



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5000

Division of Swap Dealer and
Intermediary Oversight

Joshua B. Sterling
Director

**Re: No-Action Position for Futures Commission Merchants and
Introducing Brokers to Address Net Capital Treatment of Covered
Loans under the CARES Act**

Ladies and Gentlemen:

This letter is in response to a joint request from the Futures Industry Association, on behalf of its member firms that are registered as futures commission merchants (“FCMs”) and similarly situated FCMs, and National Introducing Brokers Association, on behalf of its member firms that are registered as introducing brokers (“IBs”) and similarly situated IBs. The joint request received by the Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) of the Commodity Futures Trading Commission (“**Commission**”) is in regard to the net capital treatment of loans obtained by FCMs and IBs under the Paycheck Protection Program (“**PPP**”) administered by the Small Business Administration. Each FCM and IB is referred to herein as a “registrant.”

The World Health Organization declared the coronavirus disease 2019 (“**COVID-19**”) outbreak a global pandemic on March 11, 2020. The COVID-19 outbreak has severely disrupted domestic and international business, and adversely impacted the global economy. In response to the crisis, the **Coronavirus Aid, Relief, and Economic Security Act** (the “**CARES Act**”) ¹ was signed into law on March 27, 2020 to provide emergency assistance and health care response for individuals, families and businesses affected by the COVID-19 pandemic. The CARES Act establishes a \$2.2 trillion dollar program designed to dispense relief to individuals, families, and businesses adversely impacted by COVID-19.

The PPP is a component of the CARES Act that allows qualifying businesses to obtain loans of up to \$10 million dollars, and is designed to provide a direct incentive for small businesses to keep their employees on the payroll. Section 1106(b) of the CARES Act provides that a recipient of a covered loan (as defined in Section 1106(a)(1) of the

¹Pub.L. 116-136 (March 27, 2020).

CARES Act) is eligible for forgiveness of indebtedness on the covered loan in an amount equal to the sum of the following costs incurred and payments made (the “**Forgivable Expense Amount**”) during the eight-week period beginning on the date of the origination of the covered loan:

1. Payroll costs (as defined in Section 1106(a)(8));
2. Any payment of interest on any covered mortgage obligation (as defined in Section 1106(a)(2)), which shall not include any prepayment of or payment of principal on a covered mortgage obligation;
3. Any payment on any covered rent obligation (as defined in Section 1106(a)(4));
and
4. Any covered utility payment (as defined in Section 1106(a)(5)).

In connection with an industry-wide response to the COVID-19 pandemic, no-action relief has been requested with regard to the treatment of covered loans by FCMs and IBs under Commission regulation 1.17.²

I. DSIO No-Action Positions

In order to support an orderly and uniform response to the COVID-19 pandemic, DSIO will not recommend that the Commission take an enforcement action against any FCM or IB that receives a PPP covered loan and, in computing its net capital under Regulation 1.17, adds back to its capital the eligible Forgivable Expense Amount.³ This relief is subject to the following conditions:

1. The FCM or IB includes a covered loan as a liability on its balance sheet;
2. The FCM or IB creates and retains documentation of the basis of the add-back, including a record of its computation of the Forgivable Expense Amount, a record of costs and payments making up that amount, and a record of any estimate of the limits under Section 1106(d) with the basis of such estimate;

² 17 CFR § 1.17. On April 2, 2020, the Financial Industry Regulatory Authority (“**FINRA**”) issued a Frequently Asked Question (“**FAQ**”) document providing that, in computing its regulatory capital, a member broker-dealer that includes the covered loan as a liability on its balance sheet may add-back the Forgivable Expense Amount to net capital to the extent the firm has recorded expenses for the costs and payments making up the Forgivable Expense Amount. The Forgivable Expense Amount added back to net capital, however, may not exceed the amount of the balance sheet liability for the covered loan that the firm reasonably expects to be forgiven pursuant to Section 1106 of the CARES Act. See FINRA website at: <https://www.finra.org/rules-guidance/key-topics/covid-19/faq#cares>

³ *Net Capital* is defined under Regulation 1.17(c)(1) to mean “the amount by which current assets exceeds liabilities.”

3. The amount of the add-back cannot exceed the balance sheet liability for the covered loan that the firm reasonably expects to be forgiven pursuant to Section 1106 and, as such, the add-back amount cannot increase net capital by more than the balance sheet liability for such covered loan;
4. The add-back is reported on line 3070 (Long term debt pursuant to regulation 1.17(c)(4)(vi)) of the Statement of the Computation of the Minimum Capital Requirements of the applicable Form 1-FR-IB or Form 1-FR-FCM, with an explanation on a separate page, provided that IBs and FCMs that are dually-registered with the Securities and Exchange Commission (“SEC”) as brokers or dealers may continue to file a FOCUS Report in lieu of a Form 1-FR-IB or Form 1-FR-FCM; and
5. An FCM or IB that files a FOCUS Report reports the Forgivable Expense Amount add-back on line 3525 (Other (deductions) or allowable credits) as directed by the FINRA April 2, 2020 FAQ.

In addition, FINRA provided further guidance on April 2, 2020 providing that until September 1, 2020, small firms may add back to net capital the amount of any accrued and unpaid annual assessment fees due to FINRA. FINRA provided that the amount of the accrued and unpaid annual assessment fees added back to net capital should be reported on line 3525 (Other (deductions) or allowed credits) of the firm’s FOCUS Report. Therefore, DSIO will also not recommend an enforcement action against an IB or FCM that, in computing its net capital under Regulation 1.17, adds back its accrued annual FINRA assessment fees provided that the IB or FCM also is a registered broker-dealer with the SEC, qualifies as a small firm as defined by FINRA By-laws, and is eligible to take advantage of the additional FINRA guidance permitting an add-back of the accrued unpaid annual assessments until September 1, 2020.

II. Conclusion

DSIO recognizes that registrants and other affected market participants may require additional or different relief in their efforts to comply with the requirements of the CEA and Commission regulations. As a result, any registrants that require other relief are encouraged to contact DSIO staff. DSIO staff will address issues on a case-by-case basis in light of the requesting registrant’s particular facts and circumstances.

This letter, and the positions taken herein, represent the views of DSIO only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the CEA or in Commission regulations. Further, this letter, and the positions taken herein, are based upon the facts and circumstances presented to DSIO. Any different, changed, or omitted material facts or circumstances might render the relief provided by this letter void.

Finally, as with all staff letters, the DSIO retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of relief provided herein, in its discretion.

If you have any questions concerning this correspondence, please contact Joshua Beale, Associate Director, DSIO, at (202) 418-5446 or jbeale@cftc.gov, or Andrée Goldsmith, Special Counsel, DSIO, at (202) 418-6624 or agoldsmith@CFTC.gov.

Very truly yours,

Joshua B. Sterling
Director
Division of Swap Dealer and Intermediary Oversight

cc: Regina Thoele, Compliance
National Futures Association, Chicago



By Electronic Mail

April 13, 2020
Joshua B. Sterling, Director
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission
1155 21st Street NW
Washington DC 20581

Re: Request for No-Action Position – Commodity Exchange Act Section 4f(b)

Dear Mr. Sterling:

The Futures Industry Association (“**FIA**”),¹ on behalf of its member firms that are registered as futures commission merchants (“**FCMs**”) and similarly situated FCMs, and the National Introducing Brokers Association (“**NIBA**”),² on behalf of its member firms that are registered as Introducing Brokers (“**IBs**”) and similarly situated IBs (the IBs and FCMs collectively, “**registered entities**”), respectfully request the Division of Swap Dealer and Intermediary Oversight (“**Division**”) to confirm that it will not recommend that the Commodity Futures Trading Commission (“**Commission**” or “**CFTC**”) initiate an enforcement action against the registered entities for violation of Section 4f(b) of the Commodity Exchange Act (“**CEA**”) for failure to maintain minimum capital levels in violation of Section 1.17(a)(1) of the CFTC’s regulations if the registered entities receive a covered loan under the Coronavirus Aid, Relief, and Economic Security Act (the “**CARES Act**”), seek loan forgiveness pursuant to the provisions of the CARES

¹ FIA is the leading global trade organization for the futures, options, and centrally cleared derivatives markets, with offices in London, Brussels, Singapore and Washington DC. FIA’s mission is to support open, transparent and competitive markets; protect and enhance the integrity of the financial system; and promote high standards of professional conduct. FIA’s membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry. FIA’s core constituency consists of firms that operate as clearing members in global derivatives markets, including firms registered with the Commodity Futures Trading Commission as futures commission merchants.

² NIBA is the united voice for derivatives professionals. Established in 1991, NIBA helps its members find greater success in the futures and options business through education and networking while providing the membership with a voice in regulatory and industry matters. NIBA members include Introducing Brokers (IBs), Commodity Trading Advisors (CTAs) and Commodity Pool Operators (CPOs). The Association enjoys the support of CME Group, InterContinental Exchange, Eurexchange, American Financial Exchange, the Small Exchange and all domestic Futures Commission Merchants (FCMs) which handle retail transactions in both domestic and non-domestic markets.

Act, and reflect such activity in its minimum net capital computation, subject to the terms and conditions set forth herein.

Regulation 1.17 requires the registered entities to compute their adjusted net capital by determining their assets and liabilities under GAAP and then making certain adjustments, including adjustments to the assets for market risk or credit risk. Persons required to be registered as FCMs must maintain minimum net capital levels as required in Regulation 1.17(a)(1)(i). Persons required to be registered as IBs not guaranteed³ by an FCM are required to maintain minimum net capital levels as required in Regulation 1.17(a)(1)(iii). Both FCMs and IBs must compute their respective minimum net capital pursuant to computational and definition sections within Regulation 1.17. Those sections address how to compute assets and liabilities, but do not provide allowances to deduct from liabilities loan amounts that become forgivable in assets.

On March 27, 2020, the CARES Act was signed into law. The CARES Act includes the Payroll Protection Program (“PPP”), which allows qualifying businesses to obtain loans of up to \$10 million and is designed to provide a direct incentive for small businesses to keep their employees on the payroll. Section 1106(b) of the CARES Act provides that a recipient of a covered loan (as defined in Section 1106(a)(1)) is eligible for forgiveness of indebtedness on the covered loan in an amount (the “**Forgivable Expense Amount**”) equal to the sum of the following costs incurred and payments made during the eight-week period beginning on the date of the origination of the covered loan:

1. Payroll costs (as defined in Section 1106(a)(8));
2. Any payment of interest on any covered mortgage obligation (as defined in Section 1106(a)(2)), which shall not include any prepayment of or payment of principal on a covered mortgage obligation;
3. Any payment on any covered rent obligation (as defined in Section 1106(a)(4)); and
4. Any covered utility payment (as defined in Section 1106(a)(5)).

In light of the above and in order to assure that all FCMs and IBs that seek PPP loans can reflect the benefits of the program in their net capital computations, we respectfully request the Division to confirm that it will not recommend that the Commission initiate an action against such FCMs and IBs for apparent violation of CEA Section 4f(b) if such FCMs and IBs in computing net capital under CFTC Regulation 1.17 add back to capital the eligible Forgivable Expense

³ Introducing Brokers that operate pursuant to guarantee agreements with FCMs are not subject to the net capital requirements in Section 1.17.

Joshua B. Sterling, Director
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Amount. We suggest that the Commission provide this relief subject to certain conditions, including a requirement that the FCM and the IB maintain all records related to the PPP loan and the Forgivable Expense Amount and that the Forgivable Expense Amount be reported on CFTC Form 1-FR and Securities Exchange Commission (“SEC”) Form FOCUS.

In an FAQ released April 2, 2020, the Financial Industry Regulation Authority (“FINRA”) provided similar relief to its Broker-Dealer registrants in computing regulatory capital.⁴ Furthermore, FINRA also provided relief to small firms (as defined by FINRA) with additional time to pay FINRA’s annual assessment fees and provided that those firms may add back to the net capital the amount of any accrued and unpaid annual assessment fees due FINRA. Accordingly, we seek relief allowing any FCM or IB that is also a registered broker-dealer with the SEC to add back to net capital for purpose of calculating net capital under CFTC Regulation 1.17 the amount of accrued and unpaid annual assessment fee revenue, provided the firm is eligible to take advantage of FINRA’s guidance.

* * * *

Thank you for your consideration of this request. If you have any questions or require any additional information, please contact me at 202.772.3057 or alurton@fia.org or Melinda Schramm at 312.498.3518 or Melinda@futuresrep.com.

I hereby certify that the material facts set forth in this letter are true and complete to the best of my knowledge.

Sincerely,



Allison P. Lurton
General Counsel and Chief Legal Officer, FIA

/s/ Melinda Schramm

Melinda Schramm
Chairman, NIBA

⁴ FINRA, Frequently Asked Questions Related to Regulatory Relief Due to the Coronavirus Pandemic, available at <https://www.finra.org/rules-guidance/key-topics/covid-19/faq#cares> (Q&A titled “Net Capital Treatment of Covered Loans Under the CARES Act,” added Apr. 2, 2020).