sifma

asset management group

September 29, 2017

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

Re: Request for Information regarding Project KISS (RIN 3038-AE55)

Dear Mr. Kirkpatrick:

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG" or "AMG")[1] appreciates the opportunity to provide the following response to the Commodity Futures Trading Commission's (the "Commission") regulatory reform initiative branded "Project KISS."[2] AMG appreciates the Commission's continuing engagement on this important review and hopes that it leads to achieving greater efficiencies in applying the Commodity Exchange Act ("CEA") and Commission Regulations to the important financial markets within the Commission's jurisdiction.

AMG, as the voice for fiduciaries who serve clients such as pension funds and retail funds, has seen some areas of post-crisis overcorrection and overregulation for which recalibration would help reduce costs ultimately borne by investors. While we believe core regulatory changes achieved by the Commission have strengthened markets and protected investors, overly-prescriptive and limiting requirements on the periphery have had outsized consequences of creating unnecessary burdens and increasing operational complexity. In addition, AMG believes that some standards need to be modernized and updated to improve operational efficiencies for market participants.

To provide specific comments on each of the areas identified by the Commission, AMG has submitted four appendices, each of which will be submitted via the KISS Public comment portal.

For the reasons detailed in the appendices, AMG makes the following recommendations:

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1 SIFMA AMG brings the asset management community together to provide views on policy matters and to create industry best practices. SIFMA AMG's members represent U.S. and multinational asset management firms whose combined global assets under management exceed $39 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

2 *See* Project Kiss (Request for Information), 82 Fed. Reg. 23765 (May 24, 2017).

REGISTRATION

I. CPO and CTA Registration and Regulation: Eliminate Unnecessary Burdens on SEC-Registered Investment Advisers and Improve Clarity of Requirements

To serve the Commission's goal of harmonizing the regulations imposed on entities regulated by both the Commission and Security and Exchange Commission ("SEC") "to eliminate duplicative and unnecessary regulatory burdens,"[3] AMG recommends that the Commission:

1. Expand the CPO exemptions for SEC registrants to avoid creating an overly broad universe of Commission registrants by either:

    a. Restoring the pre-2012 exemptions, including:

        (i) Eliminating the trading and marketing tests in Regulation 4.5 for RICs; and

        (ii) Restoring the private fund CPO exemption in Regulation 4.13(a)(4) for RIAs and their affiliates;

    b. Or, alternatively, reducing unnecessary "over registration" under Regulation 4.5 and Regulation 4.13(a)(3) through appropriately tailored interpretation of conditions in current Regulation 4.5 and Regulation 4.13(a)(3), including:

        (i) Excluding bona fide hedging, as defined under appropriate current Commission standards, from the *de minimis* trading test calculation;

        (ii) Permitting netting of uncleared swaps positions to determine *de minimis* exposure;

        (iii) Clarifying the marketing test factors to avoid the "chilling effect" of vague, subjective factors and resulting over registration.

    c. Eliminating the annual confirmation requirement under Regulation 4.5 and Regulation 4.13(a)(3).

2. Harmonize Commission regulation of dual registrants with existing SEC regulation by permitting substituted compliance for SEC registrants by:

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[3] *See* Commodity Pool Operators; Exclusion for Certain Otherwise Regulated Persons From the Definition of the Term "Commodity Pool Operator"; Other Regulatory Requirements, 50 Fed. Reg. 15,868, 15,870 (Apr. 23, 1985).

a. Eliminating duplicative CPO reporting, including:

(i) For RICs, eliminate Form CPO-PQR and NFA Form PQR reporting requirements for SEC-registered advisers to registered funds that currently file SEC Forms N-Q, N-CSR, and N-SAR, and that will be required to comply with the SEC's enhanced and modernized reporting requirements.

(ii) For private funds, eliminate Form CPO-PQR and NFA Form PQR reporting requirements for SEC-registered advisers that file Form ADV and Form PF.

b. Eliminating duplicative CTA reporting, including Form CTA-PR and NFA Form PR reporting requirements for SEC-registered advisers that file Form ADV.

c. Eliminating differing recordkeeping requirements by accepting as substituted compliance by SEC-registered advisers applicable Advisers Act and '40 Act recordkeeping requirements for all Commission CPO and CTA recordkeeping requirements.

3. Rationalize and harmonize interpretation of the statutory CTA exemption for SEC-registered investment advisers in Section 4m(3) of the CEA by:

a. For advice to portfolios within a pool, clarifying that an SEC-registered adviser to a portfolio within a pool may look only to assets in the portfolio in determining whether the RIA is providing advice to a pool that is engaged primarily in commodity interest trading.

b. For advice to offshore pools and offshore clients, clarifying that advice to an offshore pool (that does not market or offer shares in the U.S. or to U.S. persons) or offshore clients is not counted for purposes of Section 4m(3).

c. Clarifying that treatment of "foreign exchange" as commodity interests for purposes of Section 4m(3) does not include foreign exchange instruments that are exempt from the definition of swaps under the CEA pursuant to the Treasury determination.

4. Engage with asset managers on additional areas that have created unnecessary regulatory friction, including delegation of CPO authority, treatment of insulated series or portfolios of private funds, and the Commission's post 2012 consideration of controlled foreign corporation subsidiaries of RICs as separate commodity pools.

II. CPO and CTA Registration and Regulation: Reduce Overly Broad Regulation and Inefficient Use of Commission Resources by Interpreting "Commodity Pool" Consistent with the Statutory Definition and Purpose

To serve the Commission's goal of employing a plain English reading of the statutory definition of the term "commodity pool" in a manner that is consistent with the terms of the statute, the legislative purpose, and judicial precedents, AMG recommends that the Commission provide principles-based guidance consistent with the plain meaning of the CEA on which industry participants can rely in making reasoned determinations about whether a particular entity is a commodity pool for purposes of CPO and CTA registration. AMG would welcome the opportunity to work with the staff in developing an appropriate set of principles, which we believe should include:

1. A statement that "operated for the purpose" is an important element of the test and that mere holding or trading of a commodity interest by an entity does not create the presumption that the entity is a commodity pool;

2. Consideration of the purpose and extent of the entity's commodity interest trading relative to the securities trading, in a manner similar to the approach the SEC takes in determining whether commodity pools are investment companies;

3. Reference to the *Lopez* factors;

4. Clarification that the principles may be applied by market participants in a reasonable manner without the need for a staff determination; and

5. Guidance that market participants may rely on the trading and marketing tests set forth in Regulation 4.5 as a non-exclusive safe harbor for determining commodity pool and CPO status.

III. CPO and CTA Registration and Regulation: Avoid Cross Border Overreach

To focus the Commission's cross-border application of its Part 4 CPO and CTA provisions upon areas where there is a significant U.S. regulatory interest, such as a direct and significant connection with U.S. investors, AMG recommends that the Commission:

1. Establish a reasonable threshold for U.S. interests that must be exceeded before asserting CPO/CTA jurisdiction (*e.g.*, U.S. investment cannot exceed 10%), together with a recognition of the need to exclude inadvertent U.S. investors and seed money provided by U.S. affiliates.

2. Establish a "U.S. person" definition to establish the scope of CPO/CTA registration requirements, potentially leveraging SEC Regulation S and Commission Regulation 4.7.

3. Confirm that CPO and CTA activities outside the U.S. and not involving investors that are U.S. persons (based on the above considerations) will not affect an offshore CPO or CTA's reliance on other available exemptions, through application of the Commission's longstanding stacking approach.

4. Provide a framework for defining the registration status of foreign affiliates of U.S. registered investment advisers (*i.e.*, adoption of a Unibanco approach).

IV. Uncleared Swap Margin: Align requirements with global market practices and remove seeded investment funds from consolidated calculations

To serve the Commission's goal of advancing requirements that balance costs of the uncleared swap margin rules with corresponding benefits, AMG recommends that the Commission:

1. Interpret or revise the T + 1 timing requirement for margin transfers to provide greater flexibility, such as through allowing transfer instructions to be issued on T + 1, with the actual transfer taking place through ordinary operational processes.

2. Move to a more principles-based interpretation and application of minimum transfer amounts.

3. Exclude seeded investment funds (*i.e.*, investment funds initially funded with seed capital by a sponsor and consolidated on the sponsor's or the sponsor's group's financial statements) from consolidation for the purposes of material swaps exposure and initial margin threshold amount calculations.

4. Consider other inefficiencies in the uncleared swap margin rules that could reduce burdens without undermining regulatory aims.

V. Commission Regulations Part 40: Strengthen Commission Authority to Address DCM, SEF, DCO and SDR Rule and Contractual Changes

To strengthen Commission oversight of rule changes at designated contract markets ("DCMs"), registered swap execution facilities ("SEFs"), registered derivatives clearing organizations ("DCOs"), and registered swap data repositories ("SDRs"), AMG recommends that the Commission amend Part 40 to require Commission review for all material rule and contractual changes by DCMs, SEFs, DCOs, and SDRs and that the Commission be able to object to any such change it deems to be inconsistent with Commission policy, including considerations of compliance costs and customer protections that are impacted by the rule or contractual changes. AMG further believes that the Commission should consider modernizing Part 40's language to make it better fit the Commission's post-Dodd-Frank jurisdictional reach so that interpretation of Part 40 can be more straight forward and certain.

VI. Additional Registration Recommendations

In addition to the foregoing, AMG recommends that the Commission revise external business conduct standards to target market needs more efficiently. For example, pre-trade mid-market marks required by Commission Regulation 23.431(a) create an unnecessary burden upon dealers. While these burdens are not imposed upon asset managers or their clients, costs imposed upon dealers translate into higher costs for investors utilizing swaps for investment strategies.

For specific burdens and recommendations, we refer you to the letter filed by SIFMA Re: Commodity Futures Trading Commission Request for Public Input on Simplifying Rules (Project KISS); External Business Conduct Requirements.

In addition to those addressed in the SIFMA letter, AMG believes that Commission Regulation 23.434 should be revised to eliminate unnecessary representations required by counterparties advised by a registered commodity trading advisor or an SEC-registered investment adviser. AMG believes this requirement is too broad and unnecessary as applied to advisers' clients; a counterparty advised by a commodity trading adviser or investment adviser should not to be required to indicate that they comply with policies and procedures reasonably designed to ensure that the person responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so. Such circumstances are already established when a commodity trading adviser or investment adviser is involved in the transaction, making the representation a meaningless, but an added burden.

REPORTING

I. Swaps Reporting: Improve Efficiency, Effectiveness, and Accuracy While Protecting Market Liquidity, Pricing, and Counterparty Confidentiality

To further the Commission's goals of providing appropriate market transparency and enable regulatory oversight of the swaps market while avoiding unnecessary burden and without unduly harming market liquidity, price, or counterparty confidentiality, AMG recommends that the Commission:

1. Lead global harmony of swaps data reporting, while not adopting burdensome reporting approaches that may continue in other jurisdictions;

2. Improve swaps reporting efficiencies by focusing on purpose-driven fields that largely can be derived from trading confirms, and by removing fields that duplicate with unique identifiers that have been developed; and

3. Lengthen delay for public dissemination of block trades to improve counterparty confidentiality and avoid market movements occurring before the block trade counterparty can execute trading strategies relating to the block trade.

II. Additional Reporting Recommendations

In addition to the foregoing, AMG recommends that the Commission:

Consider clarifications to Form 40 so that market participants can provide information that is consistent across those providing responses. AMG appreciates the steps taken in the Commission's Division of Market Oversight ("DMO") Staff Letter 17-45 to ameliorate a number of significant problems that market participants have faced in providing responses to the Commission through amended Form 40 ("New Form 40"), and supports the review that DMO will undertake of these issues during the period of no-action relief granted. Given the Commission's goal of New Form 40 to "provide the Commission with crucial information regarding reporting traders' ownership and control relationships and business activities,"[4] AMG believes that DMO's review should include providing clarity on some of the requests for information made in New Form 40. A number of definitions, terms, and questions in New Form 40 are not clear or understood uniformly. For example, the scope of Question 14, Commodity Index Trading Indicator, includes a number of key undefined terms and phrases for which more information would be helpful.

CLEARING

I. Central Counterparty Standards: Encourage Efficiencies of Central Clearing Through Fostering Resilient DCOs with Robust Customer Protections

To further the Commission's oversight of derivatives clearing organizations ("DCOs"), fostering of robust and stable swaps and futures markets, and protecting investors, AMG recommends that the Commission:

1. Strengthen minimum funding requirements and risk management processes in order to foster resilient DCOs and reduce the likelihood of DCO failure, including by:

    a. Requiring risk-aligned capital contributions from the DCO (*i.e.*, DCO skin-in-the-game) and contributions from clearing members, both of which should be prefunded.

    b. Requiring DCOs to exclude non-defaulting customer assets from default waterfall resource calculations.

    c. Requiring DCOs to have margin requirements that are appropriately sized and foreseeable.

    d. Requiring DCO risk and default management committees to consider feedback provided by clearing members' customers.

2. Require DCOs to provide expanded public disclosure that is reliable, readily available, and comparable, specifically:

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[4] *See* Ownership and Control Reports, Forms 102/102S, 40/40S, and 71; Final Rule (the "Adopting Release"), 78 Fed. Reg. 69,178, 69,198 (Nov. 18, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-26789a.pdf.

a. For the purpose of public disclosure, require DCOs to run new "benchmarking" stress tests.

b. Require DCOs to make their Public Quantitative Disclosures available on a central website, and should require those disclosures to be accurate, with quality controls supported by penalties for material misstatements.

c. Require DCO rulebooks to disclose clearly, the impact of recovery and resolution tools on clearing members' customers.

d. Require DCOs to disclose publicly, lessons learned from default drills and include investors and asset managers in DCO default drills.

3. Require DCO recovery standards to provide full protection of customer interests when a DCO is in recovery (pre-resolution), including:

a. Strictly prohibiting DCOs from taking non-defaulting customer assets to cover DCO shortfalls.

b. Requiring open auctions and mechanisms to continue the payment of variation margin to and from the customers of a defunct clearing member.

c. Exercising discretion to temporarily suspend swap clearing mandates during a DCO recovery.

d. Pre-designating a regulatory authority to initiate resolution proceedings when deemed necessary.

4. Require DCOs to have clear protocols for the porting of customers' positions, Legally Segregated, Operationally Commingled ("LSOC") treatment for all customer collateral, and rationalized capital requirements that recognize the exposure-reducing effects of posted initial margin.

5. Proceed with DCO resolution based on clear protocols that balance market and systemic interests with customer protections.

II. Additional Clearing Recommendations

In addition to the foregoing, AMG recommends that the Commission:

1. Maintain strong residual interest requirements, finalized by the Commission in 2016.

2. Maintain the LSOC model for segregation of customer collateral posted for cleared swaps, and consider expansion of LSOC to futures.

EXECUTING

I. Optimize Central Execution of Swaps and Address Known Flaws in Existing Regulations

To further the Commission's mission of fostering open, transparent, competitive and financially sound markets, AMG recommends that the Commission:

1. Expand permitted modes of swap execution for swaps mandated for trading ("Required Transactions") on SEFs in order to provide for a less prescriptive, more principles-based approach that balances transparency, competition, and liquidity through a flexible set of rules; any means of execution that provides sufficient pre-trade price transparency and preserves competitive execution should be available.

2. Fix known and identified problems with the MAT standards without making the MAT standards synonymous with the clearing requirement standards; certain market conditions should be met in order to require central execution, separate and apart from market conditions needed to require central clearing.

3. Require adjustment of DCM rules that prevent efficient pricing between swaps markets and futures markets.

4. Maintain strong impartial access requirements and continue non-discriminatory eligibility criteria for any market participant to become a SEF member.

5. Codify existing no-action relief covering the "occur away" requirement for block transactions, the ability to correct operational or clerical errors for certain cleared SEF trades, and the simplification of post-trade confirmation protocol requirements.

II. Additional Execution Recommendations

In addition to the foregoing, AMG recommends that the Commission:

1. Require SEFs to employ a consistent and uniform approach to correct trade errors for certain cleared swaps executed on a SEF. At present, there are significant gaps among the approaches to correct a trade error based on the Central Counterparties ("CCP's") infrastructure and trade correction architecture. While we do not seek to change the standard for which errors may be corrected, AMG recommends that the Commission either adjust its no-action relief, CFTC Letter 17-27, or impose certain trade error processing requirements that apply uniformly across CCPs.

2. Decline expansion of federal position limits as not necessary or, if deemed necessary, only apply limits tied to avoidance of excessive speculation tailored to contract and market specifications.[5]

3. Abandon promulgation of Regulation Automated Trading or, if deemed necessary, focus on non-redundant risk controls without use of a burdensome Automated Trading Person category.[6]

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AMG looks forward to participating in future discussions on how to best simplify, streamline and modernize Commission Regulations. We are available to discuss these recommendations whenever would be helpful to the Commission's review. Should you have any questions, please contact Tim Cameron at 202-962-7447 or tcameron@sifma.org, or Laura Martin at 212-313-1176 or lmartin@sifma.org, or Ruth Epstein, Stradley Ronon Stevens & Young, LLP, at 202-292-4522 or repstein@stradley.com.

Respectfully submitted,

Timothy W. Cameron, Esq.
SIFMA Asset Management Group – Head

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cc: Honorable J. Christopher Giancarlo, Chairman
Honorable Brian Quintenz, Commissioner
Honorable Rostin Behnam, Commissioner
Mr. Amir Zaidi, Director, Division of Market Oversight
Mr. John Lawton, Acting Director, Division of Clearing and Risk
Mr. Matthew Kulkin, Director, Division of Swap Dealer and Intermediary Oversight

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[5] For AMG's position on the Commission's most recent proposal, see SIFMA AMG's Comment Letter (Feb. 28, 2017), *available at*: https://www.sifma.org/resources/submissions/sifma-amg-and-other-associations-submit-comments-to-the-cftc-on-position-limits-for-derivatives/.

[6] For AMG's position on the Commission's most recent proposal, see SIFMA AMG's Comment Letter (May 1, 2017), *available at*: https://www.sifma.org/resources/submissions/sifma-amg-submits-comments-to-the-cftc-on-reg-at/.

Glossary of Defined Terms

Term/Acronym	Definition
'40 Act	Investment Company Act of 1940
Advisers Act	Investment Advisers Act of 1940
AMG	SIFMA Asset Management Group
CCPs	Central Counterparties
CEA	Commodity Exchange Act
CPO	Commodity Pool Operator
CTA	Commodity Trading Advisers
DCMs	Designed Contract Markets
DCOs	Derivatives Clearing Organizations
DMOs	Division of Market Oversight
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
DSIO	Division of Swap Dealer and Intermediary Oversight
ETFs	Exchange Traded Funds
ETNs	Exchange Traded Notes
FATCA	Foreign Account Tax Compliance Act
FCM	Futures Commission Merchants
IMTA	Initial Margin Threshold Amount
LSOC	Legally Segregated Operationally Commingled
MAT	Made Available to Trade
MFA	Managed Futures Association
MSE	Material Swaps Exposure
NFA	National Futures Association
RIAs	Registered Investment Advisers
RICs	Registered Investment Companies
SDRs	Swamp Data Repositories
SEC	Securities and Exchange Commission
Securities Act	Securities Act of 1933
SEF	Swap Execution Facility
Treasury	U.S. Department of the Treasury
UCITS	Undertakings for Collective Investment in Transferable Securities