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Mr. Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
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Submitted electronically to projectkiss@cftc.gov

Re: Project KISS, 82 Fed. Red. 23,765 (May 24, 2017)

September 30, 2017

Dear Mr. Kirkpatrick,

IHS Markit (Nasdaq: INFO) is pleased to provide its comments on Project KISS to the Commodity Futures Trading Commission ("CFTC" or "Commission"). IHS Markit is a world leader in critical information, analytics and solutions for the major industries and markets that drive economies worldwide. The company delivers next-generation information, analytics and solutions to customers in business, finance and government, improving their operational efficiency and providing deep insights that lead to well-informed, confident decisions. IHS Markit has more than 50,000 key business and government customers, including 80 percent of the Fortune Global 500 and the world's leading financial institutions. Over the past years, we have submitted more than 150 comment letters to regulatory authorities around the world and have participated in numerous roundtables.

IHS Markit's derivatives processing platforms are widely used by market participants, Trading Venues and brokers to increase operational efficiency, reduce cost, and ensure legal certainty. Globally over 2,000 firms use the various IHS Markit trade processing platforms that process, on average, 90,000 derivative transaction processing events per day. IHS Markit's trade processing platforms form an important element of derivatives workflows, particularly in the credit, interest rate, equity, and foreign exchange asset classes. In September 2015, IHS Markit acquired DealHub, enhancing its trade processing offerings in the foreign exchange ("FX") asset class, including regulatory reporting.

IHS Markit's trade processing platforms also facilitate firms' compliance with several regulatory requirements across jurisdictions. Specifically, the MarkitSERV platforms facilitate the electronic confirmation of a significant portion of derivatives transactions worldwide; submit them for clearing to 16 clearinghouses globally, including meeting straight-through processing ("STP") requirements to transmit trades from trading venues, including swap execution facilities ("SEFs") to clearinghouses. The platform also reports derivatives details of many counterparties to regulated swap data repositories ("SDRs") and

trade repositories in the United States, Canada, Europe, Japan, Hong Kong, Singapore, and Australia, as well as reporting on behalf of the G15 banks on a voluntary basis as a part of an OTC Derivatives Regulator Forum initiative.

IHS Markit shares Chairman Giancarlo's goal to "foster market liquidity" generally[1] and agree with Project KISS' goal "to reduce regulatory burdens and costs for participants in the markets the [CFTC] oversees."[2] The best way to ensure liquidity is to provide market participants more choice in how to trade and manage their risks, lower operational and compliance costs that across the industry and to encourage competition, while balancing the need to ensure market integrity and prevent systemic risk. Deeply liquid markets provide end users the opportunity to hedge their risks at a low cost and thereby "enhance market durability, increase trading liquidity and stimulate broad-based economic growth and revival."[3] Our comments are offered in this common spirit.

## I. Executive Summary

Below we provide suggestions on improving the Commission's swaps regulatory regime in order to foster market liquidity, better hedging opportunities for end users, and resulting economic growth. Specifically, with respect to (1) Execution, we recommend the Commission:

i. Avoid a "SEF Tax" by retaining the MAT backstop and provide market participants freedom to choose to execute block trades and non-MAT trades away from a SEF or on a SEF
ii. Provide trading freedom for package transactions
iii. Revise the MAT Rulemaking to ensure the efficacy of the MAT backstop to provide for explicit Commission review of new MAT Factors
iv. To prevent regulatory arbitrage, the Commission should harmonize its approach to MAT with the European Union and other regulators
v. Create a De-MAT process

With respect to (2) Clearing, the Commission should:

i. Clarify that the ten minute SEF STP standard should be a goal, not a requirement
ii. Defer to SEFs and market participants to determine how to best fix trades that fail to clear based on clerical or operational errors

[1] [Then] CFTC Commissioner J. Christopher Giancarlo, Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank, http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf, at (ii) (Jan. 29, 2015) ("White Paper").

[2] CFTC Requests Public Input on Simplifying Rules, May 3, 2017, http://www.cftc.gov/PressRoom/PressReleases/pr7555-17.

[3] Chairman J. Christopher Giancarlo Remarks at the Global Forum for Derivatives Markets 38th Annual Bürgenstock Conference, Sept. 12, 2017, http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-27.

iii. Eliminate preferential initial margin rules for cleared futures

With respect to (3) Reporting, the Commission should:

i. Improve data quality by enforcing the "confirm the accuracy of the [swap] data" requirement for SDRs and closing the "negative affirmation loophole"
ii. Provide a safe harbor for SDRs from the "confirm with both counterparties" requirement if a transaction is positively confirmed by both counterparties
iii. Execute the Commission staff's Roadmap to Achieve High Quality Swaps Data
iv. Reconsider allocating both the responsibility to report clearing swap data and the power to determine which SDR receives swap data to clearinghouses
v. Adopt a "counterparty choice" approach that would empower the counterparties to cleared swaps to select both who reports cleared swap data and which SDR should receive such data

With respect to (4) Registration, we recommend the Commission:

i. Adopt a principles-based approach to SEF rule compliance
ii. Encourage financial innovation by providing for an "incubating" regulatory regime for SEFs below certain volume thresholds

## II. Discussion

Below we provide our recommendations under the header of the four (4) of the five (5) Project KISS subject areas to which they relate.

### 1. Trading and Execution

*i. Avoid a "SEF Tax" by retaining the MAT backstop and provide market participants freedom to choose to execute block trades and non-MAT trades away from a SEF or on a SEF*

We commend the Commission's distinction between the scope of the clearing requirement vs. the more limited scope of the SEF trading requirement and urge the Commission to preserve these rules while, as we describe in sub-sections (ii), (iii), (iv), and (v) immediately below, improving upon it. The Dodd-Frank Act provides that once a swap subject to the Commission's clearing requirement is "made available to trade" ("MAT") by a SEF or designated contract market ("DCM"), it becomes subject to the Commission's trade execution requirement.[4] In the final rulemaking promulgating

[4] Section 723(a)(3) of the Dodd-Frank Act added section 2(h)(8) of the CEA to require that swap transactions subject to the clearing requirement must be traded on either a DCM or SEF, unless no DCM or SEF "makes the swap available to trade" or the transaction is not subject to the clearing requirement under section 2(h)(7).

standards governing MAT determinations (the "MAT Rulemaking"),[5] the Commission interpreted this statutory language to support "an available-to-trade determination that is separate from a mandatory clearing determination."[6]

Consistent with this statutory interpretation, the Commission has set forth separate and distinct liquidity-related criteria for the clearing and trade execution requirements. The Commission explained that while the "focus" of a MAT determination may be on "whether a swap has sufficient trading liquidity to be subject to mandatory trade execution,"[7] clearing requirement determinations are not focused on "the liquidity of specific individual swaps."[8] Liquidity in the clearing requirement context focuses on risk management and "whether a portfolio of swaps has common specifications that are determinative of their economic characteristics, such that a [derivatives clearing organization] can price and risk manage the portfolio in a default situation."[9] In contrast, Commission regulation 37.10(b) sets forth factors to be considered in making a MAT determination, "each of [which] is an indicator of *trading activity*" in a swap.[10] The Commission, therefore, interpreted the CEA to limit the trade execution requirement to a subset of the swaps subject to the clearing requirement, i.e. those that have trading activity that would be supported in a "centralized trading environment."[11]

We believe the Commission should continue to apply the MAT backstop it promised the public by rejecting MAT determinations that are not procedurally and substantively warranted. In the MAT Rulemaking, the Commission acknowledged concerns about the "costs imposed upon market participants if *illiquid* swaps [subject to the clearing requirement] are made available to trade and become subject to the trade execution requirement."[12] These costs to the public consist of increased transaction costs and diminished liquidity that would follow from an overly broad MAT determination.[13] The

[5] Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 Fed. Reg. 33,606.

[6] 78 Fed. Reg. at 33,609.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 33,613 (emphasis added).

[11] *Id.*

[12] *Id.* at 33,622 (emphasis added).

[13] Market participants would pay more to transact an illiquid swap subject to a trade execution requirement because their counterparty would charge them for the counterparty's increased costs to offset the risk of the swap (*i.e.,* an "illiquidity premium"). Illiquidity premiums increase as a function of the illiquidity in the swap (how many willing counterparties there are, how often they transact, etc.) and the extent that the demand for liquidity is known in the market. The requirement to trade on a central limit order book or through an request for quote ("RFQ") system would put at least three liquidity providers on notice of a party's demand for liquidity. In many illiquid interest rate swaps, there may not be much depth and may be only one or two willing dealer counterparties, and in those markets, market participants would have to pay a significant illiquidity premium if the trade execution requirement is overbroad. While the illiquidity premium would decrease with more permissive SEF trading protocols, market participants we have spoken with believe that

Commission assured commenters to its proposed rulemaking, however, that the transparency of the MAT determination process "coupled with *Commission review* and potential for public comment, provides an important *backstop* to protect the integrity of the determinations that are submitted."[14]

Illiquid swaps subject to the clearing requirement should not be required to be executed on a SEF, no matter how relaxed the trading protocol a SEF may provide. We acknowledge that the costs to market participants to trade an illiquid swap on a SEF would be reduced if a SEF can use less prescriptive trading protocols for SEF required transactions, the marginal transaction costs of trading an illiquid swap on a SEF would be unnecessary and amount to a tax on illiquid transactions subject to the clearing requirement. Such a "SEF tax" would deter central clearing and liquidity formation.

To avoid a negative liquidity impact from a SEF tax, we believe that block transactions should be permitted to be executed either away from a SEF or on SEF pursuant to the rules of a SEF.

*ii. Provide trading freedom for package transactions*

We recommend that package transactions be provided the same treatment as "block trades" or "permitted transactions" that may or may not be executed on a swap execution facility.[15] Such an approach would incentivize SEFs from offering novel methods of executing swaps while preserving existing over-the-counter ("OTC") workflows as a viable option for such illiquid transactions.

Subjecting package transaction to the SEF execution requirement was first announced by the CFTC in 2014 that "[a]ll transactions involving swaps that are subject to the trade execution requirement must be executed on a DCM or a SEF." [16] We believe that package transactions comply with the Commission's definition of "block trade." Currently there are five categories of package transactions that are subject to time-limited no-action relief related to mandatory SEF execution.[17]

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it would never be eliminated and moreover SEF trading always includes increased marginal transaction costs.

[14] 78 Fed. Reg. at 33,622 (emphasis added).

[15] See 17 CFR 37.9.

[16] See CFTC Letter No. 14-12, http://www.cftc.gov/idc/groups/public/@newsroom/documents/letter/14-12.pdf (Feb. 10, 2014) and CFTC Letter 14-118, http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-118.pdf (Sept. 19, 2014).

[17] These include: (1) MAT/New Issuance Bond Package Transactions; (2) MAT/Futures Package Transactions; (3) MAT/Non-Swap Instruments Package Transactions; (4) MAT/Non-MAT Uncleared Package Transactions; and (5) MAT/Non-CFTC Swap Package Transactions. *See* CFTC Letter 16-76, http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-76.pdf (Nov. 1, 2016).

The trade execution requirement, under the Commission's own rules (as opposed to staff interpretation) should apply to package transactions where all legs of the transaction are "made available to trade" ("MAT") swaps. Under Commission regulation 43.6(h)(2) "parties to a swap transaction with composite reference prices may elect to apply the lowest appropriate minimum block size or cap size applicable to one component reference price's swap category of such publicly reportable swap transaction."[18] The Commission's block trade proposal explained that "swaps with composite reference prices are composed of reference prices that relate to one another based on the difference between two or more underlying reference prices."[19]

The principle behind Commission regulation 43.6(h)(2) is that when a swap's value is a function of two or more reference prices, then the swap should be decomposed by underlying reference price to determine whether it qualifies as a block trade. If one component qualifies as a block trade or otherwise should not be subject to the trading requirement, then the entire package should be afforded trading freedom. We note that the term "swap with composite reference price" in Commission regulation 43.6(h)(2) is coextensive with the Commission staff's definition of "package transaction:"

> [A] transaction involving two or more instruments: (1) that is executed between two counterparties; (2) that is priced or quoted as one economic transaction with simultaneous execution of all components; (3) that has at least one component that is a swap that is made available to trade and therefore is subject to the CEA section 2(h)(8) trade execution requirement; and (4) where the execution of each component is contingent upon the execution of all other components.[20]

Illiquid non-MAT and block swap trades are highly susceptible to the execution risks that come with reduced available liquidity[21] and costs associated with information leakage. Accordingly, the Commission should provide market participants freedom to determine how to best weigh countervailing risks in choosing a method and venue to execute such trades. Accordingly, we recommend the Commission should correct its contradictory policies regarding package transactions and clarify that it is only transactions with solely MAT components that are all under a block size threshold should be required to trade on a SEF.

### *iii. Revise the MAT Rulemaking to ensure the efficacy of the MAT backstop to provide for explicit Commission review of new MAT Factors*

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[18] "[F]or example, a locational basis swap (e.g., a natural gas Rockies Basis swap) that utilizes a reference price based on the difference between a price of a commodity at one location (e.g., a Henry Hub index price) and a price at another location (e.g., a Rocky Mountains index price))." 77 FR 15,460, 15,488 available at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-5950a.pdf (Mar. 15, 2012).

[19] *Id.*

[20] CFTC Letter No. 14-12, http://www.cftc.gov/idc/groups/public/@newsroom/documents/letter/14-12.pdf (Feb. 10, 2014).

[21] See supra note 13.

We encourage the Commission to revise the MAT rules to explicitly provide for Commission review. Commission review would ensure that self-interested SEFs do not expand the scope of the trading requirement to encompass illiquid swaps that would not benefit from centralized SEF trading and impose an undue liquidity premium on end users and others that hedge their risks with such swaps. The Commission may currently deny a MAT determination only if it violates the CEA or Commission regulations.[22] Commission regulation 37.10(a)(2) sets forth the only clear requirement for a MAT swap, i.e. a listing requirement for swaps that a SEF makes "available to trade."[23] In order for a SEF to comply with the listing requirement, its MAT determination "must demonstrate that it lists or offers that swap for trading on its trading system or platform."[24] This must include whether the SEF "supports trading" in such a swap.[25] In order to properly support trading in the swap, the SEF, at a minimum, must be able to support "Order Book"[26] trade execution.

Other MAT factors are less clearly subject to Commission review. In Commission regulation 37.10(b), the Commission set forth six (6) factors ("MAT Factors") that indicate when a swap is "available to trade."[27] We recommend that of these six (6) factors, two (2) be made optional because they are not appropriate for many swaps, i.e. bid/ask spread and usual number of resting firm or indicative bids and offers.

Of the remaining four (4) factors, the Commission should clarify that it may review evidence provided by a SEF relating to the MAT Factors and provide specific and objective parameters for how sufficient "trading liquidity" is demonstrated for each factor. We would be happy to advise the Commission on how it might go about analyzing each

[22] 17 CFR 40.6(c)(3).

[23] 17 CFR 37.10(a)(2).

[24] *Id.*

[25] In the MAT Rulemaking, the Commission explained that it had proposed requiring SEFs and DCMs in their MAT determinations to consider "whether a SEF's or DCM's trading facility or platform will support trading in the swap." 78 Fed. Reg. at 33,613. The Commission, however, concluded that this requirement was "redundant" with the listing requirement because "[t]his factor contemplated, among other things, whether the SEF or DCM lists the swap for trading on its trading facility or platform." *Id.* The import of this discussion is that in order to comply with the listing requirement in Commission regulation 37.10(a)(2), a SEF or DCM must consider whether it "supports trading" in the swap. Otherwise, if the requirement that a SEF or DCM supports trading in the swap is not embedded within the listing requirement and the MAT determination, then there was no redundancy and no basis for the Commission's deletion of the proposed "supports trading" factor.

[26] "Order Book" is defined as "(i) An electronic trading facility, as that term is defined in section 1a(16) of the Act; (ii) A trading facility, as that term is defined in section 1a(51) of the Act; or (iii) A trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers." 17 CFR 37.3(a)(3).

[27] 78 Fed. Reg. at 33,613. The six MAT Factors are: (1) whether there are ready and willing buyers and sellers; (2) frequency or size of transactions; (3) trading volume; (4) number and types of market participants; (5) bid/ask spread; or (6) usual number of resting firm or indicative bids and offers. 17 CFR 37.10(b) and 17 CFR 38.12(b).

factor, based on the specifics of each asset class and other relevant product characteristics.

*iv. To prevent regulatory arbitrage, the Commission should harmonize its approach to MAT with the European Union and other regulators*

We would encourage the Commission align its review process and MAT Factor parameters with the approach ultimately taken by the European Union and other regulators. In addition, the Commission should avoid an outcome whereby the scope of the Commission's trading requirement is either broader or narrower than that taken by other regulators, especially those that oversee comparably sized markets, e.g., the European Union.

*v. Create a De-MAT process*

We recommend that as a part of its amendments to the MAT Rulemaking that the Commission also provide for a means to exclude swaps previously found to be sufficiently liquid for the SEF trading requirement as their liquidity characteristics evolve (i.e. "de-MAT"). For example, certain on-the-run credit default swaps may have sufficient liquidity when they are deemed to meet the MAT standard, but over time their liquidity may drop off to the point where the SEF trading requirement would no longer be appropriate. The Commission regularly, perhaps annually, perform a "de-MAT" review. Alternatively, the Commission should create a procedure whereby market participants can initiate such a review with supporting MAT Factor-related data where they feel the conditions to de-MAT a swap or category of swaps.

**2. Clearing**

*i. The ten minute SEF STP standard should be a goal, not a requirement*

Consistent with a principles-based regulatory regime, the Commission's and SEFs' rules relating to straight-through processing ("STP") should be based on principles, not prescriptive time limits that do not take into account countervailing risks. CFTC Staff Guidance on Swaps Straight-Through Processing, dated September 26, 2013, which requires cleared swap trades to be routed "as quickly after execution as would be technologically practicable if fully automated systems were used" ("AQATP"). CFTC Letter No. 15-67 (Straight Through Processing and Affirmation of Swap Execution Facility Cleared Swaps), dated December 21, 2015 ("STP Letter") finds that the AQATP standard may be met if trades are routed to and received by the relevant derivatives clearing organization ("DCO") no more than 10 minutes after the execution of the trade on a SEF.

Based on the STP Letter and an aggressive Commission staff interpretation of it, SEFs adopted rules that require that SEF customers' event later than ten (10) minutes after the execution of a cleared swap executed on their venue. We think that these SEF rules should be relaxed or eliminated in order to assist firms manage the risks associated with erroneously documented SEF transactions. We note that manual post-trade affirmation of

trades is a valuable risk management practice that mitigates the risk of trades clearing or failing to clear erroneously.[28]

Any specific STP requirement forces market participant to err on the side of speed even when a faster affirmation process might create new risks. While our current data shows steady improvement in affirmation times for SEF cleared transactions (approximately 82% compliance as of the week ending September 22, 2017), we do not see 100% compliance with the ten (10) minute standard as "practicable" in every instance nor should it be.

The Commission should avoid prescriptive STP rules that substitute its judgment for market participants' judgment in weighing countervailing risks. Firms should be able to allocate limited resources to addressing operational risks uncovered at affirmation during periods of market stress or volatility or any other circumstance that may provide a reasonable justification for not meeting the ten (10) minute rule. A "reasonable justification" could be defined as a reason that would lead a prudent firm to decide to take more than ten (10) minutes to affirm a trade for reasonable risk management purposes given observed market conditions.

ii. *Defer to SEFs and market participants to determine how to best fix trades that fail to clear based on clerical and operational errors*

Commission staff currently require that "any [swap] trade that is executed on a SEF… and that is not accepted for clearing should be void ab initio" (i.e., invalid from the beginning)."[29] Commission staff has provided time-limited no-action relief for the re-submission of erroneous trades.[30]

The Commission should permanently eliminate the void ab initio requirement to correct clerical or operational errors in any new SEF rulemaking.[31] Among other things, this policy places futures markets, that are not subject to a similar constraint at a competitive advantage. Moreover, such a policy increases risk without commensurate benefit. If a market participant's swap hedge is void ab initio after it fails to clear for a clerical or operational error, until the participant corrects and resubmits the trade it will be exposed to

[28] "According to ISDA, the manual post-execution affirmation process is useful to dentify errors before a trade is submitted for clearing because some methods of execution currently have higher error rates. Submitting a trade for clearing within seconds of execution would result in erroneous trades being rejected, or worse, accepted by a DCO. If an erroneous swap is cleared immediately after execution, the errors would have to be addressed after clearing, which may be difficult and costly.4 Additionally, counterparties may have to bear significant margin costs until an error is corrected because of a swap being cleared at the wrong DCO, having the wrong counterparty or having the wrong economic terms, as examples." CFTC Letter 15-67, http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-67.pdf (Dec. 21, 2015) (citations omitted).

[29] Staff Guidance on Swaps Straight-Through-Processing (Sep. 26, 2013), http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/stpguidance.pdf.

[30] *See* CFTC Letter 16-58, *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-58.pdf.

[31] *See Id.*

market and execution risk. These risks that are particularly heightened when a need to hedge is greatest, i.e. periods of market volatility and uncertainty.

The Commission's rules should reflect that fact that market participants are incentivized to correct and resubmit a trade and should be afforded flexibility to determine how best to do so. The intention to be counterparty to a transaction does not disappear after a swap fails to clear. If the Commission's concern is so-called "breakage agreements," the Commission's STP guidance prohibits the use of those by SEFs, futures commission merchants, and swap dealers.[32]

*iii. Eliminate preferential initial margin rules for futures*

The Commission should provide for initial margin requirements that are based on the risk profile of a derivative contract and not on whether a particular cleared derivative transaction is a "futures" or "swap" contract. The CFTC's current initial margin rules are based on a one-day liquidation period for all futures contracts but a five-day liquidation period for cleared financial swaps. This different treatment, even for economically similar futures and swaps reduces the cost to clear a futures contract vs. a swap contract, creating an artificial incentive to transact futures. This incentive should be reconsidered in light of the fact that the major clearinghouses that determine margin requirements for futures and swaps have a dominant position in the market for futures execution but have little to no market share when it comes to swaps execution, creating an incentive for them to encourage futures trading vs. swaps trading.

**3. Reporting**

*i. Improve data quality by enforcing the "confirm the accuracy of the [swap] data" requirement for SDRs and closing the "negative affirmation loophole"*

Section 22(c)(2) of the Commodity Exchange Act, created by the Dodd-Frank Act, requires that SDRs "confirm with both counterparties to the swap the accuracy of the data that was submitted." CFTC explained that "that it may not be necessary [for an SDR] to affirmatively communicate with both counterparties in all circumstances" to confirm the accuracy of the data that was submitted to meet this requirement.[33] The Commission created a "negative affirmation loophole" with the adoption of Commission regulation 49.11 that:

> "does not require an SDR to affirmatively communicate with both counterparties when data is received from a SEF, DCM, DCO, or third-party service provider under certain conditions. Communication need not be direct and affirmative where the SDR has formed a reasonable belief that the data is accurate, the data or

[32] See Staff Guidance on Swaps Straight-Through-Processing (Sep. 26, 2013), http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/stpguidance.pdf.

[33] See Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg., 54,538, 54,547 (2011).

accompanying information reflects that both counterparties agreed to the data, and the counterparties were provided with a 48-hour correction period."

The negative affirmation loophole should be closed as because it is ultimately the reporting counterparty that bears the entire compliance risk associated with an incorrect swap report, the non-reporting counterparty has zero incentive or inclination to even inspect swap records at an SDR. This is especially true since records corresponding to a particular party are spread across multiple SDRs due to Commission rules encouraging such fragmentation as described below in subsection (iv) and (v) and non-reporting counterparties only have the duty to correct any errors they "discover" under Commission regulation 45.14. Accordingly, in order to ensure some amount of oversight from the non-reporting counterparty, the SDR should be subject to the requirement to "confirm with both counterparties." Concurrently, non-reporting parties should be subject to a requirement to periodically review swap records located at an SDR. Firms that conduct more swaps should be subject to more frequent inspections requirements.

The negative affirmation loophole can be closed by eliminating Commission regulations 49.11(b)(1)(ii)(C) and (b)(2)(ii)(B).

*ii. Provide a safe harbor for SDRs from the "confirm with both counterparties" requirement if a transaction is positively confirmed by both counterparties*

We understand that SDRs would like the Commission to clarify that the onus to "confirm with both counterparties to the swap the accuracy of the data" submitted to the SDR be placed on the counterparties.[34] Moreover, non-reporting counterparties are unlikely to welcome a requirement to periodically review swap records at an SDR. To address these concerns, we recommend that the Commission encourage positive confirmation of trades by both counterparties. This could be done by providing for a safe harbor for SDRs if a swap is positively confirmed by "both counterparties."

This safe harbor could be implemented by regulatory text added to Commission regulation 49.11 or guidance thereto providing that "reasonable belief that the swap data is accurate" can be based on the presence of a bilateral, positive confirmation of the swap and the swap data by both counterparties. Such guidance would encourage confirmation of the accuracy of swap data at the point where it would be most efficient: at confirmation. Such an approach would also reduce the likelihood of disputes, improving the legal certainty of swap transactions – particularly important during systemic risk events where disputes on valuations are most frequent.[35]

[34] SDRs want to put onus on counterparties to check swap data (Sept. 24, 2017), https://www.risk.net/.../sdrs-want-to-put-onus-on-counterparties-to-check-swap-data.

[35] "If you're going to put conventions for trade affirmation in place, then you've got to get rid of negative affirmation. Allowing it to exist runs directly counter to the whole point of the rule," said Naeem Hukkawala, COO at consultancy ViableMkts.

"The point is to make sure both sides agree to the terms of a trade before it settles. Allowing trades to go through even when one side doesn't respond is an out card. It opens up the door to more and more

*iii. Commend the Commission staff's Roadmap to Achieve High Quality Swaps Data*

We commend the Commission staff's goal to revamp the Commission's regulatory reporting regime by end-2019[36] and look forward to continued dialogue. We are the leading third-party reporting agent for those subject to CFTC reporting requirements (certainly by notionals and likely by volumes). We are also active in international initiatives that would have a bearing on the Commission's reporting rules. To this effect we have recently commented on Committee for Payments and Market Infrastructures ("CPMI") and International Organisation of Securities Commissions ("IOSCO") consultations regarding derivatives reporting standards, as well as the Commission's recent final rules on swaps reporting.[37]

iv. *Reconsider allocating both the responsibility to report clearing swap data and the power to determine which SDR receives swap data to DCOs*

Under Commission regulation 45.8(i), the DCO would be the reporting counterparty for clearing swaps, regardless of who is the reporting counterparty for an "intended to be cleared" ("ITBC") swap. The Commission has also given DCOs exclusive discretion to determine the SDR that receives trade data for a cleared swap transaction.

The Commission's proposed policy would provide regulatory approval for anticompetitive tying of clearing and regulatory reporting services in contravention of the Commission's own regulatory precedent set forth in the Commission's adjudication of CME Rule 1001.[38]

v. *Adopt a "counterparty choice" approach that would empower the counterparties to cleared swaps to select both who reports cleared swap data and which SDR should receive such data*

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disputes bleeding out into the market … and it comes within the framework of a rule that was written specifically to reduce the possibility for disputes." SEC approves 'negative affirmation' rule, June 11, 2016, http://www.ifre.com/sec-approves-negative-affirmation-rule/21251112.article.

[36] Roadmap to Achieve High Quality Swaps Data, July 10,, 2017, http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf.

[37] See Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps; Final Rule, 81 Fed. Reg. 41,736, http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-14414a.pdf (June 27, 2016).

[38] See Markit's comment letter Re: Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps; Proposed Rule, 80 Fed. Reg. 52,544 (Aug. 31, 2015), pp. 3-6, *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60518&SearchText=markit. See also Statement of the CFTC, Mar. 6, 2013, http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/statementofthecommission.pdf and Chicago Mercantile Exchange Inc. ("CME") Rule 1001 ("CME Rule 1001"), voluntarily submitted to CFTC staff review on Dec. 6, 2012, available at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul120612cme001.pdf, and ICE Clear Credit Rule 211, submitted for self-certification on Apr. 10, 2013, available at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul041013icc002.pdf.

Instead of sanctioning anticompetitive tying arrangements between DCOs and their SDR affiliates, we urge the Commission to amend its swap reporting rules to empower market participants to select an SDR and thereby subject swaps reporting to market discipline. The Commission could do this by allowing the reporting counterparty for the ITBC swap to freely choose whether it would like to report creation and continuation data for the resulting clearing swaps and the SDR that is to receive this data. We call this approach the "counterparty choice" approach.

Under the counterparty choice approach, nothing would prevent the reporting counterparty to the ITBC swap to delegate the responsibility for clearing swaps to a DCO. In fact, many counterparties might decide to do and many DCOs may offer competitive rates and accuracy or the counterparties could choose a DCO-affiliated SDR or an independent SDR as the destination of their swap data. Such delegations could be encouraged by providing reporting entities a safe harbor for errors in reporting swap data arising from the DCO's actions. On the other hand, other market participants may want to house all of their swap data in one SDR to facilitate accuracy checks or to rely on the SDR for recordkeeping purposes.

There are also policy benefits that would follow from the counterparty choice approach. For example, if an SDR has access to a market participant's swap data housed in a single SDR, there are a wide variety of value-add services, including portfolio-level analytics, that the SDR or independent service providers could more easily provide. The consolidation of data enabled by counterparty choice would also facilitate and incentivize reviews for accuracy of SDR data.[39] Subject to market forces, the reporting of swap data would move from being a regulatory chore to a valuable resource for SDRs and market participants that invest in data accuracy.

## 4. Registration

### *i. Adopt a principles-based approach to SEF rule compliance*

We would recommend that the Commission, consistent with its historic approach to regulating the futures markets, take a principles-based approach to SEF regulation. A guiding principle for the Commission's approach to regulating swaps trading venues is to encourage more competition among SEFs, resulting in reduced transaction costs and increased liquidity and innovation. By reducing compliance costs, the Commission can reduce barriers to entry in the market for swap execution services and encourage competition.

To provide an example of how the CFTC could reduce compliance costs, we note that a SEF must retain records relating to "all indications of interest, requests for quotes, orders, and trades" whether or not they are entered into an electronic trading system.[40] Designated contract markets however must only retain records relating to "orders entered into an electronic trading system."[41] This means that SEFs' recordkeeping obligations are much broader than DCMs, even though non-electronic communications are commonly used in a pre-trade context on both.

[39] If a counterparty relies on SDR data for commercial reasons, as well as for regulatory purposes, it would have an additional, commercial incentive to review the accuracy of SDR data.

[40] 17 CFR 37.205(b)(2).

[41] 17 CFR 38.552(b).

To provide another example, CFTC Regulation 37.404(a) requires a SEF to "demonstrate that it has access to sufficient information to assess whether trading in swaps listed on its market, in the index or instrument used as a reference price, or in the underlying commodity for its listed swaps is being used to affect prices on its market." In order to implement this, the SEF would need access to trading records that it does not have access to. In contrast, DCMs have no such similar requirement.

*ii. Encourage financial innovation by providing for an incubating sandbox for SEFs below certain volume thresholds*

We also question the value of a full DCM-like regulatory regime, particularly for SEFs that do not offer swaps that are subject to the SEF trading requirement. We would recommend a more flexible regulatory regime for such venues, mirroring perhaps the Securities and Exchange Commission ("SEC")'s flexible approach to regulating alternative trading systems ("ATS") below certain volume thresholds.[42] Such an approach would reduce barriers to entry and enable new SEFs to launch new and innovative financial products with reduced compliance costs until they gain sufficient volumes and revenues to support a more pervasive regulatory regime. In short, SEF regulations should be commensurate to the importance of the trading venue as a market infrastructure and new SEFs should be provided an "incubatory" sandbox to innovate.

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We hope that our comments are helpful to the Commission. We would be more than happy to elaborate or further discuss any of the points addressed above in more detail. In the event you may have any questions, please do not hesitate to contact Salman Banaei, Executive Director for Regulatory and Government Affairs at salman.banaei@ihsmarkit.com or +1 347.324.8818.

[42] See e.g., 17 CFR 242.301(a)(6) (requiring heightened capacity, integrity, and security standards for ATS that exceed certain volume thresholds).