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September 29, 2017

Via Electronic Submission

Chris Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: Request for Public Input on Simplifying and Modernizing the Commission's Rules Pursuant to the Project KISS Initiative (RIN 3038-AE55)

Dear Mr. Kirkpatrick:

The Commodity Markets Council ("CMC") appreciates the opportunity to submit this comment letter in response to the U.S. Commodity Futures Trading Commission's ("CFTC" or "Commission") request for public input on simplifying and modernizing the CFTC's rules pursuant to the Commission's introduction of Project KISS. CMC applauds the Commission for considering the public's input on suggestions about how the Commission's existing rules, regulations, or practices could be applied in a simpler, less burdensome, and less costly manner.

I. Introduction

CMC is a trade association that brings together exchanges and their industry counterparts. Its members include commercial end-users that utilize the futures and swaps markets for agriculture, energy, metal, and soft commodities. Its industry member firms also include regular users and members of swap execution facilities (each, a "SEF") as well as designated contract markets (each, a "DCM"), such as the Chicago Board of Trade, Chicago Mercantile Exchange, ICE Futures US, Minneapolis Grain Exchange, NASDAQ Futures, and the New York Mercantile Exchange. Along with these market participants, CMC members also include regulated derivatives exchanges and price reporting agencies. The businesses of all CMC members depend upon the efficient and competitive functioning of the risk management products traded on DCMs, SEFs, and over-the-counter ("OTC") markets. As a result, CMC is well positioned to provide a consensus view of commercial end-users on the impact of the Commission's existing regulations on derivatives markets. Its comments, however, represent the collective view of CMC's members, including end-users, intermediaries, exchanges, and benchmark providers.

II. Existing Rules the Commission Should Review in Light of Project KISS Objectives

a. Registration

i. Recognition of Foreign Regulatory Regimes as Comparable to the United States

CMC supports using a principles-based cross-border framework¹ which would enable U.S. and foreign regulators to defer to another jurisdiction's regulatory regime. Providing deference to comparable regulatory regimes will allow regulators to minimize duplicative regulations and avoid market fragmentation. In addition, the Commission should amend its cross-border policy statement² to reevaluate: (i) when U.S. swaps regulations apply to cross-border activity; and (ii) when it is appropriate to defer to a comparable foreign regulatory regime.

ii. Swap Dealer *De Minimis* Threshold

CMC respectfully requests the Commission to take affirmative action to maintain the current \$8 billion swap dealer *de minimis* threshold before the automatic reduction of the *de minimis* threshold to \$3 billion on January 1, 2018. The current level protects end-users' ability to hedge risk by ensuring that entities other than banks or large financial companies can offer swaps. Preventing a drop in the *de minimis* level is critical to avoid: (i) limiting counterparty choice for end-users; and (ii) further consolidating risk and swap activity to a small number of the largest Wall Street banks. CMC members consider the current \$8 billion *de minimis* threshold to be tolerable because it provides clarity to market participants and also upholds Congressional intent.³

In addition, CMC members seek regulatory certainty with respect to calculating the notional amount of swap activity for purposes of the *de minimis* threshold.⁴ Further, the

¹ For example, the Commission should exempt foreign central counterparties ("CCPs") that are subject to a comparable and comprehensive regulatory regime to provide U.S. customers broader access to clearing services.

² Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013).

³ H.Rpt. 114-205 at 76 (July 14, 2015), *available at* <https://www.congress.gov/114/crpt/hrpt205/CRPT-114hrpt205.pdf>. Specifically, as stated in an explanatory statement accompanying the Consolidated Appropriations Act of 2016, which President Obama signed into law on December 18, 2015, Congress "directs the [Commission] to comply with the directive regarding swap dealer *de minimis* in H.Rpt. 114-205."³ Notably, H.Rpt. 114-205 directs "the [Commission] to promulgate a rulemaking either maintaining the [swap dealer *de minimis* level] at \$8,000,000,000, the amount currently set forth in regulation, or above this amount. . . ."

⁴ In the past, the CFTC only provided limited guidance on calculating the notional amount for commodity swaps with respect to the *de minimis* threshold. CMC supports the notional amount calculation methodology that was proposed by, among others, the Commodity Markets Council, the Edison Electric Institute, the Electric Power Supply Association, and the Natural Gas Supply Association (collectively, the "Coalition") in a letter submitted to the CFTC on September 20, 2012. Coalition for Derivatives End-Users, *Comment Letter Re: "Clearing*

Commission should provide interested parties an opportunity to provide input if it decides to modify the *de minimis* threshold. CMC believes that prior to making a final determination on a new *de minimis* threshold, the Commission should conduct a comprehensive study based on swap data collected, and only modify the threshold through notice and comment rulemaking.

b. Reporting

i. Large Trader Reporting

CMC supports sun-setting the large trader reporting (“LTR”) program because it was meant to be a temporary reporting requirement⁵ until swap data repositories (“SDRs”) became operational. Today, SDRs are operational and have been collecting and processing positional data for over four years. To that end, CMC believes that the Commission should focus its resources on improving data submitted to SDRs by market participants.

In addition, the Commission and regulated derivatives exchanges impose separate LTR and ownership and control reporting (“OCR”) mandates. Rather than requiring market participants to report separately to the Commission and for each exchange, the Commission should centralize these duplicative reports into a single LTR and OCR report.

ii. Form 204 Reporting

CMC advocates changing the Form 204 reporting date from the last Friday of the month to the last day of the month. This change will align the Form 204 filing requirement with each entities’ specific monthly financial reporting date and its month-end close-out process. The current Form 204 process, which occurs on the last Friday of the month, could occur anywhere from the 22nd to the 31st day, depending on the month. Moving reporting to the last day of the month would align Form 204 reports with all other month-end processes, reducing complexity and promoting consistency.

iii. Record Retention

In the Commission’s Final Rule 1.31, the amended recordkeeping requirements apply to existing records as well as new records. Rule 1.35 provided certain recording and retention relief to members of a DCM or SEF that are not registered with the CFTC. CMC respectfully asks the Commission to confirm that the relief granted pursuant to Final Rule 1.35⁶ to unregistered members of a DCM or SEF with respect to records that were retained prior to the Final Rule’s effective date but not required to be maintained under the new, amended Rule 1.35 may be: (i) applied retroactively; and that such records may be (ii) deleted or destroyed.

c. Requirements for Swaps

Exemption for Swaps Between Certain Affiliated Entities”, RIN 3038-AD47 (Sept. 20, 2012), available at

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58816&SearchText>.

⁵ 17 C.F.R. § 20.9 (2015).

⁶ 17 C.F.R. § 1.35 (2015).

i. Inter-Affiliate Swaps

CMC advocates for the Commission to establish a permanent exemption for all inter-affiliate swaps, including for those between affiliates with less than a majority ownership, from the trade execution requirements (e.g., swap data reporting) irrespective of whether such swaps are cleared or traded OTC. These swaps should also be exempted from the mandatory clearing requirement as they are used for managing risk within a corporate group, and therefore, do not increase overall systemic risk or otherwise warrant the same reporting requirements as external swaps.

ii. Margin Requirements for Uncleared Swaps

With respect to the final rule on margin requirements for uncleared swaps⁷, the primary concern for CMC members is the definition of “Financial End-User.” Section 23.151(1)(xi) of the final rule states that a “Financial End-User” is: “An entity, person, or arrangement that is, or holds itself out as being, an entity, person, or arrangement that raises money from investors, accepts money from clients, or uses its own money *primarily* for investing or trading or facilitating the investing or trading in loans, securities, swaps, funds, or *other assets*” (*emphasis added*).

CMC recommends three minor changes to the rule text to remove ambiguity and provide commercial end-users with the certainty required to avoid the imposition of unnecessary and prohibitively expensive cash margin requirements by SD counterparties. Each of the three changes are described below.⁸

1. “Primarily” should be replaced with “Predominantly”
2. “Financial” should be inserted before “Assets”
3. Use of “Financial Assets” for hedging should not be regarded as “trading.”

iii. Capital Requirements for SDs and MSPs

The current capital proposal⁹ requires swap dealers (“SDs”) and major swap participants (“MSPs”) (altogether, the “Covered Entities”) to hold capital against 8% of the aggregate initial margin requirement for both cleared and uncleared swaps. This calculation methodology likely incentivizes covered entities to limit the number of counterparties with whom they transact, which could result in significant exposure concentrations among a few large counterparties.

⁷ Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 636 (Jan. 6, 2016).

⁸ CMC, *Comment Letter Re: Interim Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, RIN 3038-AC97 (Feb. 5, 2016), available at

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60627&SearchText>.

⁹ Proposed Rule: Capital Requirements of Swap Dealers and Major Swap Participants, 81 Fed. Reg. 91,252 (Dec. 16, 2016).

Further, this decrease in liquidity to certain segments of market participants could lead to negative impacts to overall market liquidity. If this capital requirement is retained, the Commission should exempt its application to cleared swaps. Applying the same capital requirements for both cleared and uncleared swaps ignores the risk mitigating character of central clearing. In fact, the G-20 leaders encouraged the use of central clearing to provide additional marketplace safeguards in response to the 2008 financial crisis.

Additionally, CMC asks the Commission to consider the comment letter¹⁰ filed by the Commercial Energy Working Group (“Working Group”) with regard to the capital proposal. In particular, CMC urges the Commission to consider the following requests made by the Working Group: (i) revisiting the restrictive definition of “predominantly engaged in non-financial activities”; (ii) the capital rules for non-financial SDs should account for the use of sweep accounts; (iii) the National Futures Association’s capital rules adoption process should provide for formal public comment; and (iv) the capital rule’s reporting timelines should be extended.

iv. Margin T+1 Settlement

U.S. margin rules require the calculation and settlement of both initial margin (“IM”) and variation margin (“VM”) within the formula “T+1.”¹¹ This requirement is more stringent than in other jurisdictions and puts the U.S. at a competitive disadvantage with: (i) counterparties in different time zones; and (ii) smaller counterparties (including U.S. counterparties) that lack the technological and operational capability to settle T+1. Instead, CMC supports T+30 hours as the Federal Reserve Board provides.

d. Miscellaneous

i. Position Limits for Derivatives

CMC believes that the imposition of position limits for derivatives as currently proposed is impracticable to the orderly functioning of derivatives markets for commercial end-users that engage in effective, essential, sound, and appropriate risk management practices. For that reason, the current proposal¹² should be reexamined in its entirety in favor of a principles-based and incremental approach. Specifically, CMC recommends that the Commission repropose a position limits rule with a focus on the following key principles: (i) federally-mandated position limits should not apply to non-spot month contracts for any new speculative position limits; (ii) the *bona fide* hedging definition should be clarified to reflect traditional commercial business practices and statutory intent;¹³ (iii) the Commission should utilize the expertise and resources of

¹⁰ CMC, *Comment Letter Re: Proposed Rule: Capital Requirements of Swap Dealers and Major Swap Participants*, RIN 3038-AD54 (May 15, 2017), available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61224&SearchText>.

¹¹ “T+1” refers to SDs’ ongoing obligations to exchange variation margin with CFTC-registered SDs and MSPs on or before the business day after execution of an uncleared swap with those counterparties. 17 C.F.R. § 23.153 (2016).

¹² Position Limits for Derivatives, 81 Fed. Reg. 96704 (Dec. 30, 2016).

¹³ The scope of recognized or enumerated hedging exemptions should include the full scope of anticipatory merchandising hedges, anticipatory processing hedges, and cross commodity hedges.

exchanges when administering position limits; (iv) any final rule should include a risk management exemption; and (v) any final rule should not impose unnecessary, duplicative, and burdensome hedge exemption filing and approval requirements¹⁴. In addition, should the Commission continue to finalize a rule based on the current proposal, CMC kindly asks the Commission to review all of the concerns raised in our prior comment letters.¹⁵

ii. Aggregation of Positions

CMC applauds the Commission for granting no-action relief from certain position limit aggregation requirements and for establishing a two-year relief period to evaluate the impact of relief and to consider long-term solutions. Moving forward, CMC will continue to engage in dialogue with the Commission and its staff to recommend rule changes that preserve the CFTC's ability to perform adequate surveillance and monitor compliance with federally-mandated position limits - should the final position limits rule become finalized.

iii. Regulation Automated Trading

CMC requests the Commission to reconsider its prescriptive approach to addressing risks posed by automated trading under the current Regulation Automated Trading ("Regulation AT") proposal. Should the Commission move forward with rulemaking to address the risks of automated trading, it should adopt a principles-based framework with policies and procedures reasonably designed to achieve the Commission's purpose. The Commission should refrain from adopting overly prescriptive requirements as to how the underlying principles are satisfied. For example, the expansion of the Direct Electronic Access ("DEA") definition is overly broad. CMC believes that the scope of the DEA definition should only include pre-programmed algorithmic orders that involve no human involvement and that are transmitted directly to the DCM without passing through the risk controls administered by a futures commission merchant ("FCM") or clearing member.

¹⁴ For example, CMC requests that the Commission grant relief from complying with the filings requirements under § 1.48, and eliminate this requirement if a new position limits rule is finalized. When considering the information that is required during the *bona fide* hedge exemption process at the exchange level, the additional filing requirements under § 1.48 places an unnecessary burden on processors and other commercial end-users. Also, the review of additional filing requirements by CFTC staff appears to be a poor use of Commission resources. Likewise, requiring processors and end-users to comply with these additional filing requirements prior to initiating a transaction that is in compliance with a granted hedge exemption and qualifies as an enumerated hedging transaction under §1.3(z)(2)(i)(B) or (ii)(C), appears to be inconsistent with the Commission's general approach to the position limits exemption process.

¹⁵ CMC, *Comment Letter Re: Reproposal, Position Limits for Derivatives*, RIN 3038-AD99 (Feb. 28, 2017), available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61110&SearchText>; CMC, *Comment Letter Re: Supplemental Notice on Proposed Rulemaking: Position Limits for Derivatives: Certain Exemptions and Guidance*, RIN 3038-AD99 (July 13, 2016), available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60950&SearchText>.

Consequently, rather than attempting to alter and finalize select pieces of the proposal or re-proposal, the Commission should withdraw its current proposal and reconsider the risks intended to be addressed by Regulation AT and assess existing industry safeguards from a fresh perspective. CMC encourages the Commission to review previous comment letters filed by CMC and the Working Group with regard to Regulation AT.¹⁶

III. Conclusion

CMC appreciates the opportunity to provide these recommendations pursuant to the Project KISS initiative. CMC hopes that these suggestions will allow the Commission to apply its existing rules in a simpler, less burdensome, and less costly manner. If you have any questions or concerns regarding this letter, please do not hesitate to contact Kevin Batteh at Kevin.Batteh@Commoditymkts.org.

Sincerely,

/s/ Kevin K. Batteh

Kevin K. Batteh
General Counsel
Commodity Markets Council

¹⁶ See, e.g., CMC, *Comment Letter Re: Supplemental Notice of Proposed Rulemaking: Regulation Automated Trading*, RIN 3038-AD52 (May 1, 2017), available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61180&SearchText>.