

THE LAW OFFICES OF
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A PROFESSIONAL CORPORATION

September 29, 2017

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
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Washington, D.C. 20581
Telefacsimile: (202) 418-5521
Email to secretary@cftc.gov and electronically to www.cftc.gov/projectkiss

Re: *Request for Information*, 82 Fed. Reg. 21494 (May 24, 2017) RIN 3038-AE55
("Project KISS")

Dear Mr. Kirkpatrick:

"[T]he Commission has approved the solicitation of suggestions from the public regarding how the Commission's existing rules, regulations, or practices could be applied in a simpler, less burdensome, and less costly manner. The Commission is not asking the public to identify rules for revocation, suspension, annulment, withdrawal, limitation, amendment, modification, conditioning or repeal."¹

President Trump credited Bruce Lee with saying "Mistakes are always forgivable, if one has the courage to admit them."²

My first suggestion is that when the Commission makes a mistake, it should admit it, rather than dig a deeper regulatory hole, for it and everyone else.

An example of the latter is the CFTC's regulation of trade options and "embedded volumetric optionality." The CFTC did not understand what it was regulating and in 2012 required all energy transactions, between two commercial end users, many of which are used to keep the lights on, to be analyzed for reportability to a swap data repository. When confronted with its error, rather than take a deep breath and regroup, the CFTC insisted it was right, compounded a "three part test" and "seven part test"³ with a further five part test and an eventual Frankenstein's monster of more final regulations, interim final regulations, proposed regulations, "clarifications" of regulations that the regulated were apparently too dim to understand,⁴ no action letters, proposed interpretations, and undated "FAQs."⁵ Anyone seeking to comply cannot look to one rule for instructions.

¹ Project KISS, 82 Fed. Reg. 21494 col. 3.

² <https://twitter.com/realdonaldtrump/status/331876752693547009>

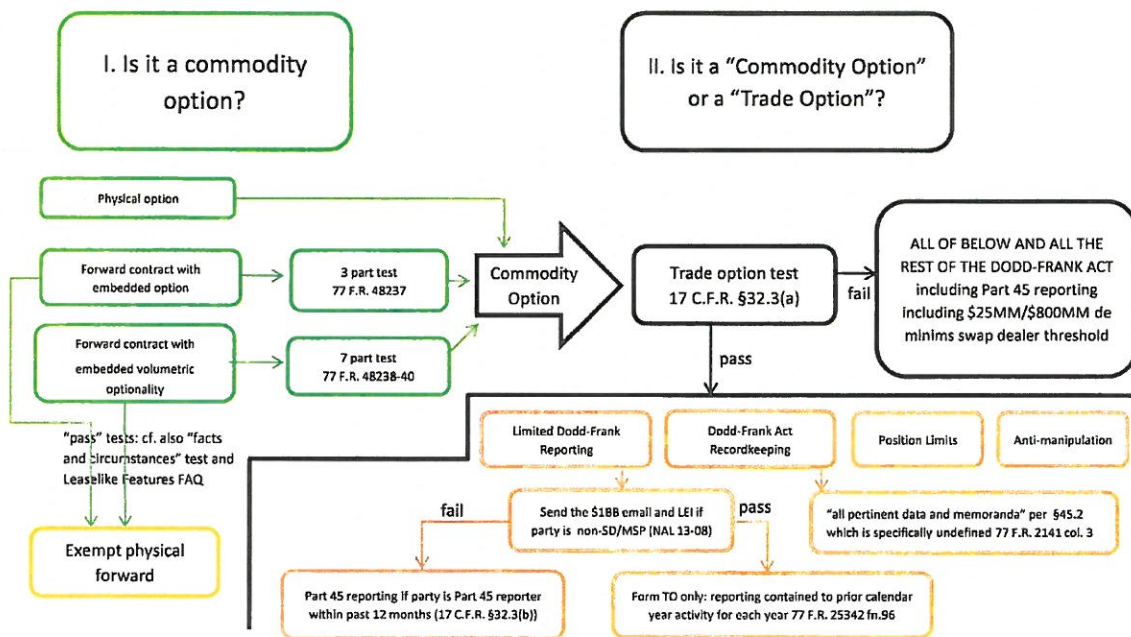
³ *Further Definition of "Swap,"* ..., 77 Fed. Reg. 48,208 at 48,237-38 (Aug. 13, 2012)

⁴ E.g., "The CFTC is proposing to *clarify* its interpretation of when ... a transaction with embedded volumetric optionality would be considered a forward contract." 79 Fed. Reg. 69074 col. 2.

⁵ *CFTC Division of Market Oversight Responds to Frequently Asked Questions Regarding Commodity Options -Commodity Options FAQs*, https://forms.cftc.gov/_layouts/PublicForms/Docs/TradeOptionsFAQ.pdf; *Response to Frequently Asked*

The CFTC's *undated* Commodity Options FAQs⁶ describes this Frankenstein's monster, which, with the special entity regulations, caused real people to lose real, good-paying jobs, as energy trading desks shut down due to intense regulatory uncertainty. The CFTC's Office of General Counsel's *undated* Response to FAQs Regarding Certain Physical Commercial Agreements for the Supply and Consumption of Energy⁷ provided the five factor test. Other than simply refusing to discuss a regulation, it is hard to imagine how a regulator could show greater contempt for the regulated than by issuing undated guidances. They do not help people comply, since one cannot tell whether an undated guidance was issued before or after a new or changed regulation or no action letter. For example, the Commodity Options FAQ is obsolete, but is still on the internet and not dated before or after the revised Commodity Option Final Rule. Accordingly, my second suggestion is that the CFTC not issue undated documents.

By 2015, the compliance map *for end users*, for every transaction "intended to be physically settled" (and therefore excluded from CFTC regulation under CEA §1a47(B)(ii)), grew to:



The CFTC emulated the Roman Emperor Caligula, of whom it was reported, "great grievances were experienced from the want of sufficient knowledge of the law. At length, on the urgent demands of the Roman people, he published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy

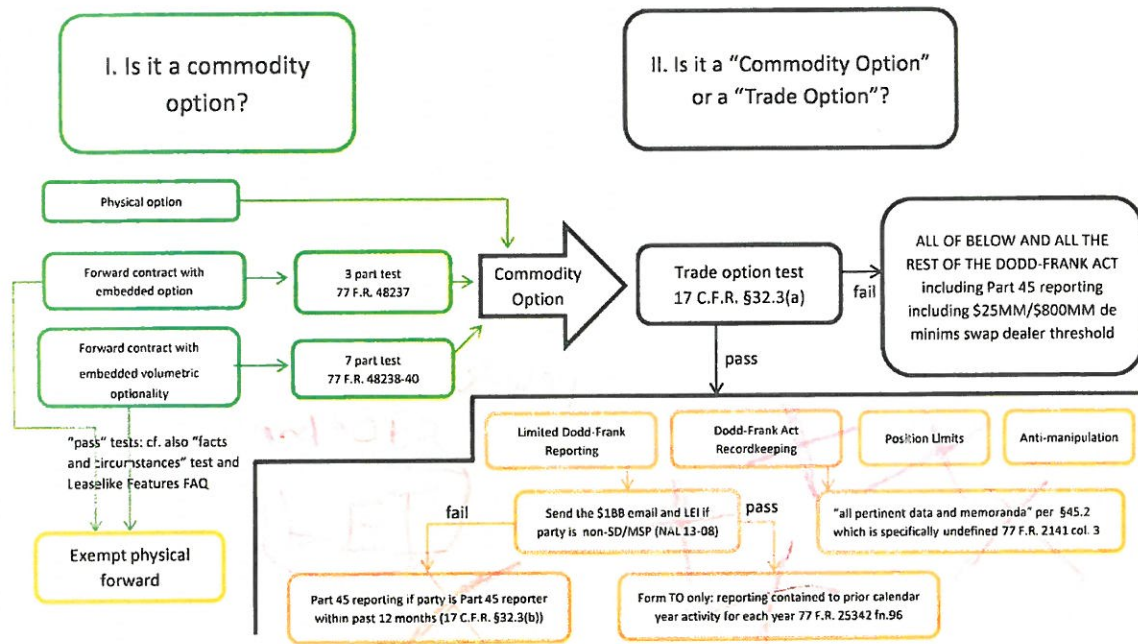
Questions Regarding Certain Physical Commercial Agreements for the Supply and Consumption of Energy, http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/leaselike_faq.pdf

⁶ https://forms.cftc.gov/_layouts/PublicForms/Docs/TradeOptionsFAQ.pdf

⁷ http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/leaselike_faq.pdf

of it.”⁸ And yet, the CFTC claimed it “*does not believe that an intricate knowledge* of the CEA or the agency’s procedures, personnel, and implementing regulations is necessary in order to accurately prepare and submit a Form TO in approximately two hours”⁹

The CFTC under Chairman Massad began to recognize it had created an untenable situation for those who simply wanted to comply with the law, and changed¹⁰ compliance to the following (my secretary’s four year old daughter marked the above chart to show suspension of some requirements and the new requirement to pay a third party vendor for a Legal Entity Identifier) *for end users*:



Chairman Massad’s solution to Chairman Gensler’s regulations was to leave them mostly in place, but make it unlikely to run afoul of them.¹¹ The tests remain for end

⁸ Suetonius, De Vita Caesarum: Caius Caligula XLI.

⁹ CFTC Paperwork Reduction Act Supporting Statement for Form TO, OMB Control No. 3038-0106 (April 8, 2013). Contra <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/transcript040314.pdf>, at p. 161.

¹⁰ In the *Final Interpretation of the Seven Part Test*, 80 Fed. Reg. 28239 (May 18, 2015), *Trade Options Final Rule*, 81 Fed. Reg. 14966 (Mar 21, 2016), and hopefully, *Proposed Guidance on Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583 (Apr 8, 2016).

¹¹ Another example is amelioration in No Action Letter 14-132 of a regulation the CFTC issued before it understood that “independent amount” in a swap collateral support relationship is different from “initial margin” in a futures contract. See Weinstein, *How the Dodd-Frank Act Will Bring Back Stagflation*, Futures & Derivatives Law Report, Jan. 2011, avail. at http://jweinsteinlaw.com/pdfs/FDLR31.01_Weinstein.pdf. See also Weinstein, *Quicksand in the Hedges*, Futures & Derivatives Law Report, Nov. 2011, avail. at <http://jweinsteinlaw.com/pdfs/Weinstein-Quicksand%20in%20the%20Hedges.pdf>.

users to apply to every transaction in a physical commodity in its commercial operations. The costs of this are borne by all businesses and all consumers. Accordingly, my third suggestion is for the CFTC to conform to CEA §1a47(B)(ii).¹²

Finally, the suggestion deadline for Project KISS is Saturday, September 30, 2017. Suggestions can be sent in early, and the CFTC provided a very generous 144 day response period. I do not want to seem petulant following my equanimous discussion of CFTC regulations, but I wish my government would not go out of its way, choosing a Saturday for a non-standard deadline, and knock Yom Kippur. So my fourth suggestion is for the Commission to look at a calendar when setting deadlines.

Thank you for the opportunity to provide these suggestions. I am especially excited that Chairman Giancarlo will execute on Project KISS and start the task of reversing the job losses caused by the regulations issued under Chairman Gensler and fostering an environment of compliance through tractable, easily discoverable, and clearly communicated regulation.

Yours truly,



Jeremy D. Weinstein

cc: Chairman Giancarlo

¹² Under CEA §1a(47)(B)(ii) “The term ‘swap’ does not include any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically *settled*”. The CFTC defines “physically settled” as “if exercised, the option would result in the sale of an exempt or agricultural commodity (i.e. non-financial) commodity for immediate (spot) or deferred (forward) shipment or delivery”, and adds an element requiring intent of “both parties”: “The third element of the trade option exemption is that both parties must intend that the commodity option be physically settled” 77 Fed. Reg. 25326. “Settled” does not mean “purchased” or “sold” or “delivered”; the element added by the CFTC to §1a(47)(B)(ii) at 77 Fed. Reg. 25326 col. 3 is not in the statute. Something that can only be physically settled must be intended to be physically settled, whether or not one or both parties “intend” to “purchase” or “sell” or “deliver”. The CFTC added two new elements - “dual intent” to “actually deliver” - that are not in the statute.