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February 18, 2014

The Honorable Debbie Stabenow
Chairman
The Honorable Thad Cochran
Ranking Member
Committee on Agriculture, Nutrition, and Forestry
United States Senate

The Honorable Frank D. Lucas
Chairman
The Honorable Collin C. Peterson
Ranking Member
Committee on Agriculture
House of Representatives

Subject: Commodity Futures Trading Commission: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Commodity Futures Trading Commission (CFTC or the Commission) entitled "Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds" (RIN: 3038-AD05). We received the rule on December 30, 2013. It was published in the *Federal Register* as a final rule on January 31, 2014. 79 Fed. Reg. 5808. The final rule is effective April 1, 2014.

The final rule implements section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which contains certain prohibitions and restrictions on the ability of a banking entity and nonbank financial company supervised by the Board of Governors of the Federal Reserve System (the Board) to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund. Section 619 also requires the Board, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), and the Securities and Exchange Commission (SEC) to issue regulations implementing section 619 and directs CFTC and those four agencies to consult and coordinate with each other, as appropriate, in developing and issuing the implementing rules, for the purposes of assuring, to the extent possible, that such rules are comparable and provide for consistent application and implementation. To that end, although the Commission adopted a final rule that is not a joint rule with the other agencies, CFTC and the other agencies have worked closely together to develop the same rule text and supplementary information, except for information specific to CFTC or the other agencies, as applicable. In particular, CFTC's final rule is numbered as part 75 of the Commission's regulations, the rule text and this report refer to the "Commission" instead of the "[Agency]" and one section of the regulations addresses authority, purpose, scope, and relationship to other authorities with respect to the Commission.

Furthermore, it is noted that the supplementary information generally refers to the “agencies” collectively when referring to deliberations and considerations in developing the final rule by CFTC together with the other four agencies and references to the “final rule” should be deemed to refer to the final rule of the Commission.

Enclosed is our assessment of CFTC compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that CFTC complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Melissa D. Jurgens
Secretary of the Commodity Futures
Trading Commission

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
COMMODITY FUTURES TRADING COMMISSION
ENTITLED
"PROHIBITIONS AND RESTRICTIONS ON PROPRIETARY TRADING
AND CERTAIN INTERESTS IN, AND RELATIONSHIPS WITH,
HEDGE FUNDS AND PRIVATE EQUITY FUNDS"
(RIN: 3038-AD05)

(i) Cost-benefit analysis

The Commission noted that some commenters correctly stated that a costs and benefits analysis is not legally required. The Commission states in a footnote that with respect to CFTC, section 15(a) of the Commodity Exchange Act (CEA) requires such consideration only when "promulgating a regulation under this [Commodity Exchange] Act." According to the Commission, this final rule was not promulgated under CEA, but was promulgated exclusively under section 13 of the Bank Holding Company Act of 1956 (BHC Act) and CEA section 15(a) is not applicable. Therefore, the Commission did not conduct a cost benefit consideration under section 15(a) of CEA.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

The Commission states that OCC, FDIC, SEC, and CFTC (the agencies) have considered the potential economic impact of the final rule on small banking entities in accordance with RFA. The agencies believe that the final rule will not have a significant economic impact on a substantial number of small banking entities. The agencies invited public comment on this determination and received several comments that resulted in the agencies making changes to the proposed rule in this final rule that would eliminate or minimize the burden on small banking entities. Therefore, the agencies certified, pursuant to 5 § U.S.C. 605(b), that for the banking entities subject to each such agency's jurisdiction, the final rule will not result in a significant economic impact on a substantial number of small entities. In light of the foregoing, the Commission states that the Board also does not believe, for the banking entities subject to the Board's jurisdiction, that the final rule would have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

As an independent regulatory agency, the Commission is not subject to the Unfunded Mandates Reform Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The Commission explains that authority for developing and adopting regulations to implement the prohibitions and restrictions of section 13 of the BHC Act is divided among the Board, FDIC, OCC, SEC, and CFTC. On November 7, 2011, as required by section 13(b)(2) of the BHC Act,

the Board, OCC, FDIC, and SEC in October 2011 invited the public to comment on proposed rules implementing that section's requirements. 76 Fed. Reg. 68,846 (Joint Proposal). On January 23, 2012, the period for filing public comments on this Joint Proposal was extended for an additional 30 days, until February 13, 2012. 77 Fed. Reg. 23. The Commission states that in January 2012, CFTC requested comment on a proposal for the same common rule to implement section 13 with respect to those entities for which it is the primary financial regulatory agency and invited public comment on its proposed implementing rule through April 16, 2012. 77 Fed. Reg. 8332 (Feb 14, 2012).

The Commission explains that the agencies received over 18,000 comments addressing a wide variety of aspects of the proposal, including definitions used by the proposal and the exemptions for market making-related activities, risk-mitigating hedging activities, covered fund activities and investments, the use of quantitative metrics, and the reporting proposals. According to the Commission, the vast majority of these comments were from individuals using a version of a short form letter to express support for the proposed rule. More than 600 comment letters were unique comment letters, including from Members of Congress; domestic and foreign banking entities and other financial services firms; trade groups representing banking, insurance, and the broader financial services industry; U.S. state and foreign governments; consumer and public interest groups; and individuals. The Commission states that in order to improve understanding of the issues raised by commenters, the agencies met with a number of these commenters to discuss issues relating to the proposed rule, and summaries of these meetings are available on each of the agency's public Web sites. CFTC staff also hosted a public roundtable on the proposed rule.

The Commission states that section 13 of the BHC Act also required the Financial Stability Oversight Council (FSOC) to conduct a study (FSOC study) and make recommendations to the agencies by January 21, 2011, on the implementation of section 13 of the BHC Act. The FSOC study was issued on January 18, 2011. The FSOC study included a detailed discussion of key issues related to implementation of section 13 and recommended that the agencies consider taking a number of specified actions in issuing rules under section 13 of the BHC Act. In formulating this final rule, the agencies noted that they carefully reviewed all comments submitted in connection with the rulemaking and considered the suggestions and issues they raise in light of the statutory restrictions and provisions as well as the FSOC study. The Commission also explains that the agencies have been mindful of the importance of providing certainty to banking entities and financial markets and of providing sufficient time for banking entities to understand the requirements of the final rule and to design, test, and implement compliance and reporting systems. Finally, the Commission also states that among the comments received, were 15 additional questions specifically regarding the approach CFTC should take in regard to provisions that were either directly related to CFTC (e.g., definition of commodity pool, clearing exemption) and others that appeared not to be (e.g., underwriting, market making of SEC entities, securitization). The Commission states that the agencies and CFTC--specifically with regard to the CFTC comments--have sought to reasonably respond to all of the significant issues commenters raised. The agencies made numerous changes and modifications to the final rule in response to the issues and information provided by commenters, and the relevant comments are addressed in the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

The Commission states that final rulemaking contains several collections of information for which the three federal banking agencies--the Board, OCC, and FDIC--sought control numbers at the time they proposed the same substantive requirements that the Commission later proposed. To avoid double accounting of information collections for which control numbers

were sought, the Commission did not propose and did not finalize an information collection request for this rule. Rather, as indicated in its proposed rule, the Board provided that it would submit its information collection to the Office of Management and Budget (OMB) once its final rule is published, and that the submission would include burden for Federal Reserve-supervised institutions, as well as burden for OCC-, FDIC-, SEC-, and CFTC-supervised institutions under a holding company. According to the Commission, the Board, OCC, FDIC, and SEC adopted equivalent final rules on or about the same date as CFTC adopted its final rule. The Commission further states that the Board, OCC, and FDIC included in the Supplementary Information of their final rules an overview of their PRA analyses including burden cost estimates, with further analyses to be provided in the supporting statements required to be submitted to OMB according to their regulations implementing PRA.

The Commission states that under section 619 of the Dodd-Frank Act, the banking agencies, SEC, and the Commission engage in “coordinated rulemaking,” which includes all entities for which the Commission “is the primary financial regulatory agency, as defined in section 2” of the Dodd-Frank Act. The Commission explains that section 2 defines “primary financial regulatory agency” as a federal banking agency with respect to certain depository institutions except as provided in other subsections of section 2. In subsection (12)(C), the Commission is designated as the primary financial regulatory agency for, among other things, “any ... swap dealer ... registered with the [Commission]” Section 4s(c)(1) of CEA, as adopted in section 731 of the Dodd-Frank Act, provides that “any person that is required to be registered as a swap dealer shall register with the Commission regardless of whether the person is also a depository institution.”

Accordingly, the Commission states that banking entities, including domestic depository institutions and branches and agencies of foreign banks subject to supervision by OCC or the Board, have registered with the Commission. The Commission states that it does not know how many additionally may register. To ensure that the Commission has access to fulfill its statutory obligations and not unduly burden its registrants with duplicative information collection requirements, and pursuant to its proposed rule, the Commission will request, pursuant to 44 U.S.C. 3509, that the director of OMB designate the banking agencies as the respective collection agencies for PRA purposes for all banking entities for which the Commission is the primary financial regulatory agency with respect to this rule.

Statutory authorization for the rule

The Commission states that the final rule is authorized by new section 13 of the Bank Holding Company Act of 1956, as amended by section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act which added a new section 13, Pub. L. No. 111-203, 124 Stat. 1376 (2010), codified at 12 U.S.C. 1851.

Executive Order No. 12,866 (Regulatory Planning and Review)

As an independent regulatory agency, the Commission is not subject to the review requirements of the Order.

Executive Order No. 13,132 (Federalism)

As an independent regulatory agency, the Commission is not subject to the review requirements of the Order.