SIFMA
Securities Industry and Financial Markets Association

The Clearing House℠

June 11, 2009

Via Electronic Mail (rule-comments@sec.gov)

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Release No. 34-59917; File Nos. SR-DTC-2009-07, SR-FICC-2009-06, SR-NSCC-2009-03

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] and The Clearing House Association L.L.C. ("The Clearing House"),[2] appreciate the opportunity to comment on the proposed rule changes relating to economic sanctions and embargo programs administered and enforced by the Office of Foreign Assets Control ("OFAC"), set forth in Release No. 34-59917; File Nos. SR-DTC-2009-07, SR-FICC-2009-06, SR-NSCC-2009-03 (collectively, the "Proposed Rules").[3] The Proposed Rules were prepared by the Fixed Income Clearing Corporation ("FICC"), the National Securities Clearing Corporation ("NSCC"), and the Depository Trust Company ("DTC"), and filed with the Securities and Exchange Commission ("SEC") on March 31, 2009, April 1, 2009, and April 22, 2009, respectively. Because the FICC, NSCC, and DTC (collectively, the "Clearing Agencies") filed the Proposed Rules pursuant to Section 19(b)(3)(A)(iii) of the Securities Exchange Act of 1934 ("Act")[4] and Rule 19b-4(f)(4),[5] the proposals were effective upon filing.

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[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 600 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

[2] The members of The Clearing House are: ABN AMRO Bank, N.V.; Bank of America, National Association; The Bank of New York Mellon; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; UBS AG; U.S. Bank National Association; and Wells Fargo Bank, National Association.

[3] 74 Fed. Reg. 23907 (May 21, 2009).

[4] 15 U.S.C. 78s(b)(3)(A)(iii).

I. Introduction

As a general matter, we strongly support the SEC's efforts to reduce risks and associated costs to the Clearing Agencies and their participants, members, and pledgees (collectively, the "Members") and to ensure that OFAC sanctions and embargos are adhered to appropriately. We are supportive of the goals of the Proposed Rules and we commend you and your staff for all of your efforts in leading this initiative. We are, however, concerned with some of the principal terms of the Proposed Rules.

As you may know, SIFMA and The Clearing House have been strong supporters of anti-money laundering and OFAC initiatives and have worked for years with regulators, including OFAC, to improve efforts to thwart money laundering and terrorist financing, and further U.S. foreign policy and national security objectives. We look forward to working with the SEC and the Clearing Agencies in furtherance of these objectives. However, as the Clearing Agencies did not solicit formal written comments prior to the release of the Proposed Rules, neither these industry groups nor any other securities industry group, to our knowledge, had an opportunity to assist with the formation of the Proposed Rules.

We submit that the Proposed Rules are unnecessary and should, therefore, be withdrawn. At a minimum, we believe there are certain critical modifications that the SEC should make to the Proposed Rules and we discuss these provisions and the modifications below.

II. We Urge the SEC to Withdraw the Proposed Rules

The Proposed Rules state that Members subject to United States jurisdiction must execute a "Confirmation of an OFAC Program" letter ("OFAC Letter") to confirm that the Member has "implemented a risk-based program reasonably designed to comply with applicable OFAC sanctions regulations."[6] It is unclear why it is necessary for Members to execute such an OFAC Letter, particularly considering that the Clearing Agencies' rules for membership already require all Members to comply with OFAC, and those Members that are regulated entities are fully aware of their OFAC obligations and have OFAC compliance programs subject to regular and ongoing review by their regulators. Moreover, Members currently make multiple certifications to The Depository Trust & Clearing Corporation ("DTCC") confirming that they have OFAC policies and procedures in place, and screen transactions for OFAC compliance. Specifically, in 2008, DTCC asked that each Member provide a letter, certifying that, among other things, the Member is "subject to the regulations administered by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") and has policies and procedures designed to comply with the prohibitions and restrictions mandated by OFAC" ("KYC/OFAC Letter"). This letter

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[5] 17 C.F.R. § 240.19b-4(f)(4).

[6] The form of the OFAC Letter is attached to each of the clearing agencies' rule filings with the SEC, and is available on DTCC's website. *See e.g.*, http://www.dtcc.com/legal/rule_filings/ (follow "The Depository Trust Company (DTC) SEC Rule Filings" hyperlink; then follow "Rule Filing SR-DTC-2009-07" hyperlink).

contained agreed upon language between DTC and the SIFMA AML Committee. In addition, Members that are Domestic Participants are required to provide an OFAC certification for each deposit to their securities account.[7] Thus, the OFAC Letter appears to be an unnecessary and duplicative administrative burden.

III. We Urge the SEC to Make Certain Critical Modifications to the Certification

In any event, should the SEC approve the Proposed Rules requiring Members to submit the OFAC Letter, we have suggested revisions, set forth below, that, we believe, are more consistent with a risk-based approach.

1. The Strict Liability Language in the Proposed Rule and in the Certification is Inconsistent with A Risk-Based Approach

The Proposed Rules state that Members "must agree not to conduct ***any*** transaction or activity through the Clearing Agencies that violate OFAC regulations."[8] (emphasis added). This strict liability language is inconsistent with public guidance articulated by OFAC, encouraging firms to have risk-based programs in place that are reasonably designed to comply with OFAC sanctions.[9] The OFAC Letter also includes strict liability language that is inconsistent with the risk-based approach encouraged by OFAC, and does not correspond with the language in the KYC/OFAC Letter. In contrast, the language in the KYC/OFAC Letter, which the Members and DTC previously discussed and agreed upon, reflects a risk-based approach.

In our view, a Member utilizing a risk-based approach should not be required to certify that it will not conduct any transaction or activity through the Clearing Agencies that violates OFAC regulations. It is more appropriate for a Member to certify that each transaction or activity conducted through the Clearing Agencies has been screened for OFAC compliance pursuant to the Member's risk-based policies and procedures, and that, to the best of the Member's knowledge, no such transaction or activity violates the OFAC regulations.

In contrast to the language in the KYC/OFAC Letter, the OFAC Letter calls for detailed representations from Members that they screen parties other than the client. Specifically, the certification addresses the screening of indirect owners and controlling

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[7] In order to receive credit for a deposit, a Domestic Participant must place a "Y" in the OFAC certification field to certify that each certificate attached to the deposit has been screened against OFAC's list of Specially Designated Nationals and Blocked Persons and that there were no valid matches.

[8] 74 Fed. Reg. at 23907.

[9] *See generally* the *Bank Secrecy Act/Anti-Money Laundering Examination Manual* ("FFIEC Manual") 137–145, last published in August 2007 by the Federal Financial Institutions Examination Council, *available at* http://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2007.pdf. The FFIEC Manual provides guidance, developed with OFAC's assistance, for establishing an OFAC compliance program that is commensurate with the financial institution's specific OFAC risk profile, based on a risk assessment of the relevant products, services, customers, and geographic locations.

parties, who may not be known to the Members.[10] Such representations regarding screening third parties are problematic because Members do not uniformly collect such information for all accounts. Where third-party information is collected, it is generally for anti-money laundering purposes, not for OFAC purposes. OFAC screening is generally performed on a computerized basis by screening the account names in the Member firms' systems. Because third-party names, if available, are not generally added to account names, Members' systems do not allow them to screen third parties. Indeed, to screen third parties, Members would need to revamp their systems, which would be very costly, or conduct OFAC screening manually, which is virtually impossible for most firms, given their size, the number of their accountholders, and more importantly, the potentially greater number of third parties, not presently referenced in the account name.

Thus, we recommend deleting the language from the OFAC Letter with respect to screening third parties, thereby allowing Members to certify that they screen *customers* against OFAC's most updated list of Specially Designated Nationals and Blocked Persons ("SDN List"). We believe this should be an acceptable amendment to the OFAC Letter based on OFAC's recent guidance regarding additional due diligence measures to be taken in those instances where there is a lack of transparency with respect to third parties, such as beneficial owners. In such circumstances, OFAC has suggested that additional due diligence measures may be taken with respect to the *customer*, not the third parties, to mitigate the risk of potential OFAC violations.[11] Therefore, it should be sufficient for Members to make representations with respect to their customers under the risk-based approach encouraged by OFAC, and unnecessary to make representations with respect to third parties.

The OFAC Letter further states that "unless authorized by OFAC [the Member must have] excluded from any Business it introduces to the Clearing Agencies all persons or entities on the SDN List and all persons with whom it is otherwise impermissible for DTCC to engage in transactions."[12] By requiring Members to certify that they have excluded all prohibited persons, rather than requiring Members to certify that all transactions have been screened for OFAC compliance, DTC is asking Members to make a representation that they have met a strict liability standard, which is an extraordinarily high standard to attain, and, as noted above, is not consistent with the risk-based approach permitted and encouraged by OFAC. Therefore, we recommend that this language be deleted and replaced with language that recognizes that the Member applies its risk-based program to all business and transactions which the Member introduces to DTC. Suggested language could include the following: "*[User name]* applies its risk-based compliance program to any Business it introduces to the Clearing Agencies."

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[10] OFAC Letter, ¶ 2, *supra* note 6.

[11] *See* OFAC, Opening Securities and Futures Accounts from an OFAC Perspective, *available at* http://www.treasury.gov/offices/enforcement/ofac/articles/securities_future_accounts_11052008.pdf.

[12] OFAC Letter, ¶ 3, *supra* note 6.

2. The Proposed Rule Needs to be Clarified to Alleviate the Administrative Burden Related To the Filing of OFAC Letters

In addition, the OFAC Letter requires Members to execute an updated certification after a merger, acquisition or other corporate change, or at least every two years, which places an administrative burden on the Members.[13] While each of the Clearing Agencies has issued an Important Notice ("Notice") advising that it will issue a similar Notice on or about the first day of October every other year to provide Members with advanced notice to complete the OFAC Letter, this procedure falls short.[14] It is not clear how the deadline for filing an updated OFAC Letter will be calculated. The Proposed Rules state that Members must execute an updated certification "periodically." But the Notices issued by the Clearing Agencies include different requirements. The Notices issued by DTC and FICC state that Members must provide an updated certification "every two years," whereas the NSCC's Notice and the OFAC Letter state that the certification must be updated "at least every two years." At a minimum, therefore, this inconsistency needs to be addressed.

Moreover, the time when a Member should begin calculating the two years is unclear. According to the Notices issued by the Clearing Agencies, the first filing of the OFAC Letter is due no later than March 31, 2010. However, a new firm could become a Member and file an initial OFAC Letter at any point during a given year, in which case, that Member's next two year deadline for an updated OFAC Letter would probably not be March 31, 2012. Further, if a Member files an updated OFAC Letter prior to the two year date, for example, following a merger, acquisition, or other corporate change, it is unclear when the two year deadline would occur. Under such circumstances, the Notices filed by the Clearing Agencies on or about the first of October every other year may not serve as a reminder to Members.

Thus, this proposed procedure does not provide sufficient guidance as to when the certification must be filed, and does not resolve the unnecessary administrative burden on Members for tracking when the certification is due. Instead, DTCC should be required to notify the Member directly when it requires the filing of the certification.

We propose revising the OFAC Letter to reflect the Members' agreement to provide an updated certification "upon request" by the Clearing Agencies. This removes the administrative burden from the Members, and may prevent Members from inadvertently missing the deadline to file an updated OFAC Letter. This is significant, in part, because Members will be subject to a significant fine for missing the deadline. At a

[13] OFAC Letter, ¶¶ 4 and 5, *supra* note 6.

[14] DTC Important Notice B5122-09 (May 22, 2009), *available at* http://www.dtcc.com/downloads/legal/imp_notices/2009/dtc/com/5122-09.pdf; NSCC Important Notice A6826 (May 22, 2009), *available at* http://www.dtcc.com/downloads/legal/imp_notices/2009/nscc/a6826.pdf; FICC Important Notices GOV078.09 and MBS109.09 (May 27, 2009), *available at* http://www.dtcc.com/downloads/legal/imp_notices/2009/ficc/gov/GOV078.09.pdf; http://www.dtcc.com/downloads/legal/imp_notices/2009/ficc/mbs/MBS109.09.pdf.

minimum, therefore, the Proposed Rule should be revised to be more specific and make clear how to calculate the deadline for updating the OFAC Letter.

3. The Fines Proposed For The Failure To File A Timely OFAC Letter Should Be Withdrawn, Or At A Minimum, Reduced

The Proposed Rule provides that each U.S. Member's OFAC Compliance Officer, Chief Compliance Officer, or other individual with responsibility for managing the OFAC compliance program, who fails to submit an updated OFAC Letter, as required by the Rule, will be subject to a $5,000 fine.[15] We question the necessity of any fine, but, at a minimum, suggest that the level of the fine be reduced since this is not the type of offense that warrants such a significant fine.

To create more uniformity between their fines, the Clearing Agencies adopted rules ("Harmonizing Rules"), including a fine schedule, that created consistent fines for certain types of infractions.[16] The $5,000 fine set forth in the Proposed Rules for failure to file an OFAC Letter is not consistent with the fines that the Clearing Agencies themselves set forth in the Harmonizing Rules. Specifically, the Harmonizing Rules provide for a fine of $1,000 for failure to file a timely notice upon learning of any change to a representation made to the Clearing Agencies that the Member satisfies the standards required for membership, such as the reasonable standards of financial responsibility and operational capability. We submit that the OFAC Letter is a representation regarding the Members' compliance with a general continuance standard related to OFAC compliance, and therefore, the fine for failing to provide an OFAC Letter should be no more than $1,000 to be consistent with the Harmonizing Rules. Pursuant to the Harmonizing Rules, a $5,000 fine applies in the event that a member fails to notify the Clearing Agencies about a "material change,"[17] but failure to file an updated OFAC Letter, in our view, does not qualify as a "material change."[18]

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[15] 74 Fed. Reg. at 23907.

[16] *See* DTC's Important Notice B3790-08 (August 6, 2008), *available at* http://www.dtcc.com/downloads/legal/imp_notices/2008/dtc/com/3790-08.pdf; NSCC Important Notice A6670 (August 6, 2008), *available at* http://www.dtcc.com/downloads/legal/imp_notices/2008/nscc/a6670.pdf; and FICC Important Notices GOV091.08 and MBS159.08 (August 6, 2008), *available at* http://www.dtcc.com/legal/imp_notices/ficc/mbs/2008.php; http://www.dtcc.com/downloads/legal/imp_notices/2008/ficc/gov/GOV091.08.pdf.

[17] A "material change," means events such as a merger or acquisition involving the Member, a change in corporate form, a name change, a material change in ownership, control or management, and participation as a defendant in litigation which could reasonably be anticipated to have a direct negative impact on the Member's financial condition or ability to conduct business. *See Id.*

[18] As a separate matter, we understand that, as provided in the Harmonizing Rules, a Member of more than one Clearing Agency will not incur multiple penalties for failure to file a timely OFAC Letter, but will pay the fine only once with equal portions paid to each applicable Clearing Agency.

4. The Proposed Rule Should Clarify That Member Firms - Not Individuals - Should Have Liability For Non-Filing

Finally, we recommend that the OFAC Letter be drafted as a certification from the Member, not the OFAC Compliance Officer, Chief Compliance Officer, or other individual responsible for the Member's OFAC sanctions compliance program. The Proposed Rules should make clear that the individual is signing the OFAC Letter on the Member's behalf, and that there is no individual liability with respect to the certification.

We attach a revised OFAC Letter reflecting our suggested modifications for your consideration.

* * *

We appreciate the opportunity to provide our comments to the SEC on the Proposed Rules. We commend the SEC for their efforts to reduce risks and associated costs to the Clearing Agencies and their participants. If you have any questions concerning our comment letter, or need additional information, please feel free to contact me at 202-962-7300.

Respectfully submitted,

Ira Hammerman
General Counsel
Securities Industry and Financial Markets Association

Norman R. Nelson
General Counsel
The Clearing House Association L.L.C.

Attachment

cc: David Karasik, Division of Trading and Markets, Office of Clearance and Settlement, U.S. Securities and Exchange Commission

ATTACHMENT
SIFMA and The Clearing House
Joint Comment Letter Re: File Nos.
SR-DTC-2009-07, SR-FICC-2009-06,
SR-NSCC-2009-03

CONFIRMATION OF AN OFAC PROGRAM

[User's Letterhead]

Date:

The Depository Trust Company,
National Securities Clearing Corporation,
Fixed Income Clearing Corporation
c/o The Depository Trust & Clearing Corporation
55 Water Street,
New York, NY 10041
Attention: OFAC Officer

Re: Confirmation of an OFAC Program

I am the OFAC Compliance Officer, Chief Compliance Officer or am otherwise responsible for managing *[User name][1]'s* OFAC sanctions compliance program. This certification is being executed in accordance with applicable rules related to the *[User name]'s* compliance with sanctions regulations (31 CFR Chapter V and Appendices) administered by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") and applies to all transactions and business activities (collectively referred to as "Business") conducted through The Depository Trust Company, National Securities Clearing Corporation, both division of the Fixed Income Clearing Corporation (collectively the "Clearing Agencies").

[User name] hereby certifies as follows:

1. *[User name]* is a "United States person" (as defined under applicable OFAC sanctions regulations) that is subject to, and has implemented a risk-based program reasonably designed to comply with, applicable OFAC sanctions regulations.

2. As part of its risk-based compliance program, *[User name]* screens customers against the most recent version of OFAC's List of Blocked Person, Specially Designated Nationals, Specially Designated Terrorists, Specially Designated Global Terrorists, Foreign Terrorist Organizations, Specially Designated Narcotics Traffickers, and against any other lists maintained by OFAC (collectively referred to as the "SDN List").

3. *[User name]* applies it's risk based compliance program to any Business it introduces to the Clearing Agencies.

4. Upon request, *[User name]* agrees to provide an updated Certification of OFAC Compliance, if required, due to a merger, acquisition or other corporate change that affects its membership and requires *[User name]* to notify the Clearing Agencies.

5. Upon request, *[User name]* understands that it will execute an updated Certification of OFAC Compliance every two (2) years.

This Certification of OFAC Compliance applies to any and all accounts for the *[User name]*s at the Clearing Agencies.

By:_____ Title:_____
Authorized Officer's Signature

Name: _____ Phone: _____
PRINT

E-Mail Address: _____

[1] For the purposes of this certification User means: a Participant or Pledgee of DTC; a Member or Limited Member, with the exception of Commission Billing Members, Data Services Only Members, and Municipal Comparison Only Members, of NSCC; Members of FICC's Government Securities Division; and Participants and Limited Purpose Participants of FICC's Mortgage-Backed Securities Division.

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Deleted: Unless otherwise authorized by OFAC, *[User name]* has excluded from any Business it introduces to the Clearing Agencies all person or entities on the SDN List and all persons with whom it is otherwise impermissible for DTCC to engage in transactions under applicable OFAC sanctions regulations.

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