WMBA
AMERICAS
WHOLESALE MARKETS BROKERS' ASSOCIATION

September 29, 2017

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

Re: Project KISS (RIN 3038–AE55)

Dear Secretary Kirkpatrick:

The Wholesale Markets Brokers' Association, Americas ("WMBAA")[1] appreciates the opportunity to provide comments to the Commodity Futures Trading Commission ("CFTC" or "Commission") in response to the Project KISS initiative and supports the Commission's effort to examine how its rules, regulations, and practices could be applied in a "simpler, less burdensome, and less costly manner."[2] WMBAA members each operate at least one Commission-registered swap execution facility ("SEF") as well as other trading venues for a variety of financial products around the world.

The WMBAA applauds the Commission's effort to identify areas within current laws, regulation, and policy that could be made more efficient and cost effective. The WMBAA has worked diligently to identify areas within the SEF regulatory regime where recommendations for improvement would be helpful, but as Chairman Chris Giancarlo's White Paper on the swap trading rules suggests, there is a disconnect between the underlying intent of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the final Part 37 rules promulgated in 2013.[3] The WMBAA understands, however, that CFTC staff is currently in the midst of evaluating and reconsidering aspects of the Part 37 regulatory regime. The WMBAA is very supportive of this undertaking and has consistently engaged the Commission and its staff on various Part 37 and SEF related issues both before and after the promulgation of the final rules.

[1] The WMBAA is an independent industry body representing the largest inter-dealer brokers. The founding members of the group—BGC Partners, GFI Group, Tradition, and TP ICAP—operate globally, including in the North American wholesale markets, in a broad range of financial products, and have received temporary registration as swap execution facilities. The WMBAA membership collectively employs approximately 4,000 people in the United States; not only in New York City, but in Stamford and Norwalk, Connecticut; Chicago, Illinois; Jersey City and Piscataway, New Jersey; Raleigh, North Carolina; Juno Beach, Florida; Burlington, Massachusetts; and Dallas, Houston, and Sugar Land, Texas. For more information, please see www.wmbaa.com.

[2] Project KISS, 82 Fed. Reg. 23,765 (May 24, 2017).

[3] *See* Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank White Paper (Jan. 29, 2015), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf.

The WMBAA is currently undergoing a comprehensive review of SEF related issues as the Commission reconsiders aspects of Part 37, and we will be providing further feedback on issues in the coming weeks that we believe would be useful. In the interim, however, to assist the Commission and its staff in the re-assessment of the SEF regulations, the WMBAA respectfully submits an updated version of a matrix in Appendix A, an iteration of which has been previously submitted to the Commission. We have prepared the enclosed based on our expertise as over-the-counter market operators for over 25 years, combined tenure in the industry of over 100 years, and our experience to date with the implementation of the SEF related rules. For each of the following topics, the matrix notes the relevant statutory provision, describes the implementation issue experienced by market participants, references the relevant CFTC rule or staff advisory, and suggests a potential recommendation to address the issue.

Lastly, the WMBAA would like to express its support for the comments provided by the SEF Chief Compliance Officer ("CCO") Working Group in its letter in response to Project KISS.

The WMBAA looks forward to continuing to work with the Commission and its staff on all matters pertaining to SEFs, including on any future CFTC rulemakings, amendments, guidance, or interpretations related to trade execution and SEFs, to ensure that the regulations are implemented in accordance with the underlying statutory intent of the Dodd-Frank Act.

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We welcome the opportunity to discuss these comments with you at your convenience. Please feel free to contact the undersigned with any questions you may have on our comments.

Sincerely,

Shawn Bernardo
Chairman, WMBAA

Enclosure

WMBA AMERICAS
WHOLESALE MARKETS BROKERS' ASSOCIATION

APPENDIX A: CFTC PART 37 SEF REGULATIONS: RECOMMENDED REVISIONS

Relevant Statutory Provision	Issue	CFTC Regulation	Proposed Solution/Revision
CEA § 1(a)(50) "The term 'swap execution facility' means 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, through any means of interstate commerce, including any trading facility, that— "(A) facilitates the execution of swaps between persons; and "(B) is not a designated contract market."	**Methods of Execution** The SEF definition is broad, flexible, and contemplates execution methods beyond an order book or RFQ system. The CFTC regulation artificially restricts the permitted methods of liquidity formation and execution, which may prevent certain technologies from qualifying as a registered SEF, in contravention to Dodd-Frank's goal of promoting the execution of swaps on SEF. It also does not contain an all-to-all requirement.	Rule 37.9(a)(2) "Execution methods. (i) Each Required Transaction that is not a block trade . . . shall be executed on a [SEF] in accordance with one of the following methods of execution: (A) An Order Book . . . ; or (B) A Request for Quote System . . . that operates in conjunction with an Order Book . . . ."	As Chairman Giancarlo stated in his White Paper entitled "Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank" (Jan. 29, 2015) ("White Paper"), there is no statutory basis for "segmenting swaps into two categories or for limiting one of those categories to two methods of execution." The WMBAA agrees that the Commission's rules should be revised to reflect the statutory intent to allow methods of execution to be "through any means of interstate commerce." Accordingly, Rule 37.9(a)(2) should be removed.
CEA § 2(h)(8) "(A) IN GENERAL.—With respect to transactions involving swaps subject to the clearing requirement of paragraph (1), counterparties shall— (i) execute the transaction on a board of trade designated as a contract market . . .; or (ii) execute the transaction on a [registered SEF] or a swap execution facility that is exempt from registration . . . (B) EXCEPTION.—The requirements [above] shall not apply if no board of trade or [SEF] makes	**Made Available to Trade Process** The CEA does not detail a required analysis, enumerate criteria in performing a "made available to trade" analysis, or establish that SEFs or DCMs have the burden of persuading the Commission that a swap should be traded on a registered marketplace.	Rule 37.10(a)(1): "Required submission. A [SEF] that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap as a rule . . . ." Rule 37.10(c): "Applicability. Upon a determination that a swap is available to trade on any [SEF] or designated contract market . . . all other [SEFs] and designated contract markets shall comply with the requirements of section 2(h)(8)(A) of the Act in listing or offering such swap for trading."	As the Chairman suggested in the White Paper, the Made Available to Trade process should be eliminated from the Commission's rules.

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the swap available to trade or for swap transactions subject to the clearing exception . . . ."			
CEA § 5h(f)(2)(B)(ii) (Core Principle 2) "A [SEF] shall . . . establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means . . . to capture information that may be used in establishing whether rule violations have occurred."	**Voice Audit Trail** CFTC staff has expressed a desire that SEFs must be able to store recordings of oral communications in a digital database and convert such recordings into searchable text. In addition, CFTC staff has explored the concept of requiring SEFs to record or access not only the communications between the SEF's employees and their customers, and any communications between employees, but also the communications of Introducing Brokers. Introducing Brokers already have the obligation under NFA rules to record communications and SEFs have access to such information pursuant to their rulebooks.	Rule 37.205 Commission rule 37.205 sets forth the audit trail requirement for SEFs to "capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses." The Commission requires that such data is "sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades within a reasonable period of time and to provide evidence of any violations of the rules of the [SEF]." Further, an audit trail must also permit a SEF to "track a customer order from the time of receipt through fill, allocation, or other disposition, and shall include both order and trade data." The elements of an acceptable audit trail program involve (1) original source documents, (2) electronic transaction history database, (3) electronic analysis capability, and (4) safe storage capability.	Revise the rules or provide guidance related to audit trail requirements for voice-based executions on SEFs to account for the unique characteristics of voice execution and to recognize the currently available technologies. Any such new rules or guidance would supplement the existing audit trail requirements that are tailored to electronic execution and should more accurately reflect a "technology-neutral" approach to SEF execution. In accordance with the preamble discussion to the final rule, the WMBAA believes that "the intent of the final rules is to require that a SEF establish and maintain an effective audit trail program, not to dictate the method or form for maintaining such information. *Importantly, the rule, by not being prescriptive, provides SEFs with flexibility to determine the manner and the technology necessary and appropriate to meet the requirements*" (emphasis added). 78 Fed. Reg. 33,476, 33,518 (June 4, 2013). The CFTC has required audits of the voice systems, which the NFA conducts on behalf of a number of entities and which have resulted in a substantial drain on resources for little to no benefit. The WMBAA recommends that the CFTC

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			consider whether the audit trail requirements may be satisfied based on exception or risk-based SEF reviews.
CEA § 5h(f)(6) (Core Principle 6) "(a) . . . a [SEF] that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators. (b) Position limits. For any contract that is subject to a position limitation established by the Commission . . . the [SEF] shall: (1) Set its position limitation at a level no higher than the Commission limitation; and (2) Monitor positions established on or through the [SEF] for compliance with the limit set by the Commission and the limit, if any, set by the [SEF]."	**Position Limits** SEFs do not possess information about a trader's position in any given swap or its underlying instrument or commodity. Rather, SEFs only have information about the economic terms of swap transactions that take place on their individual facilities and have no way of knowing whether a particular trade on the facility adds to an existing market-wide position or whether it offsets all or part of an existing position in that swap. In addition, if SEFs were required to adopt position limits, market participants might abuse such limits. For example, if five SEFs that offer a particular product set their respective limits at a level established by the CFTC, the overall aggregate position available to market participants via trading on such SEFs would be five times greater than the level set by the CFTC. As such, market participants could take advantage of this structure by spreading their transactions across multiple SEFs and DCOs when reaching the limit set by each. While staff has acknowledged that, in lieu of position limits, SEFs may establish accountability provisions	Rule 37.600 *Same as statutory provision*	For the reasons discussed herein, the Commission should provide no-action relief that is not time-limited with respect to Rule 37.600. Such relief should specify that SEFs are not obligated to impose position limits or accountability until such time as the **Commission** determines that such measures are "necessary and appropriate." At this time, implementing position limitations or position accountability is not necessary and appropriate because, for example: (1) unlike futures and options where trading and clearing is vertically integrated and each DCM has information about positions in the marketplace for any specific contract, they are not an effective tool for detecting and preventing manipulation and other abuses for swaps; and (2) individual SEFs do not possess information about a trader's position in any given swap and, therefore, have no basis of reference as to how and when a position limit should be set. In addition to these comments, the WMBAA has submitted to the Division of Market Oversight ("DMO") staff a white paper explaining why a SEF position limits and position accountability regime is

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	related to trades rather than positions, the details of such accountability mechanisms and how accountability levels would be set and functions are unclear. SEFs have no way of knowing whether a particular trade on the facility adds to an existing market-wide position or whether it offsets all or part of an existing position in that swap, which would hinder a SEF's ability to analyze and enforce position accountability levels.		neither necessary nor appropriate. Rather than imposing a position limits regime, the WMBAA respectfully reminds the Commission that a SEF is subject to regulatory requirements to provide data to the Commission, including data related to the trading activity on the SEF, to assist the Commission with monitoring compliance with federal speculative position limits.[1] A SEF CCO working group, consisting of CCOs of 18 then-provisionally registered SEFs, commissioned the National Futures Association ("NFA") to conduct a study regarding swap position limits and position accountability. The NFA study, published in April 2015, suggested that the swap market might not lend itself to notional transaction size position or accountability levels at the SEF level. While this study did not offer an official disposition as to the necessity or appropriateness of position accountability levels at the SEF level, it presented data suggesting that such position limits or accountability levels will do little to "reduce the potential threat of market manipulation or congestion," the stated goal of the Core Principle. The SEF CCO working group provided DMO staff with a synopsis of this study in the form of a discussion document.

[1] This approach was endorsed by a group of SEFs. *See* SEF CCO Group Discussion Document Regarding SEF Core Principle 6 – Position Limits and Position Accountability (May 21, 2015).

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			As an alternative to the above proposed solution, the WMBAA would welcome specific guidance on how SEFs can practically comply with an accountability provision, reflecting that: (1) SEFs do not possess position information; and (2) swaps are fungible in terms of being traded on multiple venues and cleared by multiple DCOs. Any accountability level(s) should be established by the CFTC, taking into account the entirety of market activity in a product (both on and off SEFs), and such established level(s) should be applied uniformly to all SEFs.
CEA § 5h(f)(13) (Core Principle 13) "(A) IN GENERAL.—The [SEF] shall have adequate financial, operational, and managerial resources to discharge each responsibility of the [SEF]. (B) DETERMINATION OF RESOURCE ADEQUACY.—The financial resources of a [SEF] shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the [SEF] to cover the operating costs of the [SEF] for a 1-year period, as calculated on a rolling basis."	**SEF Financial Resources** CFTC staff has indicated its preliminary belief that all SEF employees are considered part of the financial obligation, regardless of the employment arrangement, *e.g.* at-will, contractual, and guaranteed salary. As a result, SEFs with voice-based systems face significantly higher financial resources commitments than those facilities that only provide electronic trading access. The Commission's rules do not recognize that: (1) SEFs do not possess or maintain client funds or open interest; (2) there is no practical need for any individual SEF to maintain sufficient resources for a period of one-year after an event that results in the closure of a	Rule 37.1300 *Same as statutory provision*	While CFTC Staff Guidance 17-25 regarding calculating projected SEF operating costs has been helpful, the statute remains problematic. CFTC Chairman Giancarlo recognized this in his White Paper on swap market reforms: "Congress should reexamine this core principle and only require a SEF to hold enough capital to conduct an orderly wind-down of its operations. It would not take a SEF one year to terminate employees and contracts and conduct an orderly wind-down of its operations. It would not be unreasonable to expect a SEF to conduct such a wind-down in three months. This approach would release significant capital back to the SEF for innovation, lower barriers to entry, reduce costs and increase competition."

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	SEF, as a SEF could wind down its operations in a much shorter time period; and (3) for SEFs with voice brokers, such voice brokers are not necessary to ensure operation of a compliant SEF and could be removed at any point and for any reason without impacting the SEF's ability to satisfy the Core Principles.		Absent statutory change, the WMBAA agrees with Chairman Giancarlo that "the Commission and staff should reexamine CFTC rules and work with SEFs to reduce their financial burden." The WMBAA requests that the Commission flexibly interpret the SEF financial resources requirements to reflect that SEFs are execution venues only and do not ensure contract performance, making their commercial viability less relevant on a post-transaction basis. As the Commission has delegated authority to the DMO Director on issues pertaining to SEF financial resources, the WMBAA looks forward to working with Commission staff to appropriately account for the following considerations in refining the SEF rules, including with respect to creating an appropriate methodology for computing projected operating costs. *See* Rule 37.1307. The SEF financial resources requirement should focus on the fixed costs associated with compliant SEF operation and solely those required to ensure compliant operations, rather than the variable costs and costs related to staff that are not core to a compliant operating structure. The WMBAA notes that the costs associated with employing SEF brokers constitute variable costs and are not core to the compliance regime and the operations of a SEF, necessary, or required to operate a

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			compliant SEF, as is demonstrated by other registered SEFs that do not employ brokers. Therefore, costs related to employing SEF brokers should be excluded from the financial resources calculation. Any salary or compensation for SEF employee-brokers should not be included in the calculation of projected operating expenses. In addition, the WMBAA has submitted information to DMO staff regarding liquid assets and would welcome any further communication as needed for a rule revision to reduce the burden from six months' liquid assets to three months' liquid assets. Any modification of the financial resource rules should take into account the fact that the exit of an individual SEF (or brokers within an operational SEF) would not have broad market-wide or systemic effects on the swap marketplace. This is because the trades previously executed on the SEF would have been fully processed and reported, and the positions resulting from all trades would be unaffected, as they are held either at a DCO for cleared trades or with the counterparties for uncleared trades. Moreover, if a SEF were to experience difficulty or choose to exit the marketplace, the wind-down process would occur quickly. As SEFs do not hold positions, the unwind process would take no longer than a few months.

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CEA § 2(i) "The provisions of this Act relating to swaps . . . (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities— (1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act . . . ."	**Cross-Border Concerns** The scope of the Commission's cross-border guidance is far reaching such that a permitted transaction involving two non-U.S. counterparties may be subject to SEF execution under footnote 88. This interpretation has had the practical effect of bifurcating markets based on the participants' jurisdictions, impeding liquidity and redirecting activity away from SEFs and, as a result, away from U.S. markets and the oversight of U.S. regulators.	DSIO Advisory No. 13-69 "DSIO is of the view that a non-U.S. SD (whether an affiliate or not of a U.S. person) regularly using personnel or agents located in the U.S. to arrange, negotiate, or execute a swap with a non-U.S. person generally would be required to comply with the Transaction-Level Requirements. For the avoidance of doubt, the Division's view would also apply to a swap between a non-U.S. SD and a non-U.S. person booked in a non-U.S. branch of the non-U.S. SD if the non-U.S. SD is using personnel or agents located in the U.S. to arrange, negotiate, or execute such swap." CFTC staff has issued no-action relief letters pertaining to advisory 13-69, including most recently letter 17-36, which extended relief "until the effective date of any Commission action addressing whether a particular Transaction-Level Requirement is or is not applicable to a Covered Transaction."	With the prospect of MiFID II implementation on the horizon, it is now imperative that the Commission work with its fellow non-U.S. regulators to ensure that jurisdictional rules do not fragment the global swaps market. Specifically, the Commission should adopt an equivalency or substituted compliance regime, such as the establishment of an exempt SEF category, to prevent further fracturing of markets by jurisdiction and enable U.S. persons to access such equivalent non-U.S. trading venues. A substituted compliance or equivalency regime would reduce costs and friction for global swap brokers that are currently being compelled to maintain a global network of NFA registered introducing brokers solely to provide services to a few U.S. institutions that trade swaps internationally. In addition, the Commission should work with non-U.S. regulators to ensure they have a reciprocity provision for U.S.-registered SEFs. Any such CFTC rulemaking for exempt SEFs should condition the relief for the foreign MTF/OTF on the existence of a reciprocity provision in law or regulation of the applicable foreign jurisdiction.
CEA § 5b(c)(2)(D)(iv) "MARGIN REQUIREMENTS.—The margin required from each member and participant of a	**Margin Requirements** CFTC rules related to margin provide a significant commercial advantage to futures over swaps. Specifically, the	Rule 39.13(g)(2)(ii): "A derivatives clearing organization shall use models that generate initial margin requirements sufficient to cover the	Re-examine the Part 39 margin requirement for swaps to reflect a realistic liquidation time period for swaps. Margins should be based on the economic

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derivatives clearing organization shall be sufficient to cover potential exposures in normal market conditions."	CFTC's rules provide a five-day margin liquidation period for financial swaps, while all futures have a one-day margin liquidation period.	derivatives clearing organization's potential future exposures to clearing members based on price movements in the interval between the last collection of variation margin and the time within which the derivatives clearing organization estimates that it would be able to liquidate a defaulting clearing member's positions (liquidation time); provided, however, that a derivatives clearing organization shall use: (A) A minimum liquidation time that is one day for futures and options; (B) A minimum liquidation time that is one day for swaps on agricultural commodities, energy commodities, and metals; *(C) A minimum liquidation time that is five days for all other swaps . . . .*" (emphasis added).	characteristics of the products, rather than on whether a product is classified as a future or a swap. Products with similar risk profiles should have the same margin requirements.
CEA § 2(a)(13)(D) "The Commission may require registered entities to publicly disseminate the swap transaction and pricing data required to be reported under this paragraph."	**Embargo Rule** As a result of the embargo rule, SEFs and DCMs that would like to continue to permit work-ups may face workflow issues because they cannot share trade information with their customers until such information is transmitted to an SDR. Such delays can have a material effect on market liquidity. To operate efficiently and competitively, information which reflects current market activity must be available to all market participants without any disruptive pauses for the occurrence of other regulatory activities. Every market	Rule 43.3(b)(3)(i) "If there is a registered swap data repository for an asset class, a registered [SEF] . . . shall not disclose swap transaction and pricing data relating to publicly reportable swap transactions in such asset class, prior to the public dissemination of such data by a registered swap data repository unless: (A) Such disclosure is made no earlier than the transmittal of such data to a registered swap data repository for public dissemination; (B) Such disclosure is only made to market participants on such registered [SEF] . . . ; (C) Market participants are provided advance notice of such disclosure; and	The embargo rule should be eliminated, and the CFTC should amend its regulations to permit a SEF post-initial trade work stream that promotes liquidity formation, including through SEF workups, while ensuring that the Commission's rules implementing the post-trade transparency requirement for public dissemination of swap data as soon as technologically practicable do not artificially restrict a SEF's ability to efficiently execute swap transactions. Further, the Commission should consider that, due to SDR "rounding" models and "capping" of large notional transactions, the information publicly disclosed is often

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	participant must have real-time information on executed trades for the entire marketplace to ensure effective price discovery so that they can make informed trading decisions. This allows the market to operate properly as a single liquidity pool. In addition, those SEFs that rely on a third party to transmit information to SDRs are further hindered by the embargo rule in their ability to make available to all market participants current market information.	(D) Any such disclosure by the registered [SEF] . . . is nondiscriminatory.	not identical to specific trade-level information on the SEF.
CEA § 5h(f)(10) "RECORDKEEPING AND REPORTING.— (A) IN GENERAL.—A swap execution facility shall— (i) maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of 5 years . . . ."	**SEF Recordkeeping Requirement** CFTC rules requiring SEFs to retain all records through the life of a swap and for at least five years following a swap's termination is an onerous and impracticable requirement for SEFs. Following the execution of a swap, a SEF is not necessarily made aware of a swap's termination. Accordingly, it is often impracticable for a SEF to definitively ascertain the period of time for which it must retain records for a swap and can result in significantly burdensome recordkeeping costs.	Rule 45.2(c): "All records required to be kept pursuant to this section shall be retained with respect to each swap throughout the life of the swap and for a period of at least five years following the final termination of the swap."	Provide guidance to SEFs as to what materials must be retained for five years to satisfy the recordkeeping obligation, which reduces the operational burden of maintaining all possible records, particularly those with minimal value from an audit trail perspective. For both cleared and uncleared swaps, revise the recordkeeping requirement under rule 45.2 to permit SEFs to retain records with respect to each swap for a period of five years after execution.