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October 22, 2020

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

Re: *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (RIN 3038-AE77)*

Dear Mr. Kirkpatrick:

The Investment Company Institute (ICI)[1] appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (CFTC or "Commission") on its proposals on the implementation of margin requirements for uncleared swaps for swap dealers (SDs) and major swap participants (MSPs). The CFTC's proposals ("Proposals"), which are based on recommendations of its Global Markets Advisory Committee Subcommittee on Margin Requirements ("GMAC Margin Subcommittee"), are intended to address challenges related to Phase 5 and Phase 6 implementation of the CFTC's uncleared swap margin requirements.[2]

We strongly urge the Commission to adopt the proposed amendments, which provide critical clarity to market participants implementing the Commission's uncleared swap margin requirements—particularly Phase 5 and Phase 6 entities.[3] As noted by the GMAC Margin Subcommittee, the proposed

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[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$26.9 trillion in the United States, serving more than 100 million US shareholders, and US$7.8 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 85 Fed. Reg. 59470 (Sept. 22, 2020) ("First Uncleared Swap Margin Proposal"), *available at* https://www.cftc.gov/sites/default/files/2020/09/2020-18222a.pdf; *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 85 Fed. Reg. 59702 (Sept. 23, 2020) ("Second Uncleared Swap Margin Proposal"), *available at* https://www.cftc.gov/sites/default/files/2020/09/2020-18303a.pdf.

[3] We also recently submitted a joint request with several other industry associations to the US prudential regulators to amend their uncleared swap margin rules in a manner consistent with the Proposals. *See* Letter from Industry Associations

amendments would enable Phase 5 and Phase 6 entities—which represent a significant number of market participants but only 8 percent and 3 percent of average aggregate notional amount (AANA) across all compliance phases, respectively—to implement the margin requirements in a practical and efficient manner.[4] Further, as the Commission has recognized, the COVID-19 pandemic has imposed significant operational challenges and risk management demands on market participants. Therefore, adopting the proposed amendments—which codify existing CFTC staff no-action relief—would help to avoid imposing further implementation challenges ahead of the applicable compliance dates.[5]

We provide our comments in greater detail below.

Background

ICI's members—US-registered investment companies, including mutual funds, ETFs, and other funds that are regulated under the Investment Company Act of 1940 ("registered funds") and non-US regulated funds[6] (together with registered funds, "regulated funds")—use derivatives in a variety of ways. Derivatives are a particularly useful portfolio management tool in that they offer regulated funds considerable flexibility in structuring their portfolios. Specifically, regulated funds employ covered swaps in a variety of ways, including to hedge other investment positions, equitize cash that a regulated fund cannot immediately invest in direct equity holdings, manage a regulated fund's cash positions more generally, adjust the duration of a regulated fund's portfolio or manage a regulated fund's portfolio in accordance with the investment objectives stated in the fund's prospectus.

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to US Prudential Regulators (Aug. 26, 2020) 2-3, *available at* https://www.fdic.gov/regulations/laws/federal/2020/2020-margin-capital-requirements-covered-swap-entities-3064-af55-c-001.pdf (joint comment letter expressing support for the US prudential regulators' interim final rule to defer the Phase 5 and Phase 6 initial margin compliance dates).

[4] The proposed amendments are based on recommendations by the GMAC Margin Subcommittee, which were adopted by the GMAC in May 2020 to enhance the Commission's uncleared margin rules. *See* CFTC Global Markets Advisory Committee, Subcommittee on Margin Requirements for Non-Cleared Swaps, *Recommendations to Improve the Scoping and Implementation of Initial Margin Requirements for Non-Cleared Swaps* (May 19, 2020), *available at* https://www.cftc.gov/media/3886/GMAC_051920MarginSubcommitteeReport/download.

[5] We express appreciation for the Commission's recent adoption of final rules to defer the Phase 5 and Phase 6 compliance dates for an additional year to September 1, 2021 and September 1, 2022, respectively. *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 85 Fed. Reg. 41346 (July 10, 2020) (interim final rule adopting Phase 5 compliance date deferral); *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants* (Oct. 20, 2020) (final rule adopting Phase 6 compliance date deferral). As we noted in the joint comment letter with several other industry associations in support of these deferrals, our members' efforts to prepare for the final implementation phases of the initial margin requirements have been severely impacted by the COVID-19 pandemic due to personnel, systems and other issues. *See* Letter from Industry Associations to CFTC (Aug. 5, 2020), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62693&SearchText=.

[6] "Non-US regulated funds" refer to funds that are organized or formed outside the United States and are substantively regulated to make them eligible for sale to retail investors, such as funds domiciled in the European Union and qualified under the UCITS Directive (EU Directive 2009/65/EC, as amended), Canadian investment funds subject to National Instrument 81-102, and investment funds subject to the Hong Kong Code on Unit Trusts and Mutual Funds.

ICI has long supported the efforts of the CFTC and other financial regulators to ensure the safety and soundness of the swaps markets through the implementation of margin requirements for uncleared swaps.[7] Two-way margin is essential for managing the risk of swaps transactions as well as reducing systemic risk; the collection of initial margin is especially effective in reducing the risk of counterparty credit risk and provides each counterparty protection against the future replacement cost in case of a counterparty default.

The CFTC's uncleared margin rules require initial margin and variation margin to be posted and collected by SDs and MSPs and other entities with "material swaps exposure" (MSE), which is defined under Regulation 23.151 as an average daily aggregate notional amount of uncleared swaps with all counterparties above $8 billion.[8] Initial margin requirements apply in accordance with a phased compliance schedule set forth in Regulation 23.161. Phase 5 entities, *i.e.*, entities with an AANA between $50 billion and $750 billion, and Phase 6 entities, *i.e.*, entities with an AANA between $8 billion and $50 billion, must comply with these requirements beginning on September 1, 2021 and September 1, 2022, respectively.[9]

A large number of smaller entities, including many regulated funds, continue to devote considerable time and resources to complete the numerous operational, legal, and logistical steps needed to comply with the remaining initial margin compliance dates. These requirements are significant and include adopting initial margin models, calculating AANA among different accounts, amending bilateral documentation, and establishing third-party segregated accounts. Accordingly, market participants have greatly benefited from the actions taken by the CFTC and its staff to promote this progress, which include staff no-action relief and measures to further harmonize with the international framework for uncleared margin. These measures have helped significantly in mitigating the complexity of the

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[7] *See, e.g.* Letter from Dan Waters, Managing Director, ICI Global, to Robert deV. Frierson, Board of Governors of the Federal Reserve System, et al., *Margin and Capital Requirements for Covered Swap Entities, Proposed Rule; Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, Proposed Rule* 5 (Nov. 24, 2014) ("2014 ICI Global Letter"); Letter from Karrie McMillan, General Counsel, ICI, to Elizabeth M. Murphy, Secretary, SEC, *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker Dealers* 3-4 (Feb. 4, 2013); Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to Wayne Byres, Secretary General, BCBS, and David Wright, Secretary General, IOSCO, *Consultation Paper on Margin Requirements for Non-Centrally Cleared Derivatives* 4-5 (Sept. 27, 2012); Letter from Karrie McMillan, General Counsel, ICI, to David A. Stawick, Secretary, CFTC, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants* 3-4 (Sept. 13, 2012); Letter from Karrie McMillan, General Counsel, ICI, to David A. Stawick, Secretary, CFTC, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants* 3-4 (July 11, 2011).

[8] Regulation 23.151 currently provides that MSE for an entity means that the entity and its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July, and August of the previous calendar year that exceeds $8 billion.

[9] Regulation 23.161. The Commission recently adopted final rules amending Regulation 23.161(a)(7) to defer the compliance dates for Phase 5 and Phase 6 entities. *See supra* note 5.

implementation process and avoiding disruptions to regulated funds' ability to continue using uncleared swaps.

Summary of the Proposals

The Proposals would revise the CFTC's uncleared margin rules to codify certain no-action relief that the Division of Swap Dealer and Intermediary Oversight (DSIO) has provided under No-Action Letters No. 17-12 and No. 19-25.[10] Among other changes, the proposed amendments would:

- revise the calculation method and compliance timing for initial margin requirements to align with the framework set forth by the Basel Committee on Banking Supervision and Board of the International Organization of Securities ("BCBS-IOSCO Framework");
- permit an SD or MSP to apply a minimum transfer amount (MTA) of up to $50,000 to each separately managed account (SMA) of a counterparty with which it enters into an uncleared swap; and
- permit an SD or MSP to apply separate MTAs for initial margin and variation margin, provided that the combined amount of those MTAs does not exceed the existing $500,000 limit.

Alignment of Material Swaps Exposure Calculation and Methodology with the BCBS-IOSCO Framework

The Proposals would amend the definition of "material swaps exposure" (MSE) under the CFTC's uncleared margin rules[11] to align the CFTC's requirements with the BCBS-IOSCO Framework with respect to the (i) timing and methodology for calculating AANA to determine MSE; and (ii) post phase-in compliance periods. Currently, under CFTC rules, financial end-users such as regulated funds must annually determine whether they are subject to initial margin requirements, starting on January 1, by calculating their MSE based on the average of *daily* AANA during June, July and August of the prior year (emphasis added). In contrast, the BCBS-IOSCO Framework bases the MSE calculation on the average of *month-end* AANA for March, April, and May of the current year, with initial margin requirements to apply starting on September 1 of that year (emphasis added).

We strongly support alignment of the Commission's calculation of MSE and post-phase-in compliance dates with the BCBS-IOSCO Framework. Many derivatives transactions are conducted across multiple jurisdictions and, therefore, BCBS's and IOSCO's efforts to establish consistent global standards have

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[10] CFTC Letter No. 19-25 (Dec. 6, 2019), *available at* https://www.cftc.gov/csl/19-25/download; CFTC Letter No. 17-12 (Feb. 13, 2017), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/17-12.pdf.

[11] Regulation 23.151.

furthered compliance with margin requirements for uncleared swaps and facilitated regulatory coordination of oversight of these rules.[12]

In adopting its uncleared margin rules, the Commission has acknowledged the benefits of harmonization and accordingly aligned its rules with the BCBS-IOSCO Framework in other respects.[13] Regulators' divergent approaches to determining MSE, however, currently require market participants to perform multiple different calculations across various jurisdictions. This result causes market participants to expend additional operational resources without providing any additional benefit. Aligning the Commission's calculation methods, timing, and post-phase-in compliance dates with the BCBS-IOSCO Framework would allow funds to fulfill initial margin obligations more efficiently by reducing unnecessary operational burdens and costs.

We do not believe that the proposed approach to calculating MSE would result in a less accurate representation of a market participant's swaps trading activity. An AANA calculation under the proposed approach would still be based on the average of multiple periodic month-end dates. As the Commission noted, its Office of the Chief Economist's analysis of current-year swap data has demonstrated that harmonization with the international framework would not have a material negative impact on the number of entities subject to initial margin requirements.[14]

Nor do we believe that harmonization with the BCBS-IOSCO Framework would increase the likelihood of market participants engaging in trading activity designed to stay below the MSE. The Commission previously expressed concern that using fewer observations than those provided under average daily AANA to determine MSE could allow "window dressing" of swaps exposure on a *single* date to avoid initial margin (emphasis added).[15] The investment adviser to a regulated fund is a fiduciary to the fund. The adviser is legally obligated to manage the fund's assets in accordance with that fund's investment strategy, policies, and limitations, without taking into account the positions of

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[12] ICI and ICI Global have long supported the BCBS-IOSCO efforts and harmonization among different regulatory regimes. *See, e.g.*, 2014 ICI Global Letter at 3; Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to Wayne Byres, Secretary General, BCBS, and David Wright, Secretary General, IOSCO, *Second Consultation Paper on Margin Requirements for Non-Centrally Cleared Derivatives* 24-33 (Mar. 14, 2013).

[13] For example, the Commission adopted the additional Phase 6 compliance date for its initial margin requirements based in part on a similar revision to the BCBS-IOSCO Framework, citing its "effort to undertake coordinated action with international counterparts with respect to uncleared swaps margin rules." *See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 85 Fed. Reg. 19878, 19879 (Apr. 9, 2020).

[14] CFTC data show a net loss of 2 entities that would be subject to initial margin. However, many of the entities that would not be subject to initial margin, as shown in the data, tend to be the smallest entities with an average AANA of under $8 billion. Second Uncleared Swap Margin Proposal at 59707.

[15] *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 81 Fed. Reg. 636, 645 (Jan. 6, 2016) ("2016 Uncleared Swap Margin Rule").

other funds or client accounts that the adviser manages.[16] Adjusting swap exposures over the course of three periodic dates solely to avoid initial margin could impose additional transaction costs and inhibit a fund's ability to manage its portfolio risk, which may be inconsistent with the adviser's duty to act in the best interest of its clients.

Minimum Transfer Amount for Separately Managed Accounts

The Proposals would amend the MTA definition under the CFTC's uncleared margin rules[17] to allow an SD or MSP to apply an MTA of $50,000 to each separately managed account (SMA) that is owned by a counterparty. The current MTA definition allows an SD or MSP to not post or collect initial margin or variation margin with a counterparty until the combined amount of swap exposures with that counterparty exceeds the $500,000 threshold. Based on the practical difficulties of applying a single $500,000 threshold to a counterparty that owns multiple SMAs, DSIO has provided ongoing no-action relief under Letter No. 17-12 to permit an SD or MSP to instead apply a separate $50,000 MTA to each SMA.

We strongly urge the Commission to amend the MTA definition to codify the relief provided in Letter No. 17-12.[18] Having the ability to apply a separate MTA to each SMA is critical to advisers that provide investment management services to regulated funds and other clients through an SMA structure. Regulated funds, for example, may utilize multiple managers to separately invest portions of the fund's portfolio according to different investment mandates or strategies. Each separately managed portion of such a fund is treated as an SMA, which maintains its own payment and margin netting arrangements when executing uncleared swap transactions with an SD and limits its contractual liability, to the extent legally possible, to that portion of the portfolio. Importantly, each SMA of a fund typically maintains the confidentiality of its trading activities and, therefore, lacks the visibility and awareness of other SMAs' swap trading, which would be necessary to determine whether a fund's swaps activity in the aggregate has met the single $500,000 MTA threshold.[19]

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[16] *See* Section 206 of the Investment Advisers Act. As a fiduciary, an investment adviser must, among other things, act in the best interest of its clients and place the interests of its clients before its own. Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 84 S. Ct. 275 (1963).

[17] Regulation 23.151.

[18] Amending the MTA definition in this manner also would be consistent with the approach to SMAs taken by CFTC staff in No-Action Letter Nos. 19-17 and 20-28. In Letter No. 19-17, CFTC staff provided guidance regarding Regulation 1.56(b) and time-limited no-action relief regarding the application of Regulation 39.13(g)(8)(iii) as those regulations relate to the treatment of SMAs of the same beneficial owner customer of a futures commission merchant (FCM). *See* CFTC Letter No. 19-17 (July 10, 2019), *available at* https://www.cftc.gov/csl/19-17/download. In Letter No. 20-28, CFTC staff provided an extension of the time-limited no-action relief in Letter No. 19-17, along with further guidance regarding the treatment of SMAs by FCMs. *See* CFTC Letter No. 20-28 (Sept. 15, 2020), *available at* https://www.cftc.gov/csl/20-28/download.

[19] The Commission has previously recognized that this is an established industry practice. *See* 2016 Uncleared Swap Margin Rule at 653 ("[T]he Commission recognizes these types of asset management approaches are well-established industry

Regulated funds and other financial end-users have addressed the operational challenge of calculating MTA with respect to SMAs by relying on the relief DSIO provided in Letter No. 17-12. This relief has allowed regulated funds to instead focus their efforts and limited resources on addressing the most challenging aspects of implementing the uncleared margin requirements, which include the negotiation of collateral support documentation. Therefore, codifying this relief will not only provide greater regulatory certainty, but also ensure that financial end-users such as funds may benefit from the purpose of an MTA, which is to alleviate the operational burdens of *de minimis* margin transfers.

We recognize the concern that permitting a separate MTA for each SMA could potentially result in industry participants exchanging a lower total amount of initial margin than the amount exchanged when applying a single MTA. However, we believe that these concerns would be ameliorated for several reasons.[20] First, each manager to an SMA of a fund typically has the discretion to invest and manage the portion of the fund's portfolio assets that the SMA represents. This discretion includes executing swaps for the SMA on behalf of a fund where appropriate to carry out the investment mandate or strategy. Given that the asset manager typically maintains confidentiality with respect to its trading activities and lacks awareness regarding other SMAs' activities, it is extremely unlikely that an SMA manager of a specified portion of fund assets could coordinate its activities with other SMA managers to minimize the fund's margin requirements.[21] Second, the significant operational and cost burdens associated with creating and maintaining additional SMAs make it unlikely that an adviser would establish additional SMAs solely as a means to minimize initial margin obligations.[22] Third, consistent with the current no-action relief, the application of separate MTAs would continue to be limited to financial end-users that typically have smaller amounts of AANA, *i.e.*, Phase 5 and Phase 6 financial end-users, which represent

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practice, and that separate managers acting for the same fund or plan do not currently take steps to inform the fund or plan of their uncleared swap exposures on behalf of their principal on a frequent basis."). Further, we note that many advisers maintain confidentiality of their trading activity in the accounts that they manage to qualify for the CFTC's Independent Account Controller (IAC) exemption from the aggregation requirement for position limits. The IAC exemption includes conditions that prevent coordination of trading, including written procedures to preclude affiliated entities from having knowledge of, gaining access to, or receiving data about, trades of the other and such procedures must include arrangements that would maintain the independence of their activities. Regulation 150.4(b)(4).

[20] We agree with the Commission's view that the proposed $50,000 MTA threshold for each SMA is set appropriately low to mitigate the possibility of exchanging less initial margin.

[21] In this respect, we note our support for the proposed requirements that incorporate the conditions to relief set forth in Letter No. 17-12. These proposed requirements appropriately limit the scope of SMA owners that may apply separate MTAs and reflect the practical reasons for continuing to allow financial end-users such as funds to do so. The requirements include limiting the ability to use separate MTAs where swaps are entered into by an asset manager on behalf of the SMA pursuant to authority granted under an investment management agreement, and where the swaps are subject to a master netting agreement that does not permit the netting of initial margin or variation margin obligations across SMAs.

[22] These burdens include, for example, establishing for each SMA separate documentation and custodial arrangements, as well as maintaining separate payment and margin netting arrangements.

only 11% of AANA across all phases.[23] Therefore, the potential lower exchange of initial margin would not implicate concerns about a significant increase in systemic risk.

Separate Minimum Transfer Amount for Initial Margin and Variation Margin

The Proposals would amend the uncleared margin rules to allow a SD or MSP to apply separate MTAs for initial margin and variation margin for each counterparty, provided that the combined MTAs do not exceed the single $500,000 MTA threshold.[24] The current MTA definition specifies that the single MTA threshold applies to a combined amount of initial margin and variation margin. To accommodate established industry operational practices related to margin exchange, however, CFTC staff has provided time-limited no-action relief under Letter No. 19-25 to allow an SD or MSP to apply separate MTAs for initial margin and variation margin with each swap counterparty.

We strongly urge the Commission to codify the relief provided in Letter No. 19-25. Allowing an SD or MSP to apply separate MTAs for initial margin and variation margin is consistent with the existing practice among counterparties to uncleared swaps of establishing separate amounts in credit support annexes (CSAs). Failure to codify this relief would impose significant costs and burdens on industry participants, as it would require market participants to amend large numbers of CSAs, as well as require costly changes to firms' operational systems to apply MTAs on a combined basis for initial and variation margin. In the absence of relief, counterparties would be required to reconcile two operational processes: margin calculation protocols that account for a combined MTA and different settlement workflows that exist for initial margin and variation margin settlement.[25] Allowing separate MTAs would be consistent with the regulations of other major jurisdictions such as the EU, thus promoting harmonization and greater operational efficiencies for financial end-users.

We acknowledge the concern that allowing market participants to apply separate MTAs for initial margin and variation margin could in some scenarios lead to the exchange of a lower overall amount of margin than under a single combined MTA. For example, a combined initial margin and variation margin calculation could exceed the prescribed $500,000 MTA limit and require posting of the full margin amount; separate calculations based on separate MTAs, however, could result in the required posting of initial margin, but not variation margin. Nevertheless, given that the separate MTAs remain subject to the existing overall $500,000 MTA limit, we agree with the CFTC staff's view in Letter No.

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[23] Richard Haynes, Madison Lau, & Bruce Tuckman, CFTC Office of the Chief Economist, *Initial Margin Phase* 5 1 (Oct. 24, 2018), *available at* https://www.cftc.gov/sites/default/files/About/Economic%20Analysis/Initial%20Margin%20Phase%205%20v5_ada.pdf.

[24] Regulation 23.158(a).

[25] The different workflows for margin settlement are attributable to the Commission's margin segregation requirements, which differentiate treatment of initial margin and variation margin. The Commission's margin rules require initial margin to be segregated with an unaffiliated third party and do not impose similar segregation requirements with respect to variation margin. Regulation 23.702.

19-25 that the potential reduction in posted margin is unlikely to cause material increases in systemic risk.

Further, we support the recommendation of the GMAC Margin Subcommittee that separate MTAs for initial margin and variation margin should be permitted for SMAs, applied in an analogous manner as the proposed $50,000 aggregate limit for each SMA. As noted earlier above, each SMA maintains its own payment and margin netting arrangements, including separate workflows for initial margin and variation margin settlement. Therefore, allowing separate MTAs would avoid subjecting funds that use multiple SMAs to carry out different investment strategies to bear the operational burdens of adhering to a combined single amount, as described above. Further, allowing separate MTAs for each SMA would establish a straightforward and consistent regulatory approach to applying MTA thresholds for all financial end-users and their SMAs without a significant increase to uncollateralized risk.

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We appreciate the opportunity to comment on the Proposals. We also encourage the Commission to consider the other recommendations adopted by the GMAC Margin Subcommittee, which are intended to further promote implementation of the CFTC's uncleared swap margin rules.

If you have any questions on our comment letter, please feel free to contact me at (202) 326-5835 or Nhan Nguyen, Counsel, at (202) 326-5810.

Sincerely,

/s/ Sarah A. Bessin

Sarah A. Bessin
Associate General Counsel

cc: The Honorable Heath P. Tarbert
The Honorable Brian D. Quintenz
The Honorable Rostin Behnam
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