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September 29, 2017

Mr. Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Project KISS; 82 Fed. Reg. 23765

Dear Secretary Kirkpatrick:

The International Swaps and Derivatives Association, Inc. (**"ISDA"**)[1] appreciates the opportunity to provide comments on the U.S. Commodity Futures Trading Commission's (**"CFTC" or "Commission"**) agency-wide review of its operation and oversight program with the goal of identifying areas in which it can simplify and modernize Commission rules, regulations and practices in order to reduce regulatory burdens, remove barriers to the efficient operation of derivatives markets, and foster economic growth.

Our members fully support the Project KISS initiative and remain committed to working with the CFTC and other regulators to complete and refine the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] ("**Dodd-Frank**") reforms effectively and expeditiously.

Since many aspects of the regulatory reforms are in their final stages, we believe now is the appropriate time not only to simplify the existing regulatory framework in order to make it more efficient and less costly from a compliance and markets perspective, but also to review the entire

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 875 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.
[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, H.R. 4173 (July 21, 2010).

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regulatory framework established following the 2008 financial crisis in order to ensure that it is in line with the objectives of Dodd-Frank and implemented in a safe and efficient manner.

Executive Summary

In this letter we identify a series of rules, practices, and other CFTC interpretations and guidance that the Commission should re-evaluate and either revise or amend to promote economic growth and remove costly and ineffective barriers to the efficient and safe functioning of the derivatives markets. The letter is structured by providing comments on a series of specific subject matter areas, in each instance following two sets of recommendations—recommendations for streamlining the CFTC's rules and related interpretations and guidance, and recommendations for improving the CFTC's oversight responsibilities. The subject matter areas addressed are as follows:

(1) Trading,
(2) Clearing,
(3) Reporting,
(4) Registration, and
(5) A series of other areas, including:[3]
  (a) Margin,
  (b) Capital and Liquidity,
  (c) Cross-Border Swaps Regulation,
  (d) Regulation Automated Trading,
  (e) Position Limits, and
  (f) CFTC Internal Processes and Procedures and Regulatory Structure.

In some cases, this letter will recommend changes to CFTC rules, no-action relief, and guidance to resolve instances where those rules or interpretations are ambiguous or otherwise incomplete and unclear in a way that places an unnecessary element of uncertainty on businesses, transactions and markets without promoting any corresponding regulatory or policy goals. In other instances, we recommend changes to resolve issues that present burdens on or barriers to the efficient functioning of the derivatives markets. We appreciate the Commission's consideration of these recommendations, and we look forward to providing any additional information or assistance that may be helpful to the CFTC's work on Project KISS.

[3] Although not discussed in this letter, we believe the Commission should provide guidance on the treatment of Prime Brokerage transactions under the Commission's regulations. Given the unique and complex nature of these transactions and possible implication of various rules, ISDA will provide a separate submission addressing this issue outside of the KISS initiative.

I. Trading

We appreciate the Commission's decision to revisit the swap execution facility (**"SEF"**) rules to ensure that they reflect the appropriate market structure for swaps trading, allow for flexibility and choice in trade execution, and enable derivatives users to more effectively hedge their business risks. We agree with Chairman Giancarlo that "[a] better way to promote price transparency is through a balanced focus on promoting swaps trading and market liquidity as Congress intended."[4] We look forward to working with the Commission as it continues to consider changes to its trading rules.[5] Below we provide specific recommendations for the Commission to consider as it continues to re-evaluate its swaps trading regulatory regime.

A. Recommendations for Streamlining the Trading Rules

i. Allow Certain Package Transactions to Be Executed Off-SEF.

As a preliminary matter, we request that the Commission remove the time limitations on certain no-action relief for package transactions where persisting issues remain difficult, if not impossible, to remedy under current circumstances. We also ask that the Commission consider outstanding requests for relief that have remained unaddressed.[6]

Currently, there are five categories of package transactions that are subject to time-limited no-action relief related to mandatory SEF execution.[7] These include:

1. MAT/New Issuance Bond Package Transactions,
2. MAT/Futures Package Transactions,
3. MAT/Non-Swap Instruments Package Transactions,
4. MAT/Non-MAT Uncleared Package Transactions, and
5. MAT/Non-CFTC Swap Package Transactions.

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[4] J. Christopher Giancarlo, Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank (White Paper) (Jan. 29, 2015) at 75.

[5] In this regard, we note that any forthcoming changes to the SEF rules should ensure that only contracts with sufficient trading liquidity should be subject to the trade execution requirement and that the Commission should allow for certain products to continue to be traded off-SEF given these products' unique trading characteristics or frequency of trading. We also note that if the made available to trade (**"MAT"**) requirement remains a precursor to swaps being traded on a SEF via the required methods of execution, the MAT process should be changed to allow all market participants, not just SEFs, to have meaningful input on MAT determinations.

[6] For a more detailed discussion of this issue, please see our joint-letter to the CFTC with the Institute of International Bankers and Securities Industry and Financial Markets Association (**"SIFMA"**), *available at* Appendix A, Attachment 1.

[7] *See* CFTC Letter 16-76 (Nov. 1, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-76.pdf.

As we have explained in more detail in our request for no-action relief,[8] requiring these package transactions to be executed on a SEF will decrease liquidity and make it virtually impossible to trade these instruments and/or use them as a hedging tool. Accordingly, we ask that staff remove the time limitations from the existing relief and consider the appropriate treatment of package transactions as part of the Commission's holistic review of trade execution requirements and the SEF framework more generally.

ii. Provide Permanent Relief from the Trade Execution Requirement to Correct Clerical and Operational Errors.

If an error is identified after a swap has cleared, any correction or cancellation must be done by the Derivatives Clearing Organization (**"DCO"**) because only the DCO is able to make corrections or cancellations to swaps carried on its books. In some instances, however, a DCO will decline or is unable to correct or cancel the swaps carried on their books. To correct a cleared erroneous swap, counterparties must arrange and execute a transaction that offsets the swaps carried on the DCO's books as well as a new trade that matches the terms and conditions of the erroneous trade other than any such error and time of execution (new trade, old terms), which is potentially prohibited by the CFTC's SEF rules.[9]

Recognizing this issue, Commission staff provided no-action relief for the correction of erroneous trades.[10] We believe that the solution provided in No-Action Letter 17-27 should be included in any subsequent revisions to the CFTC rules.[11]

For a more detailed discussion of this issue, please see ISDA's Petition for Rulemaking to Amend Parts 1 (General Regulations under the Commodity Exchange Act), 37 (Swap Execution Facilities) and 43 (Real-Time Public Reporting) of the CFTC Regulations, available at Appendix A, Attachment 2.

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[8] Letter from ISDA to the Division of Market Oversight (**"DMO"**), CFTC, Request for Relief from the Requirement to Execute Certain Package Transactions on a SEF Pursuant to § 37.9(a) of the Commission's Regulations (Sept. 20, 2016).

[9] *See, e.g.*, CFTC Rule 37.2013(a), 17 C.F.R. § 37.2013(a) (prohibiting pre-arranged trading). In addition, current CFTC Rule 37.9(a)(2), 17 C.F.R. § 37.9(a)(2), requires that mandatorily traded contracts be executed on SEF through the required methods of execution.

[10] *See* CFTC Letter 17-27 (May 30, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-27.pdf.

[11] *See id.*

iii. Clarify the Applicability of the Trade Execution Requirement to Certain Transaction Types.

In some instances, the applicability of the trade execution requirement to certain transactions remains unclear. ISDA requests clarification that the following three transaction types are not subject to the trade execution requirement.

1. Offset Swaps Used Following the Settlement or Exercise of a Swaption into a Swap

The specific scenario in which such offset swaps are traded is as follows: (1) the parties enter into an option (**"Swaption"**) on a swap (**"Underlying Swap"**); (2) the Swaption is exercised (by either cash settling at present value or entering into the Underlying Swap); and (3) a swap is entered into (**"Offset Swap"**) so as to offset a party's risks in accordance with prudent risk management practice. The pricing of the Offset Swap is set at the same market value (*i.e.*, which can be an ISDAFIX rate) used to value the exercise of the Swaption. The fixed rate of the Offset Swap is unknown at the time of its execution and parties to Offset Swaps agree that the rate will be determined at a future time.

The rationale for entering into the Offset Swap in this manner is that the other existing market exposures or hedges tied to the exercise of the Swaption are not legally terminated (which would require a negotiated termination of those exposures). If the parties used other means to unwind their existing exposures or hedges, they would be exposed to execution risk between the option exercise and any related unwinds.

We do not believe Offset Swaps are subject to the trade execution requirement under Commodity Exchange Act (**"CEA"**) Section 2(h)(8)[12] because these contracts are different from vanilla interest rate swaps (**"IRS"**). In vanilla IRS, the fixed rate and other key terms are known at execution, whereas in Offset Swaps, the fixed rate is unknown at the time of execution. Parties to Offset Swaps execute the swap and agree that the rate will be determined at a future point in time. This rate may not be published for up to 2-3 hours after execution. This is a material difference between Offset Swaps and vanilla IRS contracts that are currently subject to the trade execution requirement.

Furthermore, interest rate contracts currently subject to the trade execution requirement have been certified based on having a "par" rate (*i.e.*, the market rate at the time of execution). The rate used for the Offset Swap is not a par rate. The Offset Swap uses a rate which is published up to several hours after execution, and therefore cannot reasonably be considered a par rate. We believe this to be the case even if, by chance, the Offset Swap's rate happens to match the rate

[12] In our February 7, 2014 letter to DMO, we explained in more detail why Offset Swaps should not be subject to the trade execution mandate. We have not received DMO's response regarding this issue.

that was "market" at time of execution. In our view, a par rate is meant to refer to the known prevailing market rate at time of execution, not to a rate in the future which, unknown to the parties at time of execution, may coincidentally match a rate at an earlier time in the day. Therefore, we request that the CFTC confirm our view that an Offset Swap, as defined above, is not subject to the trade execution requirement under CEA Section 2(h)(8).

2. Swaps Resulting from Multilateral and Bilateral Portfolio Compression Exercises

The CFTC should expressly confirm that made-available-to-trade swaps resulting from portfolio compression exercises are not required to be executed on a SEF. These swaps do not advance price transparency policy objectives as they do not contribute to price discovery and, in fact, may skew pre-trade price discovery on SEFs. Multilateral, risk-constrained compression services perform purely analytical and risk reduction services by eliminating unnecessary line items and notional principal outstanding for both cleared and uncleared derivatives in order to manage counterparty risk, thus reducing costs and lowering operational risk and capital requirements. Bilateral compression exercises perform similar benefits. Additionally, imposing the trade execution requirement undermines important policy objectives promoted by CFTC compression rules.[13]

3. Products Executed Only to Provide CDS Settlement Prices

DCO rules require clearing members to submit price quotes for any cleared CDS product in which the clearing member, or the clearing member's customers, has open interest at the end of each day. The DCO relies on these quotes in setting the end-of-day settlement prices for all cleared CDS positions. In order to ensure that the prices submitted by clearing members as part of the CDS settlement price process are reliable and reflect current market conditions, DCOs require their clearing members, from time to time, to enter into "firm" or "forced" trades at their submitted price quotes, which then result in cleared CDS positions. This process is conducted to ensure compliance with the settlement obligations under DCO Core Principle E[14] and other Commission regulations.[15] The process does not involve submission or acceptance of competitive bids and offers through the clearinghouse. Rather, the swap execution that occurs results from the requisite submissions by CDS clearing members of quotes for certain CDS products to the clearinghouse. Due to the broad interpretation of the definition of a SEF, the execution of those contracts may implicate SEF registration requirements[16] and trade execution requirements.[17]

[13] CFTC Rule 23.503, 17 C.F.R. § 23.503.
[14] CEA Section 5b(c)(2)(E), 7 U.S.C. § 7a-1(c)(2)(E); *see also* CFTC Rule 37.3, 17 C.F.R. § 37.3.
[15] CFTC Rule 39.14, 17 C.F.R. § 39.14.
[16] *See* CEA Section 5h, 7 U.S.C. § 7b-3.
[17] *See* CEA Section 2(h)(8), 7 U.S.C. 2(h)(8); CFTC Rule 37.10, 17 C.F.R. § 37.10.

To preserve this important function, we ask that the Commission issue permanent relief[18] from compliance with the SEF registration and execution requirements for certain cleared CDS products that are executed for the sole purpose of providing end-of-the-day settlement prices.

iv. Exempt Inter-Affiliate Swaps from the Trade Execution Requirement Permanently.

We ask the Commission to establish a permanent exemption for inter-affiliate swaps from the trade execution requirement under CEA Section 2(h)(8), irrespective of whether such swaps are cleared or maintained bilaterally in reliance on CFTC Rule 50.52.[19]

Mandating SEF execution of inter-affiliate trades would not advance the price discovery goals of the trading requirement. As the Commission recognized in adopting the real-time reporting rules, inter-affiliate swap transactions are often not intended to be arm's-length.[20] No purpose would be served by requiring execution on a venue intended to enhance competitive pricing and provide meaningful and informative pre-trade transparency. Inter-affiliate trades are key for managing risk economically within global group structures, many of which are subject to relevant prudential rules and any externalization of the unnecessary costs incurred to comply with a mandatory trading requirement for inter-affiliate flow would make it more expensive to service client flows for global firms.

We note that the Division of Market Oversight provided time-limited no-action relief from CEA Section 2(h)(8) (*i.e.*, the trade execution requirement) for swaps executed between eligible affiliate counterparties.[21] In granting this relief, the Division stated that during the period of the relief, staff will "assess this issue and potentially establish a permanent solution."[22] Accordingly, we ask that the Commission issue permanent relief from the trade execution requirement for inter-affiliate transactions.

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[18] We note that Commission staff previously provided time-limited no-action relief from compliance with the SEF registration and execution requirements for certain cleared CDS products that are executed for the purpose of providing end-of-the-day settlement prices (*see* CFTC Letter 14-119 (Sept. 29, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-119.pdf), but such relief expired on September 30, 2015.

[19] In Section II(A)(ii), we similarly request that the CFTC eliminate uncertainty with respect to certain aspects of the Commission's exemption from mandatory clearing for inter-affiliate swaps.

[20] *See* CFTC Rule 43.2, 17 C.F.R. § 43.2 (defining "Publicly Reportable Swap Transaction" to expressly exclude "[i]nternal swaps between one-hundred percent owned subsidiaries of the same parent entity" as swaps that are "not at arm's length").

[21] *See* CFTC Letter 16-80 (Nov. 28, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-80.pdf.

[22] *Id.*

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v. Eliminate Footnote 195 from the SEF Rules.

Footnote 195 to the SEF rules requires confirmations of a swap executed on a SEF to contain *all* terms of the counterparties' transaction, including all previously negotiated arrangements and agreements. Since the implementation of the SEF rules, CFTC staff has issued guidance and no-action relief allowing SEFs to comply with this requirement by incorporating previously negotiated terms by reference into SEF confirmations. While we appreciate the Commission's efforts to alleviate the regulatory burdens and costs imposed by Footnote 195 through no-action relief, we believe that Footnote 195 should be eliminated from the SEF rules in its entirety.

Instead, we believe that SEFs should only issue evidence of the key economic terms as agreed by the counterparties on the SEF. The obligation to supplement the key economic terms in order to create a trade confirmation should fall on the counterparties, who are familiar with such terms and have them readily available at their disposal. Requiring counterparties to submit previously negotiated terms to a SEF is unnecessary and costly, especially given that the Commission may achieve the goals of Footnote 195 (*i.e.*, certainty of terms) by simply requiring that, in the event of conflicting terms, the key economic terms issued by the SEF will supersede any previously negotiated terms between the counterparties.

We have submitted a proposal to CFTC staff that, if adopted, would eliminate the regulatory burdens imposed by Footnote 195 while achieving the Commission's goals of legal certainty of terms at execution. A copy of this proposal is available at Appendix A, Attachment 3.

vi. Allow SEFs as Self-Regulatory Organizations to Have More Flexibility in Issuing Warning Letters.

CFTC Rule 27.203(f)(5)[23] states that a SEF may only issue one warning letter to the same individual or entity—for the same potential violation—within a rolling twelve-month period before imposing penalties. There is no analogous restriction for designated contract markets (**"DCMs"**). This requirement is unduly prescriptive and fails to take into consideration important factors that are relevant to a SEF when evaluating potential sanctions in a given disciplinary matter. In essence, this provision prohibits a SEF, a Self-Regulatory Organization, from exercising reasonable discretion and substitutes the Commission's judgment, which typically will not have first-hand knowledge of the facts, for the informed judgment of the SEF staff familiar with the facts of the matter. As frontline investigators, SEFs are in a better position to evaluate the gravity of each violation and determine the appropriate sanction based on the totality of the circumstances. Not allowing SEFs the flexibility to take the unique circumstances of each matter into consideration in order to make an informed decision is ineffective and unfair to SEF members.

[23] 17 C.F.R. § 27.203(f)(5).

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vii. Exempt Counterparties from the Trade Execution Requirement in the Case of SEF Outages or Similar Unanticipated Disruptions.

The Commission should issue guidance indicating that counterparties are temporarily excused from the trade execution requirement in the event of a SEF disruption or outage and may execute trades off-SEF for a designated period of time. Such guidance would protect against market disruptions in certain asset classes and products.

B. Recommendations for Improving the CFTC's Oversight Responsibilities with Respect to Trading

i. Enable Flexibility in the Execution of Block Trades.

Currently, block trades are allowed to be executed on SEF through a Request For Quote (**"RFQ"**) to 1 pursuant to the Commission staff's no-action relief.[24] We support staff's decision to issue the relief and we ask that the Commission codify this relief in its rules.

This, however, does not solve the issue entirely. Bilateral off-SEF execution is important for block transactions since such trades typically involve complex pricing factors, unique relationship and negotiation elements, or other distinguishing factors. There are likely to be increased costs, decreased efficiency (*i.e.*, less ability to negotiate) and corresponding negative impacts on liquidity if these block transactions are required to be executed on SEF, even via RFQ to 1. Therefore, we believe that block transactions should be permitted to be executed away from a SEF (but pursuant to the rules of a SEF and subject to appropriate pre-trade risk checks).

For a more detailed discussion of these issues, please see ISDA's Petition for Rulemaking to Amend Parts 1 (General Regulations under the Commodity Exchange Act), 37 (Swap Execution Facilities) and 43 (Real-Time Public Reporting) of the Commodity Futures Trading Commission Regulations, available at Appendix A, Attachment 2.

ii. Eliminate Footnote 88 of the SEF Rules.

Confusion over Footnote 88 in the current SEF rules and the definition of a "U.S. person" (as described in the CFTC's cross-border guidance)[25] have resulted in market fragmentation and liquidity concerns. Footnote 88 states that "a facility would be required to register as a SEF if it operates in a manner that meets the SEF definition even though it only executes or trades swaps

[24] *See* CFTC Letter No. 16-74 (Oct. 7, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-74.pdf.
[25] Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013).

that are not subject to the trade execution mandate."[26] This means that the SEF registration requirement under the SEF rules could be read to apply to any platform, on a global basis, whether or not the platform executes trades that are subject to the trade execution requirement, provided that it has a single U.S. customer. A consequence of such interpretation is that non-U.S. trading venues deny access to U.S. traders for fear of being required to be registered as SEFs, leading to creation of separate liquidity pools and prices for similar transactions. Accordingly, we believe that footnote 88 should be removed. In addition, the CFTC should create a clear and equitable path for non-U.S. trading venues to make their trading facilities available to U.S. persons without requiring full SEF registration.

II. Clearing

A. Recommendations for Streamlining the Clearing Rules

i. Ensure that Requirements for DCOs Do Not Unfairly Disadvantage U.S. Market Participants.

Under CFTC staff's interpretation of the current rules, a central counterparty ("**CCP**") is required to either register as a DCO or obtain an order of exemption from the CFTC in order to clear over-the-counter (**"OTC"**) derivatives for its clearing members (or their affiliates) that are U.S. persons. U.S. clients that are not themselves members of CCPs, however, are *only* permitted to clear OTC derivatives with CCPs that are registered with the CFTC as DCOs (and not CCPs that are exempt from DCO registration). These inconsistent requirements ultimately prevent U.S. banks from providing liquidity and hedging for clients in non-U.S. markets where local CCPs have obtained a CFTC order of exemption from DCO registration. Accordingly, we believe that the CFTC should permit CCPs that are expressly exempted from DCO registration by the CFTC to clear OTC derivatives for U.S. clients.

We also believe that non-U.S. CCPs should not be required to register as a DCO or obtain an order of exemption from DCO registration solely due to the fact that they permit clearing members (or affiliates of clearing members) that are U.S. persons to clear, for their proprietary accounts, swaps *that are not subject to mandatory clearing under the CFTC's rules*. Such clearing is done on a strictly voluntary basis and U.S. persons should therefore have more flexibility with regard to the CCP they select.

[26] Core Principles and Other Requirements for Swap Execution Facilities; Final Rule, 78 Fed. Reg. 33476 (June 4, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-06-04/pdf/2013-12242.pdf.

ii. Eliminate Uncertainty Regarding the Inter-Affiliate Swap Exemption from Mandatory Clearing.[27]

We strongly support the Commission's exemption from its mandatory clearing requirements for inter-affiliate swaps. Requiring affiliated entities to clear transactions executed amongst themselves is burdensome and costly to corporate groups, without offering countervailing benefits or achieving policy goals, given that swaps between affiliates create substantially less risk as compared to swaps between unaffiliated entities.

The Commission's exemption from clearing for inter-affiliate swaps requires satisfaction of a number of conditions. These include an "outward facing" swap condition, which requires the clearing of swaps between affiliated counterparties claiming the exemption and unaffiliated counterparties. The Commission initially provided two temporary alternative compliance frameworks, which allow entities relying on the exemption to post and collect VM rather than clear all outward facing swaps, to satisfy the "outward facing" swap condition as a way to assist counterparties in transitioning to full compliance with the requirement.

The Commission has since extended these alternative compliance frameworks pursuant to time-limited no-action relief. Given the importance of the inter-affiliate clearing exemption and the uncertainty created by relying on time-limited no-action relief, we ask that the Commission provide regulatory relief that is not time-limited[28] to eligible affiliate counterparties located in the European Union, Japan, Singapore[29] and in the five new clearing law jurisdictions (Australia, Canada, Hong Kong, Mexico, and Switzerland)[30] to allow these counterparties to comply with the alternative compliance framework[31] in lieu of compliance with the clearing mandate until such time when: (1) the applicable clearing requirement takes effect in those jurisdictions, and (2) the CFTC makes a determination that a foreign jurisdiction's clearing mandate is comprehensive and comparable to the U.S. clearing mandate. To be clear, the relief should also

[27] Relatedly, we ask that the Commission extend the current exemption to include non-U.S. banks with U.S. affiliates in order to ensure a level playing field.

[28] At the end of last year, the CFTC granted time-limited relief to entities using the alternative compliance framework described in Commission regulation 50.52(b)(4)(ii) or (iii) to meet the mandatory clearing requirements. *See* CFTC Letter 16-81 *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-81.pdf; *see also* CFTC Letter 16-84, *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-84.pdf.

[29] CFTC Rule 50.52(b)(4)(ii), 17 C.F.R. § 50.52(b)(4)(ii).

[30] *See* Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act for Interest Rate Swaps, 81 Fed. Reg. 71,202 (Oct. 14, 2016).

[31] ISDA members currently relying on the alternative compliance framework of CFTC Rule 50.52(b)(4)(ii), 17 C.F.R. § 50.52(b)(4)(ii), typically comply with subparagraph (1) which requires counterparties to exchange variation margin on swaps between eligible affiliate counterparties. This is consistent with both the CFTC and Prudential Regulators' margin rules requiring swap dealers to exchange variation margin between their swap entity and financial end-user affiliates.

recognize and permit comparability when a valid exemption from clearing is relied upon in the non-U.S. jurisdiction.

For a more detailed discussion, please see ISDA's previous No-Action Letter Requests, available at Appendix B, Attachments 1, 2 and 3.

iii. Implement ABA Recommended Revisions to CFTC Part 190.

We urge the CFTC to implement the amendments to Part 190 of the CFTC's Rules submitted by the American Bar Association.[32] The proposed amendments address significant market and regulatory developments in recent years and the lessons to be learned from various FCM bankruptcy proceedings, including MF Global and Peregrine Financial Group. The amendments are necessary to ensure that the Part 190 Rules work as an integrated whole, are clear and unambiguous in setting out objectives and avoid unnecessary complexity that could hinder or delay timely, prudent action by a Bankruptcy trustee. The CFTC should make amending the Part 190 Rules a regulatory and, where necessary, legislative priority.

B. Recommendations for Improving the CFTC's Oversight Responsibilities with Respect to Clearing

i. Expand the Clearing Mandate's End-User Exception.

The current end-user exception from the Commission's clearing mandate applies to non-financial institutions and *only certain* types of financial institutions with total assets below a specified level.[33] We believe that this scope is too narrow and unnecessarily burdensome as it fails to cover other types of entities that trade minimally and do not pose risks to the U.S. financial system.

We support a full review of the scope of entities to which the CFTC's clearing mandate applies to determine whether it would be prudent to shift from an asset size-based threshold applicable to only certain financial institutions to a more risk-based threshold. A financial end-user exemption from mandatory clearing based on appropriate risk-based thresholds and risk management practices would right-size the U.S. clearing mandate to capture only those U.S. market participants whose derivatives transactions pose risk to the U.S. and global financial systems.

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[32] ISDA understands that the Part 190 Subcommittee of the American Bar Association Business Law Section is submitting model Part 190 Rules to the CFTC in connection with Project KISS. ISDA generally supports the proposed model rules, but reserves the right to comment on specific elements of the proposal during any public comment process.
[33] Specifically, apart from non-financial entities, the exemption applies to banks, savings associations, farm credit system institutions, and credit unions with total assets of $10 billion or less.

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ii. Ensure that U.S. Clearing Mandates Are Aligned and Coordinated with Non-U.S. Clearing Mandates.

Harmonization is crucial to effective and efficient implementation of all OTC derivatives reforms, especially centralized clearing. Yet, the CFTC's current clearing mandate differs in entity scope from the clearing mandates in other jurisdictions and is notably broader than clearing mandates in certain Asia-Pacific ("**APAC**") jurisdictions. This disparity unnecessarily impairs U.S. market participants' ability to effectively compete in global financial markets. To address this issue, we believe the CFTC should consider whether it would be appropriate to exempt U.S. swap dealers (**"SDs"**) from mandatory clearing when they transact certain OTC derivatives with non-U.S. market participants that are not subject to mandatory clearing under their local clearing mandates.

A more detailed discussion of these issues is available at Appendix B, Attachment 4.

iii. Continue to Implement Regulations for Global CCP Standards for CCP Resilience, Recovery, and Resolution.

While CCPs reduce systemic risks in the markets they serve, CCPs also warehouse or concentrate risks that, if not properly managed in times of significant market volatility, could inflict major financial damage on clearing members, trading venues and other market participants. For these reasons, the CFTC (together with other regulators and policymakers) must continue to consider issues related to CCP resilience during periods of market stress, the development of robust CCP recovery and risk management frameworks, and CCP resolution in the event that CCP recovery is unsuccessful or would jeopardize financial stability.

We urge the CFTC to implement key guidance on these issues from CPMI-IOSCO and the Financial Stability Board[34] in order to ensure the continued safety and efficiency of U.S. cleared OTC derivatives markets. Implementation of global standards in these areas is also crucial to equivalence determinations for U.S.-based CCPs operating globally and to preventing competitive disadvantages (including treatment of collateral) among CCPs operating in different jurisdictions.

More detailed discussions of these issues are available at Appendix B, Attachments 5, 6 and 7.

[34] *See* CMPI-IOSCO, RECOVERY OF FINANCIAL MARKET INFRASTRUCTURES(revised July 5, 2017), *available at* http://www.bis.org/cpmi/publ/d162.htm; CMPI-IOSCO, RESILIENCE OF CENTRAL COUNTERPARTIES (CCPS): FURTHER GUIDANCE ON THE PFMI (July 5, 2017), *available at* http://www.bis.org/cpmi/publ/d163.htm; FSB, GUIDANCE ON CENTRAL COUNTERPARTY RESOLUTION AND RESOLUTION PLANNING (July 5, 2017), *available at* http://www.fsb.org/2017/07/guidance-on-central-counterparty-resolution-and-resolution-planning-2/.

iv. *Increase Transparency of CCP Governance and Risk Management Procedures.*

It is imperative that clearing participants (*i.e.*, clearing members and their clients) have transparent and predictable information regarding a CCP's governance and risk management procedures so that they can measure, manage and control their exposures to the CCP. Additional transparency is particularly necessary with regard to:

- Each product that a CCP clears, on an ongoing basis:
  - The CCP's analysis of such product's suitability for clearing; and
  - The CCP's ability to risk manage such product, including in times of market stress;
- Governance with regard to how a CCP would exercise discretionary powers in an emergency;
- A CCP's margin methodology;
- Results of capital and liquidity stress testing;
- Coverage calculations (including results of backtesting and sensitivity analysis); and
- Calculation of a CCP's "skin-in-the-game."

A more detailed discussion of these issues is available at Appendix B, Attachment 7 (with respect to a CCP's margin methodology in particular, see "CCP Transparency on Margin Framework").

v. *Increase Transparency of CCP Recovery Plans and Resolution Strategies for Individual CCPs.*

It is also imperative that clearing participants have transparent and predictable information regarding expected recovery and resolution strategies so that they can measure, manage and control their potential exposures in these circumstances. At an absolute minimum, clearing participants must understand tools that would be utilized by a CCP in recovery or a resolution authority in resolution and any restrictions on the use of such tools, resources available to a CCP in recovery and to a resolution authority in resolution and any restrictions on the use of such resources, triggers for resolution (including whether such triggers are discretionary or automatic) and any separate level of regulatory intervention and/or coordination among regulators and resolution authorities. Clearing participants should also have access to information regarding resolvability assessments for CCPs. We recommend that the CFTC, in conjunction with CCPs, take steps to increase the level of transparency and certainty that is made available to CCP members and market participants regarding these issues.

A more detailed discussion of these issues is available at Appendix B, Attachments 5 and 6.

vi. Revise Governance for CCP Rulemaking.

It is also imperative that clearing members play an active role in CCP rulemaking. CCP rules form the legal agreement between the CCPs and their clearing members and are therefore the basis for many of the clearing members' key protections and rights. We believe that registered DCOs should be required to demonstrate consultation with members prior to submitting any new rules or amendments to existing rules for certification under Part 40 of the Commission's rules.

III. Reporting

ISDA strongly supports the Commission's recent initiative to review its swap data reporting rules in order to streamline reporting requirements, right-size the number of data elements necessary to fulfill the Commission's regulatory oversight function, and improve the overall quality of swap data. ISDA looks forward to working with the Commission as it continues to consider these important issues.[35]

A. <u>Recommendations for Streamlining the Reporting Rules</u>

i. Eliminate Reporting Obligations for Void Ab Initio Swaps.

Void ab initio swaps should not be subject to reporting requirements because these transactions never come into existence. Many market participants have built their reporting logic to only capture swaps that come into existence and are not voided. Thus, eliminating this requirement would improve the overall accuracy of reported data.

ii. Eliminate Conflicting Provisions in Swaps Reporting Rules.

We respectfully request that the Commission eliminate potentially conflicting provisions of swaps reporting and recordkeeping rules in order to allow reporting counterparties to better understand their obligations under the Commission's regulations.

One example relates to recent changes to the recordkeeping and accessibility requirements in CFTC Rule 1.31[36] as compared to the existing swaps recordkeeping rule in CFTC Rule 45.2.[37] CFTC Rule 1.31 requires that electronic records related to swaps be *readily accessible* for the duration of the record retention period, which, in most cases, is not less than five years after the

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[35] Please see our joint-response with SIFMA to the request for comments to the Division of Market Oversight's *Roadmap to Achieve High Quality Swaps Data* (**"DMO Roadmap"**), *available at* Appendix C, Attachment 1.
[36] *See* 17 C.F.R. § 1.31.
[37] *See* 17 C.F.R. § 45.2.

termination of the swap transaction. However, under CFTC Rule 45.2,[38] SDs and major swap participants (**"MSPs"**) must have *readily accessible* records via real time electronic access throughout the life of the swap and for two years following the swap's final termination, and records must be retrievable within three business days through the remainder of the five year period following final termination of the swap. Reading these two provisions together, it is unclear to reporting counterparties whether swap records must be *readily accessible* for two years after the termination of the swap transaction or the entire record retention period.

iii. Clarify How Certain Transactions and Events Should be Reported Under the Reporting Rules.

We also recommend that the Commission consider, for purposes of Part 43 and Part 45 reporting, clarifying the appropriate manner in which certain transactions and events must be reported. For example, we recommend that any final rulemaking amending the reporting rules address: (i) packages, bespoke, and complex trades; (ii) the transfer of portfolios (also known as "portfolio take-downs"); (iii) the definitions of Swap Data Repository (**"SDR"**) message types, such as amend, new, and modify; (iv) execution time reporting for lifecycle events;[39] (v) novations, including novation fees; (vi) mixed swaps; (vii) international swaps;[40] (viii) and clear guidance, under Part 45, for reporting of the two primary models for clearing—the "agency model" and the "principal model."[41]

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[38] *See* 17 C.F.R. § 45.2(e)(1) ("Each record required by this section *or any other section of the CEA* to be kept by a swap execution facility, designated contract market, derivatives clearing organization, swap dealer, or major swap participant shall be readily accessible via real time electronic access by the registrant throughout the life of the swap and for two years following the final termination of the swap, and shall be retrievable by the registrant within three business days through the remainder of the period following final termination of the swap during which it is required to be kept.") (emphasis added).

[39] ISDA supports the inclusion of a separate data field to capture the date and time at which the counterparties agreed to enter into a lifecycle event. We note that ISDA has proposed the data field: "life cycle event timestamp" to the CPMI-IOSCO Harmonisation Group. *See* https://www.iosco.org/library/pubdocs/545/pdf/International%20Swaps%20and%20Derivatives%20Association,%20Inc.%20(ISDA).pdf for more details regarding the proposal.

[40] For a more detailed discussion of the issues related to the reporting of international swaps, please see ISDA's previous requests for no-action relief, *available at* Appendix C, Attachments 2 & 3.

[41] We note that in the CFTC's Technical Specifications Request for Comment issued on December 22, 2015, CFTC staff recognized the issue of reporting principal versus agency model clearing swaps. *See* Draft Technical Specifications for Certain Swap Data Elements (Dec. 22, 2015), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/specificationsswapdata122215.pdf.

iv. Extend the Dissemination Delay for the Real-Time Public Reporting of Block Transactions.

We ask that the Commission extend the current dissemination delay for the real-time public reporting of block-size swap transactions in order to allow market participants to appropriately hedge the market risk of block trades during the delay period.

v. Provide Adequate Notice to Market Participants Regarding Changes in a Registrant's Registration Status.

No requirement exists for SDs or MSPs to notify their counterparties of their intent to apply for registration, deregistration or a limited designation determination with the National Futures Association (**"NFA"**) and the CFTC.[42] This is particularly problematic since counterparties may be required to make significant technological changes to their reporting infrastructure within a short period of time following such a change, resulting in added costs and complexities.

Accordingly, we request that the Commission issue a publicly available notice of: (1) a decision to approve an application for registration or deregistration at least 30 days prior to the effective date of registration or deregistration, as applicable; and (2) a decision to approve an application for limited designation at least 60 days prior to the effective date of such designation, especially where the conditions attached to the designation determination are unusually complicated.

Consistent with the comments above, we believe that the NFA SD/MSP registry and the SD/MSP list on the CFTC website should be enhanced to include and identify a change in the designation status and the applicable effective date.

Finally, we ask the Commission to clarify in line with current industry practice[43] that to the extent an entity de-registers or applies for limited designation, it remains the reporting counterparty for life cycle events after its de-registration or limited designation on trades that are live at the time of deregistration or limited designation and for which such entity has acted as the reporting counterparty prior to de-registration or limited designation. Absent such clarity, counterparties will have to temporarily build costly updates to their reporting logic for such live trades. Similarly, if an entity registers, clarification should be provided that the new registration status (including with respect to the reporting party hierarchy) only applies to new trades and events occurring after such registration so that no changes are required for data reports submitted prior to such registration.

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[42] *See* CFTC Rule 3.33, 17 C.F.R. § 3.33.

[43] *See* ISDA, Dodd-Frank Act – Swap Transaction Reporting Party Requirements, at 10 (Apr. 2, 2015) http://www2.isda.org/attachment/NzUyOA==/CFTC%20Reporting%20Party%20Requirements%20updated%20%20Apr%202%202015_FINALDRAFT_clean.pdf.

vi. Provide Relief from CFTC Rule 43.3(b) for Counterparties Subject to MiFIDII and MiFIR.

CFTC Rule 43.3(b)[44] prohibits the disclosure of swap transaction and pricing data relating to publicly reportable swap transactions prior to the public dissemination of such data by an SDR. Under MiFIDII/MiFIR (effective January 3, 2018), however, investment firms are required to make public, through Approved Publication Arrangements (**"APA"**), post-trade information in relation to financial instruments traded on a trading venue. The timing requirement for such post-trade transparency obligations[45] may require investment firms to report swaps data to an APA prior to the public dissemination of such data by an SDR. Accordingly, we ask that the CFTC issue interpretive guidance clarifying that market participants reporting data under such MiFIDII/MiFIR post-trade transparency obligations would still be deemed compliant with CFTC Rule 43.3(b).

B. <u>Recommendations for Improving the CFTC's Oversight Responsibilities with Respect to Reporting</u>

i. Align Data Reporting Elements with CPMI-IOSCO and FSB Recommendations.

Global harmonization should be a key regulatory driver for establishing reporting technical standards, data elements and their definitions. Where appropriate, the CFTC should adopt a framework in which the definition, format, and allowable values of the data elements are consistent with those recommended by CPMI-IOSCO, to promote the harmonization of values that are reportable across multiple jurisdictions. Harmonizing the definition, format and allowable values will reduce compliance costs for global market participants, minimize the complexity of implementation, and facilitate meaningful global aggregation of the data fields that individual authorities deem necessary to meet their obligations.

ii. Streamline Part 45 Creation Data.

We believe that the Commission should have one set of creation data fields, rather than separate Primary Economic Terms (**"PET"**) and confirmation data reporting requirements. Confirmation terms of a swap that are not already part of PET data should not be replicated as part of SDR reporting because such terms generally do not address counterparties' risk exposure and thus do

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[44] 17 C.F.R. § 43.3(b).

[45] Specifically, EMIR requires that "post-trade information shall be made available as close to real time as is technically possible and in any case within 15 minutes after execution, for the first three years after go-live, and thereafter, within 5 minutes after execution." The EMIR Requirement is *available at* http://ec.europa.eu/finance/docs/level-2-measures/mifir-rts-02_en.pdf.

not align with the goals of regulatory reporting. A single set of creation data fields would be consistent with regulatory requirements in other jurisdictions (*e.g.*, Canada, the EU, and Singapore) where messaging is simplified by virtue of a single, streamlined set of data fields.

Furthermore, in line with our response to the DMO Roadmap, we believe it would reduce the burden on reporting parties if reporting of Part 45 and Part 43 data could be streamlined, instead of requiring reporting parties to submit three separate messages.

For a more detailed discussion of these issues, please see the ISDA-SIFMA joint response to the DMO Roadmap and ISDA's response to the CFTC's Review of Swap Data Recordkeeping and Reporting Requirements available at Appendix C, Attachments 1 and 4.

iii. Eliminate "Any Other Terms" PET Data Field.

Appendix 1 to Part 45 of the Commission regulations requires counterparties to report "any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap" as a part of their PET reporting obligations. The Commission further directs counterparties to "use as many fields as required" in order to report each potential term.[46] As we have noted in our prior submissions, this reporting requirement poses many challenges for reporting entities primarily because different products result in differences in the set of terms that parties agree on.

This reporting requirement is equally problematic for SDRs since SDRs require specific technical requirements and field specifications to support additional values and, therefore, cannot adequately plan for a catch-all bucket of potential values. Without such SDR build, a reporting counterparty may be unable to report a term that may meet this requirement.

To this end, ISDA supports the Commission's efforts to establish a clearly defined, enumerated set of data fields. We believe that streamlining the number of data elements to meet the Commission's priority use-cases, and providing clear and globally consistent guidance on what is expected to be reported for each data element is fundamental to improving data quality. For a more detailed discussion of these issues, please see ISDA's response to the CFTC's Review of Swap Data Recordkeeping and Reporting Requirements, available at Appendix C, Attachment 4.

iv. Clarify that Post-Priced Swaps Are Reportable Only When All PET Details Are Determined.

Reporting a post-priced swap before the price, size, and/or other characteristics of the swap are determined is a challenge as not all economic details of the trade are known until a later point. Earlier reporting may expose the investment strategy of institutional customers that use swaps to perform global asset allocation strategies to the entire marketplace. Premature disclosure of such

[46] *See* Appendix 1 to Part 45 of the Commission's Regulations.

trades could have a number of adverse impacts. For example, other market participants could trade ahead of the client's order, as well as the SD's related hedging activity. The effect of this would be to add a material cost to trading a swap as compared to cash, listed options or futures. This higher cost would be imposed on long term investor types—money managers, insurance companies, pension plans, among others—and only benefit market participants seeking to trade on what should be confidential information.

Accordingly, we ask that the Commission clarify that post-priced swaps should be deemed "executed" and thus reportable only when all PET details (which include price and size) are finally determined. For a more detailed discussion of these issues please see our letters, available at Appendix C, Attachments 5 and 6.

v. Reconsider the Necessity of SDR Reconciliation.

ISDA respectfully requests that the Commission re-evaluate the requirement to provide verification of swap data sent to an SDR as currently implemented via SDR policies and procedures in light of other CFTC requirements, including confirmation, swap trading relationship documentation, and material economic term reconciliation. These other CFTC requirements are already aimed at identifying and resolving data discrepancies. For example, any discrepancies detected during the confirmation process already place an obligation on the reporting counterparty to correct data reported to the SDR. Reporting counterparties also have controls and best practices in place to help ensure that reporting obligations are satisfied. Moreover, imposing an additional verification requirement is not only unnecessary but is also unduly burdensome, particularly for end-users that may not have SDR connectivity. For these reasons, ISDA believes that the Commission should reconsider the necessity of SDR verification requirements given that other CFTC rules already achieve the same policy goals.

vi. Eliminate Large Trader Reporting Rules.

CFTC Rule 20.9 provides in relevant part: "[t]he [Large Trader Reporting Rules] shall become ineffective and unenforceable upon a Commission finding that, through the issuance of an order, operating swap data repositories are processing positional data and that such processing will enable the Commission to effectively surveil trading in paired swaps and swaptions and paired swap and swaption markets."[47] It is time for the Commission to eliminate its Large Trader Reporting rules, which it intended to do all along, and to focus its resources on improving SDR data. Instead of spending scarce resources on running two swap reporting programs, the Commission should allow Part 20 to sunset (per its terms) and should focus its swap data collection efforts on optimizing the ability of the SDR reporting program to provide the Commission with quality and reliable data.

[47] 17 C.F.R. § 20.9.

vii. Improve Ownership and Control Reporting Rules.

Our general comments on the CFTC's Ownership and Control Reporting (**"OCR"**) rules are in line with the comments and recommendations that have been provided to the CFTC by other trade groups, including the Futures Industry Association (**"FIA"**). The key unresolved issues with the OCR rules relate to the fact that the scope of data required and the timeframes to report under the new OCR rule are unworkable, and ISDA recommends that the Commission adopt amendments to the OCR rules that rationalize both the amount of data that is required to be submitted and the timeframes for submitting that data.

While we appreciate the time-limited no-action relief issued by CFTC staff,[48] we ask the Commission to issue permanent relief through rulemaking. Specifically, we believe the CFTC should adopt the following recommendations:

- Redesign Forms 102A, 102B, and 102S to limit the data that FCMs are required to report about their customers and that swap dealers are required to report about their counterparties.
- Delete the requirement to identify the natural person that is the "Trading Account Controller" for a given account. Requiring this data field fails to recognize the complex nature of trading businesses and trading desks, and it also ignores the efficiencies that the CFTC and firms would gain by providing a single point of contact for CFTC inquiries.
- Increase the volume level for reportable "volume threshold accounts", which is currently set at 50 contracts per day (regardless of end-of-day position) and captures too many traders.

We therefore encourage the Commission to amend the OCR rules to resolve these issues and to create a reporting program that meets the Commission's needs without unduly burdening market participants.

IV. Registration

A. Recommendations for Streamlining the Rules Related to Registration

i. Review and Eliminate, as Necessary, External Business Conduct Standards Applicable to SDs and MSPs.

Some business conduct rules inappropriately transform the nature of the relationship between SDs and their counterparties, create confusion regarding their respective responsibilities, and increase compliance costs. The rules include requirements, not mandated by Dodd-Frank, for an SD to: "know its counterparty"; protect confidential counterparty information; provide pre-trade

[48] CFTC Letter No. 17-45 (Sept. 25, 2017), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-45.pdf.

mid-market mark; and provide a scenario analysis. In essence, the rules require SDs to act as advisors to their counterparties and impose a full range of retail customer protection requirements, whereas the swap markets are almost entirely institutional. Additionally, in many instances, these requirements, especially the requirements to provide a pre-trade mid-market mark and scenario analysis, are not requested by clients. At a minimum, we believe that SDs should only be required to provide pre-trade mid-market marks upon counterparties' request.

Separately, many standards included in the rules are subjective or unclear, or are adopted from industry best practices. By design, best practices presume flexible compliance. Codified best practices subject counterparties to serious legal consequences, such as enforcement actions, private right of actions or rescission actions based on ambiguous legal standards.

Thus, we ask that the Commission revisit its business conduct rules in their entirety, with a fresh perspective, in order to determine which requirements remain relevant or appropriate given the sophisticated nature of SDs' counterparties and arm's-length nature of such transactions.

ii. Allow Affiliated SDs to Submit a Consolidated Annual Compliance Report and Maintain a Consolidated Risk-Management Program.

CFTC Rule 3.3[49] requires SDs to submit a compliance report to the CFTC on an annual basis (**"Annual Compliance Report"**), and CFTC Rule 23.600[50] requires SDs to maintain a Risk Management Program (**"RMP"**). In many cases, multiple affiliated entities are registered with the Commission as SDs. These entities oftentimes share common compliance and risk-management programs. As a result, these affiliated entities are required to submit Annual Compliance Reports to the Commission and maintain separate RMPs that, oftentimes, contain the same information.

Submitting multiple reports to the Commission that contain the same information is unnecessary, costly and inefficient. Similarly, requiring affiliated entities to establish separate RMPs that contain the same risk management policies and procedures imposes regulatory burdens without any commensurate risk-reducing benefit. Accordingly, we believe that the Commission should allow affiliated SDs to: (1) submit a single, consolidated Annual Compliance Report that is supplemented by entity-level specific information, where appropriate; and (2) maintain a single RMP for multiple SDs within the same corporate group.

[49] 17 C.F.R. § 3.3.
[50] 17 C.F.R. § 23.600.

iii. Eliminate Duplicative Portfolio Reconciliation and Dispute Resolution Requirements.

We ask the Commission to eliminate CFTC Rule 23.502[51] because the Commission's uncleared margin rules already provide a framework for portfolio reconciliation and dispute resolution. There is no policy reason to retain a separate duplicative requirement in CFTC Rule 23.502. Duplication increases regulatory burdens and operational and compliance costs, without achieving any risk-reducing benefits. If the Commission wishes to retain portions of CFTC Rule 23.502, the Commission should only retain the portions of the rule related to valuation reporting (*i.e.*, CFTC Rule 23.502(c)) and should adopt a more principles-based approach in setting out those requirements.

iv. Streamline Daily Trading Recordkeeping Requirements.

CFTC Rule 23.202 requires SDs and MSPs, among other things, to maintain daily trading records of all swaps and related transactions that include all necessary information that would allow for a comprehensive and accurate trade reconstruction of each swap. ISDA believes that the current requirements are overly broad, prescriptive, and costly as they require firms to filter through thousands of emails, chats, instant messages, text messages, and voice files in order to associate relevant records with a particular transaction. Accordingly, ISDA asks the Commission to issue clear guidance for trade reconstruction requirements that would require firms to only maintain the following records: (1) the Master Agreement; (2) the acknowledgement; (3) the confirmation; and (4) any amendments, terminations, or novations of the relevant transaction. ISDA believes that only the aforementioned records are necessary and relevant to trade reconstruction.

v. Reconsider the Necessity of Risk Exposure Reports and Monthly Risk Metric Reporting.

CFTC Rule 23.600(c)(2) requires SDs and MSPs to submit risk exposure reports to the Commission on a quarterly basis and upon detection of a material change in the SD's or MSP's risk exposure. The NFA has also recently adopted a separate set of monthly risk metric reporting requirements for SDs and MSPs.[52] Many SDs, however, already report extensive information regarding risk exposures to their prudential regulators. Thus, we ask the Commission to reconsider the necessity of both the CFTC's risk exposure report requirements and NFA's monthly risk metric reporting requirements in light of prudential requirements.

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[51] 17 C.F.R. § 23.502.

[52] *See Monthly Risk Data Reporting Requirements for Swap Dealers*, NFA Notice I-17-19 (May 30, 2017), *available at* https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4817. We note that the first Monthly Risk Data Report will be due on January 31, 2018.

B. Recommendations for Improving the CFTC's Oversight Responsibilities with Respect to Rules Related to Registration

i. Eliminate the Requirement that Chief Compliance Officers Must Sign Off on Volcker Compliance.

The Commission's Volcker rule requires SDs to incorporate their Volcker compliance program requirements[53] into the Commission's Chief Compliance Officer (**"CCO"**) duties and Annual Compliance Report requirements under CFTC Rule 3.3.[54] Further, CFTC staff has issued a staff advisory[55] expanding this requirement to include futures commission merchants (**"FCMs"**) that are banking entities. The practical effect of this requirement is that firms are now expected to establish policies and procedures related to compliance with the Volcker rule under both the CCO compliance regime (CFTC Rule 3.3)[56] and the Volcker compliance regime (CFTC Rule 75.20).[57] Duplicative Volcker compliance obligations imposed at the firm-wide level and the registrant level (which is only a part of the firm) lead to increased compliance costs and decreased efficiencies. Accordingly, we request that the Commission issue guidance stating that the Annual Compliance Report need not include or address a registrant's compliance with respect to the Volcker rule.

For a more detailed discussion of these issues, please see our CCO Comment Letter, available at Appendix D, Attachment 1.

ii. Permit Substituted Compliance with Prudential Regulators for Risk Management Requirements.

Currently, many firms are subject to both the CFTC and the prudential regulators' risk-management requirements. To be effective, risk management rules should be implemented on an integrated basis by a consistent set of supervisory standards. Inconsistencies in supervisory standards create inefficiency, confusion, and opportunities for control failures. To avoid duplicity and minimize compliance costs, the CFTC should permit U.S. and non-U.S. SDs that are subjected to consolidated risk management supervision and regulation to comply with the CFTC's risk management practices on a substituted compliance basis through compliance with the risk management requirements of their prudential regulator.

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[53] *See* Subpart D of Part 75 of the Commission's Regulations.
[54] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Final Rule, 79 Fed. Reg. 5808, 6020 n. 2521 (Jan. 31, 2014).
[55] DSIO Staff Advisory (not available on the CFTC website, but *available at* https://www.bridgingtheweek.com/ckfinder/userfiles/files/DSIO%20CCO%20Volcker%20Advisory.pdf).
[56] 17 C.F.R. § 3.3.
[57] 17 C.F.R. § 75.20.

iii. Treat Compo Equity Swaps as Security-Based Swaps.

ISDA respectfully requests that the Commission treat compo equity swaps as security-based swaps rather than mixed swaps. Treating these transactions as security-based swaps is appropriate because many market participants view the business of transacting in foreign equity total return swaps principally as an equity business, regardless of the method by which the foreign currency is translated into U.S. dollars for purposes of making payments under such swaps. Additionally, such treatment would avoid duplicative regulation, thereby decreasing costs.

V. Other Areas (Miscellaneous)

A. Margin[58]

i. Amend T+1 Settlement Requirements to Ensure that U.S. Firms Are Not Competitively Disadvantaged.

The U.S. margin rules require the calculation and settlement of both initial margin (**"IM"**) and variation margin (**"VM"**) within one business day (**"T+1"**).[59] This requirement is more stringent than in other jurisdictions and puts U.S. entities at a disadvantage with: (i) parties in different time zones; and (ii) smaller counterparties (including U.S. counterparties) that lack the capability to settle on T+1. The T+1 settlement requirement is particularly punitive to U.S. entities (*e.g.*, pension funds and other asset managers) that may not have the operational means to transfer certain eligible collateral within that timeframe, placing them at a competitive disadvantage as compared to both non-U.S. entities and to larger entities that have capabilities to meet the T+1 requirement. For parties in foreign jurisdictions or those intending to settle collateral denominated in certain foreign currencies (*e.g.*, AUD, Japanese Government Bonds), settlement may be impossible within T+1, thus limiting the scope of eligible collateral that can actually be used.

ISDA submits that in the near term, some flexibility should be afforded to U.S. Covered Swap Entities (**"CSEs"**) to alleviate both cases where the collateral is foreign and where the counterparty is foreign while the industry continues to seek solutions to facilitate timely settlement. Such flexibility would ease the challenge of settling between international time zones – in particular between the U.S. and Asia – and address limitations on the ability to settle some non-USD collateral.

[58] Should the Commission decide to revise its margin rules, we ask that the Commission coordinate with the prudential regulators in order to ensure that any improvements to the margin rules are implemented concurrently by both regulators. Absent such coordination, U.S. banks would be disadvantaged.
[59] 12 C.F.R. §§ 237.3(c), 237.4(b); 17 C.F.R. §§ 23.152(a), 23.153(a).

While we would appreciate any flexibility afforded by the Commission with respect to T+1 settlement timing, we also observe that certain types of collateral and certain counterparties will not be able to settle even within a less restrictive interpretation of the T+1 timeframe. Setting these artificial timeframes will limit the scope of eligible collateral for some party pairings, making it virtually impossible to trade with U.S. counterparties, which in turn will cause market fragmentation. Moreover, this challenge will be exacerbated in the coming years as more small counterparties come into scope for IM requirements.

We therefore request that the CFTC and prudential regulators harmonize their settlement timeframe with other jurisdictions by requiring settlement by T+1, where practicable, and otherwise allowing settlement by T+2. In the meantime, we ask that the Commission allow for a flexible approach to compliance with the T+1 settlement deadline which takes into consideration the legitimate challenges associated with settlement with foreign counterparties and foreign-denominated collateral.

ii. Allow for the Use of a Broad Product Set for Portfolio Margining.

In order to harmonize the product scope for non-cleared margin requirements within the U.S. and globally, the CFTC should allow use of a "broad product set" that permits portfolio margining of IM with other non-cleared derivatives that are either excluded from the CFTC's oversight (*i.e.*, security-based swaps) or which are subject to margin requirements in other jurisdictions (*i.e.*, equity options).

IM calculations are determined based on a specific product set defined by each relevant U.S. financial regulator and each foreign regulator. The use of these jurisdiction-specific product sets for IM calculations forces parties subject to the margin rules of multiple jurisdictions to perform separate calculations in order to use the highest calculation for their margin call to ensure compliance with all applicable regulations. A broad product set approach allows all trades under a netting agreement to be included in the portfolio on which margin is calculated and reduces the number of calculations that must be made among jurisdictions. The ability to perform a single, global calculation would reduce operational complexity, as well as the cost of implementation and disputes that may arise from disparate treatment of product sets.

While we appreciate No-Action Letter No. 16-71 issued by Commission staff, which allows for the inclusion of security-based swaps in the product set used for IM calculations, we request that CFTC staff expand such relief to include a broad product set comprised of all transactions allowed for inclusion in the netting sets of the applicable margin regulations for both parties. We note that certain jurisdictions, such as Japan and the EU, allow for the inclusion of OTC derivatives products that are out-of-scope or exempt under their regulations for purposes of margin calculation. We ask that the CFTC align its requirements with these jurisdictions.

For a more detailed discussion on these issues, please see ISDA letters to the U.S. regulators on February 12, 2016 and May 15, 2015, available at Appendix E, Attachments 1 and 2.

iii. Exempt Inter-Affiliate Swaps from Initial Margin.

Inter-affiliate swaps should be exempt from IM, so long as they are part of a centralized risk management program and remain subject to variation margin requirements. Under the CFTC margin rules, a swap dealer is relieved from collection of IM except when, among other things, an affiliate is located in a jurisdiction that the CFTC has not found eligible for substituted compliance with regard to its margin requirements. However, firms are unable to rely on the exemption since substituted compliance determinations have not yet been issued by the Commission.

In a recent survey of G14 firms conducted by ISDA, 11 of the firms are posting inter-affiliate IM under U.S. margin rules at a combined total of over $29 billion. This hinders the ability of firms to provide liquidity to clients as the infrastructure build for an affiliate to post IM is substantial for some dealers, and the amount of inter-affiliate IM they must collect and segregate exceeds what they collect from third parties. Removing this condition will ameliorate these concerns. Separately, we note that in its final rules, the Commission did not consider these costs in its cost-benefit analysis.

iv. Eliminate the Disparate Treatment of Liquidation Periods for Margin Calculations.

One of the key determinants in the calculation of margin for futures and swaps is the "minimum liquidation period." The CFTC's margin rules require a one-day liquidation period for all futures contracts, a five-day liquidation period for cleared financial swaps,[60] and a 10-day liquidation time for all uncleared swaps.[61]

The minimum liquidation periods should be revised to accurately reflect the liquidity profile of the underlying instruments and should not be arbitrarily based on the type of transaction (*i.e.*, futures contract, cleared swap, or uncleared swap). While the type of transaction certainly affects the liquidity profile, other factors, including the underlying instrument and the specific terms of the product (*e.g.*, optionality and tenor) should also be considered when setting margin period of

[60] *See* Derivatives Clearing Organization General Provisions and Core Principles, 76 Fed. Reg. 69334, 69438 (Nov. 8, 2011) *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2011-27536a.pdf.

[61] *See* U.S. Commodity Futures Trading Commission, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants: Final Rule, 81 Fed. Reg. 636, 656-657 (Jan. 6, 2016) *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2015-32320a.pdf.

risk (**"MPOR"**) for a particular product. This means that the MPOR for transactions based on the same underlying instruments should be less divergent than under the current CFTC rules.

Relatedly, the CFTC should analyze the appropriateness of divergent margin requirements for cleared versus uncleared swaps. In particular, the CFTC, along with the SEC and U.S. prudential regulators, should reexamine the IM regime for uncleared swaps to ensure that it is appropriately risk-sensitive. The CFTC should review historical market data, including pre-Dodd-Frank data, to determine the appropriate and accurate level of risk-sensitive IM. ISDA believes that tailoring IM requirements for uncleared swaps to risk strikes the proper balance between reducing regulatory burdens and safeguarding against systemic risk.

v. Change Certain Thresholds in the Margin Rules.

Certain thresholds established under the margin requirements are too low and therefore place an unnecessary burden on smaller market participants who do not pose the type of systemic risk contemplated by the margin rules. To reduce the unnecessary regulatory burden on smaller firms, we recommend the following changes to certain margin rule thresholds:

- Increase the $8 billion material swap exposure threshold for IM that is scheduled to take effect in 2020 to $100 billion;
- Exclude deliverable FX forwards/swaps from the material swap exposure calculation; and
- Increase the threshold for posting of IM from $50M to $100M.

By adjusting these thresholds, the margin rules will strike the proper balance between reducing regulatory burdens and safeguarding against systemic risk.

vi. Provide a Grace Period for Custodial Onboarding.

In order to comply with the obligation to segregate collateral collected to satisfy IM requirements, entities which exceed the aggregate average notional amount threshold in a given year must on-board the custodian used by each of their counterparties. The process for a client to establish a custodial account for each of the dealers it transacts with is both costly and time-consuming. Such investment of resources will be wasted if the IM calculated between a pair of parties never exceeds the $50 million threshold. This is expected to be the case for a significant number of parties that come into scope for the IM requirements on September 1, 2020.

To prevent this unnecessary burden and diversion of resources during a period for which a relatively large number of parties are expected to come into scope for IM, we request that the Commission provide for a grace period of 6 months to fully achieve the bilateral exchange of IM from the first day on which the $50 million threshold is breached. This would allow counterparties to focus on completing the documentation necessary for exchanging IM.

vii. Align the Scope of Eligible Collateral Across Jurisdictions.

CFTC Rule 23.156 provides that equity securities that are in an index of liquid and readily marketable equities as determined by the Commission may be used as eligible collateral.[62] We suggest that the Commission should determine that any main index approved as eligible collateral under the EMIR Regulatory Technical Standards[63] (**"RTS"**) is a similar index of liquidity and readily marketable equity securities for purposes of the CFTC margin rule, and thus can be used as eligible collateral. This would reduce compliance burdens and avoid the need for maintaining a list of additional securities approved by the CFTC. Alternatively, the Commission should consider issuing a set of general criteria for trading volume which market participants can use to determine the eligibility of a particular index and the equities in that index. This would promote harmonization of eligible equity securities across regimes.

viii. Clarify that the Margin Requirements Do Not Apply to Legacy Swaps that are Amended Due to Regulatory Requirements.

We seek clarification from the Commission that legacy swaps that are amended on the basis of a regulatory action or global reform agenda would not be considered new swaps for purposes of the CFTC margin rules and any other rules promulgated under Title VII. For example, if market participants were to amend swaps referencing LIBOR and other IBORs to add fallbacks or transition to alternative rates in response to global benchmark reform efforts led by the Financial Stability Board, the amended LIBOR-linked swaps should not transform into new swaps. These contracts would have been amended pursuant to a regulatory agenda, and not due to counterparties' voluntary assumption of risk. Bringing these contracts within the scope of the margin rules would create significant funding costs for market participants.

ix. Support an Evidence-Based Approach to the Oversight of SIMM.

The CFTC, in coordination with the NFA, has granted approval to dealers which became subject to its regulatory IM requirements as of September 1, 2016 to utilize the ISDA Standard Initial Margin Model (**"SIMM"**). These Phase 1 entities are using SIMM globally to calculate their IM. In accordance with the CFTC's margin requirements, ISDA maintains SIMM in compliance with the requirements for an IM model, including annual recalibration, backtesting and benchmarking, as well as quarterly industry monitoring to ensure SIMM levels adequately cover risk and otherwise address substantive shortfalls through model changes. The ongoing monitoring of

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[62] CFTC Rule 23.156(a)(viii)(A), 17 C.F.R. § 23.156(a)(viii)(A).

[63] The EMIR RTS is *available at* https://www.esma.europa.eu/press-news/esma-news/esma-updates-crr-standard-main-indices-and-recognised-exchanges.

SIMM by its users and the collection, analysis and redress of such data by ISDA is an efficient, evidence-based approach to determining whether any changes are necessary to maintain a regulatory-compliant SIMM.

As SIMM is designed and maintained as a global model, any changes to SIMM by regulators in a single jurisdiction must eventually be approved by global regulators. As such, any changes to SIMM should be based on an analysis which demonstrates that the relevant risk is materially inadequate based on the overall SIMM calculation for a diversified portfolio among SIMM users (*i.e.*, an evidence-based approach), in accordance with the principles behind SIMM. Backtesting and monitoring of the SIMM, both in coordination with ISDA and at an individual firm level, provides opportunities to continually reassess SIMM and make necessary changes to ensure the IM calculation produced by SIMM is appropriate. Therefore, we encourage the CFTC to support this evidence-based approach to its oversight of SIMM and collaborate with global regulators to establish a coordinated approach to regulatory monitoring of SIMM to ensure its continued acceptance on a global scale, while mitigating the burdens placed on its users.

x. Provide for Additional Exemptions to the Margin Rules.

We believe that the CFTC should provide for more exemptions to the margin rules in the cases of: (1) Securitization Special Purpose Vehicles (**"SPVs"**); (2) Seeded Funds; and (3) Trading Entities:

(1) <u>Securitization SPVs</u>

Since these entities are not regulated financial institutions, securitization SPVs should be afforded special treatment under the margin rules which would allow them to margin swaps based on the credit terms and collateral pools that are in place for the securitization. These entities typically enter into swaps to hedge actual and realized risks related to an underlying commercial business or investment. There is no rationale or policy basis to treat these entities as financial entities for margin purposes, and other jurisdictions do not generally require securitization SPVs to post margin.

(2) <u>Seeded Funds</u>

The IM threshold for financial end-users captures funds that are affiliates of dealers solely because the dealer has participated in the seeding of the fund. These funds are legally and operationally segregated from the dealer and, therefore, should not fall within the definition of a financial end-user. Additionally, these funds should not be subject to the IM rules.

ISDA Safe, Efficient Markets

(3) Trading Entities

As drafted, the definition of financial end-user potentially covers any entity that invests in loans or securities which could include, for example, holding companies of industrial companies. We believe that entities that are long-term holders of specific assets, such as industrial holding companies, should not be treated as financial end-users. In addition, the CFTC should consider whether other entities, such as various governmental entities and sovereign wealth funds, regional development banks, and municipalities, should also be treated as financial entities and we encourage the Commission to seek public comment on this issue.

xi. Harmonize Margin Rules for Non-Netting Jurisdictions.

The requirement under the margin rules for a non-netting counterparty to post gross variation margin has created significant challenges for the execution of VM Credit Support Annexes and the implementation of settlement of collateral. Many other jurisdictions have either adopted *de minimis* exemptions from posting margin for counterparties located in a non-netting jurisdiction (*e.g.*, the EU provides an overall cap of 2.5 percent of OTC derivatives business) or have exempted such transactions entirely from IM and VM requirements (*e.g.*, Japan, South Korea, Hong Kong, Singapore and Australia). U.S. regulators should harmonize their requirements with global requirements by either exempting transactions against non-netting counterparties from the non-cleared margin requirements or adopting a similar *de minimis* exemption for such transactions.

xii. Ensure No-Action Relief is Coordinated with Other Agencies.

ISDA appreciates CFTC no-action relief to apply a "minimum transfer amount" to the IM and VM amounts entered into with "separately managed accounts" subject to certain conditions. However, to fully maximize the value of the relief, it would be helpful if the CFTC – to the extent possible – coordinated with other regulators to issue similar relief for those swap dealers that are subject to the margin requirements adopted by the prudential regulators and/or the European Supervisory Authorities. Absence of the similar relief from other regulators limits the utility of the CFTC no-action relief.

B. Capital and Liquidity

We support the Commission's commitment to finding the right balance between regulatory capital and liquidity, and firms' ability to provide liquidity in derivatives markets—especially in instances where those regulations stand in contradiction with G-20 commitments to promote centralized clearing of standardized derivatives. We agree with Chairman Giancarlo that the Supplementary Leverage Ratio (**"SLR"**):

"…was designed to reduce the risk of bank balance sheet activity (namely lending).Yet it is being applied to an entirely different activity—swaps clearing—designed itself to steer risk away from bank balance sheets. Applying the SLR to clearing customer margin reflects a flawed understanding of central counterparty clearing … Applying a capital charge against that customer margin continues to treat FCMs as having retained the exposure."[64]

We look forward to working with the Commission as it finalizes its proposed capital requirements[65] for swap dealers and major swap participants. Below we provide specific recommendations for the Commission to consider:

i. Harmonize Model-Approval Decisions.

We ask the CFTC to undertake a streamlined process for model approval that leverages approval by other regulators. Models approved by the U.S. prudential regulators, the SEC, and foreign regulators in Basel Committee on Banking Supervision (**"BCBS"**) jurisdictions should be recognized, provided that the relevant regulator has the authority to undertake periodic assessments and informs other regulators of such assessments.

For a more detailed discussion of these issues, please see our comment letter available at Appendix E, Attachment 3.

ii. Harmonize with SEC Security-Based Swap Dealer Capital Rules, Prudential Regulators' Capital and Liquidity Rules and Related Recordkeeping and Reporting Requirements.

In order to reduce regulatory burdens and to ensure that SDs and SBSDs are not subject to competing requirements, the CFTC and SEC should harmonize their capital requirements. We also recommend that the SEC and CFTC coordinate in addressing industry comments in their final capital rules to avoid duplicative regulation of covered entities that are dually registered with both agencies. At a minimum, the CFTC should re-propose the Net Liquid Assets Approach in line with the final SEC requirements. In addition, for SDs not subject to the capital and liquidity requirements of the U.S. prudential regulators but who nonetheless elect to be governed by these standards (*i.e.*, the proposed Bank-Based Capital Approach), the CFTC should allow SDs to use U.S. prudential regulators' risk-weighted assets methodologies without any

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[64] Remarks of Acting Chairman J. Christopher Giancarlo before International Swaps and Derivatives Association 32nd Annual Meeting, Lisbon, Portugal, *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-22

[65] *Capital Requirements of Swap Dealers and Major Swap Participants; Notice of Proposed Rulemaking*, 81 Fed. Reg. 91252 (Dec. 16, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-29368a.pdf.

additional modification. Moreover, the CFTC should conform its proposed recordkeeping and reporting requirements under Part 23.105 to those required under existing regulations, whether of the U.S. prudential regulators, foreign prudential regulators, the SEC or the CFTC itself.

For a more detailed discussion of these issues, please see our comment letter available at Appendix E, Attachment 3.

iii. Reconsider Treatment of Initial Margin.

We believe that the proposed requirement for a covered entity to hold capital against 8% of aggregate IM is inconsistent with principles of prudential regulation. Aggregate IM does not account for the offset in market risk between different counterparties. Requiring covered entities to hold capital based on such a calculation may limit the number of counterparties with whom they transact, which could in turn result in significant exposure concentrations among a few large counterparties (and also decreases in liquidity to certain segments of market participants). In addition, the hypothetical IM calculation for this purpose would result in considerable additional operational burden and should be reconsidered. The CFTC should collaborate with prudential regulators to remediate this inequitable outcome.

If the CFTC and the prudential regulators decide to retain these capital requirements, we ask that the Commission exempt its application to cleared swaps. Applying the same capital requirements to both cleared and uncleared swaps ignores the risk mitigation aspects of derivatives clearing and does not advance the 2009 G-20 commitment to central clearing.

For a more detailed discussion of these issues, please see our comment letter available at Appendix E, Attachment 3.

iv. Separate Capital and Liquidity Measurements.

We believe that each SD, regardless of the approach it uses to calculate capital (either the Risk Weighted Assets approach or the Liquid Assets Capital approach) should be able to elect either of the two proposed methods to compute and meet its liquidity requirement. Both measures of liquidity are intended to obtain the same objective, and there is no inherent tie between the method by which a firm calculates its liquidity requirement and the method by which it calculates its minimum capital requirement.

C. Cross-Border Swaps Regulation

i. Limit the Application of the CFTC Rules to Only Cross-Border Swap Activities that Truly Have a Direct and Significant Effect on U.S. Commerce.

Section 2(i) of the Commodity Exchange Act stipulates that Title VII of Dodd-Frank should only apply to activities outside the United States if those activities have a "direct and significant connection with activities in, or effect on," U.S. commerce.[66] However, the CFTC's current approach to regulating cross-border transactions and activities goes well beyond the statutory provision to capture the overseas business of U.S.-based entities. Accordingly, we ask the Commission to provide clarity around the cross-border scope of its regulations and ensure that such scope is appropriately balanced within the statutory limitations of Section 2(i). At a minimum, the Commission should codify its No-Action Relief[67] by withdrawing CFTC staff advisory 13-69 and by clarifying that swap transactions between non-U.S. SDs and non-U.S. person counterparties (that are neither guaranteed affiliates nor conduit affiliates of U.S. persons) do *not* have a direct and significant connection with activities in, or effect on, commerce of the United States merely because such swaps were negotiated by an employee that happened to be physically located in the United States (**"ANE Transactions"**) and that therefore the provisions of Title VII of the Dodd-Frank Act and regulations promulgated thereunder do not apply to such swaps.

To ensure deep, robust global markets, the Commission should allow for the recognition of similar regulatory regimes through so-called "substituted compliance", "comparability", or "equivalence" determinations, which holistically focus on the outcomes achieved through foreign regulatory regimes and foreign regulators' market supervision capabilities. ISDA believes that, in light of MiFID II trading obligations, the CFTC should prioritize substituted compliance discussions.

A lack of recognition of foreign regulatory regimes requires U.S. and U.S.-affiliated firms to build-out duplicative (and occasionally conflicting) compliance systems for trading, reporting, recordkeeping and other requirements in overlapping jurisdictions. Needless to say, a duplicative compliance regime considerably increases operational costs, decreases the competitiveness of U.S. entities in relation to other foreign entities and leads to market fragmentation and diminished liquidity as foreign entities are trying to avoid trading with U.S. counterparties for fear of being captured by the U.S. regulatory regime.

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[66] 7 U.S.C. § 2(i).

[67] CFTC Letter No. 17-36, *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-36.pdf .

ISDA recently published a White Paper that proposes a framework for regulators to issue substituted compliance determinations utilizing a set of risk-based principles. A copy of the White Paper is available at Appendix E, Attachment 4.

ii. Continue to Allow Market Participants to Comply with EMIR RTS.

We note that the EU's margin rule is materially consistent with CFTC's margin rule and request that the CFTC grant substituted compliance with respect to all elements of the European margin rule, including the scope of entities subject to the requirements.

Pending a comparability determination, the Commission should continue the relief under CFTC Letter No. 17-22 (**"NAL 17-22"**), allowing SDs subject to the European margin regime to comply with those provisions in lieu of complying with CFTC regulations (as outlined in NAL 17-22). Should the parameters of a comparability determination change, firms will need sufficient time and notice in order to implement operational and compliance changes. Therefore, we request that the Commission extend the relief under NAL 17-22 for a period of time that is sufficient for the Commission to complete and issue its comparability determination and for market participants to come into compliance with such determination.

In addition, we encourage the Commission to complete its comparability determinations for all major jurisdictions with the presumption that substituted compliance should be granted for jurisdictions that have implemented margin rules in a manner that is consistent with the BCBS-IOSCO margin framework.

iii. Streamline the Cross-Border Margin Requirements.

Given that some provisions of the Commission's cross-border requirements for uncleared margin[68] create duplicative and potentially burdensome obligations for many SDs, we recommend that the CFTC amend the regulation to address the following points:

- OTC derivatives transactions between a non-U.S. CSE (whether or not the CSE is a Foreign Consolidated Subsidiary (**"FCS"**)) and a non-U.S. counterparty (which is not guaranteed by a U.S. person) should not be subject to U.S. margin rules for non-cleared OTC derivatives because these transactions have a remote connection to U.S. markets and thus do not directly pose risks to U.S. entities.
- At a minimum, full substituted compliance for both VM and IM should be made available for non-U.S. CSEs (whether or not the CSE is an FCS) which engage in swaps with non-U.S. counterparties.

[68] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants--Cross-Border Application of the Margin Requirements, 81 Fed. Reg. 34,818 (May 31, 2016).

- The availability of substituted compliance should not differ depending on whether a firm is exchanging VM, collecting IM, or posting IM. We encourage the CFTC to work with prudential and non-U.S. regulators to ensure a level playing field for U.S. firms.

iv. Harmonize SD Capital and Liquidity Requirements with Global Standards.

Capital and liquidity requirements for swap dealers and major swap participants should be based on a presumption of substituted compliance for BCBS jurisdictions. A rule-by-rule analysis approach for determining substituted compliance would prove redundant and subject CSEs to unnecessary additional compliance costs and regulatory uncertainty. The primary purpose of negotiating capital and liquidity requirements at the BCBS level is to ensure consistent objectives, outcomes, and enforcement. Importing additional compliance requirements, including related reporting, disclosures and recordkeeping, on entities subject to BCBS capital and liquidity standards contravenes these principles.

v. Recognize Non-U.S. Platforms.

In order to reduce the risk of market fragmentation and to enhance trading liquidity between U.S. and non-U.S. markets, we ask that the Commission, in consultation with non-U.S. supervisory authorities, establish clear and comprehensive regimes to facilitate mutual recognition of execution platforms and trading requirements. The Commission has long had a policy of recognizing various non-U.S. market infrastructure providers in connection with cross-border trading activities in futures and other CFTC-regulated products, and the CFTC has experience in considering the comparability of a non-U.S. jurisdiction's regulatory requirements in a number of contexts. In the spirit of the CFTC's continued legacy of international cooperation, we ask that that the Commission make comparability determinations for non-U.S. trading venues.

D. Regulation Automated Trading

i. Take a Principles-Based Approach to the Regulation of Automated Trading.

While we fully support the Commission's goal to reduce risk and prevent market abuses, we ask the Commission to reconsider its approach under both the Regulation Automated Trading Proposal and the Supplemental Notice.[69] We believe that the Commission should take a principles-based approach toward the regulation of automated trading, rather than implementing a set of impracticable and prescriptive rules.

[69] *Regulation Automated Trading; Proposed Rule*, 80 Fed. Reg. 78824 (Dec. 17, 2015); *Regulation Automated Trading; Supplemental Notice of Proposed Rulemaking*, 81 Fed. Reg. 85334 (Nov. 25, 2016).

The Proposal in its current format is unworkable and places unduly burdensome requirements on firms, with no associated risk-reducing benefits. Specifically, we take issue with three major areas of the current Proposal:

- The scope of the Direct Electronic Access definition should be revised to only include pre-programmed algorithmic orders with no human involvement and that are transmitted directly to the DCM without passing through the FCM's risk controls.
- The proposed testing requirements are unworkable because AT Persons remain liable for the testing requirements, even though they do not have the authority to require an independent third party to turn over their proprietary source code for testing.
- The CFTC continues to insist on making the source code available for inspection by the Commission without a subpoena. The internal procedural safeguards offered by the Commission do not remedy the problem.

For a more detailed discussion of these issues, please see Appendix E, Attachments 5 and 6.

E. Position Limits

i. Re-Write Position Limits Proposal.

We believe that significant flaws remain in the position limits structure that the Commission has proposed, and we encourage the Commission to address and resolve each of the issues highlighted in our February 2017 submission to the CFTC before proceeding to adopt a final position limits rule. Specifically, and most importantly, ISDA continues to believe that there is no statutory authority for the imposition of position limits as currently proposed. The implementation of the position limits as proposed could significantly harm market liquidity and reduce the ability of commercial market participants to engage in hedging and risk management activities, without any commensurate market protection or benefits. For that reason, the current proposal structure should be abandoned in favor of a principles-based and incremental approach.

Beyond this foundational point, we also continue to encourage the Commission to resolve the key substantive issues that we have identified with the proposal. Specifically, and repeating the arguments we have made before, we do not believe that the Commission can or should attempt to adopt a rule that is overly broad—position limits should not apply to derivatives held outside of the spot month, financially settled futures contracts, or swap positions, and any final rule should include a risk management exemption. Further, and as set forth in greater detail in our comment letter, multiple technical changes to the proposed rules are required in order to mitigate the risk of significant market dislocation and disruption in the event the CFTC does adopt the Proposal as a final rule. Additionally, as discussed in more detail in our letter, we believe that DCMs should be responsible for the oversight and administration of federal limits.

ISDA remains supportive of the Commission's efforts that have resulted in incremental revisions and changes to the position limits proposal over the past few years, and we encourage the Commission to continue to be thoughtful in reviewing and responding to the comments provided prior to moving to finalize a positon limits rule. For a more detailed discussion of these issues, please see our comment letter on Position Limits, available at Appendix E, Attachment 7.

F. <u>CFTC Internal Processes and Procedures and Regulatory Structure</u>

i. Improve CFTC Policies and Procedures.

We have identified a number of areas where the Commission's policy approaches may have had an adverse impact on the markets and outlined suggestions for achieving the Commission's mission in a more cost-effective manner. Good policy outcomes, however, are premised on establishment of sound processes for achieving such outcomes. In the past years, due to the implementation of a large number of Dodd-Frank rulemakings, the Commission, occasionally, has sidestepped its internal policies and procedures. While we appreciate the Commission's effort to provide immediate relief from compliance with certain Dodd-Frank related rules through no-action letters and guidance, these staff actions do not provide for public comment and while requested by some market participants, may bind the entire market. In some instances, these staff actions may impose conditions not anticipated by the requester, without providing sufficient time for review, comment and compliance. Accordingly, we ask that the Commission revisit all no-action letters and guidance issued in connection with the implementation of the Dodd-Frank rules, determine whether they still offer a workable solution, incorporate relief into the current rules, make necessary adjustments, and consistently and fairly use no-action relief in the future, where necessary.

ii. Create a CFTC-SEC Rule Safe Harbor or Substituted Compliance Regime.

While we have addressed CFTC-SEC harmonization with respect to specific areas above, we note that generally, in areas where the CFTC and SEC have both adopted and implemented Dodd-Frank Title VII rules the agencies should recognize substituted compliance and equivalency among finalized rulesets in order to remove redundancies and duplicative compliance requirements.

VI. Conclusion

We appreciate the opportunity to submit our comments in response to Project KISS. We commend the Commission for its efforts to simplify and harmonize its rules and look forward to working with the Commission as it continues to consider these important issues. Our members are strongly committed to maintaining the safety and efficiency of the U.S. derivatives markets and hope that the Commission will consider our suggestions, as they reflect the extensive knowledge and experience of market professionals within our membership.

Please feel free to contact me or Bella Rozenberg (202-683-9334) or Chris Young (202-683-9339) should you have any questions or seek any further clarifications.

Steven Kennedy
Global Head of Public Policy
ISDA

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ISDA Project KISS Appendices

Appendix A – Trading

Attachment Number	*Letter Subject*	*Date*	*Link*
1	Commodity Futures Trading Commission Request for Public Input on Simplifying Rules (Project KISS); Extension of Certain Time-Limited No-Action Relief	July 24, 2017	http://www2.isda.org/attachment/OTYxOA==/IIB-ISDA-SIFMA%20Joint%20NAR%20extension%20request%20with%20removal%20of%20time%20limitations.pdf
2	Petition for Rulemaking to Amend Parts 1 (General Regulations under the Commodity Exchange Act), 37 (Swap Execution Facilities) and 43 (Real-Time Public Reporting) of the Commodity Futures Trading Commission Regulations	June 15, 2015	http://www2.isda.org/attachment/NzY2Mg==/ISDA%20CFTC%20Petition.pdf
3	Proposal Amending CFTC Regulation § 37.6	July 5, 2017	http://www2.isda.org/attachment/OTY0Mw==/OTE-RIC-Updated%20Proposal%20(07-05-17)%20(Final).pdf

Appendix B - Clearing

Attachment Number	*Letter Subject*	*Date*	*Link*
1	Request for Commission Action – Part 50	October 11, 2016	http://www2.isda.org/attachment/OTY0Mg==/ISDA-request%20(inter-affiliate%20clearing%20exemption-Part%2050)(October%2011-201....pdf
2	Supplemental Request for Commission Action – Part 50	November 16, 2016	http://www2.isda.org/attachment/OTY0MQ==/Inter-affiliate-trades-supplemental%20request.pdf
3	ISDA Responses to CFTC Questions on Inter-Affiliate Clearing Exemption	December 6, 2016	http://www2.isda.org/attachment/OTYzOQ==/ISDA-responses-inter-affiliate-clearing-exemption%20(suppelemental%20respons....pdf
4	Clearing Requirement Determination Under Section	July 18, 2016	http://www2.isda.org/attachment/OTAwNQ==/ISDA%20Comment%20Letter%20-

	2(h) of the CEA for Interest Rate Swaps		%20CFTC%202016%20IRS%20Clearing%20Mandate.pdf
5	Discussion Note: *Essential Aspects of CCP Resolution Planning*	October 21, 2016	http://www2.isda.org/attachment/ODgwMw==/FIA-GFMA-IIF-ISDA-TCH-Response-to-FSB-Discussion-Note-CCP-Resolution.pdf
6	Consultative Document: *Guidance on Central Counterparty Resolution and Resolution Planning*	March 13, 2017	http://www2.isda.org/attachment/OTIzOQ==/FSB%20Consultative%20Document%20-%20CCP%20Resolution%20-%20Final%20FIA-GFMA-IIF-ISDA%20Response.pdf
7	Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI*	October 18, 2016	http://www2.isda.org/attachment/ODc5OQ==/FIA-GFMA-IIF-ISDA-TCH%20Response%20to%20CPMI-IOSCO%20Consultative%20Report%20(Resilience%20and%20Recovery%20of%20CCPs).pdf

Appendix C - Reporting

Attachment Number	*Letter Subject*	*Date*	*Link*
1	Request for Comments from the Division of Market Oversight of the U.S. Commodity Futures Trading Commission Regarding Staff's Comprehensive Review of the Commission's Swaps Reporting Rules and Staff's *Roadmap to Achieve High Quality Swaps Data*	August 21, 2017	http://www2.isda.org/attachment/OTYxNw==/ISDA-SIFMA_comments_CFTC_DMO_Roadmap_Swap_Data_Reporting_21%20Aug%202017_FINAL.pdf
2	Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Reporting Requirements for International Swaps (Part 45.3(h))	June 15, 2015	http://www2.isda.org/attachment/ODQ0Ng==/Request%20to%20DMO%20for%20No-Action%20Relief%20for%20International%20Swaps%20(Part%2045%203(h))_15Jun15_FINAL.pdf
3	Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Reporting Requirements for International Swaps (Part 45.3(h))	February 11, 2014	http://www2.isda.org/attachment/NjY4Mg==/Request%20for%20NAR%20for%20International%20Swaps%20(Part%2045%203(h))_11Feb14_FINAL.pdf

4	Review of Swap Data Recordkeeping and Reporting Requirements (79 Fed. Reg. 16689)	May 23, 2014	http://www2.isda.org/attachment/NjY1NQ==/2014%20May%2023%20CFTC%20RFC-%20ISDA%20Response_FINAL.pdf
5	Request for Interpretative Letter for Post-priced Swaps	December 3, 2012	http://www2.isda.org/attachment/NjcwMQ==/IL%20-%20PPS%20Dec%203%202012.pdf
6	Request for No-action Relief for Post-priced Swaps	March 26, 2013	http://www2.isda.org/attachment/NjY5OQ==/2013%20Mar%2026%20Request%20for%20NAR%20Equity%20PPS_FINAL.pdf

Appendix D – Registration

Attachment Number	*Letter Subject*	*Date*	*Link*
1	Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments	July 7, 2017	http://www2.isda.org/attachment/OTYzOA==/ISDA%20CCO%20Comment%20Letter%20(Final).pdf

Appendix E – Other Areas (Miscellaneous)

Attachment Number	*Letter Subject*	*Date*	*Link*
1	Product Set for Variation Margin Under Margin Requirements for Non-Cleared Swaps	February 12, 2016	http://www2.isda.org/attachment/ODM1NQ==/ISDA%20-%20Margin%20(Broad%20Product)%20-%20Letter%20to%20PRs_CFTC.pdf
2	Broad Product Set for Swap Margin Calculation	May 15, 2015	http://www2.isda.org/attachment/ODAwNg==/ISDABroadProdSet051515.pdf
3	Capital Requirements for Swap Dealers and Major Swap Participants (RIN 3038-AD54)	May 15, 2017	http://www2.isda.org/attachment/OTYzNw==/ISDA%20Comment%20Letter%20-%20CFTC%20Proposed%20SD%20and%20MSP%20Capital%20Requirements%20(2017)%20-%20Final%20(002).pdf
4	Cross-Border Harmonization of Derivatives Regulatory Regimes: A risk-based framework for substituted compliance via cross-border principles	September 2017	http://assets.isda.org/media/85260f13-47/8a2bfb70-pdf/

5	Regulation Automated Trading; Proposed Rule: 17 CFR Parts 1, 38, 40 et al.	March 16, 2016	http://www2.isda.org/attachment/ODI0MQ==/Regulation%20AT-comment-03-16-16%20(002).pdf
6	Regulation Automated Trading; Proposed Rule: 17 CFR Parts 1, 38, 40 et al Supplemental Notice of Proposed Rulemaking, RIN 3038-AD52	May 1, 2017	http://www2.isda.org/attachment/OTM2Ng==/Supplemental%20Reg%20AT-Comment%20Letter%20-%20ISDA%20(05.01.17)(filed).pdf
7	Position Limits for Derivatives: Re-Proposal (RIN 3038-AD99)	February 23, 2017	http://www2.isda.org/attachment/OTYzNg==/61096StevenKennedy.pdf