



September 29, 2017

Mr. Christopher Kirkpatrick  
Secretary  
U.S. Commodity Futures Trading Commission  
1155 21st Street, NW  
Washington, DC 20581

**Re: Commodity Futures Trading Commission Request for Public Input on Simplifying Rules (Project KISS); External Business Conduct Requirements (RIN 3038–AE55)**

Dear Mr. Kirkpatrick:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> greatly appreciates the continuing efforts of the Commodity Futures Trading Commission (“CFTC” or “Commission”) and its staff to review rules, regulations and practices to identify those areas that can be simplified and made less burdensome and costly, including as part of the Commission’s Project KISS initiative.<sup>2</sup> As the CFTC has implemented many important and significant requirements under Title VII of the Dodd–Frank Wall Street Reform and Consumer Protection Act (“Dodd–Frank”), such a review is timely as both the Commission and market participants have a better understanding of the resulting impacts of such efforts, helping to inform where changes are necessary and appropriate.

We believe there are several aspects of the Commission’s final rules regarding external business conduct (“EBC”) standards<sup>3</sup> that would benefit from such review and reconsideration, including those relating to certain disclosure requirements, among others. Many of these

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<sup>1</sup> SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$18.5 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

<sup>2</sup> See *Project KISS*, 82 FR 21494 (May 9, 2017), available at: <https://www.gpo.gov/fdsys/pkg/FR-2017-05-09/pdf/2017-09318.pdf>; and Press Release, available at: <http://www.cftc.gov/PressRoom/PressReleases/pr7555-17>.

<sup>3</sup> See *Business Conduct Standards for Swap Dealers and Major Swap Participants*, 77 Fed. Reg., 9,734, 9,835 (Feb. 17, 2012); available at: <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2012-1244a.pdf>.

requirements are based on rules and standards that have their roots in retail customer protection, whereas swap counterparties are almost all institutional investors who should be allowed to choose, for example, the information they receive and format in which it is provided, rather than through prescriptive regulatory requirements. Additionally, the EBC rules include requirements that go well beyond Title VII of Dodd Frank.

In the years since these requirements became effective, SIFMA members' (and their counterparties') experience has confirmed that certain disclosure obligations are not beneficial to, and in many instances are not wanted nor requested by, counterparties - including disclosure of pre-trade mid-market marks ("PTMMMs"), scenario analyses and material economic terms ("METs"), among others.<sup>4</sup> Given the significant documentation and infrastructure systems needed to comply with these requirements, it is appropriate for the Commission to review the requirements for providing such disclosures - and in some instances, their necessity - to reduce undue costs and burdens. We note, however, that market participants currently utilize protocols developed by the International Swaps and Derivatives Association aimed at assisting the industry in implementing and complying with the regulatory requirements imposed under Title VII of Dodd-Frank, including for the EBC requirements. Given the significant efforts undertaken to facilitate adherence to the protocols, we stress that any changes that the Commission considers should not require amendments to them. We would be happy to discuss approaches to implementing the recommendations discussed in this letter in ways that would not require amendments to the protocols.

With that in mind, SIFMA believes that certain disclosure obligations in the Commission's EBC rules should be revised in a manner which is more appropriately tailored to reflect the commercial contexts in which swap transactions occur, and consider the relationships which exist between swap dealers ("SDs") and their counterparties, avoiding unnecessary processes or requirements which impose undue costs and burdens, while still serving to provide the necessary protections intended under Title VII. Standardized disclosures and consideration of trading relationships would serve to facilitate consistency and quality in disclosure practices across the markets, while providing an efficient and cost-effective mechanism to satisfy obligations. In most cases, standardized disclosure materials provided via a web portal (or similar method) regarding material risks, swap characteristics, material incentives and conflicts of interests should be sufficient to meet the Commission's goals. Further, in many instances disclosures could be satisfied on a counterparty level rather than transaction-by-transaction, alleviating significant operational and documentation burdens.

In addition, certain topics are addressed in the preamble but not the rule itself, leading to uncertainty over what is actually required. SIFMA believes it important to draw a distinction

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<sup>4</sup> The application of EBC requirements to prime brokerage and post-trade allocation swap transactions has also raised numerous issues. SIFMA plans to address the application of EBC and other requirements to these types of transactions in a separate submission.

between language in the preamble of the rule and the language of the rule itself. As an overarching matter, the CFTC should take steps to ensure that any affirmative requirements exist only in codified regulations, and not interpretations of language included in preambles.

The attached appendix identifies specific EBC requirements that SIFMA believes would benefit from review and reconsideration, including recommendations for simplifying, revising – and in some cases, eliminating – certain obligations, which after several years of experience, market participants believe to be overly prescriptive and unnecessary. We look forward to discussing with the Commission our recommendations, as well as consideration of workable alternatives (including concerns related to preamble language) to more appropriately tailor requirements for these important markets and their participants.

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Please feel free to reach out to the undersigned should you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Kyle Brandon". The signature is written in a cursive, flowing style.

Kyle Brandon  
Managing Director, Head of Derivatives  
SIFMA

**APPENDIX**

Regulatory Requirement	CFTC Rule Reference	Rationale/Comments	Previous SIFMA Comments
Pre-Trade Mid-Market Mark (“PTMMM”)	23.431(a); NAL 13-12, 12-58 and 12-42	<p>Remove PTMMM requirements. This requirement creates unnecessary burdens and costs, provides minimal to no utility to counterparties, hampers trading flow and creates confusion.</p> <p>Removal of this requirement supports harmonization with SEC requirements, which do not impose PTMMM disclosure obligation.</p> <p>If the Commission does not remove the requirement in its entirety, it should consider other less burdensome alternatives, such as permitting SDs to provide PTMMM only when requested by a counterparty.</p>	<p>See page 22 of <a href="#">2011 comments</a>; <a href="#">NAL 13-12</a>; <a href="#">NAL 12-58</a>; <a href="#">NAL 12-42</a></p>
Know Your Counterparty (“KYC”), Disclosure and Swap Trading Relationship Documentation (“STRD”) Obligations	No Action Letter 13-70; 23.402, 23.430, 23.431, 23.432, 23.434, 23.440, 23.450, 23.451, and 23.504	<p>Revisit KYC, Disclosure and STRD obligations with respect to swaps that are (i) of a type accepted for clearing by a derivatives clearing organization (“DCO”) and (ii) intended to be submitted for clearing contemporaneously with execution (i.e., Intended-To-Be-Cleared, or “ITBC,” swaps). Removal of these requirements for ITBC swaps would be consistent with the Commission’s goal to identify requirements that can be made less burdensome and costly, as they are either impossible to perform or meaningless where there is no on-going relationship with a counterparty once the swap is accepted for clearing. If an ITBC swap is rejected from clearing and a bilateral fallback is available and elected, then these obligations will apply to that bilateral swap.</p> <p>At a minimum, formally adopt NAL 13-70 relief, absent onerous conditions, from these obligations as it relates to ITBC swaps.</p>	<p>See <a href="#">NAL 13-70</a></p>

Regulatory Requirement	CFTC Rule Reference	Rationale/Comments	Previous SIFMA Comments
Material Economic Terms (“MET”)	23.431(a)(2)	<p>Remove the requirement to disclose all MET of the swap given the breadth of the MET definition and the fact that all MET are, by definition, contained within the written documentation that the parties execute and agree to. To the extent that a counterparty is interested in that level of detailed disclosure, the counterparty already has the right to obtain a draft trade acknowledgment prior to execution, upon request, pursuant to 17 CFR 23.501(a)(iii).</p> <p>Maintaining a static list of MET or providing them on a trade-by-trade basis would necessarily be less accurate than the swap terms themselves and extremely burdensome for SDs, and does not offer commensurate benefit to counterparties, who demonstrate little interest in the disclosure.</p>	See page 21 of <a href="#">2011 comments</a>
Scenario Analysis	23.431(b)	<p>Eliminate scenario analysis requirements. Currently, Rule 23.431(b) requires SDs to provide comprehensive scenario analyses that provide little to no utility to clients, go beyond typical risk disclosures and incorporate extremely complex and subjective judgments about the probable or possible future market states and their relevance to a particular transaction.</p> <p>Dodd-Frank does not require the provision of a scenario analysis. Further, SDs already provide tailored analysis to counterparties in their normal course of business that may be conducted to support clients or serve to support a suitability determination.</p> <p>Based on an informal survey, SIFMA member SDs report that it is extremely rare that clients seek to exercise their right to obtain a scenario analysis as prescribed by CFTC Rule 23.431(b).</p> <p>Removal of requirement supports harmonization with SEC requirements, which do not impose scenario analysis obligations.</p>	See page 18 of <a href="#">2011 comments</a>

Regulatory Requirement	CFTC Rule Reference	Rationale/Comments	Previous SIFMA Comments
Daily Mark	23.431(a); NAL 13-12, 12-58 and 12-42d)	<p>Eliminate daily mark requirements for uncleared swaps where subject to uncleared margin requirements.</p> <p>Disclosure of the daily mark for uncleared swaps should perform a function similar to that of a clearing agency’s daily settlement price - and that it is not intended to represent a fair value, or other value at which the swap might be executed or traded. Where such uncleared swaps are subject to uncleared margin requirements, a daily valuation is already required and provided, and it is therefore duplicative (and potentially confusing) to also require a daily mark under EBC requirements.</p> <p>Counterparties subject to the uncleared margin rules or other collateral arrangements are currently receiving daily valuations, which may differ from “daily marks” as required under 23.431(d) (for example, the swap valuation used for regulatory variation margin), thus creating confusion for counterparties.</p> <p>For swaps not subject to uncleared margin requirements, the Commission should provide that daily marks may be based on other appropriate calculations, such as the valuation of the swap or consistent with “primary economic terms” reporting requirements. This would allow flexibility to SDs to provide more tailored valuations in a manner preferred by counterparties.</p>	See page 23 of <a href="#">2011 comments</a>
Referrals for Non-ERISA Special Entities	Preamble	The CFTC should revise its position based on the preamble and provide (but not require) the ability for SDs to give non-ERISA Special Entities a list of prospective qualified independent representatives (“QIRs”) without comprising the independence of such QIRs, so long as the SD does not express an opinion regarding the ability of such firms to otherwise satisfy the QIR requirements and is not directly compensated for any such referral.	N/A

Regulatory Requirement	CFTC Rule Reference	Rationale/Comments	Previous SIFMA Comments
Reliance on Client Representations	Preamble	The CFTC should confirm that the preamble language relates to the SDs' conducting periodic reviews of the types of representations required in their swap trading relationship documentation, to ensure they remain appropriate for their intended purpose. The CFTC should further confirm that SDs are not required to conduct periodic review of swap trading relationship documentation to confirm the accuracy of client representations (absent "red flags," as required in the EBC rule). The very purpose of such swap trading relationship documentation is to avoid the need to conduct such onerous reviews, and instead allow for reliance on the representations made therein. Further to Rule 23.402(d), counterparties already provide SDs with timely updates to any material changes in the representations.	N/A
Various Disclosures	Preamble	The CFTC should review and work with market participants to provide clarity on extensive language in the preamble describing additional disclosures required in certain circumstances that are ambiguous and create legal uncertainty.	N/A