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Financing America's Economy

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By Electronic Mail (http://comments.cftc.gov)

March 8, 2011

Mr. David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Regarding: Core Principles and Other Requirements for Swap Execution Facilities

RIN Number 3038–AD18

Dear Mr. Stawick:

The Financial Services Roundtable[1] respectfully submits these comments in response to the request for comments by the Commodity Futures Trading Commission (the "Commission") with respect to its proposed rulemaking, RIN Number 3038-AD18, Core Principles and Other Requirements for Swap Execution Facilities (the "Proposing Release"),[2] to implement certain requirements of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[3] The Proposing Release is part of a massive rulemaking endeavor by the Commission to implement the provisions of Title VII of the Dodd-Frank Act and subject swap transactions to comprehensive regulation and regulatory oversight. The Proposing Release relates to Section 733 of the Dodd-Frank Act and related provisions establishing a new category of registered entity, the "swap execution facility" ("SEF"); articulates the key characteristics of and core principles governing a SEF; and clarifies important aspects of the SEF's role within the

[1] The Financial Services Roundtable (the "Roundtable") represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.
[2] 76 Fed. Reg. 1214 (January 7, 2011).
[3] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1897 (July 21, 2010).

larger regulated environment for swaps established by the Dodd-Frank Act.

The Financial Services Roundtable appreciates the efforts the Commission has made to implement Title VII within the schedule mandated by Congress. We continue, however, to be concerned about the speed and sequence of rulemaking. The current proposal for SEFs, for instance—which is the principal proposal defining these entities and their functions and obligations—was released after the comment periods for other aspects of SEF regulation, such as those relating to conflicts of interest, had already closed. For those attempting to respond to these proposals, the process often feels like trying to complete a jigsaw puzzle that has no picture on the box cover, where the pieces are doled out gradually and pieces are still missing. We again request that the Commission reopen all comment periods after all rule proposals have been made, but before any final rules are adopted, so that market participants can react to the proposed regulatory picture as a whole.

1. We support the inclusion of an RFQ platform as one of the possible means of trading on a SEF; however, we believe that the RFQ platform should allow the requesting party to submit the request to a **single** counterparty selected by the requesting party.

Compared to other types of financial positions traded on exchanges, swaps and security-based swaps are extremely illiquid.[4] Although the Dodd-Frank Act seeks to encourage transparency and exchange trading for these instruments, the lack of liquidity poses a challenge to the effort to establish centralized trading. The Commission has acknowledged this challenge, in part by proposing that a request-for-quotations ("RFQ") platform be permitted as well as a central limit order book for SEFs. In an illiquid market, transparency can undermine rather than facilitate true price discovery by allowing market participants to exploit information about other parties' trading strategies or hedging needs. For this reason, the RFQ platform is a better option than a central limit order book for illiquid positions, because it does not require a party to telegraph intent to the entire market.[5]

Similarly, an extremely important characteristic of the OTC markets has been the fact that participants know their counterparties and can evaluate counterparty risk. Reputational risk is a strong incentive in this market in ensuring compliance with swap obligations. Relationship-based trading can also be a significant factor in preserving liquidity in a market that is under stress. Anonymous, exchange-traded markets may have more legal uncertainty and may face liquidity challenges in times of financial crisis that would not be present in the OTC markets. These concerns, as well, support the

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[4] See SEC Release No. 34–63825; File No. S7–06–11, Registration and Regulation of Security-Based Swap Execution Facilities (the "SEC SEF Release"), 76 Fed. Reg. 10948, 10952 n. 35 (Feb. 28, 2011)

[5] This is equally true in the context of block trades. We note that, although the Commission has included provisions in its proposed rules that are intended to prevent market manipulation, such rules are unlikely to prevent other parties from using widely disseminated information to their advantage. Such use would be harmful to the market participant initiating the trade, and is unlikely to provide offsetting benefits to the markets as a whole, such as increased liquidity or transparency.

establishment of RFQ platforms that will increase transparency by making consolidated quotations available, while preserving important, well-functioning aspects of the current markets. .

Our members believe that an RFQ system will work best if it has the following features:

(1) Participants have control over the liquidity providers to which their queries are conveyed;
(2) Participants have the ability to select a quote in their discretion, even where the quote may not reflect the best price among the quotes received, if there are relevant factors that make it more desirable;
(3) Liquidity providers receiving the request for quote have relevant information about the identity of the party making the query; and
(4) The request for quotation is not published by the SEF until after the trade has been completed, and then only as part of aggregated disclosures.

Because of the liquidity challenges in the swap markets, we believe that an RFQ platform is an essential part of a SEF. Our members do not believe that a central limit order book, on a stand-alone basis (i.e., not paired with an RFQ platform), generally would be sufficient for trading the swaps that currently comprise the OTC markets.

Finally, we also believe participants should be permitted to query a single other participant. Our members feel this may be effective in preventing inappropriate manipulation, while requiring broader queries may make participants more vulnerable to such manipulation. Section 721 of the Dodd-Frank Act defines "swap execution facility" as "a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system."[6] We understand that the Commission has proposed to interpret the "multiple to multiple" aspect of the statutory language to require that a market participant requesting a quote on an RFQ platform would have to query at least five parties.[7] However, Section 761 of the Dodd-Frank Act defines "security-based swap execution facility" using virtually identical language, except that it refers to the ability to execute or trade security-based swaps rather than swaps. The SEC has interpreted this same language by focusing on the meaning of the word "ability," and has indicated that the relevant requirement is only that the market participant requesting the quote has the *option* to query multiple parties—not that it be required to do so.[8] We request that the Commission reconsider its interpretation in light of the SEC position and permit a participant to query a single liquidity provider as long as the system supports the *ability* to query multiple providers.[9]

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[6] Dodd-Frank Act, Section 721.
[7] Proposing Release at 1220.
[8] SEC SEF Release at 10953.
[9] See Section 10 of this letter, recommending that the CFTC and SEC better conform their rules for SEFs and SB SEFs.

2. We believe that open access to SEFs is an important aspect of the new system, but counterparties will need to conduct their own diligence with respect to uncleared trades. Therefore, a central limit order book should be used only for cleared transactions.

The Commission has proposed that all ECPs would be permitted to trade on SEFs so long as they meet minimum financial standards established by the SEF. In general, we support this position. Indeed, many of our members expect to be ECPs that will not be required to register as swap dealers or major swap participants.

At the same time, we note that uncleared swaps are, by definition, bilateral trades. In an RFQ platform, we would expect the identities of the parties to be known to each other, so that requesters and those responding to requests for quotes would both have the ability to make their own due diligence determinations about their potential counterparties. Proposed sub-clause (c) of Section 37.702, which would require the SEF to evaluate documentation and to set credit filters in connection with transactions in uncleared swaps, raises questions about whether the Commission shares that expectation. Are these requirements intended to set a baseline that would be supplemented by further evaluation by RFQ participants, or are they intended to be a substitute for such evaluation? We do not believe the latter would be viable. In the absence of central clearing, to ensure prudent and appropriate risk management, the credit and documentation needs of the parties must be determined by the parties themselves, rather than by the SEF.

Alternatively, are the proposed requirements in clause (c) of Section 37.702 intended to support the use of central limit order book systems for uncleared trades? In an anonymous trading system with automatically matched trades and open access that permits trading by unregulated entities, we do not believe that a SEF can set financial standards that will be sufficient to provide the necessary comfort to market participants. For this reason, we believe that a trading platform such as a central limit order book would only be appropriate for transactions that will be submitted for clearing. We recognize that commercial end-users are given discretion as to whether to clear trades that meet the criteria for the end-user exemption. We do not believe that such discretion should extend to anonymous trades on a central platform. Indeed, we believe central clearing is fundamental to the proper functioning of a central limit order book system, especially on a facility that provides open access. If the provisions of Section 37.702 signal the possibility that anonymous trading might be possible on a SEF without central clearing, we would have grave concerns about the risks of that approach. We request that the Commission clarify that anonymous trading can only occur on a platform with comprehensive central clearing.

Finally, we note that clause (c) of Section 37.702 would mandate that SEFs require members to show that they "have entered into credit arrangement documentation for the transaction." We are not sure exactly what is contemplated by that phrase, but we believe that legal certainty, especially for anonymous trades, is essential. Open access has the potential to undermine legal certainty, especially to the extent that open access

allows unregulated market participants to trade on an anonymous basis. We believe it is critical that the rules of the SEF clearly articulate how trades become binding and enforceable and what the consequences would be if the transaction fails to clear.

3. The Commission should clarify how resting bids would work operationally in the context of an RFQ platform, rather than a central limit order book.

The preamble to the Proposing Release includes the following discussion of resting bids and how they must be treated on an RFQ platform:

> Under the proposal, SEFs that utilize request for quote systems must also furnish liquidity providers with the ability to post both executable bids or offers and indicative quotes. The terms of any such ''resting'' executable bids or offers would be displayed to the requester along with any other specific bids or offers included in the responses to its request for quote. Upon receipt of the responses and the appropriate resting bids or offers, the original requester would have the option to execute the transaction. The Commission believes that SEFs that utilize request for quote systems must ensure that any competitive resting bids or offers be taken into account and communicated to the requester along with any bids or offers included with responses to requests for quotes.

If: (i) executable "resting bids" were made available to a requester in addition to the quotes received from those participants specifically queried, (ii) the provider of the "resting bid" was not provided with information about the requester[10] or the request unless the requester chose to execute on the resting bid, and (iii) the requester had complete choice as to the bid it accepted (in other words, it could reject the resting bid even if lower than solicited bids if the requester did not want to enter into a transaction with that counterparty), the use of resting bids might be a viable way to heighten liquidity and transparency without losing the benefits of the RFQ platform. On the other hand, if the requester did not have the ability to reject the resting bid, or the participant posting the resting bid received information about the request for quote without the permission of the requester, this would undermine the RFQ platform. One of the primary advantages of the RFQ platform for swaps with limited liquidity is that it enables market participants to control the dissemination of information about their trading objectives. Moreover, if a resting bid related to less than the entire amount of the RFQ, any forced acceptance of that bid might compromise other bids received for the full amount. We request that the Commission clarify how this process would be expected to work, and consider the concerns expressed above.

[10] We note our comment in Section 2 that any open access platform that matches participants without the opportunity for those participants to conduct appropriate due diligence would have to require that all resulting trades be cleared. We would have the same concerns with respect to an RFQ platform that included bids executable by a party that had not been diligenced.

4. The Commission should clarify the what it means to "execute" a trade and should establish clear guidelines for acceptable preliminary communications between market participants.

For participants in the swap markets, executing transactions on a SEF or designated contract market ("DCM") will represent a significant change from the current practice in which most swap transactions are entered into through direct communication between the parties. We believe the exchange-trading requirements of Title VII allow direct communication, including by telephone, so long as no binding commitment to enter into a transaction is made during such communication. In other words, we believe customers should continue to be permitted to have off-exchange discussions with dealers regarding the terms of a swap, with both parties then bringing the swap onto a SEF or DCM platform to make a binding commitment in accordance with the rules of the exchange. Certain aspects of the proposed rules, such as the 15-second rule requiring exposure to other participants, seem to contemplate that significant precursors to a trading arrangements may have occurred prior to consummation of the trade on the exchange. Our members have nonetheless emphasized a need for clear guidance on permitted *versus* impermissible conduct and contacts, and we therefore request that the Commission clarify where these lines must be drawn in practice to be compliant with the requirement that the trade be executed on a SEF or DCM.

5. The 15-second rule is confusing in the context of transactions on an RFQ platform, rather than a central limit order book, and its operation and effect should be clarified.

A number of aspects of the Commission's discussion of its proposed 15-second delay create confusion as to how the delay requirement would be implemented. In the preamble, the Commission states:

> Additionally, under the proposal, SEFs must provide a general timing requirement applicable to traders such as brokers who have the ability to execute against a customer's trade or are entering a trade for two customers on opposite sides of the transaction. Under the proposal, a broker would have to provide a minimum pause before entering the second side (whether for its own account or for a second customer), thus ''showing'' other market participants the terms of a request for quote from its customer, and providing other market participants the opportunity to join in the trade. The Commission proposes to require a minimum pause of 15 seconds between entry of two potentially matching customer-broker swap orders or two potentially matching customer-customer swap orders on SEFs.[11]

One of the initial questions raised by this language is the reference to "brokers," a class of market participant not otherwise contemplated as potential participants in a SEF and likewise not encompassed within the new categories of registered entities established

[11] Proposing Release at 1220.

by Title VII. Indeed, aside from this paragraph, the term is used only twice in the Proposed Rule: once in reference to the entities that might be polled in connection with a price index,[12] and once in reference to current OTC market practice.[13] We are not sure what level of access would be provided to a broker on a SEF, nor how a broker would function within the proposed structure of the SEF.

Second, the discussion of the 15-second delay indicates that the broker would have to show other market participants "the terms of a request for quote from its customer, and provid[e] other market participants the opportunity to join in the trade." The reference here to a "request for quote" implies that this delay would be part of an RFQ platform, but in that respect it appears to be at odds with the idea of an RFQ platform in which participants could choose those to whom they made the request and limit the number of parties that they queried. Nor is there any inherent timing aspect to trades on an RFQ platform such that a 15-second delay would be meaningful. We ask that the Commission clarify these operational aspects relating to the 15-second delay, including whether the delay is intended to apply only to trades executed on a central limit order book notwithstanding the reference to a "request for quote."

6. <u>The Commission's proposed approach to determining when a swap is "available to trade" places too much power in the hands of market participants that may be motivated by self-interest and will create confusion about which swaps are required to be traded on a SEF or DCM.</u>

The term "available to trade" has a significant new meaning in the context of a SEF, where it is a critical aspect of the determination that a swap must be traded on a SEF or DCM. It is not the same as a swap being "listed," or the SEF permitting transactions to occur on its trading platforms. Instead, the Commission notes that in evaluating whether a swap is "available to trade," the SEF may consider "frequency of transactions and open interest,"[14] but does not make such consideration obligatory.

The Commission proposes that if "at least one swap execution facility has made the same or an economically equivalent swap available for trading, all swap execution facilities are required to treat the swap as made available for trading."[15] It is unclear what this means as a practical matter. Are other SEFs required to permit trading of the swap on their facility, even if they do not have systems in place to handle that type of swap? Under what circumstances would a swap be "economically equivalent" to another swap? Who would make that determination? Would SEFs be expected to police the off-exchange trading of their members? We believe that unless the swap is *identical* to the swap made available for trading, any standard that considers equivalency cannot work.[16]

[12] *Id.* at 1227.
[13] *Id.* at 1218.
[14] *Id.* at 1222.
[15] *Id.* at 1241.
[16] If the Commission's proposal is intended to cause more SEFs to facilitate trading of a particular swap, we believe it is unnecessary. SEFs will have a strong economic interest in making swaps available for trading and in competing with each other based on the scope of traded products.

We further believe the Commission should require a test period of some weeks or months from the time a swap is listed on a SEF to the time it may be deemed "available to trade," allowing the SEF, the Commission and other market participants the opportunity to confirm that such a designation is appropriate. If the SEF is permitted to make the determination on its own, it will be subject to moral hazard: a SEF may declare a swap to be available for trading on its facility in order to generate business, even where the liquidity of the swap is too limited for the platform to provide an appropriate trading venue. Once a swap is available to trade on a SEF, it must trade on a SEF or DCM if it is subject to the mandatory clearing requirement and no exception is available. If the determination is made that a swap is "available to trade" when the system is not yet adequately able to support such trading, it will unnecessarily disrupt the ability of all market participants to enter into such swaps.

We note that the SEC has proposed adoption of an objective standard for determining when a security-based swap is available to trade (although it has not yet proposed the parameters of such a standard), rather than leaving this determination in the hands of one or a handful of SEFs. We support the SEC's approach and encourage the Commission to adopt it.

7. The Commission should not limit the ability of market participants to use any available system, including single-dealer platforms, for swap transactions that are not required to be executed on a SEF or DCM.

Proposed Section 37.9(c) narrowly defines the ways in which swaps that are *not* required to be executed on a SEF or DCM may be executed, allowing voice-based systems "or any such other system for trading as may be permitted by the Commission." This language does not appear to include other systems commonly in use currently, such as single-dealer RFQ systems. Although we appreciate that such systems would not meet the definition of SEF as proposed by the Commission, we do not see why the Commission's rule should limit the use of such systems for transactions that are not required to be executed on a SEF or DCM. Nor do we believe that market participants should have to make specific requests to the Commission (or that is a valuable use of Commission resources to evaluate such requests) to continue to use their existing platforms with respect to swaps that are not required to be cleared. Indeed, where there is no requirement to move swap execution on to an exchange, we believe the Commission should avoid doing harm to the functioning of the off-exchange market.

8. SEFs should be restricted from using the proprietary data and personal information they collect from market participants without regard to the purpose for which it was collected, subject to customary carve-outs from confidentiality requirements (such as where the information is already publicly available).

We support restrictions on the ability of SEFs to use for business or marketing purposes the proprietary data and personal information they collect from market participants. We are concerned, however, that proposed Section 37.7, which restricts the use only of information obtained by the SEF for regulatory or compliance purposes, may

be overly narrow in that it would allow SEFs to argue that certain information that market participants provide is not for regulatory or compliance purposes, even where the participant has a reasonable expectation that such information would not be used for other purposes.

Although we would be concerned with the use of data that was attributable to an individual participant for purposes other than those for which it was supplied, we note that aggregate data has a number of uses in the market that should not be constrained. Our members believe the use of aggregate data should be permitted so long as such data is not presented in a way that can be attributed to any market participant..

9. CCOs should not be required to sign certifications that will effectively make them strictly liable for all aspects of their compliance programs.

Section 5h(f)(15) of the Commodity Exchange Act, as added by Section 733 of the Dodd-Frank Act, requires that a SEF have a chief compliance officer ("CCO") and sets out the responsibilities and obligations of the CCO. One of the obligations of the CCO is to provide an annual compliance certificate that describes the compliance of the SEF with the Commodity Exchange Act and "the policies and procedures, including the code of ethics and conflict of interest policies," of the SEF. The CCO is also required to "include in the report a certification that, under penalty of law, the report is accurate and complete."[17]

The report that the Commission would require under proposed Section 37.1501(e) is significantly more extensive and detailed than that required under the statute. In particular, the Commission would require the CCO to: (i) identify the compliance policies and procedures related to each subsection of Section 5h; (ii) provide a self-assessment of the effectiveness of those policies and procedures; (iii) discuss areas that need improvement and make recommendations for prospective changes; (iv) list material changes since the last report; (v) describe the available compliance resources, including structure and staffing of the self-regulatory program; (vi) catalogue all investigations and disciplinary actions taken and evaluate the performance of disciplinary committees and panels; (vii) describe all material noncompliance issues identified and how they were resolved; (viii) and state any objections to the compliance report raised by persons with oversight responsibility for the CCO. The CCO would be required to certify that "to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete."[18]

Although we appreciate the importance of having an effective compliance system, and also acknowledge that certification requirements can focus the attention of those in positions of responsibility, we question whether the proposed CCO certification is appropriate in the form set out in proposed section 37.1501(e)(7). Significant portions of the report, such as the areas that need improvement or the self-assessment of effectiveness, are subjective determinations as to which a certification of accuracy and

[17] CEA Section 5h(f)(15)(D).
[18] Proposing Release at 1252.

completeness has little relevance. Typographical errors or incomplete files could also cause the report to be incomplete or inaccurate. In our view, a CCO certification that reflects a good faith effort to evaluate, assess and otherwise report fully with respect to the state of the SEF's compliance program should not subject the CCO to liability. We strongly support allowing the certification to be made subject to a knowledge qualifier, as proposed. We question, however, the absence of a materiality qualifier. In addition, we note that the Commission is proposing that the certification be given by the CCO to "the best of his or her knowledge and reasonable belief, and under penalty of law." The "reasonable belief" of the CCO will be evaluated only in hindsight, and could effectively create a strict liability standard if, for example, the Commission asserts that belief in the effectiveness of the compliance program was not reasonable in light of subsequently discovered flaws. We are concerned generally about the willingness of highly qualified people to take on the CCO roles at this type of entity, and are reluctant to support a certification standard that may require them to guarantee the results of their compliance systems, rather than to report them to the best of their ability.

10. The Commission should work closely with the SEC to ensure that the rules for SEFs and SB SEFs are consistent and support dual registration.

We appreciate that the Commission and the SEC are not required to promulgate identical rules for SEFs and SB SEFs, and that there may be aspects of both types of products that lead to differences in some circumstances. Both Commissions, however, have stated that they are consulting with each other in connection with various rules, and the SEC in particular has noted that it expects that many entities will request dual registration as SEFs and SB SEFs.[19] Despite this consultation, it appears that many of the current differences in proposals are not particularly correlated to differences in the products. Even in addressing virtually identical language, the Commission and the SEC have proposed rules that are organized differently, use different language and impose different requirements. An example of this is Core Principle 4, Monitoring of Trading of Trade Processing, for which Congress used virtually the same language in the provisions for SEFs and SB SEFs. We appreciate that the SEC may not share the Commission's concerns about the availability of physical commodities, which will not be a relevant consideration for security-based swaps, and that the Commission may not share the SEC's concerns about insider trading. But a comparison of Subpart E of the Commission's proposed rules in Part 37 to Section 813 of the SEC's proposed rules in Part 242 shows that they differ in scope, detail and substance in ways that do not appear tied to product differences. Entities attempting to register as both SEFs and SB SEFs will find themselves dealing with the challenge of structuring their compliance programs to

[19] See SEC Release No. 34–63107; File No. S7–27–10, Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges With Respect to Security-Based Swaps Under Regulation MC, at footnote 12.: "The Commission preliminarily believes that an entity that registers with the Commission as either a security-based swap clearing agency or a SB SEF is likely to register also with the CFTC as a derivatives clearing organization or swap execution facility, respectively. As a result, the Commission staff and the CFTC staff have consulted and coordinated with one another regarding their respective agencies' proposed rules to mitigate conflicts of interest."

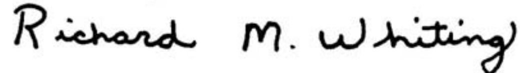
conform to two sets of rules addressing the same subject and implementing the same core principle.

We recognize that timing constraints and differing regulatory priorities have made coordinated rulemaking even more challenging than it would be otherwise. Nonetheless, we are concerned that the complications of different, and potentially conflicting, sets of rules may limit the ability of these new trading platforms to develop and may expose them to unnecessary compliance costs. We urge the Commission and the SEC to work together now—before final rules are adopted—to enhance the consistency of these rules.[20] Where rules need to be different, we urge both Commissions to explain the reasons such differences are required, especially because we believe such explanation will promote understanding among market participants and ultimately enhance implementation and compliance.

Conclusion

We appreciate the opportunity to express our views on these extremely complex issues. We are confident that the Commissions will adequately address the areas of specific concern that the Roundtable has addressed above. If you have any questions about this letter, or any of the issues raised by our comments, please do not hesitate to call me or Brad Ipema, the Roundtable's Senior Regulatory Counsel, at (202) 589-2424.

Sincerely,



Richard M. Whiting
Executive Director and General Counsel
Financial Services Roundtable

[20] We note, as well, that even sets of rules proposed by the Commission to address virtually identical language, for instance in promulgating regulations related to core principles of DCMs and SEFs, often have inconsistencies of language and structure that may create long-term confusion among those interpreting these rules. A simple example of this can be found in a comparison of proposed Section 37.202(a) and proposed Section 38.151(b), both dealing with the impartial access requirement. Section 37.202(a)(1) would require SEFs to provide "[c]riteria that are impartial, transparent, and applied in a fair and nondiscriminatory manner;" while Section 38.151(b) would require DCMs to provide "[a]ccess criteria that are impartial, transparent, and applied in a nondiscriminatory manner." We do not believe there is an intended difference between "access criteria" and "criteria," nor do we believe that fairness in the application of those criteria by DCMs is considered by the Commission to be less important than such fairness by SEFs. We suggest that the Commission consider reconciling Parts 37 and 38 before adopting either in final form.