasonably necessary to accomplishing the goals of protecting customer funds and mitigating systemic risk because it defines key terms in requirements that FCMs will need to apply to ensure margin adequacy, and in requirements that FCMs will need to apply when treating customer accounts separately for purposes of margin adequacy.

The Commission proposed to define "account" for purposes of proposed regulation § 1.44 as meaning a futures account, a Cleared Swaps Customer Account (both of which are defined in regulation § 1.3, which definitions apply broadly to all CFTC regulations), or a § 30.7 account (as defined in regulation § 30.1[115]). The Commission proposed this definition to implement the proposed Margin Adequacy Requirement, including in the context of separate account treatment, with respect to accounts of all three types for all FCMs, consistent with comments received in response to the First Proposal.

ICE's comment letter indirectly addressed the definition of "account" in proposed regulation § 1.44(a). ICE voiced support for the Commission's proposal to permit FCMs to provide separate account treatment for customers with regulation 30.7 accounts for futures and options transactions traded on exchanges outside the United States, but stated it does not believe it is necessary for the Commission to distinguish regulation 30.7

[115] 17 CFR 30.1.

accounts from futures and Cleared Swap Customer accounts in connection with separate account treatment.[116] ICE also noted that there are references in proposed regulation § 1.44 to DCMs that should also include foreign exchanges in connection with regulation 30.7 accounts.[117]

The Commission proposed to codify the Second Proposal principally in part 1 (as opposed to in part 39) in light of comments received in response to the First Proposal. This is designed to ensure that the Margin Adequacy Requirement and requirements for separate account treatment will apply directly to all FCMs and all FCM customers, including futures customers, Cleared Swaps Customers, and 30.7 account customers. The Commission is distinguishing these accounts in regulation § 1.44 to ensure that the regulation encompasses each class of FCM customer.

The Commission agrees that certain references to DCMs that are included in regulation § 1.44 should be clarified to include explicitly foreign exchanges in connection with 30.7 accounts, as separate account customers may have foreign futures and foreign options positions traded on such exchanges. Accordingly, as noted further below in connection with regulation § 1.44(b)(2) and 1.44(f)(7), in adopting these provisions, the Commission is modifying them to refer to "any designated contract market *or other board of trade*," in order to encompass such foreign exchanges. The Commission did not receive any other comments related to the definition of "account" in proposed regulation § 1.44(a) and is adopting that definition as proposed.

The Commission also proposed in proposed regulation § 1.44(a) to further define "business day" as having the same meaning as set forth in regulation § 1.3, but with the clarification that "holiday" refers to Federal holidays as established by 5 U.S.C. 6103.

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[116] ICE Comment Letter.

[117] Including proposed regulation § 1.44(b)(2) and (f)(7). *Id.*

The Commission also proposed in proposed regulation § 1.44(a) to define "holiday" as meaning Federal holidays as established by 5 USC 6103.

In Question 4 of the Second Proposal, the Commission sought commenters' views on how the proposed definition of "business day" should address days when securities and other markets are closed. (*E.g.*, whether the Commission should address in the definition days when such other markets are open or create an exception for days when such markets are closed on a prescheduled basis.) The Commission sought information on potential liquidity challenges or other risks that could result from such an exception, as well as information on how FCMs and customers currently address days when securities and other markets are closed.

In its comment letter, FIA noted that neither the proposed definitions of "business day" nor "holiday" in proposed regulation § 1.44(a) address days on which banks are open but futures and securities markets are closed.[118] FIA stated that, on such days, transfers of non-cash collateral cannot settle, and separate account customers settling initial margin calls with such collateral will, under the proposed regulation, be deemed to have failed to meet a margin call.[119] In FIA's view, a separate account customer should not be deemed to have failed to settle a margin call because securities markets are closed.[120] FIA suggested the Commission revise the definition of "holiday" in proposed regulation § 1.44(a) to provide that holidays include "any business day that is not a securities settlement day in the United States."[121] No other commenters responded specifically to this question.

The Commission acknowledges that, on days on which banks are open but futures and securities markets are closed, customers, including separate account customers, may

118 FIA Comment Letter.
119 *Id.*
120 *Id.*
121 *Id.*

be unable to use non-cash collateral to aid in their meeting margin calls. However, FCMs and customers may arrange for a variety of methods to settle margin calls, including bank transfers. The Commission believes that, given the availability of such funding mechanisms on days when banks are open but securities and other markets are closed, introducing an exception that would allow for additional delays in the payment of margin on such days may introduce unnecessary additional risk of undermargining.

The Commission did not receive any other comments related to the definitions of "business day" or "holiday" in proposed regulation § 1.44(a) and is adopting those definitions as proposed.

Relatedly, the Commission proposed to define "one business day margin call" as a margin call that is issued and met in accordance with the requirements of proposed regulation § 1.44(f). The Commission did not receive any comments with respect to this proposed definition, but the Commission received comments related to the substantive requirements defining a one business day margin call in proposed regulation § 1.44(f). The Commission addresses those comments below in connection with that provision. The Commission is adopting the definition of "one business day margin call" in regulation § 1.44(a) as proposed.

Under regulation § 1.44, an FCM may provide disbursements on a separate account basis only when it, and its customer, are operating within the "ordinary course of business," as that term is defined in the proposed regulation. The Commission proposed to define "ordinary course of business" as meaning the standard day-to-day operation of the FCM's business relationship with its separate account customer, a condition where there are no unusual circumstances that might indicate either a materially increased level of risk that the separate account customer may fail promptly to perform its financial obligations to the FCM, or a decrease in the FCM's financial resilience. The Commission proposed regulation § 1.44(e) to set forth the circumstances that would be

inconsistent with the ordinary course of business, and the occurrence of which would require a cessation of disbursements on a separate account basis.

SIFMA-AMG contended that the definition of "ordinary course of business" in proposed regulation § 1.44(a) poses certain regulatory compliance challenges.[122] Specifically, SIFMA-AMG asserted that the proposed definition does not sufficiently clarify the meaning of "standard day-to-day operation."[123] SIFMA-AMG argued that FCMs and DCOs would be required to continuously monitor for a series of events, some of which would not appear to rise to the level of significance to suggest that they are not within the ordinary course of business, such as the failure of a customer to make a single margin payment.[124] SIFMA-AMG urged the Commission to better define "ordinary course of business" and consider an approach that presumes operation in the ordinary course of business, with clearly delineated events such as default or bankruptcy as the only instances that would be considered outside the ordinary course of business.[125]

SIFMA-AMG further contended that the Commission's proposed definition of "ordinary course of business" fails to recognize that FCMs must, under Commission regulations, manage risk effectively, and that FCMs also have commercial incentives to do so.[126] SIFMA-AMG argued the proposed definition of "ordinary course of business" is inconsistent with an FCM's obligations, noting that an FCM's obligations under its Risk Management Program (RMP) are intentionally fluid and are designed to allow FCMs to tailor their RMP to the specific activities of the FCM and its customers.[127]

In adopting regulation § 1.44(a), the Commission has determined to modify the definition of "ordinary course of business" in consideration of SIFMA-AMG's comment. As an initial matter, the Commission notes that under regulation § 1.44 as proposed,

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[122] SIFMA-AMG Comment Letter.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*

events inconsistent with the ordinary course of business are generally those that the Commission would expect an FCM to become aware of through its existing compliance function and procedures (*e.g.*, with respect to cessation of disbursements on a separate account basis for a separate account customer, a failure to deposit margin timely; the occurrence and declaration *by the FCM* of an event of default *as defined in the account documentation executed between the FCM and the separate account customer*; a good faith determination by the FCM's chief compliance officer (CCO), one of its senior risk managers, or other senior manager, *following such FCM's own internal escalation procedures*, that the separate account customer is in financial distress; or the insolvency or bankruptcy of the separate account customer or a parent company of the customer; or, with respect to cessation of disbursements on a separate account basis for any of an FCM's customers, a determination in good faith by an FCM's CCO, senior risk managers, or other senior management, that *the FCM itself* is under financial or other distress; or the insolvency or bankruptcy of the FCM or a parent company of the FCM) and notifications or directives from third parties.

The Commission notes that the list of events inconsistent with the ordinary course of business proposed as part of regulation § 1.44(e) is substantially the same as the list of events discussed in CFTC Letter No. 19-17, which has been relied on by DCOs (and by extension their clearing FCMs) successfully since 2019. As SIFMA-AMG noted in its comment letter, FCMs have some discretion in managing risk with respect to their (and their customers') activities, and FCMs appear to have done so effectively under the conditions of CFTC Letter No.19-17 for over five years. The Commission expects FCMs will under regulation § 1.44 similarly exercise risk management discretion to identify when certain non-ordinary course of business events have occurred.[128]

[128] *See, e.g.*, new regulation § 1.44(e)(1)(iii) ("A good faith determination by the futures commission merchant's chief compliance officer, one of its senior risk managers, or other senior manager, following

Additionally, the Commission notes that although failure to make a single margin payment may not in itself represent a departure from the ordinary course of business (hence the Commission's proposal, consistent with the no-action conditions of CFTC Letter No. 19-17, to include an exception to non-ordinary course of business conditions for failure to pay margin due to certain unusual administrative errors or operational constraints), as a general matter, ensuring timely payment of margin is critical to the Commission's goal of providing for separate account treatment in a manner that ensures the safety of customer funds and effective risk mitigation.

Although the Commission believes default or bankruptcy of an FCM or customer are not the only events that could represent a departure from the ordinary course of business with respect to separate account margining, the Commission agrees that the standard for what constitutes the ordinary course of business can be more clearly defined.

Under the proposal, although the occurrence of any of the events described in regulation §1.44(e) would be inconsistent with the "ordinary course of business," it was also possible that some other, unspecified, events might also be inconsistent with the "ordinary course of business." Accordingly, the Commission has modified regulation § 1.44(a) to close the set of such events by providing that the "ordinary course of business" means the operation of the FCM's business relationship with its separate account customer *absent the occurrence of one or more of the events specified in regulation § 1.44(e)*. In such manner, the ordinary course of business continues, provided none of the events delineated in regulation § 1.44(e) have occurred.

The Commission proposed to define "separate account" as meaning any one of multiple accounts of the same separate account customer that are carried by the same

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such futures commission merchant's own internal escalation procedures, that the separate account customer is in financial distress, or there is significant and bona fide risk that the separate account customer will be unable promptly to perform its financial obligations to the futures commission merchant, whether due to operational reasons or otherwise.").

FCM. The Commission did not receive any comments with respect to this proposed definition and is adopting it as proposed.

The Commission proposed to define "separate account customer" as meaning a customer for which the FCM has elected to engage in separate account treatment. The Commission also did not receive any comments with respect to this proposed definition and is adopting it as proposed.

Lastly, the Commission proposed to define "undermargined amount" for an account as meaning the amount, if any, by which the customer margin requirements with respect to all products held in that account, exceed the net liquidating value plus the margin deposits currently remaining in that account.[129] The proposed definition noted that "[f]or purposes of this definition, 'margin requirements' shall mean the level of maintenance margin or performance bond (including, as appropriate, the equity component or premium for long or short option positions) required for the positions in the account by the applicable exchanges or clearing organizations."[130] This clarification (which was drawn from the definition of risk margin in regulation § 1.17(b)(8)) is in recognition of the difference between exchange (or clearing organization) requirements for "initial margin" and "maintenance margin." However, here, unlike risk margin, the Commission included the equity component or premium for long or short option positions, as those are part of the total required level of margin. "Initial margin" is the amount of margin (otherwise known as "performance bond"[131] in this context) required to

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[129] The definition of "undermargined amount" in regulation § 1.44(a) is different from, and simpler than, the definitions of "undermargined amount" for the purpose of residual interest calculations in regulations §§ 1.22(c)(1), 22.2(f)(6)(i), and 30.7(f)(1)(ii). The calculations in the latter cases are required to take into account information at the close of business on day *T-1* that will be used to calculate a residual interest requirement on day *T*, as well as payments that may be received on day *T*, and the elimination of double counting of debit balances.

[130] The definition of "undermargined amount" in regulation § 1.44(a) further provides that, with respect to positions for which maintenance margin is not specified, "margin requirements" shall refer to the initial margin required for such positions.

[131] "Performance bond" secures the performance by a customer to meet its variation margin payment obligations to its FCM (or the performance of variation margin payment obligations of an FCM to the clearinghouse, or to an intermediary upstream FCM).

establish a position. Some (though not all) contract markets and clearing houses establish "maintenance margin" requirements that are less than the corresponding initial margin requirement. Where, due to adverse market movements, the amount of margin on deposit is less than the initial margin requirement, but greater than or equal to maintenance margin, the FCM is not required to (though it may) call additional margin from the customer. Once the amount of margin on deposit is less than the maintenance margin required, the FCM must call the customer for enough margin to meet the *initial* margin level.

The Commission used the term "undermargined amount" in connection with proposed regulation § 1.44(f) in defining the requirements for making and meeting a one business day margin call, as well as in proposed regulation § 1.44(g) in setting legally segregated, operationally commingled (LSOC) compliance calculations for separate accounts.

In its comment letter, the JAC contended that the Commission's proposed definition of "undermargined amount" in proposed regulation § 1.44(a) is inconsistent with industry practice and methodologies for calculating the undermargined amount provided in the JAC Margins Handbook.[132] Specifically, proposed regulation § 1.44(a) defines "undermargined amount" for an account as, "the amount, if any, by which the customer margin requirements with respect to all products held in that account exceeds the net liquidating value plus the margin deposits currently remaining in that account." Further, proposed regulation § 1.44(a) provides that, for purposes of such definition, "margin requirements" means the "level of maintenance margin or performance bond (including, as appropriate, the equity component or premium for long or short options positions) required for the positions in the account by the applicable exchanges or clearing organizations."

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[132] JAC Comment Letter.

As the JAC explained, its Margins Handbook recognizes two methods for determining the undermargined amount: the Net Liquidating Value Method[133] and the Total Equity Method.

For purposes of the Net Liquidating Value Method, the JAC Margins Handbook defines the undermargined amount as: "The amount by which margin equity is less than the maintenance margin requirement."[134] The JAC noted that, for purposes of this method, its Margins Handbook defines margin equity as "an account's net liquidating equity plus the collateral value of acceptable margin deposits"[135] and defines the maintenance margin requirement as: "The minimum amount of margin equity required to be maintained in an account."[136]

Under the alternative Total Equity Method, the undermargined amount is the amount by which total equity plus the collateral value of acceptable margin deposits is less than the risk maintenance margin requirement adjusted for the option value.[137]

The JAC argued that, as proposed, the definition of "undermargined amount" in proposed regulation § 1.44(a) would require that, for all customer accounts (not just the separate accounts of separate account customers), an FCM include the equity component of long and short options in both the margin equity and the margin requirement.[138] However, the JAC asserted, under the JAC Margins Handbook, exchange rules, and industry practice, the equity component of long and short options is included only in either the margin equity (under the Net Liquidating Value Method) or margin requirement (under the Total Equity Method).[139] The JAC further asserted that currently,

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[133] Also referred to as the "Risk Method" or "Pure SPAN Method."
[134] JAC Comment Letter (citing JAC Margins Handbook, Chapter 1, Definition of "Undermargined Amount").
[135] *Id.* (citing JAC Margins Handbook, Chapter 1, Definition of "Margin Equity").
[136] *Id.* (citing JAC Margins Handbook, Chapter 1, Definition of "Maintenance Margin Requirement (MMR)"). The definition further notes that the maintenance margin requirement is the actual risk margin calculated by the SPAN® margin system. *Id.*
[137] *Id.* (citing JAC Margins Handbook, Chapter 4, "Margins Calls"). The JAC noted that net long option value reduces the risk margin requirement while net short option value increases it.
[138] *Id.*
[139] *Id.*

option premium is already included in margin equity and is not a component of the margin requirement.[140]

The JAC noted that, depending on the composition of an account, the Second Proposal's definition of "undermargined amount" may result in different undermargined amounts than the Net Liquidating Value Method or Total Equity Method as those methods are applied today. The JAC requested the Commission provide the specific calculation for inclusion of the equity component of premium for long or short options positions and provide further clarification as to the rationale for the apparent proposed change in methodology.

FIA similarly commented that, although the proposed definition of "undermargined amount" in proposed regulation § 1.44(a) appeared to derive from the JAC Margins Handbook definition of the same term, the definition as proposed may give the impression that the Commission intends to codify a preference for the Net Liquidating Value Method to the exclusion of the Total Equity Method alternative in the JAC Margins Handbook. FIA recommended that the Commission amend the proposed definition of "undermargined amount" in proposed regulation § 1.44(a) to provide that "undermargined amount" for an account means the account's margin deficiency, if any, computed in accordance with applicable guidance of the JAC promulgated under regulation § 1.52(d).

The Commission's proposed definition of "undermargined amount" is based not on the Net Liquidating Value/Risk/Pure SPAN Method as set forth in the JAC Margins Handbook but rather on the Margin Adequacy Requirement in regulation § 39.13(g)(8)(iii), which provides that a DCO shall require its clearing members to ensure 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

[140] *Id.*

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 DCO. In that respect, it is not intended to evince a requirement to determine the undermargined amount of an account specifically using the Net Liquidating Value Method to the exclusion of the Total Equity Method as set forth in the JAC Margins Handbook. In proposing the definition of "undermargined amount," the Commission sought to make clear that an FCM's determination of the undermargined amount for a separate account should account for the equity component or premium for long or short options positions in computing the required level of margin for an account. However, the Commission's intent was not to change FCMs' current practice with respect to the way in which they determine the undermargined amount for an account.

In its comment letter, the JAC noted that FCMs determine the undermargined amount using either the Net Liquidating Value method or the alternative Total Equity method set forth in the JAC Margins Handbook, both of which incorporate the equity component for long or short option positions (the former as part of margin equity and the latter as part of margin requirements), and that margin premium is already included as part of margin equity under either method.

Having considered the JAC's and FIA's comments, relevant provisions of the JAC Margins Handbook, and the Commission's objectives in defining "undermargined amount," the Commission is persuaded that utilizing either the Net Liquidating Value method or the alternative Total Equity method to determine an account's undermargined amount generally will produce an identical result (with the exception, as the JAC notes, of certain instances involving long options positions, in which the Total Equity method will produce a greater margin deficiency, resulting in a greater margin requirement, which would further serve to mitigate risk).

Accordingly, in adopting the definition of "undermargined amount" in regulation § 1.44(a), the Commission is removing the proposed language stating that, for purposes of the definition of "undermargined amount," the term "margin requirements" shall "include[], as appropriate, the equity component or premium for long or short option positions," based on the Commission's understanding, in light of comments received, that under current practice, the equity component is included as a matter of course in margin equity or margin requirements, and the option premium is factored into margin equity.[141] The Commission believes the resulting definition is consistent with the Net Liquidating Value method for determining an undermargined amount, as set forth in the JAC's Margins Handbook. Notwithstanding that definition, the Commission also believes an FCM's use of the Total Equity method, as set forth in the JAC's Margins Handbook, would also be consistent with that definition.

In Question 5 of the Second Proposal, the Commission invited commenters to provide feedback with respect to whether the definition of "undermargined amount" should apply haircuts to the value of customer collateral held by an FCM and, if so, whether the amount of such haircuts should be based on SEC rule 240.15c3-1 and Commission regulation § 1.17(c)(5)(ii), or on some other basis. A haircut is a reduction in the allowable value of an asset to account for market risk. In its comment letter, the JAC stated that non-cash collateral on deposit in a customer's account should be valued at market value less applicable SEC and CFTC haircuts for determining the margin value of collateral. No other commenters responded specifically to this question. The Commission has determined, in adopting the definition of "undermargined amount" in regulation § 1.44(a), to include in that definition a requirement that collateral haircuts

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[141] The Commission is also making a technical (grammatical) change to the definition of "undermargined amount" in regulation § 1.44(a) to change "by which the customer margin requirements . . . *exceeds* the net liquidating value . . ." to "by which the customer margin requirements . . . *exceed* the net liquidating value . . . ."

based on Rule 15c3-1 of the Securities and Exchange Commission (17 CFR 240.15c3-1) and regulation § 1.17(c)(5) be applied to the value of the margin deposits held by an FCM to reflect potential market risk associated with the value of the collateral if and when such collateral was liquidated.

Accordingly, the Commission is adopting regulation § 1.44(a) as proposed, subject to the modifications discussed above with respect to the definitions of "ordinary course of business" and "undermargined amount."

E. Proposed Regulation § 1.44(b)

The Commission proposed regulation § 1.44(b) to require all FCMs, whether clearing or non-clearing, to comply with the same Margin Adequacy Requirement that DCOs are required to apply to their clearing FCMs pursuant to regulation § 39.13(g)(8)(iii). As proposed, regulation § 1.44(b) provides that an FCM shall ensure that a customer does not withdraw funds from its accounts with such FCM unless the net liquidating value (calculated as of the close of business on the previous business day) plus the margin deposits remaining in the customer's account after such withdrawal are sufficient to meet the customer initial margin requirements with respect to all products held in such customer's account, except as provided in proposed regulation § 1.44(c), which allows an FCM to permit disbursements on a separate account basis under ordinary course of business conditions.[142]

In proposing regulation § 1.44(b), the Commission sought to articulate a standard for the calculation of margin adequacy that is consistent with the Commission's requirements for calculation of undermargined amounts for purposes of an FCM's residual interest calculations.[143] Regulations §§ 1.22(c)(2), 22.2(f)(6)(ii), and

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[142] Consistent with the existing Margins Handbook, the Margin Adequacy Requirement is based on initial margin requirements rather than any lower maintenance margin requirement. *See* JAC Margins Handbook at 10-1 ("Margin Funds Available for Disbursement = Net Liquidating Value + Margin Deposits - Initial Margin Requirement $\geq$ 0"); *see also supra* n. 13 and accompanying text.

[143] *Id.*

30.7(f)(ii)(B) require each FCM to compute such undermargined amounts based on the information available to the FCM as of the close of each business day for futures customer accounts, Cleared Swaps Customer Accounts, and 30.7 accounts, respectively.

In order to address circumstances in which the previous day (for purposes of regulation § 1.44(b)(1)'s margin adequacy calculation requirements), excluding Saturdays and Sundays, is a holiday (as defined in regulation § 1.44(a)) on which markets, but not banks, may be open, proposed regulation § 1.44(b)(2) further provides that, in such circumstances, the margin adequacy calculation shall instead be made using the net liquidating value of an account as of the close of business on such holiday where (i) any DCM on which the FCM trades is open for trading; and (ii) an account of any of the FCM's customers includes positions traded on such a market.[144]

The Commission notes that proposed regulation § 1.44(b)'s requirements related to the timing of the margin adequacy calculation required by the same section are intended to represent a minimum standard. The proposed requirements are not intended to prevent an FCM from exercising its judgment in connection with good risk management practice to prevent the disbursement of customer funds based on intervening intraday market movements resulting in losses to a customer account between the calculation benchmark set forth in proposed regulation § 1.44(b) and the time at which a customer requests to withdraw funds. Ensuring that customers do not withdraw funds from their accounts at FCMs if such withdrawal would create or exacerbate an initial margin shortfall is reasonably necessary from a risk management perspective to reduce the likelihood and magnitude of the risk that the FCM must cover losses due to a default by the customer on obligations that exceed the margin held by the FCM. Similarly,

[144] Proposed regulation § 1.44(b)(2), and proposed regulation § 1.44(f)(7), discussed below, are consistent with JAC Regulatory Alert #22-02, which provides that an FCM must issue margin calls to customers on holidays where futures markets are open and U.S. banks are closed. The margin calls are calculated based on information as of the close of the previous business day (*i.e.*, the business day prior to the holiday) and the FCM does not count the holiday for purposes of aging the margin call. JAC Regulatory Alert #22-01, Mar. 30, 2022, available at *www.jacfutures.com*.

because customer funds are held by an FCM in omnibus accounts, this prohibition will reduce the likelihood and magnitude of the risk that the FCM will effectively use the margin of other customers to "margin or guarantee the trades or contracts, or to secure or extend the credit of" a customer that was permitted to withdraw margin in a manner that created or exacerbated an undermargined condition,[145] whether the duty to prevent such withdrawals falls on DCOs acting on their clearing member FCMs (per regulation § 39.13(g)(8)(iii)), or directly on FCMs.

Because regulation § 39.13(g)(8)(iii) applies only to DCOs (which in turn can only apply regulation § 39.13(g)(8)(iii)'s Margin Adequacy Requirement to their clearing member FCMs), and given the strong trend of the comments in favor of addressing these issues in a manner that is uniform across all types of FCMs directly in part 1 rather than indirectly through part 39, the Commission continues to view it as reasonably necessary to extend the requirement to prevent such undermargining scenarios to all FCMs.

Accordingly, it is the Commission's judgment that regulation § 1.44(b), which will apply a Margin Adequacy Requirement similar to that of regulation § 39.13(g)(8)(iii) directly to FCMs, both clearing and non-clearing, is reasonably necessary to protect customer funds and mitigate systemic risk, thus effectuating CEA section 4d(a)(2), 4d(f)(2), and 4(b)(2)(A)[146] and accomplishing the purposes of "avoidance of systemic risk" and "protecting all market participants from … misuses of customer assets."[147]

The JAC discussed proposed regulation § 1.44(b) in several respects in its comment letter. First, the JAC asserted that proposed regulation § 1.44(b)(1) is unclear; specifically, because it is unclear how the Commission is defining customer initial

[145] *See* CEA § 4d(a)(2), 7 U.S.C. § 6d(a)(2) (Providing that an FCM may not use the money or property of one customer "to margin or guarantee the trades or contracts, or to secure or extend the credit, of any customer or person other than the one for whom the same are held.").
[146] 7 U.S.C. 6d(a)(2), 6d(f)(2), and 6(b)(2)(A).
[147] CEA § 3(b), 7 U.S.C. 5(b). *See*, as discussed above, section 8a(5) of the CEA, 7 U.S.C. 12a(5), authorizing the Commission to make and promulgate such rules and regulation as in the Commission's judgment are reasonably necessary to effectuate any of the provisions, or to accomplish any of the purposes, of the CEA.

margin requirements in light of its definition of the term "margin requirements," within the proposed definition of the term "undermargined amount" in proposed regulation § 1.44(a), as including "the equity component or premium for long or short option positions."[148] As the JAC noted, proposed regulation § 1.44(b)(1) would affect all customers, not just customers whose accounts receive separate account treatment.[149]

As discussed above in connection with regulation § 1.44(a), the Commission is adopting its proposed definition of "undermargined amount" with modifications to remove language that the JAC identified as inconsistent with exchange rules and industry practice, and the Commission views an FCM's use of either of the Net Liquidating Value or alternative Total Equity method set forth in the JAC Margins Handbook as consistent with the Commission's objective in defining an account's undermargined amount for purposes of regulation § 1.44.

Second, the JAC contended that proposed regulation § 1.44(b) may impact the way some FCMs settle with customers on a daily basis.[150] Specifically, the JAC asserted, many FCMs initiate multiple cash and/or collateral transactions within the same customer account on the same business day in order to settle each individual currency within the account, or may call initial margin separately from variation margin within a single customer account, whether or not such account is receiving separate account treatment.[151] The JAC noted this may result in a withdrawal of margin funds by a single customer account or within a separate account when, in the aggregate, including required margin on all positions and total margin equity, the account was undermargined as of the close of business on the prior business day.[152] The JAC asserted this is a generally accepted

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[148] JAC Comment Letter. The JAC reiterated additional points in support of this contention that the Commission discusses above in connection with the definition of "undermargined amount" in regulation § 1.44(a).
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

practice, provided certain controls are in place and adequate records are maintained to demonstrate margin calls are issued, aged, and fully initiated for immediate settlement to support any outgoing disbursements.[153] The JAC requested that the Commission confirm whether such margin procedures will continue to be permissible for separate and non-separate accounts, particularly with respect to the funds available for disbursement to a customer.[154]

Relatedly, the JAC sought clarification regarding whether the Second Proposal requires each separate account to settle a single undermargined amount pursuant to proposed regulation § 1.44(f) or disburse a single excess margin amount pursuant to proposed regulation § 1.44(b), taking into account the aggregate of all positions and currencies within the separate account.[155] The JAC indicated that, to the extent the proposed regulations would require a change in current practice with respect to settlement of margin payments on a currency-by-currency basis within a customer account (whether or not the account is receiving separate treatment), then FCMs may be required to update their regulatory records, risk programs, margin calculations, and reporting for customer accounts.[156]

In response to the JAC's comment, the Commission confirms that each separate account would not be required to settle a *single* undermargined amount or disburse a *single* excess margin amount pursuant to regulation § 1.44 as adopted herein. Rather,

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[153] *Id.*

[154] *Id.*

[155] *Id.* The JAC provided the following example: a customer's separate account has an overall undermargined amount at the close of business on Monday of $2,000 USD (comprised of an undermargined amount in GBP currency with a USD equivalent value of $6,000 and funds in excess of its margin requirements in USD currency of $4,000). The JAC requested the Commission clarify whether, although the separate account was undermargined overall for Monday's close of business, the FCM could allow the separate account customer to withdraw on Tuesday the excess margin funds denominated in USD of $4,000 while also issuing a margin call on Tuesday for the GBP undermargined amount (for the USD equivalent value of $6,000), and remain in compliance with proposed regulation § 1.44(b) and, if so, (i) whether there are certain requirements and controls that the FCM must have in place; and (ii) how the different settlement timeframes of the currencies would impact such permissibility, including in cases where a specific currency cannot be initiated for immediate settlement (*e.g.*, if in the JAC's example, Tuesday is a banking holiday in the UK, but not in the U.S.). *Id.*

[156] *Id.*

each receipt or disbursement would add to or subtract from the available balance in a customer's account, calculated using a single reference currency. As stated above, regulation § 1.44(b) as proposed would require an FCM to ensure that a customer does not withdraw funds from its accounts with the FCM unless the net liquidating value (calculated as of the close of business on the previous business day) plus the margin deposits remaining in the customer's account after the withdrawal are sufficient to meet the customer initial margin requirements with respect to all products held in the customer's account, except as provided for pursuant to regulation § 1.44(c), which sets forth the fundamental requirements for separate account treatment.

The Commission notes that, for purposes of regulation § 1.44(b), the net liquidating value is calculated based on the market value of the positions in the customer's account. In proposing regulation § 1.44(b), the Commission noted that real-time calculation of margin adequacy with respect to a potential withdrawal may prove impracticable.[157] In doing so, the Commission refers to the fact that it may be impracticable for an FCM to calculate the market value of the positions in a customer's account on a real-time basis.

However, the Commission does not believe it would be impracticable for an FCM to account for payments received or disbursements made since the close of business on the previous business day. Indeed, regulation § 1.22(c)(3)(ii) provides that an FCM may reduce the amount of residual interest required to be maintained under regulation § 1.22(c)(3)(i) to account for payments received from or on behalf of undermargined futures customers (less the sum of any disbursements made to or on behalf of such customers) between the close of business on the previous business day and the Residual Interest Deadline.[158] Regulations §§ 22.2(f)(6)(iii)(B) and 30.7(f)(ii)(C)(2) permit this

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[157] Second Proposal, 89 FR at 15324.
[158] 17 CFR 1.22(c)(3)(ii).

practice as to the accounts of Cleared Swaps Customers and 30.7 customers, respectively.[159]

Similarly, in calculating margin adequacy under regulation § 1.44(b), an FCM should consider payments received from or on behalf of customers, including the separate accounts of separate account customers, less the sum of any disbursements made to or on behalf of such customers, between the close of business on the previous business day and the time at which the FCM considers a disbursement to a customer. In calculating the current balance in a customer's account, an FCM may use either the currency exchange rates at the close of business on the previous day, or at some later time. The FCM should be consistent in both the sources of exchange rates that it uses and in choosing the time as of which it will reference such exchange rates in calculating the current balance in the customer's account. Moreover, in doing so, the FCM must act consistently with regulation § 1.49(e).[160] Additionally, as discussed below, the Commission notes that the final rule is not intended to preclude FCMs from, consistent with JAC guidance, considering as received for purposes of regulation § 1.44(b)'s Margin Adequacy Requirement pending receipts denominated in non-USD (and non-CAD, in light of regulation § 1.44(f)(1)-(3)'s provisions for the timing of margin payments to meet a one business day margin call standard) currencies.[161] The Commission expects that an FCM will, consistent with JAC guidance, also treat pending non-USD (and non-CAD) disbursements in the same manner (*i.e.*, as disbursed).

Third, the JAC noted that although the Margin Adequacy Requirement in proposed regulation § 1.44(b) discusses determination of funds available for withdrawal from customer accounts, the Commission in the Second Proposal proposed only to

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[159] 17 CFR 22.2(f)(6)(iii)(B); 17 CFR 30.7(f)(ii)(C)(2). *See also, e.g.*, JAC Comment Letter (discussing multi-settlement margining procedures as well as treatment of pending non-USD transfers for purposes of determining a customer's residual interest requirement).

[160] 17 CFR 1.49(e).

[161] See the Commission's discussion of the JAC's guidance with respect to pending non-USD transfers above in its discussion of amendments to regulation § 1.17.

establish a requirement to collect margin from separate account customers (in proposed regulation § 1.44(f)(1)) and did not propose a broader requirement for FCMs to collect margin, analogous to the collection requirement in regulation § 39.13(g)(8)(ii), and applicable to all accounts carried by clearing and non-clearing FCMs.[162] The JAC further noted that, in the absence of such a requirement, the requirements applicable to margin collection are limited to requirements under exchange rules whereas requirements applicable to disbursements to customers will be defined by Commission regulations (unless the exchange or clearing organization imposes a more stringent requirement).[163]

As discussed above, commenters to the First Proposal, including the JAC, asked that the Commission codify requirements for the treatment of separate accounts in its regulations that would apply to all FCMs. In the Second Proposal, the Commission proposed to do just that. The Commission discussed in the Second Proposal its intent to promulgate a narrow codification, applied directly to FCMs, of the requirements for margin disbursement set forth in regulation § 39.13(g)(8)(iii), subject to requirements based on the conditional no-action position in CFTC Letter No. 19-17, including requirements for separate account treatment that closely mirror the conditions in the no-action position.[164] The no-action position in CFTC Letter No. 19-17 and the First Proposal concerned requirements for separate account treatment for purposes of regulation § 39.13(g)(8)(iii) regarding disbursements of margin, and did not discuss requirements for collection of margin outside of the separate account context. Accordingly, the Commission considers the imposition of a requirement for collection of margin analogous to regulation § 39.13(g)(8)(ii) to be out of scope for purposes of this rulemaking, although the Commission may consider further amendments to its

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[162] *Id.* Regulation § 39.13(g)(8)(ii) provides, among other things, that a DCO shall require its clearing members to collect customer initial margin at a level that is not less than 100 percent of the DCO's clearing initial margin requirements with respect to each product and portfolio and commensurate with the risk presented by each customer account. 17 CFR 39.13(g)(8)(ii).

[163] JAC Comment Letter.

[164] *See* Second Proposal, 89 FR at 15317.

regulations in the future to incorporate a separate margin collection requirement. As the JAC's comment notes, margin collection requirements are currently set by exchanges (as well as DCOs with respect to cleared transactions).

The JAC also recommended that the Commission revise the Margin Adequacy Requirement in proposed regulation § 1.44(b) (and/or the definition of "account" proposed in proposed regulation § 1.44(a)) to "include accounts of noncustomers who pose risk to the FCM if such noncustomers are permitted to withdraw margin funds that would create or exacerbate an undermargined situation, or not be required to deposit and maintain sufficient margin to cover the risk of their positions."[165]

The Commission appreciates the JAC's recommendation to consider revising the Margin Adequacy Requirement to apply to the accounts of noncustomers, which the Commission generally understands to encompass accounts of certain affiliates and affiliated individuals of an FCM. The Commission notes that the Margin Adequacy Requirement of regulation § 39.13(g)(8)(iii) does not apply with respect to withdrawals by noncustomers, and neither CFTC Letter No. 19-17 nor the Commission's proposals to codify the no-action position in that letter contemplated the application of a Margin Adequacy Requirement, or requirements for separate account treatment, with respect to noncustomers. The Commission considers application of the Margin Adequacy Requirement in proposed regulation § 1.44(b) to noncustomers to be outside the scope of this rulemaking, but will consider whether to provide additional risk management requirements applicable to noncustomers in the future.[166]

Lastly, as the Commission discusses above in connection with amendments to regulation § 1.17, the Commission received a number of comments requesting that the

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[165] The JAC noted the Commission could then consider allowing separate account treatment for such noncustomers under the provisions of proposed regulation § 1.44(c)-(h).
[166] There are currently requirements relating to risk assessment recordkeeping for FCMs with respect to affiliated persons in regulations §§ 1.14 and 1.15.

Commission confirm whether FCMs may consider as received pending non-USD transfers for purposes of certain regulations, consistent with JAC guidance and current industry practice. Although the Commission did not receive any such comments specifically with respect to proposed regulation § 1.44(b), for the avoidance of doubt, the Commission confirms that the final rule is not intended to preclude FCMs from considering as received pending non-USD transfers, consistent with JAC guidance, when considering a disbursement under regulation § 1.44(b). However, in light of regulation § 1.44(f)(1)-(3), under which payment of margin in Canadian dollars (CAD) is required to be settled pursuant to the timing requirements for payment of margin in USD for purposes of meeting a one business day margin call standard, the Commission expects that, when considering pending non-USD transfers for purposes of regulation § 1.44(b)'s Margin Adequacy Requirement, FCMs will treat pending CAD transfers on the same basis as pending USD transfers (*i.e.*, they will not be treated as received or as disbursed). Additionally, a non-USD transfer that ultimately is not received on a one business day basis, as set forth in regulation § 1.44(f), would be considered a failed deposit and could no longer be considered pending, even if this was due to administrative error or operational constraint. Thereafter, that transfer would only be considered as received upon actual receipt.

Having considered comments received in response to proposed regulation § 1.44(b), the Commission is adopting regulation § 1.44(b) as proposed, subject to modifications to regulation § 1.44(b)(2), discussed above in connection with regulation § 1.44(a), to address foreign exchanges related to regulation § 30.7 accounts.[167]

F. Regulation § 1.44(c)

[167] Specifically, as adopted, regulation § 1.44(b)(2) provides, "For purposes of [regulation § 1.44(b)(1)] . . . where the previous day (excluding Saturdays and Sundays) is a holiday . . . where any designated contract market *or other board of trade* on which the futures commission merchant trades is open for trading, and where an account of any of the futures commission merchant's customers includes positions traded on such a market, the net liquidating value for such an account should . . . be calculated as of the close of business on such holiday."

The Commission proposed regulation § 1.44(c) to establish the fundamental requirements for separate account treatment. As a general matter, these requirements are substantially the same as in CFTC Letter No. 19-17, and in the First Proposal, except that the FCM may choose to engage in separate account treatment without a requirement that a DCO specifically authorize such treatment. As proposed, regulation § 1.44(c) provides that an FCM may, only during the ordinary course of business, as that term is defined in regulation § 1.44, treat the separate accounts of a separate account customer as accounts of separate entities for purposes of regulation § 1.44(b),[168] if such FCM elects to do so as specified in regulation § 1.44(d). Regulation § 1.44(c) further provides that an FCM that has made such an election shall comply with the risk-mitigating requirements set forth in proposed regulation § 1.44 and maintain written internal controls and procedures designed to ensure such compliance.

The Commission believes that permitting FCMs to treat the separate accounts of separate account customers as accounts of separate entities for purposes of regulation § 1.44(b), subject to the risk-mitigating requirements set forth in regulation § 1.44, accomplishes the CEA's purposes of promoting responsible innovation as well as effective customer fund protection and risk mitigation.[169] Compliance with those requirements can best be achieved if the FCM maintains written internal controls and procedures designed to ensure such compliance.

In its comment letter, ICE stated that it does not object to the specific requirements that would be imposed under proposed regulation § 1.44(c) where an FCM elects separate account treatment with respect to a customer.[170]

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[168] As noted above, proposed regulation § 1.44(b) is intended to serve as an analog to regulation § 39.13(g)(8)(iii) for FCMs.

[169] *See* CEA §§ 3(b), 8a(5); *see also*, CEA section 4d(a)(2), 7 U.S.C. 6d(a)(2); CEA section 4d(f)(2), 7 U.S.C. 6d(f)(2); CEA section 4b(2)(A), 7 U.S.C. 6b(2)(A); CEA section 4f(b), 7 U.S.C. 6f(b).

[170] ICE Comment Letter.

The Commission did not receive any other comments specific to proposed regulation § 1.44(c). Accordingly, the Commission is adopting regulation § 1.44(c) as proposed.

G. Regulation § 1.44(d)

The Commission proposed regulation § 1.44(d) to provide that an FCM may elect to treat the separate accounts of a customer as accounts of separate entities for purposes of proposed regulation § 1.44(b). As proposed, regulation § 1.44(d)(1) provides that, to elect to treat the separate accounts of a customer as accounts of separate entities for purposes of regulation § 1.44(b), the FCM shall include the customer on a list of separate account customers maintained in its books and records, and that such list shall include both the identity of each separate account customer and the identity of each separate account of such customer. The FCM would also be required to keep this list current. Furthermore, as proposed, regulation § 1.44(d)(2) provides that, when an FCM first chooses to include a customer on a list of separate account customers, the FCM is required to provide, within one business day, notification of the election to allow separate account treatment for customers in accordance with the process specified in regulation § 1.12(n)(3).[171] For the avoidance of doubt, the notification of such election would remain a one-time notification made the first time the FCM begins providing separate account notification for any customer. Successive notifications would not be required for each additional customer for which the FCM provides separate account treatment. Furthermore, the FCM would need only provide notification of the election and would not be required to include the identity of the separate account customer. The Commission believes that regulation § 1.44(d) is reasonably necessary to protect customer funds and mitigate systemic risk because it is designed to enable DSROs to effectively monitor and regulate FCMs that engage in separate account treatment, and to

[171] *See* 17 CFR 1.12(n)(3).

provide that FCMs will have the records necessary to understand which accounts receive separate account treatment for purposes of monitoring compliance with the proposed regulation.

In its comment letter, the JAC stated that a complete and accurate listing of separate accounts is critical to ensure that the Commission's risk mitigating requirements can be effectively carried out by an FCM, monitored by self-regulatory organizations (SROs) and the Commission for compliance with such requirements, and monitored by DCOs for customer gross margin reporting under proposed regulation § 39.13(g)(8)(i), and to assist DCOs and/or bankruptcy trustees in porting accounts in the event of an FCM's insolvency.[172] The JAC asserted that, currently, when such listing has been requested, certain FCMs offering separate account treatment under the no-action position of CFTC Letter No. 19-17 include all of the FCM's accounts or potential accounts on such listing rather than only those accounts "currently subject to separate account treatment (*i.e.*, beneficial owners that maintain more than one account at the FCM which are being treated separately)."[173] The JAC recommended that the Commission require only accounts currently receiving separate account treatment to be included on such listing to ensure proper focus and attention to the additional risks posed by separate account treatment, effective monitoring of reporting of separate accounts, and proper and efficient porting of separate accounts.[174] The JAC also recommended that the Commission require separate accounts to be clearly identified as such in the FCM's books and records, including on the separate account customer's statements to assist in ensuring a current, accurate, and complete listing of accounts receiving separate treatment.[175]

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[172] JAC Comment Letter.
[173] *Id.*
[174] *Id.*
[175] *Id.*

The Commission notes that the recordkeeping requirement in regulation § 1.44(d)(1), described above, is substantially similar to the corresponding condition in CFTC Letter No. 19-17 that an FCM maintain a list of all separate accounts receiving separate account treatment, indicating the beneficial owner and account numbers of such accounts. For the avoidance of doubt, the Commission also believes that the recordkeeping requirement in regulation § 1.44(d)(1) as proposed is consistent with the JAC's comment. It requires an FCM that elects to treat separate accounts of a customer as accounts of separate entities for purposes of regulation § 1.44(b) to: (i) include the customer on a list of separate account customers maintained in its books and records; (ii) include on the list the identity of each separate account customer; (iii) include on the list the identity of each separate account of such customer; and (iv) keep the list current.

The definition of "separate account customer" in regulation § 1.44(a) is "a customer for which the [FCM] has made the election set forth in [regulation § 1.44(d)]." The FCM would thus be required to subject the customers on that list, as separate account customers, to the requirements of regulation § 1.44 for separate account treatment, including regulation § 1.44's one business day margin call standard.

In its comment letter, ICE opined that it would be appropriate for the Commission under proposed regulation § 1.44(d) to require an FCM to provide notice to DCOs of which it is a clearing member of accounts that are subject to separate account treatment, so that the DCO can comply with its obligations with respect to the margining of such accounts under regulation § 39.13(g).[176]

The Commission designed the Second Proposal to codify the terms of the no-action position in CFTC Letter No. 19-17 in a manner directly applicable to FCMs and not through the instrumentation of DCO rules. The Commission notes that under the conditions of CFTC Letter No. 19-17, an FCM shall, on a one-time basis, provide

[176] ICE Comment Letter.

notification to its *DSRO* if it will apply separate account treatment a provided for in the no-action position to any separate accounts. No such notification to a *DCO* was a condition of the no-action position and, because the Commission is modifying part 1 to apply a Margin Adequacy Requirement and requirements for separate account treatment directly to FCMs, the Commission views a requirement, imposed by the Commission, for an FCM to provide to a DCO of which it is a clearing member the one-time notification of commencement of separate account treatment as outside the scope of this rulemaking. The Commission further notes that a DCO has the discretion to put in place additional rules regarding information its clearing members must provide, and could choose to independently promulgate a requirement under DCO rules to provide notification to such DCO the first time an FCM begins separate account treatment for a customer.[177] Regulation § 39.13(g)(8)(iii), as amended by this final rulemaking, requires a DCO to have rules requiring that its clearing members do not withdraw funds from their accounts in a manner that would lead to or exacerbate an undermargining scenario, except as provided for in regulation § 1.44, and DCOs have discretion in how they choose to monitor for and enforce that requirement.

FIA requested that the Commission clarify that any clearing FCM that has already provided the notice required by proposed regulation § 1.44(d)(2) to its DSRO in compliance with the conditions of CFTC Letter No. 19-17 shall be deemed to have complied with the requirement of proposed regulation § 1.44(d)(2) that an FCM provide notification to its DSRO of the first time the FCM includes a customer on its list of separate account customers.[178]

[177] *See, e.g.*, ICE Clear Credit Rule 406(f) ("Each Participant shall provide such reports to ICE Clear Credit with respect to Non-Participant Parties and their related Client Related Positions and Non-Participant Collateral … upon request of ICE Clear Credit and upon such other basis, if any, as is provided in the ICE Clear Credit Procedures.")
[178] FIA Comment Letter.

As discussed above, in addition to requiring an FCM to maintain a list of all separate accounts (indicating the beneficial owner and account numbers) receiving separate account treatment, CFTC Letter No. 19-17 requires as a condition to separate account treatment that an FCM shall, on a one-time basis, provide notification to its DSRO if it will apply separate account treatment to any separate accounts. As proposed, regulation § 1.44(d)(2) adds to this requirement that such notification shall be provided in accordance with the following conditions: (i) the first time that the FCM includes a customer on the list of separate account customers; (ii) within one business day; (iii) to the Commission (in addition to the DSRO); and (iv) in accordance with the process specified in regulation § 1.12(n)(3). With respect to the one-time notification that the FCM is required to provide to its DSRO, the Commission recognizes that the requirements of regulation § 1.44(d)(2) are, in the main, substantially the same as those in the corresponding condition of CFTC Letter No. 19-17. Notwithstanding the timing and manner requirements of regulation § 1.44(d)(2) as proposed, recognizing that FCMs have successfully applied separate account treatment under the conditions of CFTC Letter No. 19-17 for over five years, the Commission confirms that a clearing FCM that has already provided to its DSRO the one-time notification of commencement of separate account treatment pursuant to the no-action conditions of CFTC Letter No. 19-17 shall be deemed to have complied with the analogous requirement of regulation § 1.44(d)(2).

Having considered comments received with respect to proposed regulation § 1.44(d), the Commission is adopting regulation § 1.44(d) as proposed.

H. Regulation § 1.44(e)

As proposed, regulation § 1.44(e) enumerates events that would be inconsistent with the ordinary course of business, as that term is defined in regulation § 1.44(a), and sets forth requirements related to the cessation and resumption of permitting disbursements on a separate account basis upon, respectively, the occurrence and cure of

certain non-ordinary course of business events. Each of these events would raise important concerns about the financial resiliency of the FCM or one or more of its separate account customers.[179] As discussed above with respect to regulation § 1.44(a), the list of events in regulation § 1.44(e) will be the exclusive set of events that are inconsistent with the ordinary course of business for purposes of regulation § 1.44.

These events are divided into two categories: (i) events that concern the separate accounts of a particular separate account customer, the occurrence of any one of which would require the FCM to cease permitting disbursements on a separate account basis with respect to all accounts of that customer; and (ii) events that concern the financial status of the FCM itself, and the occurrence of any one of which would require the FCM to cease permitting disbursements on a separate account basis with respect to all of its separate account customers.

Significantly, while a separate account customer is outside the ordinary course of business as defined in regulation § 1.44(a), only the privilege of permitting disbursements on a separate account basis, pursuant to regulation § 1.44(c), is terminated (or suspended). So long as a customer remains a separate account customer, whether or not within the ordinary course of business, then the FCM is required to comply with the requirements of regulation § 1.44, including with respect to the relevant provisions addressed in regulations §§ 1.17, 1.20, 1.22, 1.23, 1.32, 1.55, 1.58, 1.73, 22.2, 30.7, and 39.13(g)(8)(i) regarding that customer and all of that customer's separate accounts. Similarly, if it is the FCM that is outside the ordinary course of business, it is only the privilege of permitting disbursements on a separate account basis with respect to any of the FCM's separate account customers and their separate accounts that is terminated (or

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[179] For example, while the bankruptcy of an FCM or a separate account customer would have direct effects, the bankruptcy of an FCM's or separate account customer's parent company would also portend financial challenges for, respectively, the FCM or separate account customer (*e.g.*, if the parent company decided to liquidate its subsidiaries in bankruptcy). Experience in the bankruptcies of, *e.g.*, Refco and Lehman, demonstrates that when one member of an affiliate financial company structure files for bankruptcy, other affiliates soon follow.

suspended). The FCM continues to be required to comply with the requirements in regulation § 1.44, including with respect to the relevant provisions described above, with respect to its separate account customers and their separate accounts. Thus, for the avoidance of doubt, a separate account customer that is outside the ordinary course of business is still a separate account customer.

The first category of events is as follows:

- (1)(i) The separate account customer, including any separate account of such customer, fails to deposit initial margin or maintain maintenance margin or make payment of variation margin or option premium as specified in proposed regulation § 1.44(f).[180]
- (ii) The occurrence and declaration by the FCM of an event of default as defined in the account documentation executed between the FCM and the separate account customer.
- (iii) A good faith determination by the FCM's CCO, one of its senior risk managers, or other senior manager, following such FCM's own internal escalation procedures, that the separate account customer is in financial distress, or there is significant and bona fide risk that the separate account customer will be unable promptly to perform its financial obligations to the FCM, whether due to operational reasons or otherwise.
- (iv) The insolvency or bankruptcy of the separate account customer or a parent company of such customer.
- (v) The FCM receives notification that a board of trade, a DCO, an SRO as defined in regulation § 1.3 or section 3(a)(26) of the Securities Exchange Act of 1934, the Commission, or another regulator[181] with jurisdiction over the separate

[180] *I.e.*, the one business day margin call requirement.
[181] *E.g.*, the SEC or a foreign regulator.

account customer, has initiated an action[182] with respect to such customer based on an allegation that the customer is in financial distress.

- (vi) The FCM is directed to cease permitting disbursements on a separate account basis, with respect to the separate account customer, by a board of trade, a DCO, an SRO, the Commission, or another regulator with jurisdiction over the FCM, pursuant to, as applicable, board of trade, DCO, or SRO rules, government regulations, or law.

The second set of events is as follows:

- (2)(i) The FCM is notified by a board of trade, a DCO, an SRO, the Commission, or another regulator with jurisdiction over the FCM, that the board of trade, the DCO, the SRO, the Commission, or other regulator, as applicable, believes the FCM is in financial or other distress.
- (ii) The FCM is under financial or other distress as determined in good faith by its CCO, senior risk managers, or other senior management.
- (iii) The insolvency or bankruptcy of the FCM or a parent company of the FCM.

As proposed, regulation § 1.44(e)(3) provides that the FCM must provide notice to its DSRO and to the Commission of the occurrence of any of the events terminating (or suspending) disbursements on a separate account basis for one or more separate account customers. The notice must be provided to the DSRO and the Commission in accordance with the process specified in regulation § 1.12(n)(3). The notice also must identify the event and, if applicable, the customer. The FCM is required to provide such notice promptly in writing no later than the next business day following the date on which the FCM identifies or has been informed that the relevant event has occurred. The notification required upon exiting the ordinary course of business is intended to ensure

[182] In this context, the term "initiate an action" is intended to include the filing of a complaint or a petition to take action against an entity, or an analogous process. The initiation or conduct of an investigation would not be sufficient to constitute "initiating an action" in this context.

that the Commission and DSROs will be apprised of the occurrence of non-ordinary course of business events, so that they may actively communicate with and monitor an FCM with respect to the resolution of such events (*e.g.*, where an FCM attempts to establish that its customer has reentered ordinary course of business conditions).

Regulation § 1.44(e)(4), as proposed, provides an avenue for an FCM that has experienced a non-ordinary course of business event with respect to itself or a customer to return to the ordinary course of business and resume disbursements on a separate account basis for itself or its customers, as may be the case. Regulation § 1.44(e)(4) provides that an FCM that has ceased permitting disbursements on a separate account basis to a separate account customer due to the occurrence of a non-ordinary course of business event, with respect to that specific separate account customer, or with respect to all such customers, may resume permitting disbursements to such customer(s) on a separate account basis if such FCM reasonably believes, based on new information, that those circumstances triggering the event have been cured, and such FCM documents in writing the factual basis and rationale for its conclusion. However, regulation § 1.44(e)(4) also provides that, if the circumstances triggering cessation of such treatment were an action or direction by a board of trade, a DCO, an SRO, the Commission, or another regulator with jurisdiction over the separate account customer or the FCM, then cure of those circumstances would require the withdrawal or other appropriate termination of such action or direction by that entity.

That permitting disbursements on a separate account basis should be discontinued (or at least suspended) under certain circumstances is reflected in CME's recommendation, preceding issuance of CFTC Letter No. 19-17, that disbursements on a separate account basis be permitted only during the ordinary course of business. As CME explained, FCMs should maintain the flexibility to determine that either the customer or the FCM itself is in distress and "pause" disbursements until the customer's

other account can demonstrably meet the call to deposit funds.[183] Similarly, as CME noted, an FCM should not be purposely releasing funds to a customer when the customer's overall account is in deficit, as doing so may create a shortfall in segregated, secured, or Cleared Swaps Accounts in the event the FCM becomes insolvent.[184]

However, the Commission acknowledges that in some instances, an FCM or customer may exit a state of financial, operational, or other distress, such that resumption of separate account disbursements would be appropriate. By explicitly providing FCMs with an avenue to resume disbursements on a separate account basis consistent with the resumption of the ordinary course of business, the Commission seeks to ensure that a temporary departure from the ordinary course of business, once remedied, does not continue to preclude an FCM from applying (and a customer from having applied to its accounts) separate account treatment, and to incentivize transparency between FCMs and their DSROs and Commission staff with respect to conditions at the FCMs or customers that could indicate operational or financial distress and, more generally, the risk management program at the FCM.

Regulation § 1.44(e) is designed to ensure that disbursements are permitted on a separate account basis only during the routine operation of the FCM's business relationship with its customer. Certain events signaling financial or operational distress of the FCM or customer are inconsistent with the normal operation of the business relationship between the FCM and its customer. The Commission believes that, when such events occur, and throughout the duration of their occurrence, suspending FCMs' ability to provide disbursements on a separate account basis with respect to the Margin Adequacy Requirement is reasonably necessary to protect customer funds and mitigate systemic risk, and to effectuate section 4d of the CEA.

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[183] CME Letter.
[184] *Id.*

The JAC, noting the passage of time since the Divisions issued CFTC Letter No. 19-17, requested that the Commission provide examples of non-enumerated events that would constitute operating outside the ordinary course of business, so that FCMs and their customers can better understand the circumstances in which disbursements on a separate account basis are not permitted.

In the Second Proposal, the Commission proposed to define the "ordinary course of business" as the "standard day-to-day operation of the futures commission merchant's business relationship with its separate account customer," based on the similar definition in CFTC Letter No. 19-17 ("standard day to day operation of the FCM's business relationship with its customer"). Although in both CFTC Letter No. 19-17 and proposed regulation § 1.44(e) the Commission set forth events that it would consider inconsistent with the ordinary course of business, the Commission acknowledges that the Second Proposal's proposed definition of "ordinary course of business" in conjunction with the list of events inconsistent with the ordinary course of business in proposed regulation § 1.44(e) may have resulted in confusion regarding the scope of events that the Commission will consider inconsistent with the ordinary course of business for purposes of regulation § 1.44(a).

As discussed above in connection with SIFMA-AMG's comment related to the definition of "ordinary course of business" in regulation § 1.44(a), the Commission is modifying the proposed definition of "ordinary course of business" in regulation § 1.44(a) to make clear that regulation § 1.44(e) contains the complete list of events that, for purposes of regulation § 1.44, would cause a separate account customer or an FCM providing separate account treatment to fall outside the ordinary course of business, such that the FCM would need to cease providing disbursements on a separate account basis for one or more customers. Therefore, only the events specifically enumerated in regulation § 1.44(e) would place a separate account customer or an FCM providing

separate account treatment outside the ordinary course of business, as defined in regulation § 1.44(a).

ICE, in its comment letter, stated that it did not object to the list of events that would be inconsistent with the ordinary course of business in proposed regulation § 1.44(e).

The Commission did not receive any other comments directly related to proposed regulation § 1.44(e).[185] Accordingly, the Commission is adopting regulation § 1.44(e) as proposed.[186]

I. Regulation § 1.44(f)

The Commission proposed regulation § 1.44(f) to require that each separate account must be on a one business day margin call, subject to certain requirements designed to further define what constitutes a one business day margin call. Providing for a one business day margin call, as defined in this regulation § 1.44(f), ensures that margin shortfalls are timely corrected, and that a customer's inability to meet a margin call is timely identified. However, in certain circumstances, it may be impracticable for payments to be received on a same-day basis due to the mechanics of international payment systems (*e.g.*, time zones and schedules of correspondent banks). In promulgating requirements to define timely payment of margin for purposes of the standard set forth in proposed regulation § 1.44(f), the Commission seeks to establish requirements that reflect industry best practices among FCMs and customers.[187] The

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[185] Comments with respect to the Commission's proposed definition of "ordinary course of business," set forth in regulation § 1.44(a), are addressed above in connection with that section.

[186] As a matter of internal consistency and clarity, because proposed regulation § 1.44(e)(4) concerns the resumption of disbursements on a separate account basis following a cessation of such treatment due to non-ordinary course of business conditions, the Commission is making a change in final regulation § 1.44(e)(4), to substitute "disbursements on a separate account basis" for "separate account treatment," in providing, "If the circumstances triggering cessation of *disbursements on a separate account basis* were an action or direction by one of the entities described in paragraphs (e)(1)(v) or (vi), or paragraph (e)(2)(i), of this section, then the cure of those circumstances would require the withdrawal or other appropriate termination of such action or direction by that entity."

[187] An analysis by FIA indicated that, for the FCMs studied, on average more than 90% of margin deficits were collected by the close of business on the day following the market movements creating such deficits.

Commission believes that regulation § 1.44(f) is reasonably necessary to protect customer funds and mitigate systemic risk, and to effectuate CEA section 4d, because it is designed to limit the time in which accounts receiving separate treatment may be undermargined, and to do so in a manner that takes into consideration the way in which that period may be affected by factors such as time zones, international banking conventions, and (to an appropriate extent) holidays.

Specifically, the Commission understands that, although margin calls made in the morning in the U.S. Eastern Time Zone (ET) are typically capable of being met on a same-day basis when margin is paid in United States dollars (USD) and CAD, the operation of time zones and banking conventions in other jurisdictions may necessitate additional time when margin is paid in other currencies. For example, the Commission understands, based on discussions with market participants, that margin paid in Japanese yen (JPY) and certain other currencies is typically received two business days after a margin call is issued, and margin paid in British pounds (GBP), euros (EUR), and certain other non-USD/CAD/JPY currencies is typically received one business day after a margin call is issued.

In connection with proposed regulation § 1.44(f), the Commission requested comment (as Question 6) regarding whether, in light of changes made in the Second Proposal relative to the First Proposal, the regulatory framework set forth in proposed regulation § 1.44(f) appropriately balances practicability and burden with risk management, as well as: (i) if not, what alternative approach should be taken; and (ii) how such an alternative approach would better balance practicability and burden with risk management. As part of this request, the Commission requested comment on whether the

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For a majority of the FCMs studied, 95% of margin deficits were collected by that time. *See* Letter from Barbara Wierzinski, General Counsel, FIA, to Melissa Jurgens, Secretary, CFTC, Costs of the Proposed Residual Interest Requirement Compared to the FIA Alternative, at 3, available at *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59283&SearchText=FIA*.

standard of timeliness for a one business day margin call set forth in proposed regulation § 1.44(f) presented practicability challenges and, if so, what those challenges would be, and how the proposed standard of timeliness could be improved. The Commission considers the comments received in response to the margin payment timing requirements set forth in proposed regulation § 1.44(f)(1)-(3), and other provisions of proposed regulation § 1.44(f) that modify those requirements in certain circumstances, to be generally responsive to this question. The Commission discusses these comments below.

As proposed, regulation § 1.44(f)(1) provides that, except as explicitly provided in regulation § 1.44(f), if, as a result of market movements or position changes on the previous business day, a separate account is undermargined (*i.e.*, the undermargined amount for the account is greater than zero), then the FCM shall issue a margin call for that separate account for at least the amount necessary for the separate account to meet the initial margin required by the applicable exchanges or clearing organizations (including, as appropriate, the equity component or premium for long or short option positions) for the positions in the separate account.[188] Such call must be met by the applicable separate account customer no later than the close of the Fedwire Funds Service on the same business day, consistent with the industry standard for when 90-95% of margin deficits are cured.[189]

In light of challenges to same-day settlement posed by margining in certain currencies, as described above, and in recognition of the particular banking conventions

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[188] The undermargined amount is based on maintenance margin, which may be lower than initial margin. However, if an account falls below the maintenance margin level, the amount of the margin call is generally required to be the amount necessary to bring the account back to the (potentially higher) initial margin level.

[189] The Fedwire Funds Service is an electronic funds transfer service commonly used for settlement and clearing arrangements. The service currently closes at 7:00 p.m. ET. For purposes of the Fedwire Funds Service, Federal Reserve Banks observe as holidays all Saturdays, all Sundays, and the holidays listed on the Federal Reserve Banks' Holiday Schedules. *See* The Federal Reserve, Fedwire® Funds Service and National Settlement Service Operating Hours and FedPayments® Manager Hours of Availability, available at *https://www.frbservices.org/resources/financial-services/wires/operating-hours.html*. Because the Fedwire Funds Service hours of operations may be subject to change, the Commission has determined to tie the timeframe to fulfill the one business day margin call requirements of proposed regulation § 1.44(f) to the Fedwire Funds Service's closing rather than an absolute time.

around payments in other currencies, the Commission proposed regulation § 1.44(f)(2) to provide that payment of margin in certain currencies listed in proposed Appendix A to part 1 shall be considered in compliance with the requirements of regulation § 1.44(f) provided they are received by the applicable FCM no later than the end of the second business day after the day on which the margin call is issued.

The Commission also proposed regulation § 1.44(f)(3), which provides that payment of margin in fiat currencies other than USD, CAD, or the currencies listed in proposed Appendix A to part 1 shall be considered in compliance with the requirements of regulation § 1.44(f) if received by the applicable FCM no later than the end of the business day after the business day on which the margin call was issued.

In the Commission's view, a "one business day margin call" should be defined beyond the term itself, in light of the effect of time zones and international banking conventions that may cause a customer to be unable to meet a call for margin in certain currencies on the day the margin call is issued. Although FCMs may ensure that margin calls are generally met within one business day, for purposes of separate account treatment, the Commission wishes to ensure that such margin calls are (subject to specified exceptions) always met on a one business day basis. The Commission also notes that, with respect to the calculation of balances in customers' accounts and the undermargined amount which the FCM must include in its residual interest and LSOC compliance calculations, such figures would be calculated on a separate account basis, as discussed herein.[190]

The Commission received several comments with respect to the margin payment timing framework for separate accounts set forth in proposed regulation § 1.44(f)(1)-(3).

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[190] *See, e.g.*, JAC, Regulatory Alert, #18-02, at 2, June 6, 2018 (discussing undermargined accounts), regulation § 1.44(g)(5).

As discussed above in connection with regulation § 1.44(a), the JAC contended that the Commission's proposed definition of the term "undermargined amount" would be inconsistent with existing industry practice and the guidance for calculating a margin call in the JAC Margins Handbook. As with respect to other provisions of proposed regulation § 1.44 that use or otherwise rely on the term "undermargined amount," the JAC contended that the margin call required under proposed regulation § 1.44(f)(1) would be similarly inconsistent with industry practice and JAC guidance.[191] In doing so, the JAC reiterated its comment that the Second Proposal's definition of "undermargined amount" would require FCMs to compute margin calls for separate accounts as required under proposed regulation § 1.44(f)(1) whereas FCMs would be required to compute margin calls differently for non-separate account customers.[192]

As discussed above in connection with regulation § 1.44(a), the Commission is modifying the definition of "undermargined amount" to remove the language that the Commission believes created the identified inconsistency and confirm that the Commission considers either of the Net Liquidating Value or Total Equity methods set forth in the JAC Margins Handbook to be consistent with the definition of "undermargined amount" that the Commission is adopting.

SIFMA-AMG urged the Commission to rescind the one business day margin call standard set forth in proposed regulation § 1.44(f)(1)-(3).[193] SIFMA-AMG contended that the Second Proposal does not adequately appreciate the differences in operational workflows and risk management processes currently in place and how they may differ depending on markets, products, clients, custodians, and fund structures.[194] Specifically, SIFMA-AMG disagreed with the Commission's proposal to require same-day margin

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[191] JAC Comment Letter. The JAC stated that, currently, FCMs calculate a margin call using the following formula: Initial Margin Requirement – Margin Equity – Outstanding Margins Calls = [a positive balance represents the amount of margin call to be issued]. *Id.*
[192] *Id.*
[193] SIFMA-AMG Comment Letter.
[194] *Id.*

calls to be met regardless of the time the FCM issues them.[195] SIFMA-AMG noted that, for example, a 3:00 p.m. margin call would be required to be met on a same-day basis under proposed regulation § 1.44(f)(1), which would not happen in the normal course of business.[196] According to SIFMA-AMG, depending on how late in the day an FCM issued the margin call, managers may not be capable of meeting the call on a same-day basis, due in part to the time needed for managers, as fiduciaries, to validate the margin calls and instruct payments from the separate account clients' custodians globally, who may impose earlier cutoff times to meet same-day margin transfers or be subject to different time zones and business days.[197] Instead, SIFMA-AMG argued, the Commission's timing requirements for meeting margin calls should take into account the agreed call time in documents between FCMs and customers.[198] In SIFMA-AMG's view, the Commission's proposal represents a prescriptive framework around timing and deadlines for meeting margin calls that would eliminate the operational flexibility originally provided in CFTC Letter No. 19-17, and a one business day margin call should be deemed met so long as it is issued by the cutoff time agreed between the FCM and its customer.[199]

ICE, in its comment letter, noted it did not object to the proposed one business day margin call standard as it would apply to FCMs.[200]

The Commission proposed regulation § 1.44(f), particularly the margin payment timing framework set forth in regulation § 1.44(f)(1)-(3), to more clearly define the concept of a "one business day margin call," as that term is used in CFTC Letter No. 19-17. CFTC Letter No. 19-17 provided, among other conditions for separate account treatment, that: (i) each separate account must be on a one business day margin call; (ii)

[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] ICE Comment Letter.

situations of administrative error or operational constraints which prevent the call from being met within a one-day period will not be considered a violation of such condition; and (iii) in no case can customers and FCMs contractually arrange for longer than a one business day period for a margin call to be met. The Commission notes that the no-action conditions of CFTC Letter No. 19-17 would thus appear to unambiguously provide that a margin call in a separate account must be met within one business day, but do not explicitly address certain practical challenges in applying such a standard, such as how an FCM shall make, and a customer shall meet, a call for margin paid in a currency that an FCM may be unable to practicably receive on the same (or in some cases next) business day. Although SIFMA-AMG appears to interpret this silence as promoting operational flexibility, the Commission believes it may confuse FCMs as to their obligations with respect to the margining of separate accounts, and may result in interpretations that are inconsistent with the Commission's customer funds protection and risk management goals in providing for the separate treatment of accounts.

Furthermore, although regulation § 1.44(f)(1)-(3) require a margin call to be met on a one business day basis, as set forth in regulation § 1.44(f)(1)-(3), regardless of the time the call is issued, the Commission did not prescribe a time by which a margin call must be issued, recognizing that there may be legitimate operational reasons as to why an FCM may need to issue margin calls to different separate account customers at different times. The margin call contemplated by regulation § 1.44(f)(1)-(3) is based on market movements or changes in positions on the previous business day, not as of the day of the call itself.[201] The Commission proposed this standard to provide a clear cutoff time for

[201] For the avoidance of doubt, an FCM may also, in its discretion, issue a call for margin based on same-day market movements or changes in positions. The FCM could, consistent with regulation § 1.44(f)(1), make that call due either same-day or next-day. For example, under regulation § 1.44(f)(1), the FCM would be required to make and collect, on Tuesday, a call for margin based on market movements and changes of positions on Monday. If the FCM determines to issue an additional margin call on Tuesday based on market movements (or changes in positions, or volatility, or other factors) on Tuesday, §1.44(f)(1) would require that that call be collected *no later than* close of Fedwire on Wednesday. However, the FCM

the determination of a margin call, and to allow a margin call to be reasonably made and met on a one-day basis, based on the Commission's understanding that margin calls to address market movements or changes in positions on a given day are typically issued early on the next business day. For the avoidance of doubt, FCMs and customers may agree on the time the margin call required by regulations § 1.44(f) should be made. If the call is not made timely due to administrative error or operational constraint as set forth in regulation § 1.44(f)(5), discussed below, then such failure would not be deemed a violation of regulation § 1.44's one business day margin call standard. However, to require, as SIFMA-AMG suggests, only that a margin call be met if issued by the cutoff time agreed between the FCM and its customer, would be to effectively allow FCMs and customers to interpret the one business day period on a customer-by-customer basis. This would be contrary to the Commission's goal of providing clear standards around the timely payment of margin to prevent separate accounts from becoming undermargined, which is at the core of the Commission's risk-mitigation goals.

Accordingly, the Commission is adopting regulation § 1.44(f)(1)-(3) as proposed.

The occurrence of a foreign holiday during which banks are closed may also create difficulties in the payment of margin in a fiat currency other than USD. Therefore, the Commission proposed regulation § 1.44(f)(4), which, as proposed, states that the relevant deadline for payment of margin in fiat currencies other than USD may be extended by up to one additional business day and still be considered in compliance with the requirements of proposed regulation § 1.44(f) if payment is delayed due to a banking holiday in the jurisdiction of issue of the currency. In effect, as proposed, regulation § 1.44(f)(4) provides one additional business day for each nonconsecutive holiday in the

could, in its discretion (in what would likely be an unusual case) make that supplemental call also due on Tuesday (or some earlier point in time on Wednesday). If that additional margin call does not cover the margin required for all of Tuesday's market movements and changes in positions, then the FCM would be required to issue (and collect) a margin call for the difference on Wednesday.

jurisdiction of issue of the currency in which margin is to be paid. As proposed, regulation § 1.44(f)(4) also provides that, for payments of margin in EUR specifically, either the separate account customer or the investment manager managing the separate account may designate one country within the Eurozone with which they have the most significant contacts for purposes of meeting margin calls in that separate account, the banking holidays of which shall be referred to for such purpose.[202]

The Commission designed regulation § 1.44(f)(4) to provide FCMs with a level of discretion in how they manage risk by allowing an FCM to *permit* limited delays in margin payments due to non-U.S. banking conventions. Regulation § 1.44(f)(4) would not, however, *require* an FCM to extend the deadline for payments of margin. In this manner, the Commission sought to allow FCMs to exercise risk management judgment in balancing, within limits, the risk management challenges caused by extending the time before a margin call is met with the burdens involved in requiring the client or asset manager to prefund potential margin calls in advance of the holiday or to arrange to pay margin more promptly in USD or another currency not affected by the holiday. The Commission expected that FCM risk management decisions, including the use of any extension permitted under regulation § 1.44(f)(4), will be made in consideration of relevant risk management factors; *e.g.*, a client's risk profile and market conditions, evaluated at the time the risk management decisions are made.[203]

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[202] With respect to margin payments in EUR, proposed regulation § 1.44(f)(4) was intended to prevent customers or asset managers from leveraging banking holidays in a multiplicity of jurisdictions, to circumvent requirements to pay margin timely.

[203] This expectation is consistent with the statement of the directors of DCR and DSIO in issuing CFTC Letter No. 19-17. CFTC, Statement by the Directors of the Division of Clearing and Risk and the Division of Swap Dealer and Intermediary Oversight Concerning the Treatment of Separate Accounts of the Same Beneficial Owner, Sept. 13, 2019, available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/dcrdsiodirectorstatement091319* ("We fully expect that DCOs and FCMs and their customers will agree that FCMs must retain, at all times, the discretion to determine that the facts and circumstances of a particular shortfall are extraordinary and therefore necessitate accelerating the timeline and relying on the FCM's protocol for liquidation or for accessing funds in the other accounts of the beneficial owner held at the FCM."). *See also* CFTC Letter No. 20-28 (stating the same).

In the Second Proposal, with respect to proposed regulation § 1.44(f)(4), the Commission requested comment (as Question 7) regarding whether commenters believe it will be impracticable to comply with proposed regulation § 1.44(f)(4), as that section pertains to payment of margin in EUR, including examples of operational or other challenges that would result in such impracticability. To the extent commenters have such practicability concerns, the Commission requested comment regarding how, in the alternative, the Commission should seek to achieve its goal of preventing evasion of the one business day margin call standard, in light of differing banking holidays within the national jurisdictions that comprise the Eurozone. The Commission considers the comments received in response to proposed regulation § 1.44(f)(4) to be responsive to this question.

With respect to proposed regulation § 1.44(f)'s provisions regarding payment of margin in connection with Eurozone holidays, FIA stated it does not believe motives of leveraging banking holidays in a multiplicity of jurisdictions to circumvent margin payment timing requirements are practicable or can be fairly ascribed to the institutional asset owners and money managers whom, according to FIA, comprise the predominant part of the group of customers who rely on separate account margining.[204] FIA contended that proposed regulation § 1.44(f)(4) would be unworkable, asserting that all investment managers and many separate account customers maintain custodial arrangements in multiple Eurozone jurisdictions and will be affected by local public holidays, which vary widely across the Eurozone.[205]

FIA noted, for example, that where a European state pension fund contracts with two unaffiliated institutional money managers based in France (*i.e.*, two separate accounts of the same customer), and custodies funds for one mandate with a bank in

[204] FIA Comment Letter.
[205] *Id.*

France and for the other with a bank in Germany, and both managers designate France as their jurisdiction of most significant contacts, an asset manager whose custodian is in Germany will have no way of settling a EUR call received from an FCM on October 3, which is German Unity Day, a national holiday; and, under regulation § 1.44(f)(4), as proposed, the FCM is prohibited from extending the benefit of a one business day extension to the separate account.[206] FIA noted that asset owners typically hardwire separate investment mandates to separate custodial arrangements, and do not expect to be involved in settling margin calls arising in connection with those separate mandates.[207] Therefore, FIA argued, in this example, the German custodian would not be able to pass the margin call to the French custodian or directly onto the pension fund.[208]

Furthermore, FIA asserted, FCMs would incur operational risk in having to track the Eurozone holiday preferences of hundreds or thousands of separate accounts, and FCMs will need to deploy new margin day counting systems and protocols, including new coding for automated systems.[209] FIA further contended that, where such systems are automated, the workflows imposed under the proposed regulation would likely result in the need for more manual handling, which increases the risk of operational error.[210] FIA recommended that the Commission revise proposed regulation § 1.44(f)(4) to specify that, with respect to payments in EUR, the banking holidays of any jurisdiction within the Eurozone with which either the separate account customer or the investment manager managing the separate account has significant contacts shall be referred to for purposes of receiving the benefit of a one business day extension of an EUR-denominated margin call in consideration of non-U.S. local banking holidays.[211]

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[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*

Additionally, with respect to proposed regulation § 1.44(f)(4)'s provision for one additional business day to meet a margin call in non-USD fiat currency to account for non-U.S. banking holidays, FIA noted that a growing number of FCM institutional clients, managers, and custodians are based in jurisdictions where there may be consecutive holidays.[212] In FIA's view, limiting the extension available to such clients to a single business day forces the FCM to choose between suspending disbursements on a separate account basis simply due to holidays in the client's jurisdiction and exercising its discretion not to suspend disbursements on a separate account basis in the absence of any other reason to do so, thereby risking disciplinary action by the Commission or the FCM's DSRO.[213] FIA urged the Commission to revise proposed regulation § 1.44(f)(4) to provide that the deadline for payment of margin in non-USD fiat currencies may be extended to the next business day following any banking holiday in the jurisdiction of issue of the currency and still be considered in compliance with the requirements of regulation § 1.44(f) if payment is delayed due to such banking holiday.[214]

SIFMA-AMG asserted it would be impractical for FCMs to comply with proposed regulation § 1.44(f), and further asserted that there does not appear to be data or analysis to support the Commission's position.[215] SIFMA-AMG contended that, although the Commission considers technical margin deficit scenarios from global business that regularly navigate U.S. and non-U.S. bank holidays, it does not consider that firms may plan for expected events, such as Golden Week in Japan,[216] by pre-funding accounts.[217] According to SIFMA-AMG, under the Commission's proposal,

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[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] SIFMA-AMG Comment Letter.
[216] A period from April 29 to May 5 containing multiple public holidays.
[217] SIFMA-AMG Comment Letter.

such an approach would be unmanageable and unsustainable and would impose a regulatory burden without a corresponding public policy benefit.[218]

SIFMA-AMG argued that requiring clients posting cash margin in EUR to choose a country in the Eurozone and follow its holiday schedule would, in the event different managers for the same client choose different Eurozone countries, require the overhaul of agreements and burden FCMs with additional monitoring responsibilities.[219] SIFMA-AMG recommended that the Commission provide greater flexibility to allow for better risk management, asserting that, by avoiding having to navigate the bank holidays of two different countries, a clearing member can appropriately manage its risk based on its business and customers.[220]

SIFMA-AMG stated that the base currency, custodian, and overall global nature of investing complicate efforts to pre-fund ahead of known holidays.[221] SIFMA-AMG noted that, typically, margin payments are made in the base currency of a fund, or the client and the FCM effectuate single currency margining and the asset manager then repatriates foreign currency balances.[222] SIFMA-AMG asserted that this process has been successfully implemented and that the Commission should not attempt to establish or require particular methods of achieving these goals.[223]

SIFMA-AMG stated that, when a global holiday approaches, firms are asked by FCMs to prefund anticipated, expected initial and/or variation margin, resulting in overcollateralization.[224] SIFMA-AMG asserted that prefunding margin is more operationally risky, particularly when scaled across multiple jurisdictions and with a global client base, because: (i) overcollateralization places excess risk at the FCM; (ii) it

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[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*

is impractical to attempt to estimate what other market moves will be in order to proactively overcollateralize and post margin; (iii) different custodians have different cutoff times, which may not be met ahead of a holiday; and (iv) prefunding leads to an inefficient process of having to be credited back payments as opposed to paying what is owed on a daily basis.[225] SIFMA-AMG asserted that with large, separate accounts, there is always margin on hand to meet volatile market movements, and requiring prefunding as a precaution may be unnecessary because of a firm's ability to pay cash when needed.[226] SIFMA-AMG also contended that the Commission's belief that firms might use holidays to gain a benefit with respect to required margin is misguided and impractical.[227]

Additionally, SIFMA-AMG stated the Commission's Second Proposal does not consider the product and foreign currency associated with a particular trade, noting that a client may always be behind on margin due to the client's or fund's location, the client custodian, the product traded, and the clearinghouse.[228] SIFMA-AMG stated the Commission's regulations should consider all parties involved in a transaction, such as the FCM, asset manager, clearinghouse, product, and foreign currency associated with a particular trade.[229]

SIFMA-AMG requested that, to the extent the Commission is considering the deadline for payment of margin in non-USD fiat currencies may be extended by up to one additional business day and still be considered in compliance with proposed regulation § 1.44(f) if payment is delayed due to a banking holiday in the jurisdiction of issue of the currency, the Commission confirm that initiating a transfer on the same day would suffice to meet the requirement.[230]

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[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*

SIFMA-AMG contended FCMs should have discretion to consider a deposit as pending in a customer's account, consistent with JAC Regulatory Alert #14-03.[231] Specifically, SIFMA-AMG argued, if the FCM has a sufficient basis to believe the wire was actually initiated, and based on its experience with the customer and its normal course of business and consistent with its risk management program, then the FCM should have discretion to treat the margin as received and credited to a customer's margin equity.[232] Otherwise, SIFMA-AMG stated, the Commission should consider same-day initiation of a transfer as an alternative to a grace or cure period to demonstrate compliance with proposed regulation § 1.44(f).[233] SIFMA-AMG stated that utilizing the time of initiation would effectively build into the regulation notice that payment was not received, the cure for which would be confirmation that the payment was initiated.[234]

In MFA's comment letter, MFA opined that the manner in which the Second Proposal defined "business day" provided appropriate extensions of time for circumstances in which U.S. markets are open, but the day is a holiday in a non-U.S. jurisdiction.[235]

The Commission is adopting regulation § 1.44(f)(4) with modifications in light of comments received.

Specifically, final regulation § 1.44(f)(4) provides, in its first sentence, "The relevant deadline for payment of margin in fiat currencies other than U.S. Dollars may be extended to the next business day following any banking holiday in the jurisdiction of issue of the currency, and still be considered in compliance with the requirements of this paragraph (f) if payment is delayed due to such banking holiday." Accordingly, final

[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] MFA Comment Letter.

regulation § 1.44(f)(4) provides an extension to meet margin calls in non-USD fiat currency during consecutive holidays.

Furthermore, in final regulation § 1.44(f)(4), the Commission eliminates the proposed provision regarding payments in EUR that a would have required the identification of the jurisdiction within the Eurozone with which either the separate account customer or the relevant asset manager has the most significant contacts; the banking holidays of which would be referred to for purposes of receiving a one-day extension for EUR-denominated payments.

The Commission views the one business day margin call standard set forth in regulation § 1.44(f) as a fundamental measure for mitigating the risk to an FCM and its omnibus customer accounts for futures, Cleared Swaps, or foreign futures and foreign options, as it limits the time in which a customer's separate account may be undermargined. However, noting that, in codifying the no-action position of CFTC Letter No. 19-17, the Commission does not seek to disrupt established margining practices, the Commission has considered, and finds persuasive, comments submitted by FIA and SIFMA-AMG with respect to the anticipated challenges associated with implementing regulation § 1.44(f)(4) as proposed, including the expected difficulties associated with implementing and administering new operational systems and renegotiating customer agreements. The Commission also finds persuasive information submitted by commenters regarding steps FCMs take currently to ensure customer accounts will not be undermargined during non-U.S. banking holidays, including instances in which there are consecutive non-U.S. banking holidays. Furthermore, both FIA and SIFMA-AMG disputed that firms leverage banking holidays (or that they practicably could) to gain a benefit with respect to required margin, and the Commission did not receive any comments indicating that such leveraging occurs, or that it is a substantial risk.

In CFTC Letter No. 19-17, staff stated that a failure to deposit, maintain, or pay margin or option premium due to administrative errors or operational constraints would not constitute a failure to timely deposit or maintain initial or variation margin that would place a customer out of the ordinary course of business. This provision was intended to prevent a clearing FCM from being excluded from relying on the no-action position as a result of one-off exceptions, such as mis-entered data, a flawed software update, or an unusual and unexpected information technology outage (*e.g.*, an unanticipated outage of the Fedwire Funds Service).

The Commission proposed regulation § 1.44(f)(5), which, as proposed, provides that a failure with respect to a specific separate account to deposit, maintain, or pay margin or option premium that was called pursuant to regulation § 1.44(f)(1), due to unusual administrative error or operational constraints that a separate account customer or investment manager acting diligently and in good faith could not have reasonably foreseen, does not constitute a failure to comply with the requirements of regulation § 1.44(f). As proposed, regulation § 1.44(f)(4) also provides that, for such purposes, an FCM's determination that the failure to deposit, maintain, or pay margin or option premium is due to such administrative error or operational constraints must be based on the FCM's reasonable belief in light of information known to the FCM at the time the FCM learns of the relevant administrative error or operational constraint.

FIA contended that proposed regulation § 1.44(f)(5) results in a proposal that is unnecessarily complex, disruptive of existing market practice, and an inappropriate and unjustified departure from the conditions of CFTC Letter No. 19-17.[236] FIA further contended that the proposed rule is overly prescriptive and inflexible, and would increase systemic risk in margin settlement rather than mitigate it.[237] FIA argued that proposed

[236] FIA Comment Letter.
[237] *Id.*

regulation § 1.44(f)(5) would effectively require FCMs to suspend the ordinary course of business for events that are not extraordinary or unusual at all, but are intrinsic to the complexity and multiplicity of the components of the global payment settlement system that FCMs and their customers rely on.[238]

Specifically, FIA contended that, by reformulating CFTC Letter No. 19-17's standard for situations of administrative error or operational constraints to require that such situations be "unusual," and by requiring FCMs to, in effect, document each determination of failure to settle based on administrative error or operational constraints in light of whether the separate account customer or investment manager acting diligently and in good faith could have reasonably foreseen the error or constraints giving rise to the settlement failure, the Commission has made such standard unworkable.[239] FIA asserted that, when a separate account fails to settle within the applicable timeframe, FCMs will have to make and document a complicated and potentially highly speculative assessment of the facts under a legal standard that is subjective and vague.[240] FIA noted that this would subject FCMs to the risk of being second-guessed by DSRO examiners.[241]

Additionally, FIA noted, FCMs have invested significantly in renovating operational and compliance systems in order to implement the conditions of CFTC Letter No. 19-17.[242] FIA argued that proposed regulation § 1.44(f)(5) will require material levels of new investment in compliance, risk management, and operations time and resources for no discernable risk management benefit.[243] FIA recommended the Commission strike the requirement that an administrative error or operational constraint be "unusual," and the requirement that the error or constraint be one that a separate

[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*

account customer or investment manager acting diligently and in good faith could not have reasonably foreseen.[244]

SIFMA-AMG similarly contended that proposed regulation § 1.44(f)(5) would establish a standard that is subjective and ambiguous and does not appropriately balance practicability and burden with risk management.[245] SIFMA-AMG opined that the Commission's proposal does not make sufficiently clear the meaning of "unusual," asserting that the meaning of the term can be analyzed in any number of different contexts and that the proposed regulation would therefore be difficult to implement without factors or a determinative standard.[246] SIFMA-AMG stated that it believes the level of prescriptiveness of proposed regulation § 1.44(f)(5) is inconsistent with the Commission's principles-based approach with respect to FCM regulation.[247]

MFA similarly argued that the Commission should effectively revert proposed regulation § 1.44(f)(5) to the original language of the corresponding condition in CFTC Letter No. 19-17 regarding instances when administrative error or operational constraints do not result in a non-ordinary course of business event.[248] MFA, like FIA and SIFMA-AMG, asserted that FCMs and their customers have already developed procedures and controls to implement the conditions of CFTC Letter No. 19-17.[249] MFA noted the Commission historically has applied a more principles-based approach with respect to margin regulation to recognize differences in FCMs and other market participants, and contended that this practice has avoided the interpretative challenges that would be created by the prescriptive nature of proposed regulation § 1.44(f)(5).[250]

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[244] *Id.*
[245] SIFMA-AMG Comment Letter.
[246] *Id.*
[247] *Id.*
[248] MFA Comment Letter.
[249] *Id.*
[250] *Id.*

MFA opined that the Second Proposal revises the conditions of CFTC Letter No. 19-17 to narrow them significantly and render them all but unusable. Specifically, MFA contended that the term "unusual" is subjective, and that, with the benefit of hindsight, any administrative error or operational constraint could be argued to have been reasonably foreseen.[251] MFA further questioned how an FCM is to make a determination that a failure to pay margin is due to administrative error or operational constraint, who is required to approve such determination, and whether it is expected that an FCM would be obligated to escalate a proposed recommendation that an error or constraint is unusual through its corporate governance infrastructure.[252] MFA argued that regulation § 1.44(f)(5), as proposed, would add unnecessary delay, complexity, and administrative burden to an FCM, creating a disincentive for the FCM to develop and present a record to support a determination that a failure to timely pay margin was due to unusual administrative error or operational constraints.[253] MFA further argued that the burden imposed by regulation § 1.44(f)(5) as proposed would incentivize FCMs to simply declare that an event was outside the ordinary course of business and seek to eliminate separate account margining for the client.[254] With respect the requirement that an FCM's determination of unusual administrative error or operational constraint be based on its "reasonable belief," MFA questioned whether an FCM is expected to review the entire customer relationship to determine the frequency of administrative errors or operational constraints before it has the necessary information to form the basis of a determination.

MFA expressed concern that proposed regulation § 1.44(f)(5) would impede an FCM from exercising reasonable risk management practices and would require the FCM

[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*

to undergo a complex and time-consuming analysis before determining whether to provide some form of grace period to the underlying customer.[255]

The Commission proposed regulation § 1.44(f)(5) to provide that a single missed margin payment would not result in an FCM being required to suspend disbursements on a separate account basis for a customer, where the missed payment is the result of an unexpected, unusual administrative error or operational constraint. As proposed, regulation § 1.44(f)(5) reflects the Commission's belief that providing such an exception for *any* administrative error or operational constraint could result in an FCM maintaining separate account disbursements for a separate account customer that fails to make timely margin payments on a frequent basis or because of known or avoidable issues. At the same time, the Commission believes that limiting such exceptions to specific events, or requiring that the FCM's determination of administrative error or operational constraint be based on a prescriptive set of criteria, could in fact increase the risk that a single "foot-fault" (*i.e.*, an unusual and inadvertent failure), not explicitly addressed by Commission regulations, that results in a missed margin payment, would result in suspension of disbursements on a separate account basis, and may ultimately make separate account treatment unworkable for FCMs and their customers.

The Commission recognizes that there could be a wide variety of situations that may constitute administrative error or operational constraints for purposes of regulation § 1.44(f)(5), and, as discussed further below, that, at the time an FCM learns of such administrative error or operational constraint, a well-run FCM, may be required to act expeditiously based on limited information concerning such events, and in a manner consistent with its own risk management processes and procedures. The Commission accordingly is not prescribing the form or manner in which an FCM must document determinations of administrative error or operational constraints, much less that such

[255] *Id.*

determination be made following an exhaustive analysis. For the same reason, the Commission is not prescribing specific procedures or lines of escalation an FCM must implement in order to make a determination of administrative error or operational constraint in compliance with regulation § 1.44(f)(5).

Moreover, a client's or asset manager's arrangements for paying margin are not necessarily static. Where an administrative error or operational constraint prevents the prompt payment of margin, the FCM may be able to work with the client or asset manager so that steps are taken to mitigate the likelihood of, or prevent, the recurrence of, the circumstances that led to that result.

As discussed above, FIA, SIFMA-AMG, and MFA variously commented that proposed regulation § 1.44(f)(5) uses subjective and ambiguous terms; in particular, the requirement that an administrative error or operational constraint be "unusual." The corresponding condition in CFTC Letter No. 19-17, provides an exception to the one business day margin call condition for margin payments that are untimely due to administrative error or operational constraint, but does not contain an express limiting principle with respect to the nature of the administrative errors or operational constraints that would be within its scope.

The Commission agrees with commenters that the "unusual" standard could be read to be subjective and ambiguous, and does not appropriately balance practicability and burden with risk management. As such, the Commission is declining to retain in final regulation § 1.44(f)(5) the proposed requirement that an administrative error or operational constraint be unusual. The Commission is also persuaded by commenters' assertions that the requirement that the relevant unusual administrative error or operational constraint be one that a "separate account customer or asset manager acting diligently and in good faith could not have reasonably foreseen" may prove unworkable

and may ultimately introduce unnecessary delay and complexity to an FCM's determination of the occurrence of an unusual administrative error or operational constraint.

Accordingly, in adopting regulation § 1.44(f)(5), the Commission is eliminating the requirement that an administrative error or operational constraint be "unusual" or one "that a separate account customer or asset manager acting diligently and in good faith could not have reasonably foreseen." The Commission is otherwise adopting regulation § 1.44(f)(5) as proposed, with a change for internal consistency.[256]

Although not directly related to proposed regulation § 1.44(f)(5), ICE suggested that the Commission revise regulation § 1.56, which prohibits an FCM from representing that it will not call for or collect margin, to make conforming changes to facilitate separate account treatment.[257] ICE asserted that it is concerned that failing to do so may not allow FCMs to fully take advantage of regulation § 1.44, or may create uncertainty with respect to the application of regulation § 1.56 for a customer with separate accounts.[258]

The Commission appreciates ICE's comment. The Commission noted in the Second Proposal that it seeks in this rulemaking only to directly apply the Margin

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[256] As proposed, regulation § 1.44(f)(5) provides, in part, that, "A failure with respect to a specific separate account to deposit, maintain, or pay margin or option premium that was called pursuant to paragraph (f)(1) of this section, due to unusual administrative error or operational constraints . . . does not constitute a failure to comply with the requirements of this paragraph (f)." As discussed above, this provision is intended to implement in regulation § 1.44 the no-action condition providing that "[e]ach such separate account must be on a one business day margin call" and that "[s]ituations of administrative error or operational constraints which prevent the call from being met within a one-day period will not be considered a violation of [the] condition." CFTC Letter No. 19-17. Regulation § 1.44(f) requires separate accounts to be on a one business day margin call, a concept which the provisions of regulation § 1.44(f) further define. While regulation § 1.44(f)(1) provides a base requirement to issue a margin call which must be met on a one-day basis, other components of regulation § 1.44(f) address how a one business day margin call must be made and met in the context of international banking conventions as well as holidays. For internal consistency, the avoidance of confusion, and to ensure that the exception provided in regulation § 1.44(f)(5) applies in respect of such other provisions informing the meaning of a one business day margin call, in final regulation § 1.44(f)(5), the Commission is adjusting the reference to regulation § (f)(1) to instead reference regulation § 1.44(f) generally.

[257] ICE Comment Letter.
[258] *Id.*

Adequacy Requirement encompassed by regulation § 39.13(g)(8)(iii) to all FCMs and to enact a narrow codification of the no-action position in CFTC Letter No. 19-17 as applicable to all FCMs, and that it considers amendments to regulation § 1.56 as outside the scope of this rulemaking. The Commission believes regulation § 1.56's prohibition of guarantees against loss with respect to "any commodity interest in *any account* carried by [an FCM]" (emphasis added) is sufficiently clear that such provision would apply to the separate accounts of a separate account customer. As staff made clear in CFTC Letters Nos. 19-17 and 20-28, separate account treatment is consistent with regulation §1.56 so long as the FCM retains, at all times, the discretion to access funds in the other separate accounts of the beneficial owner held at the FCM.[259]

The Commission additionally notes that the requirement that an FCM provide separate account customers with a disclosure that under part 190 of the Commission's regulations that all separate accounts of a separate account customer will be combined in the event of an FCM bankruptcy, an original condition of the no-action position proposed as regulation § 1.44(h)(3), was included as a no-action condition due to the fact that it would not possible to limit the losses in one separate account from affecting another separate account of the separate account customer in a default scenario.

The Commission proposed regulation § 1.44(f)(6) to make clear that it is establishing a maximum period in which a margin call must be met for purposes of regulation § 1.44, rather than establishing a minimum time an FCM must allow. As proposed, regulation § 1.44(f)(6) provides that an FCM would not be in compliance with the requirements of proposed regulation § 1.44(f) if it contractually agrees to provide separate account customers with periods of time to meet margin calls that extend beyond

[259] *See, e.g.,* CFTC Letter No. 20-28.

the time periods specified in proposed regulation § 1.44(f)(1)-(5),[260] or engages in practices that are designed to circumvent proposed regulation § 1.44(f). As proposed, regulation § 1.44(f) would not preclude an FCM from having customer agreements that provide for more stringent margining requirements or applying more stringent margining requirements in appropriate circumstances. The statement that these "requirements apply solely for purposes of this paragraph (f)" means that such requirements are not intended to apply to any other provision; *e.g.*, they are not intended to define when an account is undermargined for purposes of regulation § 1.17. Conversely, the Commission did not propose to prohibit contractual arrangements inconsistent with proposed regulation § 1.44(f). However, the FCM would not be permitted to engage in separate account treatment under such arrangements.

SIFMA-AMG urged the Commission to consider permitting FCMs to continue having discretion to agree on a limited grace period, based on their own credit assessment and consistent with their risk management programs.[261] SIFMA-AMG contended that such grace periods are consistent with the objectives of ensuring the timely correction of margin shortfalls or timely identification of a customer's inability to meet a margin call.[262]

SIFMA-AMG asserted that contractual grace periods can manifest in scenarios other than separate account treatment, depending on a fund's structure.[263] For example, SIFMA-AMG noted, in instances where subadvisors are hired for a specific fund and the investment firm is managing the same fund with potentially the same FCM, removing the grace period would mean that a single "foot fault" with respect to a single asset manager

[260] For example, if an FCM and a customer contract for a grace or cure period that would operate to make margin due and payable later than the deadlines described herein, including a case where the FCM would not have the discretion to liquidate the customer's positions and/or collateral where margin is not paid by such time, such an agreement would be inconsistent with the requirements pursuant to which such FCM may engage in separate account treatment.
[261] SIFMA-AMG Comment Letter.
[262] *Id.*
[263] *Id.*

can cause the FCM to revert to margining on a gross basis, which would disrupt the ability of certain SIFMA-AMG members to get excess margin back and could cause a lack of awareness of a client's overall margin requirements.[264] SIFMA-AMG further asserted that this would incentivize customers to change FCMs and would result in less transparency and opportunity for existing FCMs to cover themselves if a client defaults.[265]

SIFMA-AMG contended that an FCM's inability to rely on the return of excess margin due to "foot faults" at other managers could cause further downstream failures and inadvertent consequences.[266] For example, SIFMA-AMG noted, excess margin is normally expected to be returned based on data generated early in the morning, and managers may anticipate that excess margin will be available to make additional investments or execute new transactions, or to be used to cover other margin or payment obligations due.[267] However, SIFMA-AMG stated, if later in the day, the excess margin unexpectedly is not returned due to a "foot fault" at a separate manager, which such manager cannot validate or challenge, there may not be time to either unwind the new trades or investments, or to meet the other margin or payment demands, which could lead to defaults on these and other obligations and potentially trigger other cross-defaults.

SIFMA-AMG also asserted that certain sub-advised funds or separate account clients are not able to hold cash as a buffer against this scenario due to cash limits, which, in light of the proposed regulation, would incentivize managers to move sub-advised funds or separate account clients to FCMs where there is no overlap across such sub-advised funds or separate account clients. SIFMA-AMG contended that this would result in less transparency and fewer assets available to each FCM, potentially impairing

[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*

FCMs' credit risk management, and running counter to risk management goals where separate account treatment results in an FCM holding more margin than it otherwise would. Asserting that there may be occasions when additional time is warranted to allow a customer to address delays in the payment of margin that are not caused by administrative errors or operational constraints, SIFMA-AMG recommended that the Commission reconsider its position regarding grace periods.[268]

The Commission views grace periods as inconsistent with the risk management goals of separate account treatment, although the Commission reiterates that regulation § 1.44, as proposed, does not prohibit the use of grace periods with respect to the accounts of non-separate account customers. The Margin Adequacy Requirement set forth in regulation § 1.44(b) provides that an FCM shall not allow a customer to withdraw funds from its accounts if such withdrawal would create or exacerbate an undermargining scenario in the customer's account. Regulation § 1.44(c)'s provision for an election for separate account treatment for purposes of the Margin Adequacy Requirement is premised on an FCM's ability to comply with risk management requirements designed to ensure, in part, that margin for separate accounts is paid timely, such that a separate account customer's individual separate accounts do not become undermargined. The Commission's one business day margin call standard is intended to limit the window in which a customer's separate account may be undermargined, thus limiting the risk to the FCM, and the FCM's omnibus customer account for futures, Cleared Swaps, or foreign futures or foreign options.

The Commission notes that while a single "foot fault" with respect to a single manager *theoretically could* result in an FCM being required to suspend disbursements on a separate account basis, the error would not lead to that result if the FCM determines it constitutes an administrative error or operational constraints as set forth in regulation §

[268] *Id.*

1.44(f)(5). Additionally, the Commission notes that, in light of the unpredictability of markets, it would appear that an asset manager that puts its account in a position where a failure to receive margin would result in an actual default would be placing its customer at substantial risk.

As noted above, as proposed, regulation § 1.44(f)(6) provides that an FCM would not be in compliance with the requirements of proposed regulation § 1.44(f) if it contractually agrees to provide separate account customers with periods of time to meet margin calls that extend beyond the time periods specified in proposed regulation § 1.44(f)(1)-(5), or engages in practices that are designed to circumvent proposed regulation § 1.44(f). While the JAC did not directly discuss proposed regulation § 1.44(f)(6) in its comment letter, the JAC noted that if an FCM and customer contract to arrange for margins calls to be met in longer than one business day, then 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.[269]

The Commission reiterates that regulation § 1.44 is designed to operate without prejudice to the rules or guidance of a DSRO, and that a DSRO may promulgate and maintain rules and guidance with respect to the treatment of customer accounts, including separate accounts, that are more stringent than the regulations promulgated herein.

Although FIA in its comment letter did not directly discuss proposed regulation § 1.44(f)(6), FIA noted that, for the past three years, examiners from CME's Financial and Regulatory Surveillance Department have taken the position in financial and operational audits of FCM clearing members for which CME serves as DSRO that any contractual grace or cure period overlying a customer's failure to satisfy a margin call (which is not qualified by reference to administrative or operational reasons for failure) is a violation of CME Rule 930.K.1, requiring clearing members to maintain full discretion to determine

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[269] JAC Comment Letter.

when and under what circumstances positions in any account shall be liquidated.[270] FIA stated that it believes clear guidance is needed with respect to permissibility of grace periods, and requested the Commission communicate to CME and the JAC that they should make their position with respect to the permissibility of grace periods under CME rules known publicly through a market regulatory notice so that all clearing member FCMs, buy-side managers, and asset owners will receive the same message at the same time.[271] This issue would appear to have been addressed subsequent to FIA's comment.[272]

With respect to FIA's comment, the Commission believes that DSROs, in overseeing FCMs, should make clear the manner in which they will apply their rules, and should not apply such rules in a disparate manner to the entities for which they serve as DSRO.

Accordingly, the Commission is adopting regulation § 1.44(f)(6) as proposed, with a change for internal consistency.[273]

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[270] FIA Comment Letter.

[271] *Id.*

[272] *Id.* Following the close of the comment period, on October 15, 2024, CME published a bulletin reminding clearing members of their responsibility to comply with CME Rule 930.K.1 and Chicago Board of Trade, New York Mercantile Exchange, and COMEX Rule 930.K (collectively, Rule 930.K). CME Group, Memorandum, Financial and Regulatory Bulletin #24-02 re: Rule 930.K. – Liquidation of Accounts, Oct. 15, 2024, available at *https://www.cmegroup.com/notices/clearing/2024/10/frb-24-02.html*. The bulletin notes that recent disciplinary actions for violation of this rule highlight that clearing members may need to review and update their account agreements, and further notes that where a disciplinary committee has found one clearing member's conduct to be a violation of exchange rules, the public posting of the disciplinary action provides notice to all clearing members and market participants that such conduct is a rule violation. *Id.* CME further stated that, aside from reasonable, one-day administrative or operational exceptions, contractual language providing a period of time (*i.e.*, a grace or cure period) after a missed performance bond call before the clearing member could take action (including liquidation of positions) would violate Rule 930.K. *Id.*

[273] As proposed, regulation § 1.44(f)(6) provides, "A futures commission merchant would not be in compliance with the requirements of this paragraph (f) if it contractually agrees to provide separate account customers with periods of time to meet margin calls that extend beyond the time periods specified in paragraph (f)(1) through (5) of this section, or engages in practices that are designed to circumvent this paragraph (f)." This provision is intended to implement in regulation §1.44 the no-action condition (part of the one business day margin call condition) that, "In no case can customers and FCMs contractually arrange for longer than a one business day period for a margin call to be met." CFTC Letter No. 19-17. As a matter of internal consistency (with respect to the final clause of regulation § 1.44(f)(6)), consistency with the corresponding no-action condition, and to ensure that the time periods specified in the regulation encompass banking holidays for which regulation § 1.44(f)(7) provides an exception to the timing requirements of regulation § 1.44(f)(1), the Commission is adopting final regulation § 1.44(f)(6) with a modification to reference paragraph (f) generally in the first instance.

The Commission proposed regulation § 1.44(f)(7) to provide an exception to regulation § 1.44(f)(1) with respect to certain holidays (currently, Columbus Day and Veterans Day) on which some DCMs may be open for trading, but on which banks are closed (and, therefore, payment of margin may be difficult or impracticable). As proposed, regulation § 1.44(f)(7) only applies to an FCM if that FCM intermediates trades on such a DCM, and to a separate account if that separate account includes positions traded on such a DCM.

Paragraph (i) deals with margin calls based on undermargined amounts in a separate account resulting from market movements on the business day before the holiday. Such calls may be made on the holiday but would be due by the close of Fedwire on the next business day after the holiday.[274]

Paragraph (ii) deals with margin calls based on undermargined amounts resulting from market movements on the holiday. If, as a result of such market movements, a separate account is undermargined by an amount greater than the amount it was undermargined due to market movements or position changes on the business day before the holiday, the FCM shall issue a margin call for the separate account for at least the incremental undermargined amount, which must be met by the applicable separate account customer no later than the close of the Fedwire Funds Service on the next business day after the holiday.[275]

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[274] Additional days due to other provisions of proposed regulation § 1.44(f) would also be applicable.

[275] To illustrate the operation of regulation § 1.44(f)(7)(i)-(ii) as proposed, using Veterans Day (November 11) as an example, and assuming that no relevant day falls on a weekend, if, as a result of market movements on November 10, a separate account is undermargined by $100, the FCM would issue a margin call of at least $100 and, payment of that $100 would be due by the close of Fedwire on November 12. If that separate account were to be undermargined by a total of $160 as a result of market movements on November 11, the FCM would issue a margin call for at least the incremental amount ($160 - $100 = $60) on November 12, and that incremental $60 would also be due by the close of Fedwire on November 12. If, instead, the separate account gained $60 on November 11, the original margin call for $100 (issued on November 11) would still need to be met by the close of Fedwire on November 12. By contrast, if the separate account were not undermargined as a result of market movements on November 10, but then became undermargined by $60 as a result of market movements on November 11, the FCM would issue a margin call in the amount of at least $60 on November 12, and payment would be due by the close of Fedwire on November 12.

Although ICE, in its comment letter, stated that it did not object to the Commission's proposed standard for a one business day margin call as it applies to FCMs,[276] ICE recommended that the Commission modify regulation § 1.44(f)(7), as proposed, to extend to DCOs that are open for clearing on a U.S. holiday to account for Cleared Swaps that may not be traded on a DCM and for which margin requirements are set by the DCO.[277]

The Commission acknowledges that the same rationale for providing the exception in proposed regulation § 1.44(f)(7) with respect to an FCM trading uncleared swaps on a DCM applies equally in respect of an FCM with swaps cleared at a DCO: on days when DCOs are open, but banks are closed, and margin requirements are set by the DCO, it may be difficult or impracticable for FCMs to pay margin.

Accordingly, the Commission is adopting regulation § 1.44(f)(7) with the modification that its terms shall apply in the case of a holiday where any DCM or other board of trade on which the FCM trades is open for trading, or any DCO that clears the Cleared Swaps of such FCM's Cleared Swaps Customers is open for clearing such swaps, and where a separate account of any of the FCM's separate account customers includes positions traded on such market or cleared at such a DCO. Additionally, as discussed above in connection with regulation § 1.44(a), final regulation § 1.44(f)(7) will also refer to "any designated contract market *or other board of trade*," to explicitly encompass foreign exchanges in connection with 30.7 accounts.

Lastly, the Commission proposed regulation § 1.44(f)(8) to set forth a procedure to adjust the scope of currencies in proposed Appendix A to part 1. In proposing regulation § 1.44(f)(8), the Commission sought to ensure a more flexible process whereby members of the public, or the Commission itself, may initiate a process to

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[276] ICE Comment Letter.
[277] *Id.*

expand or narrow proposed Appendix A to part 1 as may be required from time to time, subject to public notice and comment. Regulation § 1.44(f)(8), as proposed, provides that any person may submit to the Commission any currency that such person proposes to add to or remove from proposed Appendix A to part 1.

The submission must include a statement that margin payments in the relevant currency cannot, in the case of a proposed addition, or can, in the case of a proposed removal, practicably be received by the FCM issuing a margin call no later than the end of the first business day after the day on which the margin call is issued. The submitter would be required to support such assertion with documentation or other relevant supporting information, as well as any additional information that the Commission requests.[278] The Commission would be required to review the submission and determine whether to propose to add the relevant currency to, or remove it from, proposed Appendix A to part 1. The Commission would also be required to issue such determination through notice-and-comment rulemaking, with a comment period of no less than thirty days. Proposed regulation § 1.44(f)(8) also provides that the Commission may propose to issue such a determination of its own accord, without prompting by a submission from a member of the public. As with a public submission, a Commission determination on its own accord would be subject to notice and comment rulemaking, with a public comment period of no less than thirty days.

The Commission did not receive any comments with respect to proposed regulation § 1.44(f)(8). Accordingly, the Commission is adopting regulation § 1.44(f)(8) as proposed.

J. <u>Regulation § 1.44(g)</u>

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[278] Submitters may request confidential treatment for parts of its submission in accordance with regulation § 145.9(d).

As proposed, regulation § 1.44(g) contains requirements related to calculations for capital, risk management, and segregation of customer funds. These provisions are substantially similar to the corresponding no-action conditions in CFTC Letter No. 19-17, except that they have been reorganized and subjected to minor changes to account for their proposed inclusion in part 1 of the Commission's regulations as well as the proposed introduction of new defined terms. Regulation § 1.44(g) is intended to ensure that an FCM treats separate accounts in a consistent manner for purposes of risk management. Many of its provisions are intended to ensure that an FCM treats each separate account as a distinct account from all other accounts of a separate account customer for purposes of the FCM computing its regulatory capital and segregation of customer funds.

The Industry Letters preceding the issuance of CFTC Letter No. 19-17 provided examples of controls an FCM could apply to mitigate the risk of permitting disbursements on a separate account basis, and discussed restrictions used in customer agreements providing for the application of separate account treatment designed to ensure that a customer's separate accounts are in fact treated separately on a consistent basis in the FCM's management of risk. For instance, as FIA noted in its June 26, 2019 letter, customer agreements that provide for separate account treatment generally require that a separate account be margined separately from any other account maintained for the customer with the FCM, and assets held in one separate account should not ordinarily be used to offset, or (absent default) meet, any obligations of another separate account, including obligations that it or another asset manager may have incurred on behalf of a different account of the same customer.[279] In that letter, preceding issuance of CFTC Letter No. 19-17, FIA observed that these restrictions serve to assure the customer, or the asset manager responsible for a particular account, that the account will not be subject to

[279] First FIA Letter.

unanticipated interference that may exacerbate stress on a customer's aggregate exposure to the FCM.[280] Additionally, FIA noted that where an FCM treats separate accounts as separate customers for risk management purposes, the FCM may manage risk more conservatively against the customer under the assumption that the customer has fewer assets than it may in fact have.[281]

These controls, and conditions for the consistent treatment of separate accounts in an FCM's books and records for purposes of risk management, constitute a key part of the no-action conditions of CFTC Letter No. 19-17. The Commission considers such requirements as reasonably necessary with respect to this final rule to ensure that FCMs do not manage the risk posed by the separate accounts of certain separate account customers, or the risk posed by certain such separate accounts of such customers, in a disparate manner. Such disparate treatment could reduce the risk-mitigating effects of such requirements with respect to certain separate account customers and their separate accounts, and could impair the ability of an FCM's DSRO or the Commission to ascertain the extent to which certain customers' accounts are in fact being treated separately. Thus, these requirements are reasonably necessary to effectuate section 4d of the CEA.

Accordingly, as proposed, regulation § 1.44(g) would apply to all FCMs certain conditions in CFTC Letter No. 19-17 designed to provide for consistent treatment of separate accounts. As proposed, regulation § 1.44(g) requires a separate account of a customer to be treated separately from other separate accounts of the same customer for purposes of certain existing computational and recordkeeping requirements, which would otherwise be met by treating accounts of the same customer on a combined basis. Because accounts subject to regulation § 1.44 would be risk-managed on a separate basis,

[280] *Id.*
[281] *Id.*

the Commission believes it is appropriate for the regulation to provide that FCMs apply these risk-mitigating computational and recordkeeping requirements on a separate account basis. The effect of the requirements in these paragraphs is to augment the FCM's existing obligations under various provisions of regulation § 1.17.

As proposed, regulation § 1.44(g)(1) provides that an FCM's internal risk management policies and procedures shall provide for stress testing as set forth in regulation § 1.73, and credit limits for separate account customers. Regulation § 1.44(g)(1) further provides that such stress testing must be performed, and the credit limits must be applied, both on an individual separate account and on a combined account basis. By conducting stress testing on both an individual separate account and on a combined account basis, an FCM can determine the potential for significant loss in the event of extreme market conditions, and the ability of traders and FCMs to absorb those losses, with respect to each individual separate account of a customer, as well as with respect to all of the customer's separate accounts. Additionally, by applying credit limits on both an individual separate account basis (to address issues that may be specific to the particular strategy governing the separate account) and on a combined account basis (to address issues that may be applicable to the customer's overall portfolio at the FCM), an FCM can better manage the financial risks they incur as a result of carrying positions both for a customer's separate account and for all of the customer's accounts. By better managing the financial risks posed by customers and understanding the extent of customers' risk exposures, FCMs can better mitigate the risk that customers do not maintain sufficient funds to meet applicable initial and maintenance margin requirements. Such FCMs can also anticipate and mitigate the risk of the occurrence of certain of the events detailed in regulation § 1.44(e).

Regulation § 1.44(g)(2), as proposed, provides that an FCM shall calculate the margin requirement for each separate account of a separate account customer

independently from such margin requirement for all other separate accounts of the same customer with no offsets or spreads recognized across the separate accounts. An FCM would be required to treat each separate account of a customer independently from all other separate accounts of the same customer for purposes of computing capital charges for undermargined customer accounts in determining its adjusted net capital under regulation § 1.17.

Regulation § 1.44(g)(3), as proposed, provides that an FCM shall, in computing its adjusted net capital for purposes of regulation § 1.17, record each separate account of a separate account customer in the books and records of the FCM as a distinct account of a customer, including recording each separate account with a net debit balance or a deficit as a receivable from the separate account customer, with no offsets between the other separate accounts of the same separate account customer.

Regulations §§ 1.20, 22.2, and 30.7 currently require an FCM to maintain a sufficient amount of customer funds in segregated accounts to meet its total obligations to all futures customers, Cleared Swaps Customers, and 30.7 customers, respectively.[282] In order to ensure that the FCM holds sufficient funds in segregation to satisfy the aggregate account balances of all customers with positive net liquidating balances, the FCM is prohibited from netting the account balances of customers with deficit or debit ledger balances against the account balances of customers with credit balances.[283] Each FCM is also required to prepare and submit to the Commission, and to FCM's DSRO, a daily statement demonstrating compliance with its segregation obligations.[284]

Regulation § 1.44(g)(4), as proposed, provides that an FCM shall, in calculating the amount of its own funds it is required to maintain in segregated accounts to cover

[282] 17 CFR 1.20(a), 22.2(f)(2), and 30.7(a).
[283] 17 CFR 1.20(i)(4), 22.2(f)(4), and 30.7(f)(2)(iv) for futures customer accounts, Cleared Swaps Customer Accounts, and 30.7 accounts, respectively.
[284] *See* 17 CFR 1.32(d), 22.2(g)(3), and 30.7(l)(3).

deficits or debit ledger balances pursuant to regulations §§ 1.20(i), 22.2(f), or 30.7(f)(2) in any futures customer accounts, Cleared Swaps Customer Accounts, or 30.7 accounts, respectively, include any deficits or debit ledger balances of any separate account as if the accounts are accounts of separate entities. The purpose of regulation § 1.44(g)(4) is to ensure that an FCM that elects to permit separate account customers treats separate accounts as if the accounts are accounts of separate entities for purposes of computing the amount of funds the FCM is required to hold in segregation for futures customers, Cleared Swaps Customers, and 30.7 customers. Specifically, regulation § 1.44(g) would provide that an FCM may not offset a deficit or debit ledger balance in the separate account of a separate account customer by any credit balance in any other separate accounts of the same separate account customer carried by the FCM. Regulation § 1.44(g) would impose the same obligations on separate accounts that are currently imposed by regulations §§ 1.20, 22.2, and 30.7 on customer accounts that are not separate accounts. Regulation § 1.44(g) is also consistent with CFTC Letter No. 19-17.[285]

Regulations §§ 1.22, 22.2, and 30.7 currently prohibit an FCM from using, or permitting the use of, the funds of one futures customer, Cleared Swaps Customer, or 30.7 customer, respectively, to purchase, margin, or settle the positions of, or to secure or extend the credit of, any person other than such customer.[286] To ensure compliance with this prohibition, each FCM is required to compute, as of the close of the previous business day, the total undermargined amount of its customers' accounts and to maintain a sufficient amount of the FCMs' own funds (*i.e.,* residual interest) in the applicable customer segregated accounts to cover the undermargined amounts.[287]

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[285] CFTC Letter No. 19-17 provides that an "FCM shall use its own funds to cover the debit/deficit of each separate account." CFTC Letter No. 19-17.
[286] 17 CFR 1.22(a), 22.2(d), and 30.7(f)(1)(i).
[287] An FCM is required to maintain a sufficient amount of its own funds in segregation to cover the FCM's customers' undermargined amounts by the residual interest deadline. The residual interest deadline for futures customers and 30.7 customers is 6:00 p.m. Eastern Time on the next business day. 17 CFR 1.22(c) & 30.7(f). The residual interest deadline for Cleared Swaps Customers is the time of settlement on the next business day of the applicable swaps clearing organization. 17 CFR 22.2(f)(6).

The Commission proposed regulation § 1.44(g)(5) to provide that, for purposes of its residual interest and LSOC compliance calculations, as applicable under regulations §§ 1.22(c), 22.2(f)(6), and 30.7(f)(1)(ii), the FCM shall treat the separate accounts of a separate account customer as if the accounts were accounts of separate entities and include the undermargined amount of each separate account, and cover such deficiency with its own funds. The amendments would result in an FCM treating each separate account in a manner comparable with the treatment currently provided to customer accounts that are not separate accounts and are consistent with CFTC Letter No. 19-17.[288]

Regulation § 1.11 requires an FCM that accepts customer funds to margin futures, Cleared Swaps, or foreign futures and foreign options to implement a risk management program designed to monitor and manage the risks associated with the activities of the FCM.[289] The risk management program is required to address, among other risks, segregation risk, and further requires an FCM to establish a targeted amount of its own funds, or residual interest, that the firm will hold in segregated accounts for futures customers, Cleared Swaps Customers, and 30.7 customers to reasonably ensure that the FCM remains in compliance with its obligation to hold, at all times, a sufficient level of funds in segregation to cover its full obligation to its customers.[290] Regulation § 1.23(c) further requires an FCM to establish a targeted residual interest amount that is held in segregation to reasonably ensure that the FCM remains in compliance, at all times, with its customer funds segregation requirements.[291]

The Commission proposed regulation § 1.44(g)(6) to provide that, in determining its residual interest target for purposes of regulations §§ 1.11(e)(3)(i)(D) and 1.23(c), the FCM must treat separate accounts of separate account customers as accounts of separate

[288] CFTC Letter No. 19-17 provides that an "FCM shall include the margin deficiency of each separate account, and cover with its own funds as applicable, for purposes of its [r]esidual [i]nterest and LSOC compliance calculations." CFTC Letter No. 19-17 (Condition 10).
[289] 17 CFR 1.11(c).
[290] 17 CFR 1.11(e)(3)(i)(D).
[291] 17 CFR 1.23(c).

entities. In this regard, an FCM is required to consider the potential impact to segregated funds and to the FCM's targeted residual interest resulting from one or more separate accounts of a separate account customer that are undermargined, or that contain deficits or debit ledger balances, without taking into consideration the funds in excess of the margin requirements maintained in other separate accounts of the separate account customer.

Currently, Commission regulations require an FCM to maintain its own capital, or residual interest, in customer segregated accounts in an amount equal to or greater than its customers' aggregate undermargined accounts.[292] Additionally, each day, an FCM is required to perform a segregated calculation to verify its compliance with segregation requirements. The FCM must file a daily electronic report showing its segregation calculation with its DSRO, and the DSRO must be provided with electronic access to the FCM's bank accounts to verify that the segregated funds reported are in fact maintained. The FCM must also assure its DSRO that when it meets a margin call for customer positions, it never uses value provided by one customer to meet another customer's obligation.[293] These requirements are intended to prevent FCMs from being induced to cover one customer's margin shortfall with another customer's excess margin and allow DSROs to verify that FCMs are not in fact doing so. Regulation § 1.44(g)(6) is designed to ensure that margin deficiencies are calculated accurately for accounts receiving separate treatment, and that such deficiencies are covered consistent with existing Commission regulations. Regulation § 1.44(g)(6) is also consistent with the conditions to the no-action position in CFTC Letter No. 19-17.[294]

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[292] *See, e.g.*, 17 CFR 1.22(c)(3); 17 C.F.R. 22.2(f)(6)(iii)(A).
[293] *See, e.g.*, 17 CFR 22.2(g).
[294] CFTC Letter No. 19-17 provides that the "FCM shall factor into its residual interest target customer receivables as computed on a separate account basis." CFTC Letter No. 19-17 (Condition 9).

Citing proposed regulation § 1.44(g)(5)'s requirement that an FCM, for purposes of its residual interest and LSOC compliance calculations, must "treat the separate accounts of a separate account customer as if the accounts were accounts of separate entities and include the undermargined amount of each separate account, and cover such undermargined amount with its own funds," the JAC reiterated its comment that the definition of "undermargined amount" in proposed regulation § 1.44(a) defines the undermargined amount differently than how the term is currently defined in the JAC Margins Handbook and has been applied for purposes of an FCM's compliance with regulations §§ 1.22(c), 22.2(f)(6), and 30.7(f)(1)(ii).[295] The JAC stated that, given this discrepancy, for non-separate account customers, the undermargined amount to be included in the residual interest requirements and LSOC compliance calculations may be different than that for separate account customers under proposed regulation § 1.44(g)(5), and this change would require FCMs that permit separate account treatment to bifurcate the manner in which they calculate their requirements and update their regulatory reporting records.[296]

As discussed above in connection with regulation § 1.44(a), the Commission is adopting its proposed definition of "undermargined amount" with modifications to remove language that the JAC identified as inconsistent with exchange rules and industry practice, and the Commission views an FCM's use of either of the Net Liquidating Value or alternative Total Equity method set forth in the JAC Margins Handbook as consistent with the Commission's objective in defining an account's undermargined amount for purposes of regulation § 1.44.

[295] JAC Comment Letter. The JAC noted that, pursuant to JAC Regulatory Alert #14-06, the undermargined amount or margin deficiencies should be calculated for the residual interest requirement as: Risk Maintenance Margin Requirement – Credit Net Liquidating Value – Margin Collateral in Excess of Amounts to Secure Debit/Deficits = Undermargined Amount (if amount < zero, then the amount is zero.) The JAC also noted JAC Regulatory Alert #12-03 defines a similar calculation for the margin deficiencies to be included in the LSOC compliance calculation in accordance with regulation § 22.2(f). *Id.*
[296] *Id.*

Additionally, recalling its comment with respect to pending receipts, the JAC noted it was unclear whether pending non-USD receipts could be considered as received under proposed regulation § 1.44(g)(5) based on the definition of "undermargined amount" in proposed regulation § 1.44(a).[297]

Consistent with its discussion of the JAC's and FIA's comments with respect to treatment of pending non-USD transfers in connection with amendments to regulation § 1.17, the Commission confirms that the final rule would not preclude an FCM from treating as received pending non-USD transfers, consistent with the conditions in the JAC guidance discussed above, for purposes of complying with regulation § 1.44(g)(5).

ICE noted that it generally supports the risk management requirements for separate accounts set forth in proposed regulation § 1.44(g).

The Commission did not receive any other comments regarding proposed regulation § 1.44(g). Accordingly, the Commission is adopting regulation § 1.44(g) as proposed.

K. Regulation § 1.44(h)

As proposed, regulation § 1.44(h) contains requirements related to information and disclosures. As with the provisions in regulation § 1.44(g), these provisions are substantially similar to their corresponding no-action conditions in CFTC Letter No. 19-17, except that they have been reorganized and subject to minor changes to account for their proposed inclusion in part 1 as well as the proposed introduction of new defined terms. The Commission believes that regulation § 1.44(h) is reasonably necessary to protect customer funds and mitigate systemic risk, and to effectuate section 4d of the CEA, because it establishes requirements designed to ensure that FCMs applying separate account treatment have the customer information necessary to apply such treatment consistent with the risk mitigating requirements of regulation § 1.44 and, with respect to

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[297] *Id.*

FCMs that choose to apply separate account treatment, it establishes requirements designed to inform customers of certain potential risks associated with such treatment.

As proposed, regulation § 1.44(h)(1) provides that an FCM shall obtain from each separate account customer or, as applicable, the manager of a separate account, information sufficient for the FCM to: (i) assess the value of the assets dedicated to such separate account; and (ii) identify the direct or indirect parent company of the separate account customer, as applicable, if such customer has a direct or indirect parent company.[298] Regulation § 1.44(h)(1) is intended to ensure that FCMs have visibility with respect to customers' financial resources appropriate to ensure that a customer's separate account is adequately margined in light of those resources, and to identify when a customer's financial circumstances would necessitate the cessation of disbursements on a separate account basis. Regulation § 1.44(h)(1)(i) contemplates that, in certain instances, an asset manager may manage one or more accounts under power of attorney on a customer's behalf. In such cases, an FCM may obtain the requisite financial information from the asset manager. Regulation § 1.44(h)(1)(ii) is intended to ensure that FCMs have sufficient information to identify the direct or indirect parent company of a customer so that they may identify when a parent company of a customer has become insolvent, for purposes of proposed regulation § 1.44(e)(1)(iv).

The Commission did not receive any comments with respect to proposed regulation § 1.44(h)(1), and accordingly is adopting that provision as proposed.

As proposed, regulation § 1.44(h)(2) provides that, where a separate account customer has appointed a third-party as the primary contact to the FCM, the FCM must obtain and maintain current contact information of an authorized representative at the customer and take reasonable steps to verify that such contact information is and remains

[298] The Commission understands that, in certain cases, such as when a customer is a fund, the customer may not have a parent company. In such cases, the requirement to obtain information sufficient to identify the direct or indirect parent company would not apply.

accurate, and that the person is in fact an authorized representative of the customer. In many cases, an asset manager acts under a power of attorney on behalf of a customer, and the FCM has little direct contact with the customer. Regulation § 1.44(h)(2) is designed to ensure that FCMs have a reliable means of contacting separate account customers directly if the asset manager fails to ensure prompt payment on behalf of the customer.

The Commission did not receive any comments with respect to proposed regulation § 1.44(h)(2), and accordingly is adopting that provision as proposed.[299]

Regulation § 1.44 will not affect the Commission's bankruptcy rules under part 190 of its regulations or any rights of a customer or FCM in bankruptcy thereunder. In the event that an FCM electing separate account treatment experiences a bankruptcy, the accounts of a customer in each account class will be consolidated, and accounts of the same customer treated separately for purposes of regulation § 1.44 will not be treated separately in bankruptcy. To make this limitation clear to customers and FCMs, the Commission proposed regulation § 1.44(h)(3), which provides that an FCM must provide each separate account customer with a disclosure that, pursuant to part 190 of the Commission's regulations, all separate accounts of the customer in each account class will be combined in the event of the FCM's bankruptcy. As proposed, regulation § 1.44(h)(3) provides that the disclosure statement must be delivered directly to the customer via electronic means, in writing or in such other manner as the FCM customarily delivers disclosures pursuant to applicable Commission regulations, and as permissible under the FCM's customer documentation. Furthermore, the FCM must maintain documentation demonstrating that the disclosure statement required by regulation § 1.44(h)(3) was delivered directly to the customer. The FCM must also

[299] The Commission is making a technical change to final regulation § 1.44(h)(2), to substitute "representative *of* the customer" for "representative *at* the customer," in recognition of the fact that a customer may be a natural person.

include the disclosure statement required by regulation § 1.44(h)(3) on its website or within its Disclosure Document required by regulation § 1.55(i).

The Bankruptcy Reform Act of 1978[300] enacted subchapter IV of chapter 7 of the Bankruptcy Code, title 11 of the U.S. Code, to add certain provisions designed to afford enhanced protections to commodity customer property and protect markets from the reversal of certain transfers of money or other property, in recognition of the complexity of the commodity business.[301] The Commission enacted part 190 of its regulations,[302] to implement subchapter IV. Under part 190, all separate accounts of a customer in an account class will be combined in the event of an FCM's bankruptcy.[303] The Commission proposed regulation § 1.44(h)(3) so that customers receive full and fair disclosure as to the treatment of their accounts in an FCM bankruptcy.

In its comment letter, FIA requested that the Commission clarify that any FCM that has already provided the disclosure specified in proposed regulation § 1.44(h)(3) pursuant to the identical requirement of CFTC Letter No. 19-17 shall be deemed to have complied with regulation § 1.44(h)(3).[304]

The Commission is adopting regulation § 1.44(h)(3) as proposed. However, the Commission recognizes that regulation § 1.44(h)(3) is virtually identical to a corresponding condition in CFTC Letter No. 19-17,[305] and that, under the terms of the

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[300] Public Law 95-598, 92 Stat. 2549.

[301] Bankruptcy, 46 FR 57535, 57535-36 (Nov. 24, 1981).

[302] 17 CFR part 190.

[303] 17 CFR 190.08(b)(2)(i) and (xii) ("Aggregate the credit and debit equity balances of all accounts of the same class held by a customer in the same capacity … . Except as otherwise provided in this paragraph (b)(2), all accounts that are … deemed to be held by [a person] in its individual capacity shall be deemed to be held in the same capacity … . Except as otherwise provided in this section, an account maintained with a debtor by an agent or nominee for a principal or a beneficial owner shall be deemed to be an account held in the individual capacity of such principal or beneficial owner.").

[304] FIA Comment Letter.

[305] *Cf.* CFTC Letter No. 19-17 ("The FCM shall provide each beneficial owner using separate accounts with a disclosure that under CFTC Part 190 rules all separate accounts of the beneficial owner will be combined in the event of an FCM bankruptcy. The disclosure statement required by this paragraph will be delivered separately to the beneficial owner via electronic means in writing or in such other manner as the FCM customarily delivers disclosures pursuant to applicable CFTC regulations and as permissible under the FCM's customer documentation. The FCM must maintain evidence that such disclosure was delivered directly to the beneficial owner. The FCM shall also include the disclosure on its website or within its disclosure document required by Regulation 1.55(i).").

no-action letter, as applied by DCOs, FCMs permitting separate account treatment are required to comply with the condition. Accordingly, the Commission confirms that, to the extent an FCM has already provided the disclosure required by regulation § 1.44(h)(3) to its separate account customers consistent with the no-action position in CFTC Letter No. 19-17, and continues to provide such disclosure to new separate account customers, then such FCM would be in compliance with the disclosure provision requirement of regulation § 1.44(h)(3).

As proposed, regulation § 1.44(h)(4) provides that an FCM that has made an election pursuant to regulation § 1.44(d) shall disclose in the Disclosure Document required by regulation § 1.55(i) that it permits the separate treatment of accounts for the same customer under the requirements of proposed regulation § 1.44 and that, 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 may affect the segregated funds of all of the FCM's customers in one or more account classes. Regulation § 1.55 was adopted to "advise new customers of the substantial risk of loss inherent in trading commodity futures."[306] The Commission amended regulation § 1.55 in 2013 to, among other things, add new paragraph (i) requiring FCMs to disclose to customers "all information about the [FCM], including its business, operations, risk profile, and affiliates, that would be material to the customer's decision to entrust … funds to and otherwise do business with the [FCM] and that is otherwise necessary for full and fair disclosure."[307] Such disclosures include material information regarding specific topics identified in regulation § 1.55(k), which include "[a] basic overview of customer funds segregation," as well as "current risk practices, controls, and procedures."[308] These disclosures are designed to "enable customers to make informed judgments regarding the appropriateness of

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[306] Adoption of Customer Protection Rules, 43 FR 31886, 31888 (July 24, 1978).
[307] 17 CFR 1.55(i).
[308] 17 CFR 1.55(k)(8) & (11).

selecting an FCM" and to enhance the diligence that a customer can conduct prior to opening an account and on an ongoing basis.[309]

The Commission believes that the application of separate account treatment for some customers of an FCM, is "material to the … decision to entrust … funds to and otherwise do business with the [FCM]" with respect to the customers of such FCM generally 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.[310] Accordingly, the Commission proposed regulation § 1.44(h)(4) to ensure that customers are apprised of a matter that is relevant to the FCM's risk management policies.

In its comment letter, FIA contended that the Commission's proposed firm-specific disclosure for regulation § 1.55(i) under proposed regulation § 1.44(h)(4) is confusing and misleading.[311] As proposed, regulation § 1.44(h)(4) provides that the disclosure statement must apprise the customer that if separate account treatment for some customers were to contribute to a loss that exceeds the FCM's ability to cover, that loss may affect the segregated funds of all of the FCM's customers in one or more account classes. FIA argued that such language is confusing because it fails to specify how separate account treatment for some customers might contribute to a loss that exceeds the FCM's ability to cover.[312] FIA noted any customer's activity in any account could contribute to a loss, and FIA asserted that such fellow-customer risk is already addressed in existing firm-specific disclosure.[313] FIA asserted that it is unclear how separate account margining increases such risk, noting that, if anything, separate account treatment generally mitigates credit risk to the underlying asset owner, ensuring, in most

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[309] Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 FR 68506, 68564 (Nov. 14, 2013).
[310] *See* 17 CFR 1.55(i).
[311] FIA Comment Letter.
[312] *Id.*
[313] *Id.*

cases, that the FCM holds more collateral against the owner's consolidated portfolio of positions than it would if it was net margining the portfolio as a single account.[314]

The Commission notes that, although separate account margining may reduce risk in the sense that, generally, an FCM will hold more collateral with respect to the portfolio of a separate account customer, separate account margining is not risk-free. In adopting a Margin Adequacy Requirement applicable to all FCMs similar to that presently in regulation 39.13(g)(8)(iii), the Commission implements a regulation designed to guard against the possibility that an FCM will permit a withdrawal of customer funds that will lead to the customer's account becoming undermargined. Regulation § 1.44 operates to permit the customer's separate accounts to be treated as accounts of separate legal entities for purposes of the Margin Adequacy Requirement, provided the FCM complies with specified requirements for the treatment of separate accounts. Those requirements (including those that would result in the FCM holding a greater amount of margin than it would if it did not engage in separate account treatment) are designed to mitigate the potential risk posed by the treatment of one customer's separate account as the account of a separate legal entity without reference to other separate accounts of the same separate account customer.

Although the Commission believes FCMs have successfully complied with the no-action conditions of CFTC Letter No. 19-17, where ensuring margin adequacy is critical to protecting customer funds and mitigating risk to an FCM and the broader financial system, FCMs that engage in separate account treatment comply with margin adequacy in a materially different manner than FCMs that do not engage in separate account treatment, and are subject to additional requirements. The failure to comply with such requirements could contribute to a loss that the FCM is unable to cover. In light of considerations of protection of customer funds, and the purpose of regulation § 1.55(i) to

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[314] *Id.*

provide to customers "all information … that would be material to the customer's decision to entrust such funds to and otherwise do business with" the FCM, the Commission believes it is appropriate for FCMs to apprise customers, whether separate account customers or otherwise, of such risk of loss resulting from the FCM's separate treatment of accounts.

Additionally, as proposed, regulation § 1.44(h)(4)(i) provides that an FCM that applies separate account treatment pursuant to proposed regulation § 1.44 must apply such treatment in a consistent manner over time, and that if the election pursuant to proposed regulation § 1.44(d) for a separate account customer is revoked, such election may not be reinstated during the 30 days following such revocation. The Commission proposed this 30-day period to prevent the possibility that, as discussed below, an FCM could toggle its separate account treatment election for purposes other than serving customers' bona fide commercial purposes.

Proposed regulation § 1.44(h)(4)(i) is intended to ensure that FCMs employ separate account treatment in a way that is consistent with the customer protection and FCM risk management provisions of the CEA and Commission regulations. The Commission recognizes that, although bona fide business or risk management purposes may at times warrant application or cessation of separate account treatment, FCMs should not apply or cease separate account treatment for reasons, or in a manner, that would contravene the customer protection and risk mitigation purposes of the CEA and Commission regulations. For instance, an FCM should not switch back and forth between separate and combined treatment for customer accounts to achieve preferable margining outcomes or offset margin shortfalls in particular accounts. The period of 30 days was chosen to balance this goal with a recognition that, after a sufficient period, the relevant circumstances for a particular customer may change for reasons other than

strategic switching. The Commission recognizes that there are a wide variety of circumstances that may indicate inconsistent application of separate account treatment.

With respect to the 30-day toll on reinstatement of separate account disbursements in proposed regulation § 1.44(h)(4)(i), FIA asserted that it is not aware that any FCM has ever "toggled" separate account treatment for any customer, and further asserted the tolling period could have negative unintended consequences for customers and overall market liquidity.[315] FIA noted that separate account margining is crucial for many institutional asset managers to efficiently deploy their investment strategies across multiple accounts, and if an FCM is forced to suspend separate account treatment due to an event outside the ordinary course of business, the 30-day minimum waiting period could significantly disrupt the trading and risk management of affected customers even after the underlying issue is resolved.[316] FIA urged the Commission to adopt a more targeted, risk-based approach that defers to FCMs' judgment.[317] FIA asserted that the only reasons an FCM is likely to have to suspend separate account treatment against the wishes of its customer are those detailed in the risk scenarios in proposed regulation § 1.44(e), and the timeframe within which separate account treatment should be restored in the wake of any such event should be left to the FCM's risk management discretion.[318]

SIFMA-AMG similarly commented that its members are not aware of instances in which an FCM might "toggle" separate account treatment, noting that, in addition to significant regulatory obligations intended to protect customers, including stringent risk management provisions, FCMs who try to "game" a system to maintain separate account status would lose the trust necessary to maintain these competitive, longstanding commercial relationships.[319] SIFMA-AMG also asserted that, operationally, its members

[315] FIA Comment Letter.
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] SIFMA-AMG Comment Letter.

would not permit or give contract authority for an FCM to switch back and forth between separate and combined treatment for customer accounts in order to achieve more preferable margining outcomes or offset margin shortfalls in particular accounts.[320] According to SIFMA-AMG, this would be highly unusual and would be a significant deviation from industry practice.[321] Additionally, SIFMA-AMG asserted that it did not find the rationale for a tolling period of 30 days to be persuasive, and does not believe there is any reason why such period should be considered appropriate or sufficient.[322] SIFMA-AMG expressed concern that such revocation could cause harm to its business activities, in turn harming SIFMA-AMG members' customers and their investments.[323] SIFMA-AMG also expressed concern that the tolling period could have a compounding effect on markets and liquidity as well as risk management of FCMs and asset managers, and should be removed or modified to be more flexible.[324]

For the avoidance of doubt, the Commission confirms that the proposed 30-day toll on the reinstatement of separate account *treatment* was not intended to apply in instances in which the occurrence of events outside the ordinary course of business, as enumerated in regulation § 1.44(e), have caused an FCM to terminate or suspend *disbursements* on a separate account basis for a separate account customer.

An event that is outside the ordinary course of business would mean that the customer would, at least for a time, not be able to obtain disbursements on a separate account basis, pursuant to regulation § 1.44(c). During that time, the FCM would still be subject to the requirements attendant upon separate account treatment of a customer's account, including, *e.g.*, those under regulations §§ 1.44(f) through (h), 1.58(c), and 1.73(c). It is only where the election pursuant to regulation § 1.44(d) for a particular

[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *Id.*

customer's account is affirmatively revoked that those requirements would cease to be applicable, and it is only in that case that the 30-day toll period would apply.

By contrast, if an FCM must cease providing disbursements to a customer on a separate account basis because the customer's account is no longer in the "ordinary course of business," the FCM may permit a resumption of disbursements on a separate account basis for the separate account customer as soon as the requirements of regulation § 1.44(e)(4), regarding the cure of non-ordinary course of business conditions and resumption of separate account treatment, are met.

As discussed above, FIA and SIFMA-AMG stated in their comments that they are not aware that any FCM has ever attempted to selectively use separate account treatment to obtain an illegitimate economic advantage. The Commission does not assume that establishes that there is no possibility of separate account treatment being used in such manner, and further submits that, if such strategic use of separate account treatment is uncommon, then a toll on resumption of separate account treatment following a revocation of an election for separate account treatment should not represent a significant burden for FCMs or customers. At the same time, the Commission is not aware of any such instances of "strategic switching" occurring under the no-action position, nor has any commenter discussed such issue as a significant risk.

Accordingly, in adopting regulation § 1.44(h)(4), including regulation § 1.44(h)(4)(i), the Commission is eliminating the proposed 30-day tolling period for an FCM to reinstate an election for separate account treatment. The Commission is also adopting regulation § 1.44(h)(4) with a technical change.[325]

[325] The Commission is making a technical change in final regulation § 1.44(h)(4) to substitute the phrase "pursuant to the requirements" for "under the terms and conditions" ("A futures commission merchant that has made an election pursuant to paragraph (d) of this section shall disclose in the Disclosure Document required under paragraph 1.55(i) of this part that it permits the separate treatment of accounts for the same customer *pursuant to the requirements* of this § 1.44 . . . .").

L. Appendix A to Part 1

The Commission proposed Appendix A to part 1 to set forth those currencies for which payment of margin shall be considered in compliance with the one business day margin call requirements of regulation § 1.44(f) if received no later than the end of the second business day after the day on which the margin call is issued.[326]

The Commission understands that the list of currencies it included in proposed Appendix A to part 1 is consistent with current industry settlement conventions, based on the Commission staff's informational discussions with industry professionals knowledgeable regarding such conventions. The Commission proposed that the initial currencies under proposed Appendix A to part 1 should be Australian dollar (AUD), Chinese renminbi (CNY), Hong Kong dollar (HKD), Hungarian forint (HUF), Israeli new shekel (ILS), Japanese yen (JPY), New Zealand dollar (NZD), Singapore dollar (SGD), Turkish lira (TRY), and South African rand (ZAR).

The Commission did not receive any comments with respect to proposed Appendix A to part 1. Accordingly, the Commission is adopting Appendix A to part 1 as proposed.

M. Amendments to Regulation § 1.58

Regulation § 1.58(a) currently provides that each FCM that carries a commodity futures or commodity option position for another FCM or a foreign broker on an omnibus basis must collect, and each FCM and foreign broker whose account is so carried, must deposit initial and maintenance margin on positions reportable under regulation § 17.04[327] at a level of at least that established for customer accounts by the rules of the relevant contract market. Regulation § 1.58(a) is designed to ensure that where a clearing FCM (*i.e.*, a carrying FCM) carries a customer omnibus account for a non-clearing FCM

[326] As discussed above, the procedures for adding currencies to or removing currencies from Appendix A to part 1 will be set forth in regulation § 1.44(f)(8).
[327] 17 CFR 17.04.

(*i.e.*, a depositing FCM), the risk posed by the customers of the depositing FCM continues to be appropriately mitigated through margining of those positions (*i.e.*, calculation of initial and maintenance margins) on a gross basis at the depositing FCM. This is analogous to the margining of positions of a clearing FCM on a gross basis at the DCO.[328]

In proposing regulation § 1.58(a) in 1981, the "Commission view[ed] with great concern the fact that [a significant] amount of customer funds [was] being held by firms [*i.e.*, non-clearing FCMs] that, in comparison to clearing FCMs, generally have less capital and are less equipped to handle the volatility of the commodity markets, a concern which was highlighted by the . . . bankruptcies [of three FCMs] which occurred during the last half of 1980."[329] In light of the segregation requirements at the time – which did not yet apply to foreign futures and foreign options, and also did not apply to cleared swaps (a category that did not then exist) – these requirements were designed only to apply to futures and options. The requirement was therefore tied to position reporting under regulation § 17.04, a reporting requirement that is limited to futures and options.

By 2011, industry practice had developed such that "[u]nder current industry practice, omnibus accounts report gross positions to their clearing members and clearing members collect margins on a gross basis for positions held in omnibus accounts."[330] The Commission thus required DCOs to require that clearing members post margin to DCOs on a gross basis for both domestic futures and cleared swaps.[331] The Commission stated, as its rationale, that it continues to believe, as stated in the notice of proposed rulemaking, that gross margining of customer accounts will: (a) More appropriately address the risks posed to a DCO by its clearing members' customers than net margining;

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[328] *See* regulation § 39.13(g)(8)(i).
[329] *See* Gross Margining of Omnibus Accounts, 46 FR 62864 (Dec. 29, 1981).
[330] *See* Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334, 69375 (Nov. 8, 2011).
[331] *See id.*, regulation § 39.13(g)(8)(i).

(b) will increase the financial resources available to a DCO in the event of a customer default; and (c) with respect to cleared swaps, will support the requirement in § 39.13(g)(2)(iii) that a DCO must margin each swap portfolio at a minimum 99 percent confidence level.[332]

The Commission also noted that, "under certain circumstances gross margining may also increase the portability of customer positions in an FCM insolvency. That is, a gross margining requirement would increase the likelihood that there will be sufficient collateral on deposit in support of a customer position to enable the DCO to transfer it to a solvent FCM."[333]

At the time, with its focus on implementing rules for DCOs, the Commission did not amend regulation § 1.58 explicitly to require gross margining for Cleared Swaps in omnibus accounts cleared by a non-clearing FCM through a clearing FCM. However, reviewing the matter presently, the Commission is of the view that the reasons for requiring clearing FCMs to post margin at a DCO on a gross basis apply, *mutatis mutandis*, to support requiring gross margining for omnibus customer accounts of non-clearing FCMs for Cleared Swaps in addition to domestic futures.[334]

Accordingly, in the Second Proposal, the Commission proposed to amend regulations § 1.58(a) and (b). The Commission proposed to amend regulation § 1.58(a), addressing gross collection of margin generally, to require that "[e]ach futures commission merchant which carries a futures, options, or Cleared Swaps position for another futures commission merchant or for a foreign broker on an omnibus basis must

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[332] Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69375-69376.
[333] *Id.* at 69376 n. 133 (citing CPSS–IOSCO Consultative Report [on the Principles for Financial Market Infrastructures], Principle 14: Segregation and Portability, Explanatory Notes 3.14.6 and 3.14.8, at 67–68).
[334] By contrast, the Commission has imposed limits on holding the foreign futures or foreign options secured amount outside the United States. *See* regulation § 30.7(c) (limiting such amounts to 120% "of the total amount of funds necessary to meet margin and prefunding margin requirements" that are "established by rule, regulation or order of foreign boards of trade or foreign clearing organizations, or to meet margin calls issued by foreign brokers carrying the 30.7 customers' foreign futures and foreign options positions.") Requiring an FCM to send a larger amount of 30.7 funds upstream to a foreign broker or foreign clearing organization would run counter to the regulation's goal of limiting such amounts. Accordingly, the Commission did not propose to require gross margining with respect to 30.7 accounts.

collect, and each futures commission merchant and foreign broker for which an omnibus account is being carried must deposit, initial and maintenance margin on each position so carried" at a level no less than that established for customer accounts by the rules of the applicable contract market or other board of trade" (or, if the board of trade does not specify any such margin level, the level specified by the relevant clearing organization), *i.e.*, on a gross margin basis. The Commission proposed to amend regulation § 1.58(b), addressing entitlement to spread or hedge margin treatment, to require that if an FCM that "carries a futures, options, or Cleared Swaps position for another futures commission merchant or for a foreign broker on an omnibus basis allows a position to be margined as a spread position or as a hedged position in accordance with the rules of the applicable contract market, the carrying futures commission merchant must obtain and retain a written representation from the futures commission merchant or from the foreign broker for which the omnibus account is being carried that each such position is entitled to be so margined."

Under regulation § 1.58 as proposed to be amended, clearing FCM initial and maintenance margin requirements for separate accounts of the same customer are to be calculated on a gross basis as the margin for accounts of distinct customers.[335] The Commission believes it is important to continuity of risk management that the same approach also be applied in the case of a non-clearing (depositing) FCM whose accounts are carried by a clearing (carrying) FCM, with respect to the amount that depositing FCM is required to deposit, and that the carrying FCM is required to collect.[336] The Commission therefore proposed to amend regulation § 1.58 to add new paragraph (c) providing that, where an FCM has established an omnibus account that is carried by

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[335] *See* proposed regulation § 1.44(g)(2).

[336] As a result, each customer with accounts subject to separate account treatment should be subject to the same or greater margin requirements as such customer would be subject to if its separate accounts were margined on a combined account basis.

another FCM, and the depositing FCM has elected to treat the separate accounts of a customer as accounts of separate entities for purposes of regulation § 1.44, then the depositing FCM must calculate initial and maintenance margin for purposes of regulation § 1.58(a) separately for each separate account.[337]

In its comment letter, the JAC discussed the Commission's proposal to amend regulation § 1.58(a) and (b) to extend the gross margin requirements of domestic futures and options accounts to Cleared Swaps accounts while specifically declining to require gross margining for omnibus accounts of secured 30.7 futures and options positions held by FCMs.[338] The JAC noted that, although proposed regulation § 1.58(a) allows an FCM carrying a secured 30.7 omnibus account to margin that account on a net basis, the FCM would be able to margin the account on a net basis even if the DCO, a non-U.S. clearinghouse, or broker carrying an omnibus account were to collect margin on a gross basis from the FCM.[339] Thus, the FCM would be collecting less margin than they are paying to the DCO, the non-U.S. clearinghouse, or the carrying broker. The JAC recommended that the Commission consider requiring gross margining for secured 30.7 omnibus accounts.[340] Discussing the Commission's statement in the Second Proposal that "[r]equiring an FCM to send a larger amount of 30.7 funds upstream to a foreign broker or foreign clearing organization would run counter to [regulation § 30.7(c)'s] goal of limiting such amounts," the JAC asserted that requiring a secured 30.7 omnibus account to be gross margined under regulation § 1.58 would only require the FCM to collect gross margin (*i.e.*, versus a lower net margin amount) from the depositing FCM or

[337] If non-clearing FCM *N* has customers *P* and *Q*, and *Q* is a separate account customer with separate accounts *R*, *S*, and *T*, then *N* would calculate, on a gross basis, the margin requirements for accounts *P*, *R*, *S*, and *T*, consistent with proposed regulation § 1.58(c). That gross margin requirement, across those four accounts, will be the amount that, consistent with regulation § 1.58(a), *N* must deposit and *N*'s clearing FCM, *C*, must collect.
[338] JAC Comment Letter.
[339] *Id.*
[340] *Id.*

foreign broker, not for the FCM to send the amount along outside the U.S.[341] The JAC contended that requiring gross margining of secured 30.7 omnibus accounts will ensure the FCM's risk-based capital requirement is accurately based on the risk margin required for all customer and noncustomer positions.[342]

CME also suggested that the Commission require FCMs to collect margin on a gross basis for the foreign futures and foreign options contracts in an omnibus account held by the clearing FCM, noting that CME believes gross margining of customer positions is an important element of risk management in the event of default by an FCM and is essential to the Commission's stated goal in part 190 for porting customers regardless of whether the non-DCO foreign clearing organization collects margin on a gross or net basis.[343]

The Commission has not proposed to require gross margining of secured 30.7 omnibus accounts and does not in this final rulemaking adopt such a requirement, although the Commission may consider proposing to do so in the future. The Commission notes that, with respect to the accounts of foreign futures and foreign options customers, unless an FCM is a direct clearing member of a non-U.S. DCO, porting the positions of the FCM's customers may prove impracticable because, to the extent the FCM clears through a foreign affiliate, the foreign affiliate will likely be subject to foreign insolvency laws.

N. Amendments to Regulation § 1.73

The Commission proposed to amend regulation § 1.73 to add new paragraph (c) providing that an FCM that is not a clearing member of a DCO but that treats the separate accounts of a customer as accounts of separate entities for purposes of proposed regulation § 1.44 shall comply with regulation § 1.73(a) and (b) with respect to accounts

341 *Id.*
342 *Id.*
343 CME Comment Letter.

and separate accounts of separate account customers, as if the FCM were a clearing member of a DCO. Regulation § 1.73 currently sets forth risk management requirements only for FCMs that are clearing members of DCOs. The Commission proposed this amendment to ensure that, where non-clearing FCMs are engaging in separate account treatment, they are required to comply with the same baseline risk management requirements with respect to those separate accounts as their clearing counterparts do with respect to all accounts. In particular, this amendment links regulation § 1.73 to a non-clearing FCM's compliance with proposed regulation § 1.44(g)(1)'s stress testing and credit limit requirements. Since 2019, clearing FCMs have successfully applied regulation § 1.73(a), in conjunction with the no-action position's stress testing and credit limit conditions,[344] to manage the risk of accounts subject to separate treatment.

In proposing to codify the no-action position in part 1 of the Commission's regulations, the Commission believes it would be prudent from a customer funds protection perspective, and a systemic risk mitigation perspective, to ensure that any FCMs that provide for separate account treatment, whether clearing or non-clearing, do so subject to similarly heightened risk management requirements. The Commission expects that, by applying the heightened risk management requirements applicable to clearing FCMs to all of a non-clearing FCM's accounts for a customer receiving separate treatment, a non-clearing FCM will be better able to detect and prevent the emergence of risks that could lead to operational or financial distress at such customer, reducing the potential risk of a default (or a failure to maintain adequate customer funds) by the non-clearing FCM.

The Commission did not receive any comments with respect to the proposed amendments to regulation § 1.73.

[344] CFTC Letter No. 19-17 (Condition 3).

Accordingly, the Commission is adopting the amendments to regulation § 1.73 as proposed.[345]

O. Amendments to Regulation § 30.2

Regulation § 30.2(b) currently excludes an FCM engaging in foreign futures and foreign option transactions for 30.7 customers from certain provision of the Commission's regulations, including regulation § 1.44, in recognition that such transactions are entered into on contract markets that are subject to regulation by non-U.S. authorities.[346] Immediately prior to this final rule, regulation § 1.44 was reserved. The Commission proposed to amend regulation § 30.2(b) to remove regulation § 1.44 from the list of excluded regulations.[347]

The amendment to regulation § 30.2(b) is consistent with the imposition of the Margin Adequacy Requirement on 30.7 accounts and the proposed definition of the term "account" in regulation § 1.44(a), which would include 30.7 accounts in addition to futures accounts and Cleared Swaps Customer Accounts.

The Commission also proposed to remove the exclusion of regulations §§ 1.41-1.43 from applicability to part 30. When regulation § 30.2 was promulgated in 1987 as part of the establishment of part 30,[348] it explicitly provided that certain of its existing regulations would not be applicable "to the persons and transactions that are subject to the requirements of" part 30. At that time, regulations §§ 1.41-1.43 addressed, respectively, crop or market information letters, filing of contract market rules with the

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[345] The Commission is making one technical modification to the final amendments to regulation § 1.73. In final regulation § 1.73(c), the Commission is changing "[an FCM] . . . shall comply . . . as if it *was* a clearing member of a [DCO]" to "[an FCM] . . . shall comply . . . as if it *were* a clearing member of a [DCO]."

[346] For example, regulation § 30.2 excludes persons and foreign futures and foreign options transactions from the segregation requirements of § 1.20, which applies only to futures customer funds and transactions. Regulation § 30.7 addresses the segregation requirements of 30.7 customer funds.

[347] As previously noted, immediately prior to this final rule, regulation § 1.44 was reserved and, accordingly, did not impose any regulatory obligation on an FCM. However, at the time regulation § 30.2 was promulgated, regulation § 1.44 addressed records and reports of warehouses, depositories, and other similar entities. This regulation was subsequently deleted.

[348] Foreign Futures and Foreign Options Transactions, 52 FR 28980 (Aug. 5, 1987).

Commission, and warehouses, depositories, and other similar entities. Those regulations were subsequently deleted, and those sections were reserved.

When the Commission revised its part 190 bankruptcy rules in 2021, the Commission added, as regulations §§ 1.41-1.43, designation of hedging accounts, delivery accounts, and conditions on accepting letters of credit as collateral. Each of these regulations was intended to apply to foreign futures accounts. In this final rule, the Commission amends regulation § 30.2 to conform with that intention.

The Commission did not receive any comments with respect to the proposed amendments to regulation § 30.2.

Accordingly, the Commission is adopting the amendments to regulation § 30.2 as proposed.

P. Amendments to Regulation § 39.13

Regulation § 39.13(g)(8)(i) requires DCOs to collect customer margin from their clearing members on a gross basis, that is, collect margin "equal to the sum of initial margin amounts that would be required by the [DCO] for each individual customer within that account if each individual customer were a clearing member."[349] The Commission proposed to add new regulation § 39.13(g)(8)(i)(E) to clarify that, for purposes of this regulation on gross margining, each separate account of a separate account customer shall be treated as an account of a separate individual customer.

The Commission also proposed to amend regulation § 39.13(g)(8)(iii) to provide that such paragraph shall apply except as provided for in regulation § 1.44. The Commission proposed this amendment to ensure that the carve-out (represented by regulation § 1.44(c)-(h)) to the Margin Adequacy Requirement (represented by regulation § 1.44(b)) that would apply to all FCMs is also effectuated with respect to the Margin

[349] 17 CFR 39.13(g)(3)(i)(A).

Adequacy Requirement applicable to clearing members through DCOs pursuant to regulation § 39.13(g)(8)(iii).

OCC commented that the Second Proposal makes clear, in defining the conditions under which an FCM can offer separate account treatment, that the Commission intended to make compliance with the requirements for such treatment the responsibility of FCMs, and the responsibility for monitoring such compliance that of the FCM's DSRO rather than any DCO of which it is a member.[350] OCC noted that, consistent with this, the proposal would not require an FCM to notify a DCO of which it is a member either of the FCM's initial election for separate account treatment, or the occurrence of any non-ordinary course of business event, which would have the effect of removing the DCO's visibility into its members' separate account treatment practices.[351]

With respect to the Margin Adequacy Requirement of regulation § 39.13(g)(8)(iii), which, as proposed, would apply except as provided for in § 1.44, OCC noted that the requirements for determining whether an FCM is operating in compliance with the requirements of regulation § 1.44 would require detailed knowledge of an FCM's operational and risk management practices on an ongoing basis, including, among other information, real-time knowledge of the timing of each such customer's margin posting to the FCM, and information as to the exact cause of any delay in posing margin.[352] OCC expressed concern that, without clarification, regulation § 39.13(g)(8)(iii), as amended, could be interpreted as imposing strict liability on DCOs for their members' compliance with regulation § 1.44.[353] Accordingly, OCC recommended that the Commission modify regulation § 39.13(g)(8)(iii) to specify that a DCO will not

[350] OCC Comment Letter.
[351] *Id.*
[352] *Id.*
[353] *Id.*

be liable for violating regulation § 39.13(g)(8)(iii) on the basis of any failure by any clearing member to comply with any requirement or requirements of regulation § 1.44.[354]

Although both regulation § 1.44(b) and regulation § 39.13(g)(8)(iii) contain a Margin Adequacy Requirement, the former applies directly to FCMs whereas the latter applies to FCMs that are clearing members of DCOs through the operation of DCO rules. Accordingly, a DCO must have in place rules to effectuate the requirements of regulation § 39.13(g)(8)(iii) and must monitor and enforce compliance with those rules, consistent with DCO Core Principle H[355] and regulation § 39.17[356] regarding rule enforcement, but a DCO is not itself responsible for enforcing regulation § 1.44. Although the Commission disagrees that there are *no* instances in which a DCO could be held liable with respect to a clearing member's violation of regulation § 1.44 (*i.e.*, where the violation would independently result in a violation of the Margin Adequacy Requirement of regulation § 39.13(g)(8)(iii), such as might result where the DCO has actual knowledge of an actual or potential underlying violation of regulation § 1.44 which results in a violation of the DCO's rules to effectuate the Margin Adequacy Requirement of regulation § 39.13(g)(8)(iii)), the Commission agrees that, as a general matter, regulation § 1.44 is not designed to impose on a DCO responsibility to meticulously supervise a clearing FCM's compliance with the requirements of the regulation. Moreover, DCOs currently have the responsibility to enforce their rules established pursuant to regulation § 39.13(g)(8)(iii), subject to CFTC Letter No. 19-17.

In its comment letter, CME agreed with the Commission's proposal to add new regulation § 39.13(g)(8)(i)(E) to clarify that, for purposes of such provision, related to gross margining, each separate account of a separate account customer shall be treated as

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[354] *Id.*
[355] 7 U.S.C. 7a-1(c)(2)(H).
[356] 17 CFR 39.17.

an account of a separate individual customer.[357] CME however requested that the Commission clarify, for purposes of ensuring accurate customer gross margin, that an FCM must identify not only accounts eligible for separate account margining, but also which accounts are currently deploying the practice on the FCM's books.[358] Consistent with its response above to the JAC's similar comment with respect to the recordkeeping requirement in regulation § 1.44(d)(1), the Commission confirms that such requirement, which requires an FCM to keep current the required list of separate account customers and their separate accounts, is intended to ensure that FCMs maintain a current list of separate account customers and their accounts receiving separate treatment. Thus, the FCM is required to apply the requirements of regulation § 1.44 applicable to separate account customers to all customers on that list.

Additionally, in connection with proposed changes to regulation § 39.13(g)(8)(iii), the Commission requested comment with respect to whether the Commission should remove regulation § 39.13(g)(8)(iii), if the Commission includes the Margin Adequacy Requirement and requirements regarding separate account treatment in part 1 of its regulations as proposed (Question 8). In its comment letter, CME agreed that it would be logical to delete regulation § 39.13(g)(8)(iii) as regulation § 1.44 will address withdrawals from customer accounts at the clearing member.[359] The Commission did not receive any other comments in response to this question.

The Commission appreciates CME's comment and acknowledges that the Margin Adequacy Requirement in regulation § 39.13(g)(8)(iii) is substantially the same as that in regulation § 1.44(b) (albeit applicable to FCMs through the instrumentation of DCO rules). The Commission, however, notes that in requiring DCOs to prevent clearing members from withdrawing margin such that it would lead to undermargining in the

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[357] CME Comment Letter.
[358] *Id.*
[359] *Id.*

customer's account, regulation § 39.13(g)(8)(iii) provides for an additional layer of monitoring and enforcement (in addition to FCMs' DSROs and the Commission), to ensure that the Margin Adequacy Requirement is being met. Considering this substantial oversight benefit and noting the low volume of responses to this question, the Commission has determined to retain regulation § 39.13(g)(8)(iii).

Accordingly, the Commission is adopting the amendments to regulation § 39.13 as proposed.

III. COST BENEFIT CONSIDERATIONS

A. Introduction

Section 15(a) of the CEA requires the Commission to "consider the costs and benefits" of its actions before promulgating a regulation under the CEA or issuing certain orders.[360] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency; competitiveness, and financial integrity of markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations (collectively referred to herein as the section 15(a) Factors). Accordingly, the Commission considers the costs and benefits associated with this final rule in light of the section 15(a) Factors. In conducting its analysis, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern. In the sections that follow, the Commission considers: (1) the costs and benefits of the final rule; (2) the alternatives contemplated by the Commission and their costs and benefits; and (3) the impact of the final rule on the section 15(a) Factors.

By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of a new rule or to determine whether the benefits of the adopted rule outweigh its costs. Nonetheless, the Commission has endeavored to assess the expected

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[360] 7 U.S.C. 19(a).

costs and benefits of the final rule in quantitative terms, including Paperwork Reduction Act-related costs, where practicable. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable amendments in qualitative terms. However, the Commission lacks the data necessary to reasonably quantify all of the costs and benefits considered below. In some instances, it is not reasonably feasible to quantify the costs and benefits to FCMs with respect to certain factors, such as market integrity. Additionally, any initial and recurring compliance costs for any particular FCM will depend on its size, existing infrastructure, practices, and cost structures. Notwithstanding these types of limitations, the Commission otherwise identifies and considers the costs and benefits of these final rule amendments in qualitative terms.

In the following consideration of costs and benefits, the Commission first identifies and discusses the benefits and costs attributable to the final rule amendments. Next, the Commission identifies and discusses the benefits and costs attributable to the final rule amendments as compared to alternatives to the final rule amendments. The Commission, where applicable, then considers the costs and benefits of the final rule amendments in light of the section 15(a) Factors.

The Commission notes that this consideration of costs and benefits is based on, *inter alia*, its understanding that the derivatives markets regulated by the Commission function internationally, with (1) transactions that involve entities organized in the United States occurring across different international jurisdictions, (2) some entities organized outside of the United States that are prospective Commission registrants, and (3) some entities that typically operate both within and outside the United States, and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the final regulations on all relevant derivatives activity, whether

based on their actual occurrence in the United States or on their connection with, or effect on, U.S. commerce.[361]

In the Second Proposal, the Commission generally requested comment on all aspects of its cost benefit considerations. The Commission also included a number of questions for the purpose of eliciting cost and benefit estimates from public commenters wherever possible.

1. Final Rule

The Commission is promulgating new regulations in part 1 of its regulations designed to (1) further ensure that FCMs hold customer funds sufficient to cover the required initial margin for the customer's positions, by prohibiting an FCM from permitting customers to withdraw funds from their accounts with such FCM unless the net liquidating value plus the margin deposits remaining in the customer's account after the withdrawal would be sufficient to meet the customer initial margin requirements with respect to the products or portfolios in the customer's account (*i.e.*, the Margin Adequacy Requirement) (regulation § 1.44(b)) and (2) permit FCMs to treat the separate accounts of a single customer as accounts of separate entities for purposes of the Margin Adequacy Requirement, subject to requirements designed to ensure that such separate account treatment is carried out in a documented and consistent manner, and that FCMs, their DSROs, and the Commission are apprised of, and able to respond to, conditions that, for risk mitigation reasons, would necessitate the cessation of disbursements on a separate account basis (regulation § 1.44(c)-(h)).[362] The Commission is also adopting revisions to regulations in parts 1, 22, and 30 of its regulations related to definitions, FCM minimum financial requirements, reporting, collection of margin, and clearing FCM risk management (amendments to regulations §§ 1.3, 1.17, 1.20, 1.58, and 1.73, as well as §§

[361] *See, e.g.,* 7 U.S.C. 2(i).
[362] Regulation § 1.44(a) provides definitions supporting the other subsections of the regulation.

22.2 and 30.7), and part 39 of its regulations related to DCO risk management (amendments to regulation § 39.13), to facilitate full implementation of the Margin Adequacy Requirement and the requirements for separate account treatment.

2. Baseline: Current Part 1 and Regulation 39.13(g)(8)(iii)

The Commission identifies the costs and benefits of the final amendments relative to the baseline of the regulatory status quo. In particular, the baseline that the Commission considers for the costs and benefits of these final rule amendments is the Commission regulations in effect immediately prior to the adoption of this final rule; specifically, part 1 of the Commission's regulations (where the operative part of the final rule would be codified) and regulation § 39.13(g)(8)(iii) (which contains the Commission's current Margin Adequacy Requirement). In considering the costs and benefits of the final rule against this baseline, the Commission considers the costs and benefits for both clearing FCMs and non-clearing FCMs – the two categories of market participants that will be directly affected by the final rule. To the extent that certain FCMs that are clearing members of DCOs have taken actions in reliance on CFTC Letter No. 19-17, the Commission recognizes the practical implications of those actions on the costs and benefits of the final rule.

a. Baseline with Respect to Clearing FCMs

Regulation § 39.13(g)(8)(iii) currently provides that DCOs shall establish a Margin Adequacy Requirement for their clearing FCMs with respect to the products that the DCOs clear. Thus, under the status quo baseline, clearing FCMs are, albeit indirectly (through the operation of DCO rules designed to implement regulation § 39.13(g)(8)(iii)), subject to the Margin Adequacy Requirement for futures and Cleared Swaps. They are not, however, subject to the Margin Adequacy Requirement for foreign futures that are

not cleared by a DCO.[363] Under the baseline – which does not include the effect of CFTC Letter No. 19-17 and its superseding letters – clearing FCMs are not permitted to engage in separate account treatment with respect to the Margin Adequacy Requirement.

b. Baseline with Respect to Non-Clearing FCMs

Immediately prior to the adoption of this final rule, Commission regulations did not, either directly or indirectly, impose a Margin Adequacy Requirement on non-clearing FCMs. Accordingly, non-clearing FCMs had no need to engage in separate account treatment with respect to such a requirement.

Additionally, immediately prior to the adoption of this final rule, the Commission's part 1 regulations did not contain any requirements specifically related to the separate treatment of accounts. As noted above, under the baseline, clearing FCMs are not permitted to engage in separate account treatment with respect to regulation § 39.13(g)(8)(iii)'s Margin Adequacy Requirement, and non-clearing FCMs previously had no need to engage in separate account treatment with respect to the Margin Adequacy Requirement of regulation § 39.13(g)(8)(iii) (because DCO rules addressing that regulation do not apply to non-clearing FCMs). Additionally, a non-clearing FCM was not permitted to treat the accounts of a single customer as accounts of separate entities for purposes of regulatory requirements imposed by the Commission (*e.g.*, capital requirements under regulation § 1.17).

B. Consideration of the Costs and Benefits of the Commission's Action

1. Benefits

a. Margin Adequacy Requirement (Regulation § 1.44(b))

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[363] While existing regulation § 39.13(g)(8)(iii) does not require DCOs to impose a Margin Adequacy Requirement on their clearing FCMs with respect to such FCMs' foreign futures (part 30) accounts, it may well be the case that such FCMs' existing systems and procedures already apply that requirement to those accounts, because it may be impracticable operationally to treat those accounts differently from futures and Cleared Swaps Accounts. If that assumption is correct, then the final part 1 Margin Adequacy Requirement is unlikely to impose significant costs on, or cause significant benefits with respect to, clearing FCMs.

As discussed above, the Commission is (a) promulgating new regulations in part 1 of its regulations designed to (1) further ensure that FCMs hold customer funds sufficient to cover the required initial margin for the customer's positions, and (2) permit FCMs to treat the separate accounts of a single customer as accounts of separate entities for purposes of such Margin Adequacy Requirement, subject to requirements designed to mitigate the risk that such separate account treatment could result in or worsen an undermargining scenario; and (b) adopting supporting amendments in parts 1, 22, 30, and 39 to facilitate the Margin Adequacy Requirement and requirements for separate account treatment, namely through changes to definitions, amendment of certain margin calculation requirements, application of certain risk management requirements to non-clearing FCMs engaged in separate account treatment, and amendment of regulation § 39.13(g)(8)(iii)'s Margin Adequacy Requirement to accommodate separate account treatment under the final rule.

Existing regulation § 39.13(g)(8)(iii) establishes a Margin Adequacy Requirement, designed to mitigate the risk that a clearing member fails to hold, from a customer, funds sufficient to cover the required initial margin for the customer's cleared positions, and thereby designed to avoid the risk that a clearing FCM will, whether deliberately or inadvertently, misuse customer funds by using one customer's funds to cover another customer's margin shortfall. DCO Core Principle D, which concerns DCO risk management, imposes a number of duties upon DCOs related to their ability to manage the risks associated with discharging their responsibilities as DCOs, such as measuring credit exposures, limiting exposures to potential default-related losses, setting margin requirements, and establishing risk management models and parameters.[364] Among other requirements, Core Principle D requires that the margin required from each member and participant of a DCO be sufficient to cover potential exposures in normal

[364] Section 5b(c)(2)(D) of the CEA, 7 U.S.C. 7a-1(c)(2)(D).

market conditions.[365] Regulation § 39.13 implements Core Principle D, including through regulation § 39.13(g)(8)(iii)'s restrictions on withdrawal of customer initial margin.

With respect to clearing FCMs, because regulation § 39.13(g)(8)(iii) already results in the application of a Margin Adequacy Requirement to clearing FCMs through DCO rules in the context of futures and Cleared Swaps, the benefits of a Margin Adequacy Requirement in part 1 that applies directly to FCMs will be more limited than the benefits with respect to non-clearing FCMs. However, the Commission believes that, to the extent there are failures in compliance with respect to margin adequacy, final regulation § 1.44(b) will provide an additional avenue (*i.e.*, through the Commission and an FCM's DSRO) for monitoring and enforcement of margin adequacy for clearing FCMs. Moreover, final regulation § 1.44(b) will expand the Margin Adequacy Requirement to apply to foreign futures transactions cleared through both clearing and non-clearing FCMs.[366]

With respect to non-clearing FCMs, the Margin Adequacy Requirement of final regulation § 1.44(b) will result in similar benefits to those currently experienced with respect to clearing FCMs under regulation § 39.13(g)(8)(iii). Regulation § 39.13(g)(8)(iii) provides that DCOs shall require clearing FCMs to ensure that their customers do not withdraw funds from their accounts unless sufficient funds remain to meet customer initial margin requirements with respect to all products and swap portfolios held in the customers' accounts and cleared by the DCO. This requirement is designed to prevent the undermargining of customer accounts, and thus mitigate the risk

[365] Section 5b(c)(2)(D)(iv) of the CEA, 7 U.S.C. 7a-1(c)(2)(D)(iv).
[366] To the extent that FCMs already follow the Margin Adequacy Requirement for foreign futures, *e.g.*, for reasons of operational convenience (for example, if a clearing FCM applies the Margin Adequacy Requirement to its customer risk management for futures and Cleared Swaps, it may be easier to also apply it in the context of customer risk management for foreign futures than to have two different approaches) or as a matter of prudent risk management, the related costs and benefits would be reduced.

of a clearing member default and the consequences that could accrue to the broader financial system.

Section 4d(a)(2) of the CEA and regulation § 1.20(a) require an FCM to separately account for and segregate all money, securities, and property which it has received to margin, guarantee, or secure the trades or contracts of its commodity customers, and section 4d(a)(2) of the CEA and regulation § 1.22(a) prohibit an FCM from using the money, securities, or property of one customer to margin or settle the trades or contracts of another customer.[367]

The Commission believes that regulation § 1.44(b), which will apply a Margin Adequacy Requirement directly to FCMs, both clearing and non-clearing, would further achieve the benefits of serving to protect customer funds, and mitigating systemic risk that could arise from misuse of customer funds, by applying the undermargining avoidance requirements of regulation § 39.13(g)(8)(iii) directly to all FCMs. As noted above, this Margin Adequacy Requirement does not currently apply to non-clearing FCMs. The Commission further believes that the application of such a Margin Adequacy Requirement to all FCMs (and to all three types of customer transactions, including (additionally) foreign futures transactions), through more broadly preventing undermargining situations, is reasonably necessary to effectuate CEA sections 4d and 4(b)(2) and to accomplish the purposes of the CEA (from section 3(b)) of "avoidance of systemic risk" and "protecting all market participants from … misuses of customer assets."

b. Requirements for Separate Account Treatment (Regulation § 1.44(c)-(h) and Supporting Amendments to Regulations §§ 1.3, 1.17, 1.20, 1.32, 1.58, 1.73, 22.2, 30.2, 30.7, and 39.13(g)(8))

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[367] 7 U.S.C. 6d(a)(2); 17 CFR 1.20(a); 17 CFR 1.22(a).

As discussed in section I.B above, there are a number of commercial reasons why an FCM or customer may wish to treat the separate accounts of a single customer as accounts of separate entities. Combination of all accounts of the same customer within the same regulatory account classification for purposes of margining and determining funds available for disbursement may make it challenging for certain customers and their asset managers to achieve certain commercial purposes.[368] For example, where a customer has apportioned assets among multiple asset managers, neither the customer nor their asset managers may be able to obtain certainty that the individual portion of funds allocated to one asset manager will not be affected by the activities of other asset managers.

Where FCMs are able to treat the separate accounts of a single customer as accounts of separate entities for purposes of the Margin Adequacy Requirement, customers benefit from being better able to leverage the skills and expertise of asset managers and realize the benefits of a balance of investment strategies in order to meet specific commercial goals. Moreover, as discussed further below, clearing FCMs and customers of clearing FCMs already relying on the no-action position would also obtain the benefit of continuing to leverage existing systems and procedures to provide for separate account treatment.

The Commission believes that, where such separate account treatment is offered, it should be subject to safeguards that mitigate the risk that it will result in the undermargining of customer accounts. By applying regulatory safeguards designed to preserve the goals of the Margin Adequacy Requirement during such treatment, the final rule would achieve the benefit of permitting separate account treatment in a manner that would not contravene the customer funds protection and risk mitigation purposes of the CEA and Commission regulations.

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[368] *See* First FIA Letter.

The Commission also believes that several years of successful separate account activity based on the no-action conditions of CFTC Letter No. 19-17 and its superseding letters by DCOs, clearing FCMs, and customers demonstrate that separate account treatment can be successfully applied, subject to certain safeguards.

As discussed above, sections 4d(a)(2) of the CEA and regulations §§ 1.20(a) and 1.22(a) require an FCM to account separately for and segregate futures customer funds and prohibit FCMs from using one customer's funds to cover another customer's margin shortfall[369] – requirements which serve to further the CEA's purposes (as set forth in section 3(b)) of protecting customer funds and avoiding systemic risk.

Part 1 of the Commission's regulations contain the principal regulations applicable to the operation of FCMs that support the above-described statutory purposes and requirements. Such regulations include requirements related to financial and other reporting, risk management, treatment of customer funds, and recordkeeping, among others. As noted above, the Commission believes that a Margin Adequacy Requirement, directly applied to all FCMs and combined with separate account treatment, can further effectuate CEA section 4d(a)(2)'s customer fund protection and risk avoidance requirements[370] while offering commercial utility for a variety of market participants. However, prior to the adoption of this final rule, part 1 did not contain any regulations imposing such a Margin Adequacy Requirement, or governing the manner in which separate account treatment may be conducted.

The final rule is designed to achieve the benefit of bridging this gap by

(i) inserting a Margin Adequacy Requirement (regulation § 1.44(b)) into part 1 to ensure further that an FCM (whether a clearing or non-clearing FCM) does not permit margin

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[369] *See also* the analogous requirements in CEA §§ 4d(f)(2) and 4(b), and regulations §§ 22.2 and 30.7 (for, respectively, Cleared Swaps and foreign futures).
[370] And, similarly, those of CEA section 4d(f)(2) and 4(b).

withdrawals that would create or exacerbate an undermargining situation,

(ii) allowing FCMs to treat the separate accounts of a single customer as accounts of separate entities for purposes of the Margin Adequacy Requirement, with the benefits discussed above (regulation § 1.44(c)),

(iii) establishing the manner in which FCMs may elect to engage in separate account treatment for a particular customer, with the benefit of identifying both for the FCM and its supervisory authorities (the Commission and SROs) whether it is engaging in separate account treatment, and, if so, for which customers, with the benefit of facilitating effective regulatory/self-regulatory supervision (regulation § 1.44(d)),

(iv) setting forth financial and operational conditions for customers and FCMs that would identify risk management issues that are sufficiently significant to disqualify a particular separate account customer from receiving (or an FCM with respect to all of its separate account customers from making) disbursements on a separate account basis (regulation § 1.44(e)),

(v) requiring that separate accounts be on a one business day margin call, while setting forth limited circumstances in which failure to actually receive margin on a same-day basis may be excused, with the benefit of limiting the extent of potential undermargining, (regulation § 1.44(f)), and

(vi) establishing requirements designed to ensure that separate account treatment is carried out in a consistent and documented manner, and carrying that treatment through to related FCM capital, customer funds protection, and risk management requirements in part 1 (regulation § 1.44(g)-(h)), with the benefit of further ensuring that the risk management objectives of the Margin Adequacy Requirement continue to be met during separate account treatment.

The revisions to regulations §§ 1.3, 1.17, 1.20, 1.32, 1.58, 1.73, 22.2, 30.2, 30.7, and 39.13(g)(8)(i) are designed to define terms used in regulation § 1.44 and facilitate implementation of provisions in regulation § 1.44 that would affect compliance with financial requirements for FCMs, collection of margin, and FCM risk management. Additionally, a revision to regulation § 39.13(g)(8)(iii) is intended to make clear that regulation § 39.13(g)(8)(iii)'s Margin Adequacy Requirement, applicable directly to DCOs and indirectly to clearing FCMs, and similar in substance to the Margin Adequacy Requirement of regulation § 1.44(b), does not require DCOs to preclude separate account treatment carried out subject to regulation § 1.44.

The Commission believes that final regulation § 1.44(c)-(h), and the final supporting amendments to regulations §§ 1.3, 1.17, 1.20, 1.32, 1.58, 1.73, 22.2, 30.2, 30.7, and 39.13 would benefit both clearing FCMs and non-clearing FCMs, in addition to customers and other market participants, by providing a comprehensive framework that affirms the availability of separate account treatment, and sets forth the manner in which such treatment can be carried out consistent with the customer fund protection and risk avoidance objectives of regulation § 39.13(g)(8)(iii) (as applied via DCO rules, with

respect to clearing FCMs) and regulation § 1.44(b)'s Margin Adequacy Requirement (with respect to both clearing FCMs and non-clearing FCMs).

The Commission additionally notes that the allowance of, and requirements for separate account treatment in final regulation § 1.44(c)-(h) are substantially similar to the conditions to the staff no-action position in CFTC Letter No. 19-17. A number of clearing FCMs have adopted some practices based on this no-action position provided by Commission staff. As such, to the extent that some clearing FCMs have relied on the no-action position, the actual costs and benefits of the rule amendments as realized in the market may not be as significant as a comparison of the rule to the regulatory baseline would suggest.[371]

Moreover, if the Commission were to allow the no-action position in CFTC Letter No. 19-17 to expire, and did not adopt the proposed regulation, then clearing FCMs that already engage in separate account treatment consistent with the terms of CFTC Letter No. 19-17 would be required to reverse those changes. This could entail significant expenditures of funds and resources in order to rework systems, procedures, and customer documentation for such FCMs.[372] Hence, actual benefits to the regulation may accrue from the ability of many FCMs to avoid these costs.

In connection with its discussion of the benefits of the proposed requirements for separate account treatment, the Commission asked as Question 9 what evidence can be provided that customers have been able to achieve better performance by virtue of

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[371] For those clearing FCMs that currently choose not to engage in separate account treatment, and therefore, do not adhere to CFTC Letter No. 19-17, but choose to do so following the adoption of this final rule, the Commission submits that there will be significant costs; similar to those faced by non-clearing FCMs. This is discussed further below in the costs section.

[372] *See* Second FIA Letter. For instance, FIA noted that clearing FCMs would again be required to review and amend customer agreements, noting that negotiations to amend such agreements would likely prove "extremely difficult" as "advisers would seek to assure that their ability to manage their clients' assets entrusted to them would not be adversely affected by the actions (or inactions) of another adviser." FIA letter dated May 11, 2022 to Robert Wasserman (Third FIA Letter). FIA further noted that "an adviser may be less likely to use exchange-traded derivatives to hedge its customers' cash market positions if the adviser could not have confidence that it would be able to withdraw its customers' excess margin as necessary to meet its obligations in other markets." *Id.*

allowing separate account treatment; and whether there is evidence of under margining due to separate account treatment since CFTC Letter No. 19-17 was issued. Additionally, as Question 10, the Commission asked whether there is evidence of regulatory arbitrage between clearing FCMs and non-clearing FCMs on the grounds that the latter are not currently subject to the Margin Adequacy Requirement. No commenter responded to these questions.

2. Costs

The final rule (i) amends part 1 of the Commission regulations to add a new requirement (regulation § 1.44(b)) for FCMs to hold customer funds sufficient to cover the required initial margin for the customer's positions (the Margin Adequacy Requirement); (ii) amends part 1 to, in the same new section (regulation § 1.44(c)-(h)), permit FCMs, subject to certain requirements and for purposes of the Margin Adequacy Requirement, treat the accounts of a single customer as accounts of separate entities; and (iii) amends existing regulations in parts 1 and 39 to facilitate implementation of the new regulation. The Commission herein discusses the costs related to each such set of amendments with respect to clearing and non-clearing FCMs. There are currently approximately 60 registered FCMs, and of these, the Commission estimates that approximately 40 are clearing FCMs and approximately 20 are non-clearing FCMs.[373] While the final rule would require all FCMs to comply with the Margin Adequacy Requirement, it would not require FCMs to engage in separate account treatment, and the Commission does not expect that all FCMs will engage in separate account treatment. Accordingly, as noted in connection with the Commission's discussion below related to the PRA, the Commission estimates that 30 FCMs will choose to apply separate account treatment.

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[373] CFTC, Financial Data for FCMs, Aug. 31, 2024, available at *https://www.cftc.gov/MarketReports/financialfcmdata/index.htm*.

a. Margin Adequacy Requirement (Regulation § 1.44(b))

The Margin Adequacy Requirement of regulation § 1.44(b) requires FCMs to hold customer funds sufficient to cover the required initial margin for customer positions. With respect to clearing FCMs, the Commission estimates that the cost of compliance would be *de minimis*. As discussed above, existing regulation § 39.13(g)(8)(iii) provides that a DCO 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 DCO. Thus, regulation § 39.13(g)(8)(iii) applies a requirement that is substantively identical to the Margin Adequacy Requirement of regulation § 1.44(b) indirectly to clearing FCMs, through the rules of their DCOs. Because clearing FCMs are already functionally subject to the Margin Adequacy Requirements of regulation § 1.44(b) as a result of regulation § 39.13(g)(8)(iii), the Commission does not expect any significant additional cost of compliance for clearing FCMs.

Prior to this final rule, non-clearing FCMs were not subject to a Margin Adequacy Requirement promulgated by the Commission, and the Commission expects that the costs for a non-clearing FCM to comply could be significant. The Commission expects that compliance with the Margin Adequacy Requirement for a non-clearing FCM may entail many of the same types of costs noted below in connection with compliance with separate account treatment requirements. Such costs could include personnel, operational, and other costs related to updating internal policies and procedures, updating or renegotiating customer documentation, and implementing or configuring internal systems to identify and prevent margin withdrawals that would be inconsistent with the Margin Adequacy Requirement. The Commission expects that the compliance costs for

non-clearing FCMs could vary significantly depending on factors such as the FCM's size, customer base, and existing compliance infrastructure and resources. The extent to which non-clearing FCMs need to develop new tools, policies, and procedures may however be reduced, to the extent that such FCMs already voluntarily take steps to avoid distributing funds back to their customers in a manner that would create or exacerbate an undermargined condition for a customer, as a means of managing risks to the FCM.

Moreover, while promoting margin adequacy is a policy goal of many of the regulations promulgated under the CEA, there are potential costs to individual investors of the Margin Adequacy Requirement. In general, tightening the rules concerning margins can reduce the return to investors, and some effects of this type could result from requiring margin adequacy at non-clearing FCMs.

b. Requirements for Separate Account Treatment (Regulation § 1.44(c)-(h) and Supporting Amendments to Regulations §§ 1.3, 1.17, 1.20, 1.32, 1.58, 1.73, 22.2, 30.2, 30.7, and 39.13(g)(8))

In addition to the Margin Adequacy Requirement of regulation § 1.44(b), the Commission is also adopting in regulation § 1.44(c)-(h) rules to allow FCMs to elect to apply separate account treatment for purposes of the Margin Adequacy Requirement, and requirements for the application of such treatment. The regulation would not require FCMs to apply separate account treatment, and FCMs that do not presently apply separate account treatment, and do not desire to do so in the future, would generally not incur any costs related to the application of such treatment. Furthermore, the Commission believes that an FCM electing separate account treatment will do so because such FCM believes the benefits of doing so will exceed the costs of doing so.

With respect to FCMs that choose to engage in separate account treatment under the final rule, the Commission expects that clearing FCMs and non-clearing FCMs will generally incur the same types of compliance costs, as there are no applicable

requirements for separate account treatment under the baseline with respect to either clearing FCMs or non-clearing FCMs, and the requirements of the final rule generally do not distinguish between clearing FCMs and non-clearing FCMs.[374]

The costs of the final rule related to application of separate account treatment will likely vary across FCMs depending on the nature of their existing rule and compliance infrastructures, and as such would be difficult to quantify with precision. However, for those FCMs that choose to engage in separate account treatment in a manner consistent with the final rule, the costs of compliance could be significant, and may vary based on factors such as the size and existing compliance resources of a particular FCM, as well as the extent to which the FCM's existing risk management policies and procedures already incorporate risk management measures that overlap with those required under the final rule. FCMs that wish to allow for separate account treatment would likely incur costs in connection with updating their policies and procedures, internal systems, customer documentation and (re-)negotiation of customer agreements to allow for separate account treatment under the conditions codified in the final rule.

In a letter to the Commission staff dated April 1, 2022, FIA noted that, "For many [clearing] FCMs and their customers, the terms and conditions of the no-action position . . . presented significant operational and systems challenges," as clearing FCMs were required to "(i) adopt new practices for stress testing accounts; (ii) review and possibly change margin-timing expectations for non-US accounts; (iii) undertake legal analysis to

[374] There are two distinctions between clearing and non-clearing FCMs relevant to separate account compliance costs.
The first would not create a difference in costs: Gross collection of margin without netting between separate accounts is required by regulation § 1.44(g)(2) and existing regulation § 39.13(g)(8)(i), as clarified by regulation § 39.13(g)(8)(i)(E) for clearing FCMs, and regulation § 1.58(c) creates this requirement for non-clearing FCMs.
The second would create some difference in additional costs: Under current regulation § 1.73, clearing FCMs are required to establish risk-based credit limits, screen orders for compliance with those limits, and monitor adherence to those limits, as well as conduct stress testing of positions that could pose material risk. Non-clearing FCMs are not currently required to do these things. Under regulations §§ 1.44(g)(1) and 1.73(c), they would be required to do so for separate account customers and separate accounts, both on an individual separate account and aggregate basis. As such, there are additional incremental costs faced by non-clearing FCMs that choose separate account treatment.

clarify interpretive questions; and (iv) revise their segregation calculation and recordkeeping practices," as well as engage in "time-consuming documentation changes and customer outreach."[375]

FIA further described these challenges in a letter to the Commission staff dated May 11, 2022, noting that in order to meet the conditions of the no-action position, clearing FCMs were required to review and in some cases amend customer agreements, and identify and implement information technology systems changes.[376] FIA also asserted that clearing FCMs were likely required to revise internal controls and procedures.[377] FIA stated that while the costs incurred by each clearing FCM varied depending on its customer base, among larger clearing FCMs with a significant institutional customer base, personnel costs would have included identifying and reviewing up to 3,000 customer agreements to determine which agreements required modification, and then negotiating amendments with customers or their advisers.[378] FIA further stated that because the relevant provisions of these agreements were not uniform, they generally required individual attention.[379]

The Commission anticipates that similar costs would arise for FCMs attempting to meet the requirements of the final rule.

Of the costs that FCMs would likely incur related to application of separate account treatment, some costs would be incurred on a one-time basis (*e.g.*, updates to systems, procedures, disclosure documents, and recordkeeping practices, and renegotiation of customer agreements with separate account customers), and some would be recurring (*e.g.*, monitoring compliance with the one-day margin call requirement and

[375] FIA letter dated Apr. 1, 2022 to Clark Hutchison and Amanda Olear (Second FIA Letter).
[376] Third FIA Letter. FIA noted that these changes were particularly challenging for FCMs that are part of a bank holding company structure, as "[m]odifying integrated technology information systems across a bank holding company structure is complicated, expensive and time-consuming." *Id.*
[377] *Id.*
[378] *Id.*
[379] *Id.*

the other conditions for ordinary course of business). However, those costs could vary widely on an FCM-by-FCM basis, depending on factors such as the number of customers at a particular FCM who wish to have separate treatment applied to their accounts; thus, for some FCMs, ongoing costs of maintaining compliance may be less significant.

While the Commission, in connection with its Paperwork Reduction Act assessment below,[380] estimates that certain reporting, disclosure, and recordkeeping costs would not be significant on an entity level, as FIA noted, taken as a whole, compliance with the conditions that the regulation codifies could result in significant operational and systems costs. In other words, the Commission anticipates that FCMs may incur significant costs related to designing and implementing new systems, or enhancing existing systems, to comply with the final rule, as well as negotiation costs, even where direct recordkeeping costs may not be significant on an entity-by-entity basis.[381]

In terms of implementation costs relative to the baseline (that does not consider the effects of NAL 19-17), the Commission believes clearing FCMs and non-clearing FCMs will be subject to the same types of costs related to application of separate account treatment.

As discussed above, a number of clearing FCMs have adopted some current practices based not only upon regulation § 39.13(g)(8)(iii)'s existing Margin Adequacy Requirement applicable to clearing FCMs through the rules of such clearing FCMs' DCOs, but also on the no-action position provided by Commission staff in CFTC Letter No. 19-17, and decisions by DCOs to provide relief from their rules adopting a Margin Adequacy Requirement in line with (and subject to the conditions specified in) that staff

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[380] As discussed below, the Commission staff estimates total annual costs of $10,292,580 across 7,530 respondents with respect to reporting, disclosure, and recordkeeping requirements; however, as certain such costs are one-time costs, the Commission staff expects such figure would be reduced after the first year of application of separate account treatment.

[381] This may be true to a somewhat lesser extent with respect to new entrants to the FCM business, in that those FCMs would incur the cost of implementing policies, procedures, and systems that comply with the requirements of the final rule, but would not need to retrofit existing policies, procedures, and systems.

no-action position. As such, to the extent that clearing FCMs have relied on the no-action position, the actual costs and benefits of the final rule amendments as realized in the market may not be as significant as a comparison of the rule to the regulatory baseline would suggest.[382] Specifically, to the extent clearing FCMs already rely on the effects of the no-action position, the tools (*e.g.*, software) and policies and procedures necessary to comply with the final rule on an ongoing basis will largely have already been built, and the costs associated with compliance will largely have already been incurred.[383] (This would not apply to non-clearing FCMs, who have had no need to rely on the effects of the no-action position.) However, the Commission notes that because the provisions of the final rule vary in some respects from the terms of the no-action position, at least some additional costs are likely to be incurred by clearing FCMs that already rely on the no-action position.

In addition to compliance costs, one other type of costs should be noted: The Commission is of the view that the risk mitigants in final regulation § 1.44(c)-(h) would achieve the benefits of the Margin Adequacy Requirement while permitting separate account treatment. However, there does exist a possibility that, despite these risk mitigants, an undermargin condition could exist, followed by a default by the customer to the FCM, and a consequent default by the FCM upstream (either to a DCO or to a clearing FCM), where the losses due to that default would be greater than they would have been absent separate account treatment.

As Question 11, the Commission asked whether the descriptions of the types of costs that would be incurred by FCMs to implement each of the Margin Adequacy Requirement and Separate Account Treatment under the proposed rules were

[382] For those clearing FCMs that currently choose not to engage in separate account treatment, and therefore, do not adhere to CFTC Letter No. 19-17, but choose to do so following the adoption of the final rule, the Commission submits that there will be significant costs similar to non-clearing FCMs.

[383] Communications from FIA indicate that significant resources have, in fact, been expended to meet the conditions of the no-action position of CFTC Letter No. 19-17. *See* Second FIA Letter.

appropriately comprehensive, and what data can be provided about the magnitude of such costs, either by type or in the aggregate. As Question 12, the Commission requested comment on the extent to which FCMs that are not presently clearing members that rely on the no-action position in CFTC Letter No. 19-17 would, following implementation of the proposed regulation, seek to engage in separate account treatment (requesting that commenters provide data where available). As Question 13, the Commission requested comment regarding whether there are FCMs that chose not to rely on the no-action position in CFTC Letter No. 19-17 due to the conditions required to rely on that position. The Commission further requested comment on how the implementation of those conditions in the Second Proposal could be modified to mitigate the burden of compliance while achieving the goals of mitigating systemic risk and protecting customer funds.

No commenters responded to these questions; however, several commenters submitted comments that dealt with potential costs, generally qualitatively. For example, in commenting on the Commission's definition of "undermargined amount" in proposed regulation § 1.44(a), the JAC asserted that the proposed rule appeared to require FCMs to perform margin calculations differently for compliance with different regulatory reporting requirements (including, potentially, bifurcated treatment for non-separate account customers and separate account customers), which the JAC contended may prove burdensome for FCMs that permit separate account treatment (*e.g.*, such FCMs may be required to update their regulatory reporting records).[384] As discussed above, the Commission has modified the final definition of "undermargined amount" to address the JAC's comment and make clear that the final rule is not intended to alter the manner in which FCMs determine the undermargined amount for a separate account or non-separate account customer.

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[384] JAC Comment Letter.

In discussing the permissibility under the proposed regulation of certain multi-settlement margining processes, the JAC also noted FCMs may be required to undertake significant work to update their regulatory records, risk programs, margin calculations, and reports for separate account customers and non-separate account customers.[385] While the Commission confirms above that the final rule is not intended to preclude FCMs and their customers from, *e.g.*, settling margin in multiple currencies, and does not require the disbursement or settlement of a single amount, the Commission nonetheless expects that, as a general matter, some FCMs will be required to undertake significant work to implement requirements for separate account treatment (in particular, FCMs that have not provided such treatment for customers previously but opt to do so following the adoption of this final rule).

The JAC discussed in its comment letter that FCMs could be subject to significant capital charges for separate accounts in light of the requirement in proposed regulation § 1.17(c)(5)(viii)(B) to require the calculation of current calls used in computing a separate account's undermargined capital charge based on the age of all margin calls in all separate accounts of the separate account customer.[386] With respect to the requirement in proposed regulation § 1.17(c)(2)(i), which would have required FCMs to look across all separate accounts of a separate account customer in determining one-day debits or deficits for purposes of ascertaining current assets, the JAC noted that FCMs permitting separate account treatment may need to consider additional capital needs, particularly in the event that margin calls met in non-USD currencies would be considered satisfied only when receipts are settled.[387] FIA similarly argued that the proposed revisions to regulation § 1.17 would likely be costly to FCMs because they would require FCMs to rebuild operational and reporting systems to perform the required look-across of separate

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[385] *Id.*
[386] *Id.*
[387] *Id.*

accounts.[388] Using a quantitative example and information ascertained from a survey of FIA members, FIA also argued that the proposed look-across could result in capital treatment that, in FIA's view, would be punitive and without regard to related financial or operational risk.[389]

As discussed above, in this final rule, the Commission has eliminated the requirement to look across separate accounts for purposes of regulation § 1.17(c)(2)(i) and regulation § 1.17(c)(5)(viii)(B), and further confirms that the final rule is not intended to preclude treatment of pending non-USD transfers as received (subject to conditions identical to those set forth in JAC guidance) for purposes of regulation § 1.17(c)(5)(viii), among others.

Additionally, FIA asserted that the standard for determining the occurrence of an unusual administrative error or operational constraint that would excuse a margin fail under the one business day margin call standard of regulation § 1.44, set forth in proposed regulation § 1.44(f)(5), introduces subjectivity and complexity into routine determinations that will require material levels of new investment in compliance, risk management, and operations time and resources, for no discernible risk management benefit.[390] SIFMA-AMG opined that the proposed regulation § 1.44(f)(5) did not appropriately balance practicability and burden with risk management,[391] and MFA contended that the proposed requirement would result in additional administrative burdens on an FCM.[392] FIA also contended that proposed regulation § 1.44(f)(4), which in part permits a separate account customer or investment manager to designate the holiday schedule of a Eurozone country to follow for purposes of regulation § 1.44's one business day margin call standard where margin is to be paid in EUR, will require FCMs

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[388] FIA Comment Letter.
[389] *Id.*
[390] *Id.*
[391] SIFMA-AMG Comment Letter.
[392] MFA Comment Letter.

to deploy new margin day counting systems and protocols.[393] SIFMA-AMG argued that proposed regulation § 1.44(f)(4) would be unmanageable and unsustainable, would impose a regulatory burden without a corresponding public policy benefit, and could require the overhaul of customer agreements and burden FCMs with additional monitoring responsibilities.[394] The Commission is adopting regulation § 1.44(f)(4) and 1.44(f)(5) with modifications in light of comments received, and responds to FIA's and SIFMA-AMG's comments above.

FIA also asserted that proposed regulation § 1.44(h)(4)(i)'s 30-day stay on reinstating disbursements on a separate account basis could have certain negative unintended consequences for customers and market liquidity, if, due to an event outside the ordinary course of business, an FCM were forced to suspend disbursements to customers on a separate account basis (even after the underlying event was resolved).[395] SIFMA-AMG voiced similar concerns.[396] Here, and above, the Commission notes that the 30-day stay on reinstating disbursements on a separate account basis is intended to apply only in instances in which the election for separate account treatment for a separate account customer pursuant to regulation § 1.44(d) is revoked. It will not apply where an event outside the ordinary course of business has required cessation of disbursements on a separate account basis, and that circumstance subsequently has been cured, consistent with regulation § 1.44(e)(4).

C. Costs and Benefits of the Commission's Action as Compared to Alternatives

The Commission considered as an alternative to this final rule codifying the no-action position absent the conditions. This alternative would preserve the benefits of

[393] FIA Comment Letter.
[394] SIFMA-AMG Comment Letter.
[395] FIA Comment Letter.
[396] SIFMA-AMG Comment Letter.

separate account treatment for FCMs and customers. However, as discussed further below, the conditions of the no-action position – codified herein on an FCM-wide basis – are designed to permit separate account treatment only to the extent that such treatment would not contravene the risk mitigation goals of regulation § 39.13 (and the Margin Adequacy Requirement of regulation § 1.44(b)). The Commission believes that codifying the staff no-action position without the conditions would intensify risks for DCOs, FCMs, and customers. For instance, without a requirement to cease disbursements on a separate account basis in cases in which a customer is in financial distress, it is more likely that an undermargining scenario would be exacerbated, and a customer default to the clearing FCM – and potentially a default of the clearing FCM to the DCO – would be more likely. It would also forego applying the benefits of the Margin Adequacy Requirement and specific risk-mitigating requirements for separate account treatment to all FCMs.

D. Section 15(a) Factors

Section 15(a) of the CEA requires the Commission to consider the effects of its actions in light of the following five factors:

1. Protection of Market Participants and the Public

Section 15(a)(2)(A) of the CEA requires the Commission, before promulgating a regulation or issuing an order, to consider the costs and benefits of the action in light of considerations of protection of market participants and the public. The Commission believes that the amendments adopted herein would strengthen the customer protection and risk mitigation provisions of part 1 applicable to FCMs generally, and, with respect to clearing FCMs, maintain the efficacy of protections for customers and the broader financial system contained in Core Principle D and regulation § 39.13.

The Commission believes that the final rule's Margin Adequacy Requirement will have a salutary effect on the protection of market participants and the public. Section

4d(a)(2) of the CEA and the Commission's implementing regulations under part 1 require FCMs to segregate customer funds to margin trades and prohibit FCMs from using one customer's funds to margin another customer's trades. The final rule is designed to effectuate and support these requirements by implementing requirements for FCMs to limit the potential for losses from defaults and maintain margin sufficient to cover potential exposures in normal market conditions[397] by requiring FCMs to ensure that their customers do not withdraw funds from their accounts if such withdrawal would create or exacerbate an initial margin shortfall, and to do so in a manner consistent with the Margin Adequacy Requirement in regulation § 39.13(g)(8)(iii) already applicable through DCO rules to clearing FCMs. This requirement protects not only market participants by requiring FCMs to ensure that adequate margin exists to cover customer positions; it also protects the public from disruption to the wider financial system by mitigating the risk that an FCM will default due to customer nonpayment of variation margin obligations combined with insufficient initial margin.

The Commission also believes the requirements in the final rule for carrying out separate account treatment will provide for separate account treatment in a manner that protects market participants and the public. While, with respect to clearing FCMs subject to the indirect effects of current § 39.13(g)(8)(iii), permitting separate account treatment unavoidably creates some additional risk of a margin deficiency, the conditions of the no-action position outlined in CFTC Letter No. 19-17, and codified herein, as modified and applicable on an FCM-wide basis, are designed to effectuate these customer protection and risk mitigation goals notwithstanding an FCM's application of separate account treatment (and the consequent additional risk). For example, disbursements on a separate account basis are not permitted in certain circumstances outside the ordinary course of business (*e.g.*, where an FCM learns a customer is in financial distress, and thus may be

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[397] 7 U.S.C. 7a-1(c)(2)(D)(iii)-(iv).

unable promptly to meet initial margin requirements, whether in one or more separate accounts or on a combined account basis). The final rule also puts in place requirements for FCMs designed to ensure that they collect information sufficient to understand the value of assets dedicated to a separate account, apply separate account treatment consistently, and maintain reliable lines of contact for the ultimate customer of the account. Clearing FCMs have, for over five years, successfully relied on a no-action letter, as applied through their DCOs, establishing conditions substantially similar to the requirements for separate account treatment set forth in this final rule, and the Commission believes that the codification of these conditions, as set forth herein, supports protection of market participants and the public.

2. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of its action in light of efficiency, competitiveness, and financial integrity of futures markets. The Commission believes that the final rule may carry potential implications for the financial integrity of markets, but not for the efficiency or competitiveness of markets, which the Commission believes remain unchanged.

As stated above, the purposes of the Commission's customer funds protection and risk management regulations include not just protection of customer assets, but also mitigation of systemic risk: a customer in default to an FCM may in turn trigger the FCM to default, either to the DCO (if it is a clearing member) or to another FCM that is itself a clearing member, with potentially cascading consequences for the clearing FCM (if applicable) or the DCO and the wider financial system. The Margin Adequacy Requirement of regulation § 1.44(b) advances those purposes directly. The final amendments permitting separate account treatment reflect the Commission's conclusion that the conditions of CFTC Letter No. 19-17, as codified herein, are sufficient and

appropriate to guard against such risks for purposes of the Margin Adequacy Requirement.

In CFTC Letter No. 19-17, the Commission staff highlighted market participants' concerns that the Commission should recognize "diverse practices among FCMs and their customers with respect to the handling of separate accounts of the same beneficial owner" as consistent with regulation § 39.13(g)(8)(iii). FIA, in particular, outlined several business cases in which a customer may want to apply separate account treatment, and each of SIFMA-AMG, FIA, and CME outlined controls that clearing FCMs could apply to ensure that, in instances in which separate account treatment is desired, such treatment can be applied in a manner that effectively prevents systemic risk.[398] By codifying in part 1 a Margin Adequacy Requirement directly applicable to FCMs similar to the Margin Adequacy Requirement of regulation § 39.13(g)(8)(iii), and a modified version of the no-action position provided for by CFTC Letter No. 19-17 and its superseding letters, applicable to all FCMs, the Commission is promulgating a framework for FCMs, whether clearing or non-clearing, to provide separate account treatment for customers subject to enhanced customer fund and risk mitigation protections, thereby ensuring FCMs can compete on services offered to customers to address their financial needs, in a manner consistent with the customer protection and risk mitigation goals of the CEA.

3. Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of its action in light of price discovery considerations. The Commission believes that the final amendments will not have a significant impact on price discovery.

4. Sound Risk Management Practices

[398] *See* First FIA Letter; SIFMA-AMG Letter; CME Letter.

Section 15(a)(2)(D) of the CEA requires the Commission to evaluate the costs and benefits of its action in light of sound risk management practices. As discussed above, the CEA sets forth requirements providing that an FCM may not use one customer's funds to cover another customer's margin shortfall. The Margin Adequacy Requirement of regulation § 1.44(b) serves these purposes by further ensuring that FCMs do not allow customers to create or increase undermargining in their accounts through withdrawals of funds. While, as discussed above, clearing FCMs are already subject to this requirement as a result of DCO rules adopted under regulation § 39.13(g)(8)(iii), the final rule also applies this requirement to non-clearing FCMs, and creates another avenue to monitoring and enforcement of this requirement for clearing FCMs.

Additionally, the Commission believes that the final rule will ensure that application of the requirements for separate account treatment occurs in a manner that continues to be consistent with the CEA's customer fund protection and risk mitigation objectives. As discussed above, the no-action position has been successfully used to allow clearing FCMs to engage in separate account treatment in a manner that is consistent with the protection of customer funds and the mitigation of systemic risk, including by requiring the application of separate account treatment in a consistent manner, and requiring regulatory notifications and the cessation of disbursements on a separate account basis in certain instances of operational or financial distress. The Commission believes codification of the no-action conditions, and the Margin Adequacy Requirement they address, applied directly to all FCMs, promotes sound FCM risk management practices.[399]

5. Other Public Interest Considerations

Section 15(a)(2)(e) of the CEA requires the Commission to evaluate the costs and benefits of its action in light of other public interest considerations. The Commission is

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[399] *See, e.g.*, First FIA Letter (describing use of separate account treatment for hedging purposes).

identifying a public interest benefit in codifying the Divisions' no-action position, where the efficacy of that position has been demonstrated. In such a situation, the Commission believes it serves the public interest and, in particular, the interests of market participants, to engage in notice-and-comment rulemaking, where it seeks and considers the views of the public in amending its regulations, rather than for market participants to continue to rely on a time-limited no-action position that can be easily withdrawn, provides less long-term certainty for market participants, and offers a more limited opportunity for public input. In promulgating this final rule, the Commission sought and considered public comment both as to the proposed regulation generally and as to specific aspects of the proposal (including costs and benefits).

As Question 14, the Commission requested comment, including any available quantifiable data and analysis, concerning its analysis of the section 15(a) factors. No commenters responded to this question.

IV. RELATED MATTERS

A. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA in issuing any order or adopting any Commission rule or regulation.[400]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission did not identify any anti-competitive effects in the NPRM. The Commission requested comment on whether the proposed regulation implicates any other specific public interest to be protected by the antitrust laws, as well as on whether the proposed regulation is anticompetitive and, if it

[400] 7 U.S.C. 19(b).

is, what the anticompetitive effects are. The Commission did not receive any comments in response to these requests.

The Commission confirms its determination that this final rule is not anti-competitive and has no anti-competitive effects. Given this determination, the Commission has not identified any less anti-competitive means of achieving the purposes of the CEA.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies to consider whether their rules have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis with respect to such impact.[401] The rules adopted herein would require all FCMs to ensure that they do not permit their customers to withdraw funds from their accounts unless the net liquidating value plus the margin deposits remaining in the account are sufficient to meet the customer initial margin requirements for such accounts, but would also establish requirements under which FCMs could engage in separate account treatment. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[402] The Commission has previously determined that FCMs are not small entities for the purpose of the RFA.[403] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these final rules will not have a significant economic impact on a substantial number of small entities.

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[401] 5 U.S.C. 601 *et seq*.

[402] Bankruptcy Regulations, 86 FR 19324, 19416 (Apr. 13, 2021) (citing Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982)).

[403] *See id.* (citing New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609 (Aug. 29, 2001); Customer Margin Rules Relating to Security Futures, 67 FR 53146, 53171 (Aug. 14, 2002)).

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[404] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any "collection of information" as defined by the PRA. Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Office of Management and Budget (OMB) has assigned to this new collection the control number 3038-0121.

The PRA is intended, in part, to minimize the paperwork burden created for individuals, business, and other persons as a result of the collection of information by Federal agencies, and to ensure the greatest possible benefit and utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal government. The PRA applies to all information, regardless of form or format, whenever the Federal government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinions, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.

This final rule will result in a new collection of information within the meaning of the PRA, as discussed below. Responses to this collection of information would be required to obtain a benefit. Specifically, FCMs would be required to respond to the collection in order to obtain the benefit of engaging in separate account treatment for purposes of regulation § 1.44.[405] Beyond the reporting, disclosure, and recordkeeping provisions identified below, the Commission does not believe the final rule imposes any

[404] 44 U.S.C. 3501 *et seq*.
[405] As noted below in connection with recordkeeping requirements, the final rule may also contain recordkeeping implications under the PRA for certain separate account customers/asset managers to the extent an FCM considers pending non-USD transfers as received for certain purposes.

other new collections of information that require approval of OMB under the PRA. The Commission requests that OMB approve OMB control number 3038-0121 in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.

The Commission will protect proprietary information it may receive according to the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers."[406] The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

1. Information Provided by Reporting Entities/Persons

The final rule applies directly to FCMs. All FCMs that engage in separate account treatment, both those that are clearing members of DCOs and those that are not, would be subject to certain reporting, disclosure, and recordkeeping requirements to comply with the requirements for separate account treatment specified in regulation § 1.44.

While the Commission staff estimates burden hours and costs using current part 1 and regulation § 39.13(g)(8)(iii) as a baseline, the Commission notes that FCMs that are clearing members of DCOs are already effectively subject to the Margin Adequacy Requirement, in order to comply with rules that their DCOs have established in order to in turn comply with the DCO's obligations under regulation § 39.13(g)(8)(iii). Thus, the Commission notes that many clearing FCMs already are subject to the conditions of the no-action position, which are substantially similar to the requirements for separate account treatment under this final rule. For these clearing FCMs, the Commission

[406] 7 U.S.C. 12(a)(1).

expects that any additional cost or administrative burden associated with complying with the final rule would be reduced.[407]

a. Reporting Requirements

The final rule contains two reporting requirements that could result in a collection of information from ten or more persons over a 12-month period.

There are currently approximately 60 registered FCMs.[408] The Commission staff estimates that slightly less than half of all FCMs would engage in separate account treatment under the final rule, resulting in approximately 30 respondents.

First, regulation § 1.44(d)(2) provides that, to the extent an FCM elects to treat the separate accounts of a customer as accounts of separate entities pursuant to the terms of regulation § 1.44, the FCM must provide a one-time notification to its DSRO and to the Commission that it will apply such treatment. The Commission staff estimates this would result in a total of one response per respondent on a one-time basis, and that respondents could expend up to $268, based on an hourly rate of $268,[409] to comply with regulation § 1.44(d)(2). This would result in an annual burden of 30 hours and an

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[407] However, the Commission expects that FCMs that do not currently rely on the no-action position, but choose to apply separate account treatment following the adoption of this final rule, would incur new costs. This would include all non-clearing FCMs that choose to apply separate account treatment following the adoption of this final rule.

[408] *See* CFTC, Selected FCM Financial Data as of August 31, 2023, available at *https://www.cftc.gov/sites/default/files/2023-10/01%20-%20FCM%20Webpage%20Update%20-%20August%202023.xlsx*.

[409] This figure is rounded to the nearest dollar and based on the annual mean wage for U.S. Bureau of Labor Statistics (BLS) category 13-2061, "Financial Examiners." BLS, Occupational Employment and Wages, May 2023 [hereinafter "BLS Data"], available at *https://www.bls.gov/oes/current/oes_nat.htm*. This category consists of professionals who "[e]nforce or ensure compliance with laws and regulations governing financial and securities institutions and financial and real estate transactions." BLS, Occupational Employment and Wages, May 2023: 13-2061 Financial Examiners, available at *https://www.bls.gov/oes/current/oes132061.htm*. According to BLS, the mean salary for this category in the context of Securities, Commodity Contracts, and Other Financial Investments and Related Activities is $116,520. This number is divided by 1,800 work hours in a year to account for sick leave and vacations and multiplied by 4 to account for retirement, health, and other benefits or compensation, as well as for office space, computer equipment support, and human resources support. This number is further multiplied by 1.0357 to account for the 3.57% change in the Consumer Price Index for Urban Wage-Earners and Clerical Workers between May 2023 and September 2024 (298.382 to 309.046). BLS, CPI for Urban Wage Earners and Clerical Workers (CPI-W), U.S. City Average, All Items – CWUR0000SA0, available at *https://www.bls.gov/data/#prices*. Together, these modifications yield an hourly rate of $268. The rounding and modifications applied with respect to the estimated average burden hour cost for this occupational category have been applied with respect to each occupational category discussed as part of this analysis.

aggregated cost of $8,040 (30 respondents × $268).

Second, regulation § 1.44(e)(3) requires an FCM engaging in separate account treatment to communicate promptly in writing to its DSRO and to the Commission the occurrence of certain enumerated "non-ordinary course of business" events. The Commission staff estimates that each such FCM may experience two non-ordinary course of business events per year, either with respect to themselves, or a customer. For purposes of determining the number of responses, the Commission staff anticipates that additional notifications of substantially the same information, and at substantially the same time, by means of electronic communication to both the DSRO and the Commission would not materially increase the time and cost burden for such FCM. Therefore, for purposes of these estimates, the Commission staff treats a set of notifications sent to the DSRO and to the Commission as a single response.[410] Accordingly, the Commission staff estimates a total of two responses per respondent on an annual basis. In addition, the Commission staff estimates that each response would take eight hours. This yields a total annual burden of 480 hours (2 responses × 8 hours/response × 30 respondents). In addition, the Commission staff estimates that each respondent could expend up to $4,288 annually, based on an hourly rate of $268, to comply with this requirement.[411] This would result in an aggregated cost of $128,640 per annum (30 respondents × $4,288).

The aggregate information collection burden estimate associated with the reporting requirements is as follows:[412]

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[410] The Commission staff applies the same assumption to notifications to DSROs and the Commission with respect to regulation § 1.44(d)(2) and regulation § 1.44(e)(3).

[411] *See* BLS Data (category 13-2061, "Financial Examiners," in Securities, Commodity Contracts, and Other Financial Investments and Related Activities).

[412] This estimate reflects the aggregate information collection burden estimate associated with the reporting requirements for the first annual period following implementation of the final rule. Because regulation § 1.44(d)(2) will result in a one-time reporting requirement, the Commission staff estimates that for each subsequent annual period, the number of reports, burden hours, and burden cost will be reduced accordingly.

Estimated number of respondents: 30.

Estimated number of reports: 90.

Estimated annual hours burden: 510.

Estimated annual cost: $136,680.

b. Disclosure Requirements

The final rule contains three disclosure requirements that could affect ten or more persons in a 12-month period.

First, regulation § 1.44(h)(3)(i) requires an FCM to provide each customer using separate accounts with a disclosure that, pursuant to part 190 of the Commission's regulations, all separate accounts of the customer will be combined in the event of the FCM's bankruptcy. The Commission staff estimates that this would result in a total of 1 response per respondent on a one-time basis, and that each respondent is likely to spend one hour to comply with this requirement for a total of 1 annual burden hour and up to $268 annually, based on an hourly rate of $268.[413] This would result in an annual burden of 30 hours (1 response/respondent × 1 hour/response × 30 respondents) and an aggregated cost of $8,040 (30 respondents × $268). This estimate reflects one initial disclosure distributed simultaneously to all existing separate account customers. The Commission staff expects that, on a going forward basis, this disclosure would be included in standard disclosures for new customers and would therefore not result in any additional costs.

Second, regulation § 1.44(h)(3)(iii) requires that an FCM engaging in separate account treatment include the disclosure statement required by regulation § 1.44(h)(3) on its website or within its Disclosure Document required by regulation § 1.55(i). If the FCM opts to update its Disclosure Document, the Commission staff estimates that this

[413] This figure is based on the annual mean wage of $264,110 for BLS category 23-1011, "Lawyers," in Securities, Commodity Contracts, and Other Financial Investments and Related Activities, available at *https://data.bls.gov/oes/#/indOcc/Multiple%20occupations%20for%20one%20industry*.

requirement would result in a total of one response on a one-time basis, and that each respondent could expend up to $608 annually, based on an hourly rate of $608,[414] to comply with regulation § 1.44(h)(3)(iii). This would result in an estimated 30 burden hours annually (1 response × 1 hour/response × 30 respondents) and an aggregated cost of $18,240 (30 respondents × $608). This estimate reflects one updated disclosure distributed simultaneously to existing customers. If the FCM opts to include the disclosure on its website, the Commission staff estimates that this requirement would result in a total of one response on a one-time basis, and that each respondent could expend up to $324 annually, based on an hourly rate of $324, to comply with regulation § 1.44(h)(3)(iii).[415] This would result in an estimated 30 burden hours annually (1 response × 1 hour/response × 30 respondents) and an aggregated cost of $9,720 (30 respondents × $324). The Commission staff expects that once the disclosure is included in the Disclosure Document required by regulation § 1.55(i) or posted on the FCM's website, the FCM would not incur any additional costs.

Third, regulation § 1.44(h)(4) requires an FCM that has made an election pursuant to regulation § 1.44(d) to treat the separate accounts of a customer as accounts of separate entities for purposes of regulation § 1.44(b), to disclose in the Disclosure Document required under regulation § 1.55(i) that it permits the separate treatment of accounts for the same customer under the requirements of regulation § 1.44. The Commission staff estimates that this would result in a total of one response per respondent on a one-time basis, and that respondents could expend up to $608 annually, based on an hourly rate of $608,[416] to comply with regulation § 1.44(h)(4). This would result in an estimated 30

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[414] This figure is based on the annual mean wage of $264,110 for BLS category 23-1011, "Lawyers," in Securities, Commodity Contracts, and Other Financial Investments and Related Activities, available at *https://data.bls.gov/oes/#/indOcc/Multiple%20occupations%20for%20one%20industry*.
[415] This figure is based on the annual mean wage of $140,970 for BLS category 15-1254, "Web Developers," in Securities, Commodity Contracts, and Other Financial Investments and Related Activities. BLS Data, available at https://www.bls.gov/oes/current/oes_nat.htm.
[416] *See* BLS Data (category 23-1011, "Lawyers," in Securities, Commodity Contracts, and Other Financial Investments and Related Activities).

burden hours annually (1 response × 1 hour/response × 30 respondents) and an aggregated cost of $18,240 (30 respondents × $608). This estimate reflects an initial updated disclosure distributed simultaneously to existing customers. The Commission staff expects that once this disclosure is made, the disclosure would be included in the Disclosure Document required by regulation § 1.55(i) going forward and would not result in any additional costs.

The aggregate information collection burden estimate associated with the disclosure requirements is as follows:[417]

Estimated number of respondents: 30.

Estimated number of reports: 120.

Estimated annual hours burden: 120.

Estimated annual cost: $54,240.

c. Recordkeeping Requirements

The final rule contains four recordkeeping requirements that could affect ten or more persons in a 12-month period.

First, regulation § 1.44(d)(1) provides that, to elect to treat the separate accounts of a customer as accounts of separate entities, for purposes of the Margin Adequacy Requirement, the FCM shall include the customer on a list of separate account customers receiving such treatment maintained in its books and records. The Commission staff estimates that this would result in a total of 125 responses per respondent on a one-time

[417] For purposes of this analysis, the Commission staff calculates the aggregate information collection burden assuming that respondents choose to include the disclosure statement required by regulation § 1.44(h)(3) on their websites *and* within their Disclosure Document required by regulation § 1.55(i), in order to comply with regulation § 1.44(h)(3)(iii). Additionally, this estimate reflects the aggregate information collection burden estimate associated with the disclosure requirements for the first annual period following implementation of the final rule. Because each of regulation § 1.44(h)(3)(i), § 1.44(h)(3)(iii), and § 1.44(h)(4) would result in a one-time disclosure requirement for PRA purposes, the Commission staff estimates that for each subsequent annual period the number of respondents, reports, burden hours, and burden cost would be reduced accordingly.

basis at a rate of 15 minutes per response,[418] and that respondents could expend up to $8,375 annually per respondent, based on an hourly rate of $268,[419] to comply with regulation § 1.44(d)(1). This would result in an estimated 938 burden hours annually (125 responses × 15 minutes/response × 30 respondents) and an aggregated cost of $251,250 per annum (30 respondents × $8,375).

Second, regulation § 1.44(e)(4) provides that an FCM that has ceased permitting disbursements on a separate account basis to a separate account customer due to the occurrence of a non-ordinary course of business event may resume permitting disbursements on a separate account basis if the FCM reasonably believes, based on new information, that the circumstances leading to cessation of disbursements on a separate account basis have been cured, and the FCM documents in writing the factual basis and rationale for its conclusion that such circumstances have been cured. Where the Commission staff have estimated above that an FCM may experience two non-ordinary course of business events per year, the Commission staff conservatively estimate that in each case the conditions leading to cessation of disbursements on a separate account basis would be cured. Accordingly, the Commission staff estimates that documenting the cure of each non-ordinary course of business event would require two recordkeeping responses per respondent on an annual basis, resulting in a total of 60 annual responses, and that respondents are likely to spend two hours to complete the required recordkeeping tasks.[420] This would result in a total of 120 annual burden hours (2 responses × 2 hours/response × 30 respondents) and up to $1,072 annually per

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[418] The Commission does not expect a significant time burden required to record that an individual customer is receiving separate account treatment and add such customer to a list of customers receiving separate account treatment.

[419] Financial Examiners.

[420] Regulation § 1.44(e)(4) requires the FCM to document in writing the factual basis and rationale for its conclusion that the circumstances leading to the cessation of separate account treatment for one or more separate account customers has been cured but does not otherwise prescribe the form or manner for such documentation. Nor does it require that such documentation be voluminous. As such, the Commission staff estimates that two hours per response may be reasonable in most instances.

respondent, based on an hourly rate of $268,[421] to comply with this requirement. This would result in an aggregated cost of $32,160 per annum (30 respondents × $1,072).

Third, regulation § 1.44(h)(2) provides that where a separate accounts customer has appointed a third-party as the primary contact to the FCM, the FCM must obtain and maintain current contact information of an authorized representative(s) at the customer and take reasonable steps to verify that such contact information is and remains accurate and that such person is in fact an authorized representative of the customer. The Commission staff estimates this would result in a total of 125 responses per respondent on an annual basis at one hour per response,[422] and that respondents could expend up to $20,250 annually, based on an hourly rate of $162.[423] This would result in an estimated 3,750 burden hours annually (125 responses × 1 hour/response × 30 respondents) and an aggregated cost of $607,500 per annum (30 respondents × $20,250).

Fourth, regulation § 1.44(h)(3)(ii) requires that an FCM maintain documentation demonstrating that the part 190 disclosure statement required by regulation § 1.44(h)(3)(i) was delivered directly to the customer. The Commission staff estimates that this would result in a total of 125 responses per respondent on a one-time basis at an estimated six minutes per response, and that respondents could expend up to $2,025 annually, based on an hourly rate of $162, to comply with regulation § 1.44(h)(3)(ii). This would result in an estimated 375 burden hours annually (125 responses × 6 minutes/response × 30 respondents) and an aggregated cost of $60,750 (30 respondents ×

[421] Financial Examiners.
[422] FIA stated that while the costs incurred by each FCM to comply with the conditions of CFTC Letter No. 19-17 varies depending on customer base, among larger FCMs with a significant institutional customer base, personnel costs would have included identifying and reviewing up to 3,000 customer agreements to determine which agreements required modification, and then negotiating amendments with customers or their advisors. Applying a 25% upward adjustment to account for the passage of time, potential onboarding of new customers, and application to non-clearing FCMs, the Commission staff estimates that there are 3,750 customers of FCMs whose accounts could be in scope for the final rule, with an average of 125 customers per FCM (among 30 FCMs).
[423] This figure is based on the annual mean wage of $70,470 for BLS category 43-6012, "Legal Secretaries & Administrative Assistants" in the New York City Metropolitan Area, one of the top paying metropolitan areas for this category. BLS Data, available at *https://www.bls.gov/oes/current/oes436012.htm*.

$2,025). This estimate reflects initial recordkeeping of documentation that the disclosure was delivered to existing customers subject to separate account treatment. The Commission staff estimates that, once such recordkeeping is complete, the recordkeeping required by regulation § 1.44(h)(3)(ii) would be required only with respect to new customers who receive disclosures pursuant to regulation § 1.44(h)(3)(ii), and the costs and burden hours associated with regulation § 1.44(h)(3)(ii) would be reduced accordingly. [424]

Lastly, to the extent FCMs treat pending non-USD transfers as received, consistent with JAC guidance, for certain purposes,[425] as discussed above, the Commission appreciates that an FCM's application of the condition in JAC guidance that an FCM has a sufficient basis to believe that the wire supporting the transfer was actually initiated may result in recordkeeping for customers/asset managers. The Commission staff estimates that this would result in a total of 1 response per respondent, 125 times per year,[426] at an estimated one minute per response, and that respondents could expend up to $1,220 annually, based on an hourly date of $574, to perform the relevant recordkeeping.[427] This would result in an estimated 15,938 burden hours annually (125 responses × 1 minute (approximately 0.017 hours)/response × 7,500 respondents)[428] and

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[424] This estimate reflects the aggregate information collection burden estimates associated with the disclosure requirements for the first annual period following implementation of the final rule. Because, as noted above, regulation § 1.44(h)(3)(i) would result in a one-time recordkeeping requirement as to each customer (*i.e.*, once the disclosure is provided to existing customers, it would need to be provided only to new customers on a going forward basis), the Commission staff estimates that for each subsequent annual period the number of reports, burden hours, and burden cost would be reduced accordingly.

[425] *I.e.*, with respect to the final amendments to regulation § 1.17(c)(5)(viii), with respect to regulation § 1.17(c)(5)(ix) as discussed in the JAC's comment letter, and with respect to final regulation § 1.44(b) and (g)(5).

[426] A response would only be necessary on days when a respondent has been called for margin due to an undermargined condition, and is meeting that call with at least one currency other than USD (or CAD). A conservative estimate of the frequency of this happening is on half of the trading days in a year for each respondent.

[427] This figure is based on the annual mean wage of $249,260 for BLS category 11-3031, "Financial Managers," in Securities, Commodity Contracts, and Other Financial Investments and Related Activities, available at *https://www.bls.gov/oes/current/oes113031.htm*.

[428] The Commission staff has estimated that there are 3,750 separate account customers and further estimates that each customer has an average of three separate accounts, and that two thirds of these accounts settle at least in part in currencies other than USD and CAD. While the same asset manager may,

an aggregated cost of $9,150,000 (7,500 respondents × $1,220).The Commission notes that while certain other provisions of the final rule may result in recordkeeping requirements, the Commission anticipates that any burden associated with these requirements is likely to be *de minimis* and therefore does not expect these provisions to increase the recordkeeping burden for FCMs.

The aggregate information collection burden estimate associated with the recordkeeping requirements is as follows:

Estimated number of respondents: 7,530

Estimated number of reports: 948,810

Estimated annual hours burden: 21,121

Estimated annual cost: $10,101,660

The Commission invited, but did not receive, any public comments related to the proposed information collection requirements.

D. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects

17 CFR Part 1

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 22

Brokers, Clearing, Consumer protection, Reporting and recordkeeping, Swaps.

17 CFR Part 30

in fact, manage multiple separate accounts, the Commission is treating each separate account as a separate respondent.

Consumer protection.

17 CFR Part 39

Clearing, Clearing organizations, Commodity futures, Consumer protection.

For the reasons set forth in the preamble, the Commodity Futures Trading Commission amends 17 CFR chapter I as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

1. The authority citation for part 1 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24 (2012).

2. Amend § 1.3 by revising the definition of “business day” to read as follows:

§ 1.3 Definitions

* * * * *

Business day. This term means any day other than a Saturday, Sunday, or holiday. In all notices required by the Act or by the rules and regulations in this chapter to be given in terms of business days the rule for computing time shall be to exclude the day on which notice is given and include the day on which shall take place the act of which notice is given.

* * * * *

3. Amend § 1.17 by:

a. Republishing paragraph (b) introductory text;

b. Revising paragraphs (b)(6) and (b)(8) introductory text;

c. Adding paragraph (b)(8)(v);

d. Republishing paragraphs (c) introductory text and (c)(2) introductory text;

e. Revising paragraph (c)(2)(i);

f. Republishing paragraph (c)(4) introductory text;

g. Revising paragraph (c)(4)(ii);

h. Republishing paragraph (c)(5) introductory text; and

i. Revising paragraph (c)(5)(viii).

The republications, revisions, and additions read as follows:

§ 1.17 Minimum financial requirements for futures commission merchants and introducing brokers.

* * * * *

(b) For the purposes of this section:

* * * * *

(6) *Business day* means any day other than a Saturday, Sunday, or holiday.

* * * * *

(8) *Risk margin* for an account means the level of maintenance margin or performance bond required for the customer and noncustomer positions by the applicable exchanges or clearing organizations, and, where margin or performance bond is required only for accounts at the clearing organization, for purposes of the futures commission merchant's risk-based capital calculations applying the same margin or performance bond requirements to customer and noncustomer positions in accounts carried by the futures commission merchant, subject to the following.

* * * * *

(v) If a futures commission merchant carries separate accounts for separate account customers pursuant to § 1.44, the futures commission merchant shall calculate the risk margin pursuant to this section as if the separate accounts are owned by separate entities.

* * * * *

(c) Definitions: For the purposes of this section:

* * * * *

(2) The term *current assets* means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold during the next 12 months. “Current assets” shall:

(i) Exclude any unsecured commodity futures, options, cleared swaps, or other Commission regulated account containing a ledger balance and open trades, the combination of which liquidates to a deficit or containing a debit ledger balance only. For purposes of this paragraph (c)(2)(i), a futures commission merchant that carries separate accounts for separate account customers pursuant to § 1.44 shall treat each separate account as if it is the account of a separate entity, apply only margin collateral held for the particular separate account in determining if the deficit or debit ledger balance is secured, and exclude from current assets a separate account that liquidates to a deficit or contains a debit ledger balance only. *Provided, however*, that any deficit or debit ledger balance in an account listed above, including a separate account, which is the subject of a call for margin or other required deposits may be included in current assets until the close of business on the business day following the date on which such deficit or debit ledger balance originated provided that the account had timely satisfied, through the deposit of new funds, the previous day’s deficit or debit ledger balance, if any, in its entirety.

* * * * *

(4) The term *liabilities* means the total money liabilities of an applicant or registrant arising in connection with any transaction whatsoever, including economic obligations of an applicant or registrant that are recognized and measured in conformity with generally accepted accounting principles. “Liabilities” also include certain deferred credits that are not obligations but that are recognized and measured in conformity with generally accepted accounting principles. For the purposes of computing “net capital,” the term “liabilities”:

* * * * *

(ii) Excludes, in the case of a futures commission merchant, the amount of money, securities and property due to customers which is held in segregated accounts in compliance with the requirements of the Act and these regulations. For purposes of this paragraph (c)(4)(ii), a futures commission merchant that carries separate accounts of a separate account customer pursuant to § 1.44 shall compute the amount of money, securities and property due to the separate account customer as if the separate accounts were accounts of separate entities. A futures commission merchant may exclude money, securities and property due to customers, including separate account customers, only if such money, securities and property held in segregated accounts have been excluded from current assets in computing net capital;

* * * * *

(5) The term *adjusted net capital* means net capital less:

* * * * *

(viii)(A) In the case of a futures commission merchant, for undermargined customer accounts, the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade, or if there are no such maintenance margin requirements, 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. If there are no such maintenance margin requirements or clearing organization margin requirements, then the amount of funds required to provide margin equal to the amount necessary, after application of calls for margin or other required deposits outstanding no more than one business day, to restore original margin when the original margin has been depleted by 50 percent or more. If, however, a call for margin or other required deposits for an undermargined customer account is outstanding for more than one business day, then no such call for that

undermargined customer account shall be applied until all such calls for margin have been met in full.

(B) If a futures commission merchant carries separate accounts for one or more separate account customers pursuant to § 1.44, the futures commission merchant shall compute the amount of funds required under paragraph (c)(5)(viii)(A) of this section to meet maintenance margin requirements for each separate account as if the account is owned by a separate entity, after application of calls for margin or other required deposits which are outstanding no more than one business day. If, however, a call for margin or other required deposits for any separate account of a particular separate account customer is outstanding for more than one business day, then all outstanding margin calls for that separate account shall be treated as if the margin calls are outstanding for more than one business day, and shall be deducted from net capital until all such calls have been met in full.

(C) If a customer account or a customer separate account deficit or debit ledger balance is excluded from current assets in accordance with paragraph (c)(2)(i) of this section, such deficit or debit ledger balance amount shall not also be deducted from current assets under this paragraph (c)(5)(viii).

(D) In the event that an owner of a customer account, or a customer separate account pursuant to § 1.44, has deposited an asset other than cash to margin, guarantee or secure the account, the value attributable to such asset for purposes of this paragraph (c)(5)(viii) shall be the lesser of:

(*1*) The value attributable to the asset pursuant to the margin rules of the applicable board of trade, or

(*2*) The market value of the asset after application of the percentage deductions specified in this paragraph (c)(5);

* * * * *

4. Amend § 1.20 by revising paragraph (i)(4) and adding paragraph (i)(5) to read as follows:

§ 1.20 Futures customer funds to be segregated and separately accounted for.

* * * * *

(i) * * *

(4) The futures commission merchant must, at all times, maintain in segregation an amount equal to the sum of any credit and debit balances that the futures customers of the futures commission merchant have in their accounts. Notwithstanding the preceding sentence, a futures commission merchant must add back to the total amount of funds required to be maintained in segregation any futures customer accounts with debit balances in the amounts calculated in accordance with paragraph (i)(5) of this section.

(5) The futures commission merchant, in calculating the total amount of funds required to be maintained in segregation pursuant to paragraph (i)(4) of this section, must include any debit balance, as calculated pursuant to this paragraph (i)(5), that a futures customer has in its account, to the extent that such debit balance is not secured by "readily marketable securities" that the particular futures customer deposited with the futures commission merchant.

(i) For purposes of calculating the amount of a futures account's debit balance that the futures commission merchant is required to include in its calculation of its total segregation requirement pursuant to this paragraph (i)(5), the futures commission merchant shall calculate the net liquidating equity of each futures account in accordance with paragraph (i)(2) of this section, except that the futures commission merchant shall exclude from the calculation any noncash collateral held in the futures customer account as margin collateral. The futures commission merchant may offset the debit balance computed under this paragraph (i)(5) to the extent of any "readily marketable securities," subject to percentage deductions (*i.e.*, "securities haircuts") as specified in paragraph

(f)(5)(iv) of this section, held for the particular futures customer to secure its debit balance.

(ii) For purposes of this section, “readily marketable” shall be defined as having a “ready market” as such latter term is defined in Rule 15c3–1(c)(11) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(11)).

(iii) In order for a debit balance to be deemed secured by “readily marketable securities,” the futures commission merchant must maintain a security interest in such securities, and must hold a written authorization to liquidate the securities at the discretion of the futures commission merchant.

(iv) To determine the amount of such debit balance secured by “readily marketable securities,” the futures commission merchant shall:

(A) Determine the market value of such securities; and

(B) Reduce such market value by applicable percentage deductions (*i.e.*, “securities haircuts”) as set forth in Rule 15c3–1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 240.15c3-1(c)(2)(vi)). Futures commission merchants that establish and enforce written policies and procedures to assess the credit risk of commercial paper, convertible debt instruments, or nonconvertible debt instruments in accordance with Rule 240.15c3–1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(2)(vi)) may apply the lower haircut percentages specified in Rule 240.15c3–1(c)(2)(vi) for such commercial paper, convertible debt instruments and nonconvertible debt instruments.

* * * * *

5. Amend § 1.32 by:

a. Removing from paragraph (b) the reference “17 CFR 241.15c3-1(c)(2)(vi)” and adding in its place “17 CFR 240.15c3-1(c)(2)(vi)” wherever it appears, and

b. Adding paragraph (l).

The addition reads as follows:

§ 1.32 Reporting of segregated account computation and details regarding the holding of futures customer funds.

* * * * *

(l) A futures commission merchant that carries futures accounts for futures customers as separate accounts for separate account customers pursuant to § 1.44 shall:

(1) Calculate the total amount of futures customer funds on deposit in segregated accounts carried as separate accounts of separate account customers on behalf of such futures customers pursuant to paragraph (a)(1) of this section and the total amount of futures customer funds required to be on deposit in segregated accounts carried as separate accounts of separate account customers on behalf of such futures customers pursuant to paragraph (a)(2) of this section by including the separate accounts of the separate account customers as if the separate accounts were accounts of separate entities;

(2) Offset a net deficit in a particular futures account carried as a separate account of a separate account customer in accordance with paragraph (b) of this section against the current market value of readily marketable securities held only for the particular separate account of such separate account customer; and

(3) Document its segregation computation in the Statement of Segregation Requirements and Funds in Segregation of Customers Trading on U.S. Commodity Exchanges required by paragraph (c) of this section by incorporating and reflecting the futures accounts carried as separate accounts of separate account customers as accounts of separate entities.

6. Add § 1.44 to read as follows:

§ 1.44 Margin Adequacy and Treatment of Separate Accounts

(a) *Definitions.* These following definitions apply only for purposes of this section, except to the extent explicitly noted:

Account means a futures account as defined in § 1.3, a Cleared Swaps Customer Account as defined in § 1.3, or a 30.7 account as defined in § 30.1 of this chapter.

Business day has the meaning set forth in § 1.3, with the clarification that "holiday" has the meaning defined in paragraph (a) of this section.

Holiday means Federal holidays as established by 5 U.S.C. 6103.

One business day margin call means a margin call that is issued and met in accordance with the requirements of paragraph (f) of this section.

Ordinary course of business means the operation of the futures commission merchant's business relationship with its separate account customer absent the occurrence of one or more of the events specified in paragraph (e) of this section.

Separate account means any one of multiple accounts of the same separate account customer that are carried by the same futures commission merchant.

Separate account customer means a customer for which the futures commission merchant has made the election set forth in paragraph (d) of this section.

Undermargined amount for an account means the amount, if any, by which the customer margin requirements with respect to all products held in that account exceed the net liquidating value plus the margin deposits currently remaining in that account. For purposes of this definition, "margin requirements" shall mean the level of maintenance margin or performance bond required for the positions in the account by the applicable exchanges or clearing organizations. Market risk collateral haircuts based on Rule 15c3-1 of the Securities and Exchange Commission (17 CFR 240.15c3-1) and § 1.17(c)(5) shall be applied to the value of the margin deposits held by a futures commission merchant. With respect to positions for which maintenance margin is not specified, "margin

requirements" shall refer to the clearing organization margin requirements applicable to such positions.

(b) *Ensuring adequacy of customer initial margin.* (1) A futures commission merchant shall ensure that a customer does not withdraw funds from its accounts with such futures commission merchant unless the net liquidating value (calculated as of the close of business on the previous business day) plus the margin deposits remaining in the customer's account after such withdrawal are sufficient to meet the customer initial margin requirements with respect to all products held in such customer's account, except as provided in paragraph (c) of this section.

(2) For the purposes of paragraph (b)(1) of this section, where the previous day (excluding Saturdays and Sundays) is a holiday, as defined in paragraph (a) of this section, where any designated contract market or other board of trade on which the futures commission merchant trades is open for trading, and where an account of any of the futures commission merchant's customers includes positions traded on such a market, the net liquidating value for such an account should instead be calculated as of the close of business on such holiday.

(c) *Separate account treatment with respect to withdrawal of customer initial margin.* A futures commission merchant may, only during the "ordinary course of business" as that term is defined in this section, treat the separate accounts of a separate account customer as accounts of separate entities for purposes of paragraph (b) of this section if such futures commission merchant elects to do so as specified in paragraph (d) of this section. A futures commission merchant that has made such an election shall comply with the requirements set forth in this section, and maintain written internal controls and procedures designed to ensure such compliance.

(d) *Election to treat a customer's accounts as separate accounts.* (1) To elect to treat the separate accounts of a customer as accounts of separate entities for purposes of

paragraph (b) of this section, the futures commission merchant shall include the customer on a list of separate account customers maintained in its books and records. This list shall include the identity of each separate account customer, identify each separate account of such customer, and be kept current.

(2) The first time that the futures commission merchant includes a customer on the list of separate account customers, it shall, within one business day, provide notification of the election to allow separate account treatment for customers to its designated self-regulatory organization and to the Commission. The notice shall be provided in accordance with the process specified in § 1.12(n)(3).

(e) *Events inconsistent with the ordinary course of business.* (1) The following events are inconsistent with the ordinary course of business with respect to the separate accounts of a particular separate account customer, and the occurrence of any such event would require the futures commission merchant to cease permitting disbursements on a separate account basis with respect to all accounts of the relevant separate account customer:

(i) The separate account customer, including any separate account of such customer, fails to deposit initial margin or maintain maintenance margin or make payment of variation margin or option premium as specified in paragraph (f) of this section.

(ii) The occurrence and declaration by the futures commission merchant of an event of default as defined in the account documentation executed between the futures commission merchant and the separate account customer.

(iii) A good faith determination by the futures commission merchant's chief compliance officer, one of its senior risk managers, or other senior manager, following such futures commission merchant's own internal escalation procedures, that the separate account customer is in financial distress, or there is significant and bona fide risk that the

separate account customer will be unable promptly to perform its financial obligations to the futures commission merchant, whether due to operational reasons or otherwise.

(iv) The insolvency or bankruptcy of the separate account customer or a parent company of such customer.

(v) The futures commission merchant receives notification that a board of trade, a derivatives clearing organization, a self-regulatory organization as defined in § 1.3 or section 3(a)(26) of the Securities Exchange Act of 1934, the Commission, or another regulator with jurisdiction over the separate account customer, has initiated an action with respect to such customer based on an allegation that the customer is in financial distress.

(vi) The futures commission merchant is directed to cease permitting disbursements on a separate account basis, with respect to the separate account customer, by a board of trade, a derivatives clearing organization, a self-regulatory organization, the Commission, or another regulator with jurisdiction over the futures commission merchant, pursuant to, as applicable, board of trade, derivatives clearing organization or self-regulatory organization rules, government regulations, or law.

(2) The following events are inconsistent with the ordinary course of business with respect to the separate accounts of all separate account customers of the futures commission merchant, and the occurrence of any such event would require the futures commission merchant to cease permitting disbursements on a separate account basis with respect to any of its customers:

(i) The futures commission merchant is notified by a board of trade, a derivatives clearing organization, a self-regulatory organization, the Commission, or another regulator with jurisdiction over the futures commission merchant, that the board of trade, the derivatives clearing organization, the self-regulatory organization, the Commission,

or other regulator, as applicable, believes the futures commission merchant is in financial or other distress.

(ii) The futures commission merchant is under financial or other distress as determined in good faith by its chief compliance officer, senior risk managers, or other senior management.

(iii) The insolvency or bankruptcy of the futures commission merchant or a parent company of the futures commission merchant.

(3) The futures commission merchant must provide notice to its designated self-regulatory organization and to the Commission of the occurrence of any of the events enumerated in paragraph (e)(1) or (2) of this section. The notice must identify the event and (if applicable) the customer, and be provided promptly in writing, and in any case no later than the next business day following the date on which the futures commission merchant identifies or has been informed that such event has occurred. Such notice must be provided in accordance with the process specified in § 1.12(n)(3).

(4) A futures commission merchant that has ceased permitting disbursements on a separate account basis to a separate account customer due to the occurrence of any of the events enumerated in paragraph (e)(1) of this section with respect to a specific separate account customer (or in paragraph (e)(2) with respect to all of its separate account customers) may resume permitting disbursements on a separate account basis to that customer (or, respectively, all customers) if such futures commission merchant reasonably believes, based on new information, that those circumstances have been cured, and such futures commission merchant documents in writing the factual basis and rationale for that conclusion. If the circumstances triggering cessation of disbursements on a separate account basis were an action or direction by one of the entities described in paragraph (e)(1)(v) or (vi) or (e)(2)(i) of this section, then the cure of those circumstances

would require the withdrawal or other appropriate termination of such action or direction by that entity.

(f) *Requirements: One business day margin call.* Each separate account must be on a one business day margin call. The following provisions apply solely for purposes of this paragraph (f):

(1) Except as explicitly provided in this paragraph (f), if, as a result of market movements or changes in positions on the previous business day, a separate account is undermargined (*i.e.*, the undermargined amount for that account is greater than zero), the futures commission merchant shall issue a margin call for the separate account for at least the amount necessary for the separate account to meet the initial margin required by the applicable exchanges or clearing organizations (including, as appropriate, the equity component or premium for long or short option positions) for the positions in the separate account, and that call must be met by the applicable separate account customer no later than the close of the Fedwire Funds Service on the same business day.

(2) Payment of margin in currencies listed in appendix A to this part shall be considered in compliance with the requirements of this paragraph (f) if received by the applicable futures commission merchant no later than the end of the second business day after the day on which the margin call is issued.

(3) Payment of margin in fiat currencies other than U.S. Dollars, Canadian Dollars, or currencies listed in Appendix A to this part shall be considered in compliance with the requirements of this paragraph (f) if received by the applicable futures commission merchant no later than the end of the business day after the day on which the margin call is issued.

(4) The relevant deadline for payment of margin in fiat currencies other than U.S. Dollars may be extended to the next business day following any banking holiday in the

jurisdiction of issue of the currency, and still be considered in compliance with the requirements of this paragraph (f) if payment is delayed due to such banking holiday.

(5) A failure with respect to a specific separate account to deposit, maintain, or pay margin or option premium that was called pursuant to this paragraph (f), due to administrative error or operational constraints, does not constitute a failure to comply with the requirements of this paragraph (f). For these purposes, a futures commission merchant's determination that the failure to deposit, maintain, or pay margin or option premium is due to such administrative error or operational constraints must be based on the futures commission merchant's reasonable belief in light of information known to the futures commission merchant at the time the futures commission merchant learns of the relevant administrative error or operational constraint.

(6) A futures commission merchant would not be in compliance with the requirements of this paragraph (f) if it contractually agrees to provide separate account customers with periods of time to meet margin calls that extend beyond the time periods specified in this paragraph (f), or engages in practices that are designed to circumvent this paragraph (f).

(7) In the case of a holiday where any designated contract market or other board of trade on which the futures commission merchant trades is open for trading, or any derivatives clearing organization that clears the Cleared Swaps of such futures commission merchant's Cleared Swaps Customers is open for clearing such swaps, and where a separate account of any of the futures commission merchant's separate account customers includes positions traded on such a market or cleared at such a derivatives clearing organization, then for any such separate account:

(i) If, as a result of market movements or changes in positions on the business day before the holiday, a separate account is undermargined, the futures commission merchant shall issue a margin call for the separate account for at least the undermargined

amount, and that call must be met by the applicable separate account customer no later than the close of the Fedwire Funds Service on the next business day after the holiday, and,

(ii) If, as a result of market movements or changes in positions on the holiday, a separate account is undermargined by an amount greater than the amount it was undermargined as a result of market movements or changes in positions on the business day before the holiday, the futures commission merchant shall issue a margin call for the separate account for at least the incremental undermargined amount, and that call must be met by the applicable separate account customer no later than the close of the Fedwire Funds Service on the next business day after the holiday.

(8) Any person may submit to the Commission any currency that such person proposes should be added to or removed from appendix A to this part.

(i) A submission pursuant to this paragraph (f)(8) shall include:

(A) A statement that margin payments in the relevant currency cannot, in the case of a proposed addition, or can, in the case of a proposed removal, practicably be received by the futures commission merchant issuing a margin call no later than the end of the first business day after the day on which the margin call is issued;

(B) Documentation or other information sufficient to support the statement contemplated by paragraph (f)(8)(i)(A) of this section; and

(C) Any additional information specifically requested by the Commission.

(ii) A submitter pursuant to paragraph (f)(8)(i) of this section that wishes to request confidential treatment for portions of its submission may do so in accordance with the procedures set out in § 145.9(d).

(iii) The Commission shall review a submission made pursuant to this paragraph (f)(8) and determine whether to propose to add the relevant currency to, or remove the relevant currency from, appendix A to this part.

(iv) If the Commission proposes to add a currency to or remove a currency from appendix A to this part, the Commission shall issue such determination through notice and comment rulemaking, and shall provide a public comment period of no less than thirty days.

(v) The Commission may, of its own accord and absent a submission pursuant to this paragraph (f)(8), propose to issue a determination to add a currency to or remove a currency from appendix A to this part pursuant to the procedure set forth in paragraph (f)(8)(iv) of this section.

(g) *Requirements: Calculations for capital, risk management, and segregation.* (1) The futures commission merchant's internal risk management policies and procedures shall provide for stress testing and credit limits as set forth in § 1.73 for separate account customers. Such stress testing must be performed, and the credit limits must be applied, both on an individual separate account and on a combined account basis.

(2) A futures commission merchant shall calculate the margin requirement for each separate account of a separate account customer independently from such margin requirement for all other separate accounts of the same customer with no offsets or spreads recognized across the separate accounts.

(3) A futures commission merchant shall, in computing its adjusted net capital for purposes of § 1.17, record each separate account of a separate account customer in the books and records of the futures commission merchant as a distinct account of a customer. This includes recording each separate account with a net debit balance or a deficit as a receivable from the separate account customer, with no offsets between the other separate accounts of the same separate account customer.

(4) A futures commission merchant shall, in calculating the amount of its own funds it is required to maintain in segregated accounts to cover deficits or debit ledger balances pursuant to § 1.20(i), § 22.2(f), or § 30.7(f)(2) of this chapter in any futures

customer accounts, Cleared Swaps Customer Accounts, or 30.7 accounts, respectively, include any deficits or debit ledger balances of any separate accounts as if the accounts are accounts of separate entities.

(5) For purposes of its residual interest and legally segregated operationally commingled compliance calculations, as applicable under §§ 1.22(c), 22.2(f)(6), and 30.7(f)(1)(ii) of this chapter, a futures commission merchant shall treat the separate accounts of a separate account customer as if the accounts were accounts of separate entities and include the undermargined amount of each separate account, and cover such undermargined amount with its own funds.

(6) In determining its residual interest target for purposes of §§ 1.11(e)(3)(i)(D) and 1.23(c), the futures commission merchant must consider the impact of calculating customer receivables for separate account customers on a separate account basis.

(h) *Requirements: information and disclosures.* (1) A futures commission merchant shall obtain from each separate account customer or, as applicable, the manager of a separate account, information sufficient for the futures commission merchant to:

(i) Assess the value of the assets dedicated to such separate account; and

(ii) Identify the direct or indirect parent company of the separate account customer, as applicable, if such customer has a direct or indirect parent company.

(2) Where a separate account customer has appointed a third-party as the primary contact to the futures commission merchant, the futures commission merchant must obtain and maintain current contact information of an authorized representative of the customer, and take reasonable steps to verify that such contact information is and remains accurate, and that the person is in fact an authorized representative of the customer.

(3) A futures commission merchant must provide each separate account customer a disclosure that, pursuant to part 190 of the Commission's regulations (17 CFR part

190), all separate accounts of the customer in each account class will be combined in the event of the futures commission merchant's bankruptcy.

(i) The disclosure statement required by this paragraph (h)(3) must be delivered directly to the customer via electronic means, in writing or in such other manner as the futures commission merchant customarily delivers disclosures pursuant to applicable Commission regulations, and as permissible under the futures commission merchant's customer documentation.

(ii) The futures commission merchant must maintain documentation demonstrating that the disclosure statement required by this paragraph (h)(3) was delivered directly to the customer.

(iii) The futures commission merchant must include the disclosure statement required by this paragraph (h)(3) on its website or within its Disclosure Document required by paragraph 1.55(i).

(4) A futures commission merchant that has made an election pursuant to paragraph (d) of this section shall disclose in the Disclosure Document required under § 1.55(i) that it permits the separate treatment of accounts for the same customer pursuant to the requirements of this section and that, in the event that separate account treatment for some customers were to contribute to a loss that exceeds the futures commission merchant's ability to cover, that loss may affect the segregated funds of all of the futures commission merchant's customers in one or more account classes.

(i) A futures commission merchant that applies separate account treatment pursuant to this section shall apply such treatment in a consistent manner over time.

7. Revise § 1.58 to read as follows:

§ 1.58 Gross collection of exchange-set margins.

(a) Each futures commission merchant which carries a futures, options on futures, or Cleared Swaps position for another futures commission merchant or for a foreign

broker on an omnibus basis must collect, and each futures commission merchant and foreign broker for which an omnibus account is being carried must deposit, initial and maintenance margin on each position so carried at a level no less than that established for customer accounts by the rules of the applicable contract market or other board of trade. If the contract market or other board of trade does not specify any such margin level, the level required will be that specified by the relevant clearing organization.

(b) If the futures commission merchant which carries a futures, options on futures, or Cleared Swaps position for another futures commission merchant or for a foreign broker on an omnibus basis allows a position to be margined as a spread position or as a hedged position in accordance with the rules of the applicable contract market, the carrying futures commission merchant must obtain and retain a written representation from the futures commission merchant or from the foreign broker for which the omnibus account is being carried that each such position is entitled to be so margined.

(c) Where a futures commission merchant has established an omnibus account that is carried by another futures commission merchant, and the depositing futures commission merchant has elected to treat the separate accounts of a futures customer or a Cleared Swaps Customer as accounts of separate entities for purposes of § 1.44, the depositing futures commission merchant shall calculate the required initial and maintenance margin for purposes of paragraph (a) of this section separately for each such separate account.

8. Amend § 1.73 by adding paragraph (c) to read as follows:

§ 1.73 Clearing futures commission merchant risk management.

* * * * *

(c) A futures commission merchant that is not a clearing member of a derivatives clearing organization, but that treats the separate accounts of a customer as accounts of separate entities for purposes of § 1.44, shall comply with paragraphs (a) and (b) of this

section with respect to the accounts and separate accounts of separate account customers as if it were a clearing member of a derivatives clearing organization.

9. Add appendix A to part 1 to read as follows:

Appendix A to Part 1 – Treatment of Certain Foreign Currencies for Margin Adequacy Requirements under Regulation 1.44

Payment of margin in currencies listed in this Appendix A shall be considered in compliance with the requirements of Regulation 1.44(f) of Part 1 of the Commission's regulations (17 CFR 1.44(f)) if received by the applicable futures commission merchant no later than the end of the second business day after the day on which the margin call is issued.

Currency
Australian dollar (AUD)
Chinese renminbi (CNY)
Hong Kong dollar (HKD)
Hungarian forint (HUF)
Israeli new shekel (ILS)
Japanese yen (JPY)
New Zealand dollar (NZD)
Singapore dollar (SGD)
South African rand (ZAR)
Turkish lira (TRY)

PART 22—CLEARED SWAPS

10. The authority citation for part 22 continues to read as follows:

Authority: 7 U.S.C. 1a, 6d, 7a-1 as amended by Pub. L. 111-203, 124 Stat 1376.

11. Amend § 22.2 by

a. Republishing the paragraph (f) heading;

b. Revising paragraphs (f)(4) and (5);

c. Republishing the paragraph (g) heading; and

d. Adding paragraph (g)(11).

The republications, revisions, and addition to read as follows:

§ 22.2 Futures Commission Merchants: Treatment of Cleared Swaps and Associated Cleared Swaps Customer Collateral.

* * * * *

(f) *Requirements as to amount.* * * *

(4) The futures commission merchant must, at all times, maintain in segregation, in its FCM Physical Locations and/or its Cleared Swaps Customer Accounts at Permitted Depositories, an amount equal to the sum of any credit and debit balances that the Cleared Swaps Customers of the futures commission merchant have in their accounts. Notwithstanding the preceding sentence, a futures commission merchant must add back to the total amount of funds required to be maintained in segregation any Cleared Swaps Customer Accounts with debit balances in the amounts calculated in accordance with paragraph (f)(5) of this section.

(5) The futures commission merchant, in calculating the total amount of funds required to be maintained in segregation pursuant to paragraph (f)(4) of this section, must include any debit balance, as calculated pursuant to this paragraph (f)(5), that a Cleared Swaps Customer has in its account, to the extent that such debit balance is not secured by "readily marketable securities" that the particular Cleared Swaps Customer deposited with the futures commission merchant.

(i) For purposes of calculating the amount of a Cleared Swaps Customer Account's debit balance that the futures commission merchant is required to include in its calculation of its total segregation requirement pursuant to this paragraph (f)(5), the

futures commission merchant shall calculate the net liquidating equity of each Cleared Swaps Customer Account in accordance with paragraph (f)(2) of this section, except that the futures commission merchant shall exclude from the calculation any noncash collateral held in the Cleared Swaps Customer Account as margin collateral. The futures commission merchant may offset the debit balance computed under this paragraph (f)(5) to the extent of any "readily marketable securities," subject to percentage deductions (*i.e.*, "securities haircuts") as specified in paragraph (f)(5)(iv) of this section, held for the particular Cleared Swaps Customer to secure its debit balance.

(ii) For purposes of this section, "readily marketable" shall be defined as having a "ready market" as such latter term is defined in Rule 15c3–1(c)(11) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(11)).

(iii) In order for a debit balance to be deemed secured by "readily marketable securities," the futures commission merchant must maintain a security interest in such securities, and must hold a written authorization to liquidate the securities at the discretion of the futures commission merchant.

(iv) To determine the amount of such debit balance secured by "readily marketable securities," the futures commission merchant shall:

(A) Determine the market value of such securities; and

(B) Reduce such market value by applicable percentage deductions (*i.e.,* "securities haircuts") as set forth in Rule 15c3–1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(2)(vi)). Futures commission merchants that establish and enforce written policies and procedures to assess the credit risk of commercial paper, convertible debt instruments, or nonconvertible debt instruments in accordance with Rule 240.15c3–1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(2)(vi)) may apply the lower haircut percentages specified in Rule

240.15c3–1(c)(2)(vi) for such commercial paper, convertible debt instruments and nonconvertible debt instruments.

* * * * *

(g) *Segregated account; Daily computation and record*. * * *

(11) A futures commission merchant that carries Cleared Swaps Accounts for Cleared Swaps Customers as separate accounts for separate account customers pursuant to § 1.44 of this chapter shall:

(i) Calculate the total amount of Cleared Swaps Customer Collateral on deposit in segregated accounts on behalf of Cleared Swaps Customers pursuant to paragraph (g)(1)(i) of this section and the total amount of Cleared Swaps Customer Collateral required to be on deposit in segregated accounts on behalf of Cleared Swaps Customers pursuant to paragraph (g)(1)(ii) of this section by including the separate accounts of the separate account customers as if the separate accounts were accounts of separate entities;

(ii) Offset a net deficit in a particular Cleared Swaps Customer Account carried as a separate account of a separate account customer in accordance with paragraphs (f)(4) and (5) and (g)(1)(ii) of this section against the current market value of readily marketable securities held only for the particular separate account of such separate account customer; and

(iii) Document its segregation computation in the Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under 4d(f) of the CEA required by paragraph (g)(2) of this section by incorporating and reflecting the Cleared Swaps Customer Accounts carried as separate accounts of separate account customers as accounts of separate entities.

PART 30—FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

12. The authority citation for part 30 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6c, and 12a, unless otherwise noted.

13. Amend § 30.2 by revising paragraph (b) to read as follows:

§ 30.2 Applicability of the Act and rules.

* * * * *

(b) The provisions of §§ 1.20 through 1.30, 1.32, 1.35(a)(2) through (4) and (c) through (i), 1.36(b), 1.38, 1.39, 1.40, 1.45 through 1.51, 1.53, 1.54, 1.55, 1.58, 1.59, 33.2 through 33.6, and parts 15 through 20 of this chapter shall not be applicable to the persons and transactions that are subject to the requirements of this part.

14. Amend § 30.7 by:

a. Republishing the paragraph (f) and (f)(2) headings;

c. Revising paragraph (f)(2)(iv);

d. Adding paragraph (f)(2)(v);

e. Republishing the paragraph (l) heading; and

f. Adding paragraph (l)(11).

The republications, revisions, and additions read as follows:

§ 30.7 Treatment of foreign futures or foreign options secured amount.

* * * * *

(f) *Limitations on use of 30.7 customer funds.*

* * * * *

(2) *Requirements as to amount.* * * *

(iv) The futures commission merchant must, at all times, maintain in segregation an amount equal to the sum of any credit and debit balances that 30.7 customers of the futures commission merchant have in their accounts. Notwithstanding the preceding sentence, a futures commission merchant must add back to the total amount of funds required to be maintained in segregation any 30.7 accounts with debit balances in the amounts calculated in accordance with paragraph (f)(2)(v) of this section.

(v) The futures commission merchant, in calculating the total amount of funds required to be maintained in segregation pursuant to paragraph (f)(2)(iv) of this section, must include any debit balance, as calculated pursuant to this paragraph (f)(2)(v), that a 30.7 customer has in its account, to the extent that such debit balance is not secured by "readily marketable securities" that the particular 30.7 customer deposited with the futures commission merchant.

(A) For purposes of calculating the amount of a 30.7 account's debit balance that the futures commission merchant is required to include in its calculation of its total segregation requirement pursuant to this paragraph (f)(2)(v), the futures commission merchant shall calculate the net liquidating equity of each 30.7 account in accordance with paragraph (f)(2)(ii) of this section, except that the futures commission merchant shall exclude from the calculation any noncash collateral held in the 30.7 account as margin collateral. The futures commission merchant may offset the debit balance computed under this paragraph (f)(2)(v) to the extent of any "readily marketable securities," subject to percentage deductions (*i.e.*, "securities haircuts") as specified in paragraph (f)(2)(v)(D) of this section, held for the particular 30.7 customer to secure its debit balance.

(B) For purposes of this section, "readily marketable" shall be defined as having a "ready market" as such latter term is defined in Rule 15c3–1(c)(11) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(11)).

(C) In order for a debit balance to be deemed secured by "readily marketable securities," the futures commission merchant must maintain a security interest in such securities, and must hold a written authorization to liquidate the securities at the discretion of the futures commission merchant.

(D) To determine the amount of such debit balance secured by "readily marketable securities." To do so, the futures commission merchant shall:

(*1*) Determine the market value of such securities; and

(*2*) Reduce such market value by applicable percentage deductions (*i.e.*, "securities haircuts") as set forth in Rule 15c3–1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(2)(vi)). Futures commission merchants that establish and enforce written policies and procedures to assess the credit risk of commercial paper, convertible debt instruments, or nonconvertible debt instruments in accordance with Rule 240.15c3–1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(2)(vi)) may apply the lower haircut percentages specified in Rule 240.15c3–1(c)(2)(vi) for such commercial paper, convertible debt instruments and nonconvertible debt instruments.

* * * * *

(l) *Daily computation of 30.7 customer secured amount requirement and details regarding the holding and investing of 30.7 customer funds*.

* * * * *

(11) A futures commission merchant that carries 30.7 accounts for 30.7 customers as separate accounts for separate account customers pursuant to § 1.44 of this chapter shall:

(i) Calculate the total amount of 30.7 customer funds on deposit in 30.7 accounts on behalf of 30.7 customers pursuant to paragraph (l)(1) of this section and the total amount of 30.7 customer funds required to be on deposit in segregated accounts on behalf of 30.7 customers pursuant to paragraph (l)(1) of this section by including the separate accounts of the separate account customers as if the separate accounts were accounts of separate entities;

(ii) Offset a net deficit in a particular 30.7 account carried as a separate account of a separate account customer in accordance with this paragraph (l) against the current

market value of readily marketable securities held only for the particular separate account of such separate account customer; and

(iii) Document its segregation computation in the Statement of Secured Amounts and Funds Held in Separate Accounts for 30.7 Customers pursuant to Commission Regulation 30.7 required by paragraph (l)(3) of this section by incorporating and reflecting the 30.7 accounts carried as separate accounts of separate account customers as accounts of separate entities.

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

15. The authority citation for part 39 continues to read as follows:

Authority: 7 U.S.C. 2, 6(c), 7a–1, and 12a(5); 12 U.S.C. 5464; 15 U.S.C. 8325; section 752 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, title VII, sec. 752, July 21, 2010, 124 Stat. 1749.

16. Amend § 39.13 by:

a. Republishing the paragraph (g) and (g)(8) headings;

c. Adding paragraph (g)(8)(i)(E); and

d. Revising paragraph (g)(8)(iii).

The republications, addition, and revision read as follows:

§ 39.13 Risk management.

* * * * *

(g) *Margin requirements—*

* * * * *

(8) *Customer margin—*

* * * * *

(i) * * *

(E) For purposes of this paragraph (g)(8)(i), each separate account of a separate account customer (as such terms are defined in § 1.44 of this chapter) shall be treated as an account of a separate individual customer.

* * * * *

(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, except as provided for in § 1.44 of this chapter.

* * * * *

Issued in Washington, DC, on December 20, 2024, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Regulations to Address Margin Adequacy and to Account for the Treatment of Separate Accounts by Futures Commission Merchants – Commission Voting Summary and Chairman's and Commissioner's Statements

Appendix 1 – Commission Voting Summary

On this matter, Chairman Behnam and Commissioner Goldsmith Romero voted in the affirmative. Commissioners Johnson and Pham voted to concur. Commissioner Mersinger voted in the negative.

Appendix 2 – Statement of Support of Chairman Rostin Behnam

Since 2019, derivatives clearing organizations (DCOs) and futures commission merchants (FCMs) faithfully relied on guidance and a no-action position issued through

CFTC Staff Letter 19-17[1] to comply with DCO rules. In the several years during which the original letter was issued, DCOs and FCMs invested accordingly in anticipation that the Commission would act diligently and engage the Commission in the process to implement appropriate relief on a permanent basis. I am pleased today that, consistent with my commitment to improving rules and codifying longstanding staff positions through rulemakings that benefit from the engagement and expertise of our entire Commission, the CFTC is issuing a final rule that allocates greater protections and more importantly, provides long awaited certainty.

I fully support the final rule which protects customer funds, promotes effective DCO and FCM risk management, and balances risk management with practicability. To ensure that the final rule was workable, there were numerous discussions and extensive engagement between staff and industry, in addition to two notices of proposed rulemaking[2]. This final rule is the culmination of these efforts and serves as an example of effective collaboration with industry yielding positive results.

I thank Alicia Lewis in my office, and staff in the Division of Clearing and Risk, Market Participants Division, Office of the General Counsel, and the Office of the Chief Economist for their work on the final rule.

Appendix 3 – Concurring Statement of Commissioner Caroline D. Pham

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[1] CFTC Letter No. 19-17, July 10, 2019, available at *https://www.cftc.gov/csl/19-17/download* as extended by CFTC Letter No. 20-28, Sept. 15, 2020, available at *https://www.cftc.gov/csl/20-28/download*; CFTC Letter No. 21-29, Dec. 21, 2021, available at *https://www.cftc.gov/csl/21-29/download*; CFTC Letter No. 22-11, Sept. 15, 2022, available at https://www.cftc.gov/csl/22-11/download; CFTC Letter No. 23-13, Sept. 11, 2023, available at *https://www.cftc.gov/csl/23-13/download*; and CFTC Letter No. 24-07, June 24, 2024, available at *https://www.cftc.gov/csl/24-07/download*.

[2] On April 14, 2023, the Commission published in the *Federal Register* a notice of proposed rulemaking designed to codify the no-action position in CFTC Letter No. 19-17. Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants, 88 FR 22934 (Apr. 14, 2023) (First Proposal). The First Proposal sought to codify the provisions of CFTC Letter No. 19-17 in regulation 39.13, where it would have applied directly to DCOs, and only indirectly to FCMs that are clearing members of DCOs through DCO rules. The Second Proposal, which withdrew the First Proposal, sought to codify these provisions in part 1 of the Commission's regulations, which apply to FCMs directly. Regulations To Address Margin Adequacy and To Account for the Treatment of Separate Accounts by Futures Commission Merchants, 89 FR 15312 (Mar. 1, 2024) (Second Proposal). The final rule follows from the Second Proposal.

I respectfully concur on the Regulations to Address Margin Adequacy and to Account for the Treatment of Separate Accounts by Futures Commission Merchants (FCMs) (Separate Accounts Final Rule). I am pleased that the Separate Accounts Final Rule has resolved two critical issues with the proposed rule that were unworkable because of 1) conflicts of law under U.S. banking and securities regulation and foreign banking law, and operational realities regarding the cross-border movement of funds, and 2) lack of regulatory clarity for the handling of administrative errors and operational constraints. In particular, the significant changes in the proposed rule from existing regulatory requirements under CFTC Letter No. 19-17, which FCMs have implemented and complied with for the past 5 years, were not supported by robust cost-benefit analysis to justify imposing overly burdensome new rules. I greatly appreciate the support of Chairman Behnam and the efforts by CFTC staff to address my concerns, and the engagement with my fellow Commissioners.

I would like to thank Daniel O'Connell, Bob Wasserman, and Clark Hutchison in the Division of Clearing and Risk for their work on the Separate Accounts Final Rule and the significant time and effort spent working with my office, especially to reconsider the requirements for a one business day margin call and circumstances involving banking holidays in the eurozone, and "unusual" administrative errors and operational constraints.[1] I applaud their dedication to strengthening our markets and addressing the public comments.

[FR Doc. 2024-31177 Filed: 1/14/2025 4:15 pm; Publication Date: 1/22/2025]

[1] Statement of Commissioner Caroline D. Pham in Support of the Treatment of Separate Accounts Proposal (Feb. 20, 2024), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement022024b*.