

Additional Information:

The external attendees requested additional clarification regarding several terms found in the CFTC's Notice of Proposed Rulemaking setting forth the duties of a Chief Compliance Officer (CCO) for Swap Dealers, Major Swap Participants, and Futures Commission Merchants. External attendees pointed out how the traditional duties of compliance were split into several functions: designing a compliance program, maintaining and implementing that program, and enforcing that program. The CCO's responsibility to escalate (repeatedly if necessary) if a problem has not been resolved was discussed as a possible meaning of the term "ensure compliance" when applied to the CCO position. External attendees indicated that the phrase "resolve conflicts of interest" would traditionally be interpreted as eliminating a conflict of interest, which is not always possible. Instead, they believe further interpretation is needed to permit conflicts of interest to be addressed, mitigated, or conditioned as well. External attendees also emphasized that the role of a compliance officer is to advise the business side of acceptable and unacceptable alternatives, and if the business side chooses an unacceptable alternative, then the compliance officer must escalate the problem until an acceptable alternative is selected. However, the compliance officer should not be the actual decision maker in the resolution.

The differences between the CFTC's proposed rules and the existing framework under FINRA's Rule 3130 were summarized by external attendees into three categories: resolution vs. mitigation of conflicts; the presence of the term "ensure compliance" in the CFTC's proposed rules, and whether the CEO or the CCO certifies the annual report. External attendees discussed the value of having the CEO make a certification as to whether policies are in place reasonably designed to ensure compliance, as well as the value of sharing responsibility between compliance and the business side. External attendees also requested clarification as to how the certification as to the accuracy and completeness of the information in the annual report might be kept separate from the matters of opinion expressed in the annual report. In general, the external attendees requested that the standard for the annual report be attainable. The issue of having to prepare two reports – one for FINRA, and one for the CFTC, was also raised. There was additional concern about the lack of materiality qualifiers for the annual report.

External attendees also pointed out that the Volcker certification required under the CFTC's rules could be problematic depending on the definition of proprietary trading, which is not yet been proposed. Finally, the point was raised that small futures commission merchants need to be separately considered in how the CCO requirements will impact their operations.