May 13, 2024

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

VIA ONLINE SUBMISSION

RE: Request for Comment on Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions

Dear Mr. Kirkpatrick:

Miami International Holdings, Inc. ("**MIH**"), the Minneapolis Grain Exchange, LLC ("**MGEX**"), and LedgerX LLC d/b/a MIAX Derivatives Exchange ("**MIAXdx**") (collectively, the "**MIH Entities**") appreciate the opportunity to comment on the Commodity Futures Trading Commission's ("**Commission**" or "**CFTC**") notice of proposed rulemaking titled Requirements for Designated Contract Markets ("**DCMs**") and Swap Execution Facilities ("**SEFs**") Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation ("**Proposal**").[1] As explained further below, although we support the objectives and certain aspects of the Proposal, we have concerns about other aspects of the rulemaking, including the ramifications of largely codifying the DCM and SEF Core Principle guidance into binding regulatory text.

Historically, the Core Principle guidance has informed how exchanges satisfy their regulatory obligations, while simultaneously affording each registered entity the flexibility to develop and implement processes tailored to its business. Indeed, the Core Principle guidance has largely been so effective precisely because it is intended to apply concepts to which registrants must comply, rather than imposing specific, defined requirements.

[1] Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions, 89 Fed. Reg. 19646 (March 19, 2024).

The MIH Entities believe, however, that this conceptual approach is not appropriate for binding regulations that impose affirmative duties upon exchanges. With this distinction between guidance and regulation in mind, the MIH Entities have respectfully identified certain areas below where broad or ambiguous text from the Proposal could be clarified prior to implementing final rules.

I. Introduction

MGEX and MIAXdx are wholly-owned subsidiaries of MIH, a technology-driven leader in building and operating regulated financial markets across multiple asset classes and geographies. MIH is the fourteenth largest global derivatives exchange group by executed volume in 2023 and the fastest growing exchange group for U.S. multi-listed options since 2016.[2] MGEX is regulated by the CFTC as a DCM and Derivatives Clearing Organization ("**DCO**"). MIAXdx is regulated by the CFTC as a DCM, SEF, and DCO.

II. Proposal

A. Proposed Governance Fitness Requirements – §§ 37.207, 38.801

The Proposal would "require SEFs and DCMs to establish minimum fitness standards for certain categories of individuals who are responsible for exchange governance, management, and disciplinary functions, or who have potential influence over those functions."[3] The Proposal clarifies that these categories of individuals are: (i) officers; (ii) members of the board of directors; (iii) committees; (iv) disciplinary panels and dispute resolution panels; (v) members of the SEF or DCM; (vi) any other person with direct access to the SEF or DCM; (vii) any person who owns 10 percent or more of a SEF or DCM **and** who, ***either directly or indirectly, may control or direct*** the management or policies of the DCM; and (viii) any party affiliated with any of the above.[4]

In connection with the codification of these minimum fitness standards, the Commission would also require that SEFs and DCMs independently verify the fitness information provided to them. The Commission explained that "[i]ndependent verification of fitness information is particularly important because certain individuals could be disincentivized from self-reporting fitness information that could disqualify them from service."[5] The Commission also stated that "SEFs and DCMs should verify fitness information provided by individuals by collecting information from third parties, for example, via the National

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[2] Compiled from source data available at theocc.com. *See also* FIA ETD Tracker, Volume by Exchange, available at https://www.fia.org/fia/etd-tracker.
[3] Proposal, 89 Fed. Reg. at 19656.
[4] *Id*. at 19657.
[5] *Id*. at 19659.

Futures Association's ('NFA') Background Affiliation Status Information Center ('BASIC') system or background checks."[6]

The MIH Entities support the concept of "excluding individuals with a history of certain disciplinary or criminal offenses from serving in roles with influence over the governance and operations of the exchange."[7] Ensuring those responsible for exchange governance, management, and disciplinary functions are ethically and morally fit to serve in their roles is of utmost importance for DCMs and SEFs. However, it is also necessary that DCMs and SEFs have reasonable clarity and discretion to effectuate this important goal. We believe the proposed rules could be further tailored and clarified, as outlined below, while still achieving their underlying objective.

First, the categories of individuals who would be subject to the proposed minimum fitness standards could be revised to (i) clarify the scope of the requirement, and (ii) more closely align with the universe of persons currently covered by DCM Core Principle 15 and CFTC Rule 1.63—namely, "persons who have governing obligations or responsibilities, or who exercise disciplinary authority."[8]

- "Officers" is a broad term subject to varying interpretations (for example, "senior officer," "corporate officer," or "designated officer"). The term could be further defined to avoid confusion or inconsistent application of the minimum fitness standards among DCMs and SEFs. For example, certain types of officers (*e.g.*, Chief Marketing Officer or Chief Data Officer) are not principally concerned with exchange governance matters and it is unclear if they would also be subject to the minimum fitness standards. Providing additional clarity would assist DCMs and SEFs in identifying the critical employees that should be subject to such practices and avoid the extension of minimum fitness standards to unnecessary or unrequired individuals. Similarly, it would also be helpful to clarify that the reference to "committees" in the rule text refers to board committees and not to other types of committees that may exist within an organization.

- The Commission also proposes, for the first time, to impose fitness requirements on persons due (at least in part) to their ownership interest in the DCM or SEF. Specifically, the proposed fitness requirements would apply to "any person who owns 10 percent or more of a SEF or DCM **and** who, *either directly or indirectly*, through agreement or otherwise, in any other manner, *may control or direct the management or policies of the SEF or DCM*."[9] The scope of this category could clarified in several ways.

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6 *Id*.
7 *Id*. at 19656.
8 DCM Core Principle 15(a). *See also* CFTC Rule 1.63(b) for comparable requirements currently applicable to SEFs.
9 Proposal at 19657 (emphasis added).

- It is unclear whether "person" includes entities (as the term "person" is defined to include under CFTC Rule 1.3) or only individuals.[10] If the term is intended to include entities, it is unclear how DCMs and SEFs should apply the minimum fitness standards. For example, should DCMs and SEFs assess whether specific individuals employed by these entities meet the minimum fitness standards? Or, do the fitness standards apply to the entity itself, which could result in many entities being automatically disqualified on the bases of settlements with other regulators that would trigger a statutory disqualification under CEA Sections 8a(2) and 8a(3).[11] If the Commission's intent is to subject firms to these fitness requirements, the MIH Entities respectfully request that the rules be revised to include a process by which DCMs and SEFs may disclose any potential grounds for disqualification to the NFA or CFTC and seek a waiver.

- If the Commission declines to limit application of the 10 percent ownership interest of a SEF or DCM to individuals, then the MIH Entities respectfully request that the Commission clarify that this requirement only extends to *direct* owners of DCMs and SEFs, and not to entities that may indirectly have a 10 percent or more interest in the DCM or SEF. Based upon the rule text, we interpret this requirement to apply only to firms with a direct ownership of 10 percent or more in the DCM or SEF, but confirmation would simplify the implementation of this requirement by DCMs and SEFs. Further, if entities are included in this requirement, the MIH Entities respectfully request that the Commission not apply these minimum fitness standards to "any party affiliated with" the entity possessing the ownership interest, as some firms have dozens or hundreds of affiliates that would then become subject to these fitness standards, despite having no involvement with the DCM or SEF.

- The Proposal does not explain how DCMs and SEFs should determine if a person (either a firm or an individual) "directly or indirectly, through agreement or otherwise, in any other manner may control or direct the management or policies of the SEF or DCM." The Proposal suggests, but does not state, that a 10 percent ownership interest presumptively creates such control. It is also unclear what the Commission means by "*may*

[10] CFTC Rule 1.3 (defining "person" to include "individuals, associations, partnerships, corporations, and trusts").

[11] For example, a firm that entered into a settlement with the Securities and Exchange Commission for violations of the Securities Exchange Act of 1934 appears to be automatically barred under the Proposal from maintaining an ownership interest in the DCM or SEF, provided it otherwise "may control or direct the management or policies of the SEF or DCM." The disqualification arises from CEA Section 8a(3)(B)(i) and the Proposal does not provide a process by which the NFA or CFTC could waive the disqualification. *See* Proposed Rules 37.207(b) and 38.801(b).

> control." In other contexts, the Commission has focused on the actual possession of the power to direct or cause the direction of management and policies, rather than the *possibility* that an entity *might* be able to exert control.[12] For example, the preamble suggests that a person without the legal or contractual power to direct management or policy may nevertheless fall within this definition due to their powers of persuasion.[13] The MIH Entities respectfully submit that without a more concrete, defined definition of control, any entity with a 10 percent or greater ownership interest arguably falls within the ambit of this proposed requirement.

Second, the Commission proposes that SEFs and DCMs must independently verify the fitness information reported to them. It is unclear, however, what standard of independent verification would satisfy this requirement. For example, if a person or firm is not listed in NFA BASIC, it is unclear if the SEF or DCM must utilize a professional background check service to confirm no disqualification exists, or if an in-house due diligence may suffice, despite perhaps being less comprehensive than a formal background check. Moreover, it is unclear how the Commission expects SEFs and DCMs to satisfy the annual verification requirement. For example, the Proposal does not state if the annual verification requirement requires the DCM and SEF to conduct full-fledged background checks on all covered personnel annually, or if an attestation would suffice.

Background checks are costly, consume significant resources, and subsequent checks that merely confirm the initial vetting may be of limited value relative to the cost, especially for smaller or newer DCMs or SEFs with limited resources. Clarifying the level of due diligence required for both the initial verification and ongoing annual verification would have a significant impact on DCMs and SEFs, each of which may have dozens or even hundreds of potential annual background checks to conduct, either to reaffirm an incumbent's prior background check or to conduct background checks for new individuals. Following the completion of a successful initial background check, and in the absence of any red flags, the MIH Entities believe that an annual attestation by incumbent persons should satisfy this requirement.

As noted above, the MIH Entities support ensuring that those with governing or disciplinary authority over SEFs and DCMs are ethically and morally fit to serve in their roles. Without the clarifications described above, however, the MIH Entities believe the cost and resources necessary for SEFs and DCMs to comply with the requirement would dramatically increase without any concomitant benefit.

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[12] *See* 77 Fed. Reg 30596, 30631 n. 437 (May 23, 2012) (defining "control" for purposes of the swap dealer *de minimis* exception).

[13] Proposal at 19657 ("While individuals who own 10 percent or more of a SEF or DCM may not be involved in the daily operations of a SEF or DCM, their sizable ownership interest may, either directly or indirectly, *enable them to exert influence* or control over various aspects of decision-making….") (emphasis added).

B. Proposed Substantive Requirements for Identifying, Managing and Resolving Actual and Potential Conflicts of Interest – §§ 37.1201-1203, 38.851-853

The MIH Entities generally support the codification of conflict of interest requirements under parts 37 and 38 for SEFs and DCMs, respectively. As discussed further below, however, we believe there are certain aspects of the Proposal that could be narrowed or clarified in order to make these requirements more transparent and effective.

i. General Requirements – §§ 37.1201, 38.851[14]

The Proposal would require, consistent with existing DCM Core Principle guidance, that SEFs and DCMs "establish a process for identifying, minimizing, and resolving actual or potential conflicts of interest that may arise including, but not limited to, conflicts between and among any of the [SEF/DCM's] market regulation functions; its commercial interests; and the several interests of its management, members, owners, customers and market participants, other industry participants, and other constituencies."[15] The MIH Entities support the codification of this existing requirement, but believe the Proposal could be clarified in three ways.

First, the Commission "proposes defining 'affiliate' in proposed §§ 37.1201(b)(1) and 38.851(b)(1), to mean a person that directly or indirectly controls, or is controlled by, or is under common control with, the SEF or DCM (as applicable). The definition of affiliate in the Proposal would establish that, 'affiliate' broadly includes direct or indirect common ownership or control."[16] MIH requests the Commission make certain clarifications regarding the term "affiliate". The proposed definition does not include (i) a minimum percentage of ownership interest required to be an affiliate, (ii) stipulate if an ownership interest must be direct, or (iii) define what the "control standard" is for purposes of defining who may be an affiliate (*i.e*., whether control is imputed by virtue of a specific percentage of ownership or whether a contractual ability to exercise control qualifies). This lack of clarity leaves open for interpretation whether entities that make small strategic investments constitute affiliates for purposes of the Proposal. For example, it is uncertain if a firm with a five percent ownership interest in the SEF or DCM that otherwise has no involvement in the day-to-day operations of the SEF/DCM would nonetheless qualify as an affiliate under the Proposal. Moreover, it is unclear how the affiliate definition would apply to *that* firm's affiliates and subsidiaries, who would be even further removed from the SEF's or DCM's operations. Without a bright-line test, the affiliate definition will likely be over-inclusive and could create an unrealistic and unnecessary web of potential conflicts of interest where none actually exist.

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[14] The MIH Entities believe there is a typo in Proposed Rule 38.851(b)(9). We believe the reference to DCM Core Principle 17 (Composition of Governing Boards of Contract Markets) is intended to be to DCM Core Principle 18 (Recordkeeping).

[15] Proposed Rules 37.1201(a) and 38.851(a).

[16] Proposal at 19661.

Second, the MIH Entities respectfully request that the Commission further clarify how DCMs and SEFs should address actual or potential conflicts of interests with the "several interests of its management, members, owners, customers and market participants, other industry participants, and other constituencies." The guidance for DCM Core Principle 16 in Appendix B currently includes this language in the context of emphasizing the importance of remaining "vigilant" for conflicts between the exchange's own commercial interests and the interests of a variety of other constituencies. In the context of guidance that tries to more clearly elucidate how DCMs should conceptualize and implement a conflicts of interest framework, such broad, expansive language may be appropriate and helpful. However, in the context of establishing an affirmative, regulatory requirement with which SEFs and DCMs must comply (and evidence their compliance with), the breadth of the language seems unworkable. SEFs and DCMs may have commercial interests that inherently conflict, or are in competition, with the interests of other industry participants, including other SEFs and DCMs, without causing any harm to the integrity of the markets or customers. The MIH Entities respectfully request that the Commission remove the broader categories of market participants, industry participants, and other constituencies from any final rule text.

Third, the preamble expands upon the definition of "family relationship" in the regulatory text by stating that "the relationships listed in this proposed definition are not exhaustive; rather, each relationship should be viewed in light of the particular circumstances surrounding the relationship and the closeness of the relationship."[17] However, the definitions under Proposed Rules 37.1201(b)(7) and 38.851(b)(7) do not indicate that the definition is not intended to be an exhaustive list. The MIH Entities respectfully suggest that the Commission, for purposes of regulatory clarity, indicate that the list in the regulatory text is exhaustive.

ii. Conflicts of Interest – §§ 37.1202, 38.852

The Proposal seeks to "codify and harmonize for SEFs and DCMs, in proposed §§ 37.1202 and 38.852, respectively, certain elements of Commission regulation § 1.69 that require a self-regulatory organization to address the avoidance of conflicts of interest in the execution of its self-regulatory functions."[18] As a general matter, the MIH Entities support the harmonization of this requirement across SEFs and DCMs and the codification of the requirement, respectively, under parts 37 and 38. However, the MIH Entities respectfully request that the Proposal be revised to more closely align with the existing scope and requirements of CFTC Rule 1.69, as explained below.

CFTC Rule 1.69 currently prohibits members of the board of directors and others with disciplinary or governing authority from voting on any matter "involving a named party of

[17] *Id*. at 19662.
[18] *Id*. at 19661. As the Proposal notes, DCMs are currently exempt from regulation § 1.69 but most have voluntary adopted rules to implement these requirements.

interest" if certain enumerated relationships exist between the person voting and the named party of interest. Significantly, the proposal does not include the "named party of interest" limitation, but instead states that persons may not vote or deliberate on a matter if a potential or actual conflict exists between the voting person and "the subject of any matter being considered."

The proposed language raises questions about how the term "matter" should be defined for purposes of applying the voting and deliberation prohibition. For example, the Proposal states that conflicts of interest may arise when a board member or officer "has any ongoing business relationship with or a financial interest in the subject of any matter being considered."[19] The Proposal does not establish a minimum threshold for what constitutes a business relationship or financial interest (for example, CFTC Rule 1.69 clearly defines what it means for a member to have a "financial interest in a significant action" such that they must abstain from deliberations or voting). As drafted, if a board member or officer (i) has any financial or ownership interest in the SEF or DCM, or (ii) has any financial or ownership interest in a participant on the exchange, they could be prohibited from deliberating and voting on general strategic or commercial decisions that regularly come before the board. Decisions implicating the financial condition or growth strategy of the DCM or SEF will necessarily also have potential impacts on a board member's own interest in the DCM or SEF or interest in a participant on the exchange.

In contrast to the Proposal, the deliberation and voting prohibition under CFTC Rule 1.69 is limited to matters explicitly involving the "named party of interest"—that is, a member cannot vote on a matter where the *specific market participant* they are associated with was named (*i.e*., a disciplinary matter involving Firm A), but they can vote on matters that *generally affect all participants* (including Firm A). The MIH Entities believe that applying the deliberation and voting prohibition to the specific relationship the board member or officer has with a named entity, rather than a broader, more amorphous "interest in the subject of any matter being considered" is a more effective, tailored approach to addressing conflicts.

The Proposal also requires "any officer or member of a board of directors, committee, or disciplinary panel … that has an actual or potential conflict of interest … to abstain from deliberating or voting on such matter."[20] The MIH entities understand and support the rationale for this aspect of the Proposal, but respectfully request that the Commission clarify this provision in two ways.

First, the MIH entities believe that what constitutes a "potential" conflict of interest could be further defined. The MIH Entities request that the Commission clarify that the "potential conflict" language is intended to address situations where a conflict does not currently exist, but where one is reasonably anticipated to exist in the future based upon one or more anticipated events and/or circumstances occurring in the future.

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[19] Proposed Rules 37.1202(a)(1)(iv) and 38.852(a)(1)(iv).
[20] Proposed Rules 37.1202(a)(3) and 38.852(a)(3) (emphasis added).

Second, unless the Commission revises the rule text to narrow the voting and deliberation prohibition to matters explicitly involving a "named party of interest" as discussed above, the MIH Entities respectfully request that the Commission allow individuals to participate in deliberations, but not voting, if they disclose any potential or actual conflicts of interest to Regulatory Oversight Committee ("**ROC**") and the ROC approves of their participation in the deliberations. We believe a limited exception that permits deliberation (but not voting) upon disclosure and approval by the ROC is consistent with the current exception under Rule 1.69(b)(3)(i) that permits participation in deliberations if it "would be consistent with the public interest."

iii. Limitations on the Use and Disclosure of Material, Non-Public Information – §§ 37.1203, 38.853

The Commission proposes that DCMs and SEFs "establish and enforce policies and procedures on safeguarding the use and disclosure of material non-public information. These policies and procedures must, at a minimum, prohibit a SEF or DCM employee, member of the board of directors, committee member, consultant, or owner with a 10 percent or more interest in the SEF or DCM, from trading commodity interests or related commodity interests based on, or disclosing, any non-public information obtained through the performance of their official duties."[21] The Proposal is generally consistent with the prohibition on the use or disclosure of material, non-public information ("**MNPI**") under existing CFTC Rule 1.59, with the exception that it would expand the prohibition to "those with an ownership interest of 10 percent or more in the SEF or DCM."[22] Although the MIH Entities generally support the codification of the treatment of MNPI under parts 37 and 38, we have concerns, similar to those explained above, regarding how the rule is intended to apply to entities, in addition to individuals, with an ownership interest.

As a threshold matter, it would be helpful for the Commission to clarify whether the rule applies to both entities and individuals with ownership interests, and, if the rule does encompass entities, to specify how the ownership interest should be calculated (*i.e*., direct or indirect ownership interests) and if a minimum percentage of ownership is necessary to trigger the regulation's applicability. Including entities with an indirect ownership interest in the SEF or DCM could greatly expand the scope of the regulation to entities with a tangential relationship with the exchange. This, in turn, would greatly increase the costs to DCMs and SEFs of implementing policies and procedures to ensure compliance with the regulation. As we discuss further below, we believe the prohibition against disclosure or use of MNPI should only apply to entities who have actual knowledge of the MNPI; theoretical knowledge should not be imputed to indirect owners who may have no involvement with the exchange and over which the exchange itself has no control.

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[21] Proposal at 19664.
[22] *Id*. at 19663.

As drafted, the Proposal imputes knowledge of MNPI that certain individuals at an entity may have to the entire organization. For example, certain individuals employed by (or associated with) a trading firm with a 10% ownership interest may have MNPI that they *personally* should be prohibited from trading on or disclosing, but this prohibition should not prevent the *firm* from trading for its own account (or on the behalf of its customers) or *other individuals* employed by the firm from trading for their own account (providing they are otherwise authorized to do so) more generally.

The MIH Entities respectfully request that if the regulation is intended to apply to entities, in addition to individuals, that it be clarified to focus on restricting the trading on, or disclosure of, MNPI by the individuals at the entity in possession of the MNPI, rather than the entity itself or other individuals employed by the entity. We believe this clarification is consistent with the fundamental purpose of the regulation, which is to prevent improper trading "on the basis of material non-public information" and the disclosure of MNPI "for any purposes inconsistent with the performance of the person's official duties."[23] It also furthers the Commission's stated goal "not [] to impair the ability or diminish the willingness of knowledgeable industry members who are also active traders from serving on a self-regulatory organization's board of directors or its major policy or disciplinary committees."[24] If an individual's knowledge is imputed to their employer or affiliated firm, this will likely encourage employers to prohibit otherwise qualified persons from serving on the board of directors.

iv. Board of Directors – §§ 37.1204, 38.854

The Commission "proposes §§ 37.1204(c) and 38.854(c) to prohibit linking the compensation of public directors and other non-executive members of the board of directors to the business performance of the SEF or DCM, or any affiliate of the SEF or DCM. The Commission believes prohibiting compensation in this manner would help enable non-executive directors to remain independent and focused on making objective decisions for the SEF or DCM."[25] The Commission goes on to say that "[it] understands that it may be industry practice to include some form of nominal equity in a compensation package. The Commission does not consider nominal equity ownership interest, in and of itself, to be compensation that is 'directly dependent on the business performance' of the SEF or DCM or its affiliates. However, the Commission considers any equity ownership in a SEF or DCM or its affiliates that is *more than nominal* to be compensation that is 'directly dependent on the business performance' of the SEF or DCM or its

[23] We note that the preamble of the Proposal states that the rule would prohibit covered individuals from trading when they are "in possession of" MNPI, though the proposed rule text would prohibit covered individuals from trading "on the basis of any MNPI…." *Id*. at 19688. The MIH Entities note that this language in the preamble should be clarified to align with the rule text and state that trading "on the basis of" MNPI is prohibited.

[24] *Id*. at 19663, 19664.

[25] *Id*. at 19667.

affiliates."[26] The Commission further states that "any equity ownership included as a component of public director compensation that *reasonably could be viewed as being substantial enough to potentially compromise the impartiality* of a public director would not be considered nominal."[27]

The MIH Entities agree that ensuring all directors, including public directors and non-executive members, act in the best interests of the SEF or DCM, without regard to personal benefit, is of paramount importance. However, equity compensation is a meaningful component of any overall compensation package, particularly for smaller or newer DCMs and SEFs without the wherewithal to offer salaries comparable to those offered by larger incumbents. Equity compensation enables smaller or newer DCMs and SEFs to attract key talent to their boards by offering compensation that may not have significant value today, but which could in the future.

The MIH Entities respectfully request that the Commission clarify what it means by "nominal" equity ownership, including what level of equity compensation would reasonably be viewed as impacting impartiality. Without this clarification, the MIH Entities submit that restricting equity compensation based upon an unclear, vague standard would be significantly detrimental to the industry and the innovation of smaller or newer DCMs and SEFs. To the extent equity is restricted, the MIH Entities believe clear, objective thresholds should be established to avoid an inconsistent approach across DCMs and SEFs. For example, the Commission could limit equity compensation (i) above a certain monetary amount, **and** (ii) above a certain percentage threshold of the director's total compensation. Adopting this conjunctive approach would promote parity across all DCMs and SEFs and prevent larger DCMs/SEFs from offering equity packages that constitute a small percentage of overall compensation, but nonetheless have significant monetary value.

Lastly, the Proposal would require the board of a SEF or DCM to "annually conduct a self-assessment of its performance and that of its committees. Such self-assessments must be documented and made available to the Commission for inspection."[28] The Commission notes that the self-assessment "will enhance [the board's] accountability to the Commission," and explains that "Commission staff may request to see the results of the self-assessment during a rule enforcement review of the SEF or DCM."[29] Although the MIH Entities support a board's voluntary undertaking of a self-assessment, we do not believe it should be a requirement. Further, the Proposal suggests that the self-assessment will be used by Commission staff to evaluate the board's performance of its duties. The MIH Entities respectfully submit that using a self-assessment for such purposes will undermine the efficacy of the assessment, because board members may be reluctant to identify or discuss any weaknesses or areas for improvement. For these

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[26] *Id.* (emphasis added).
[27] *Id*. (emphasis added).
[28] Proposed Rules 37.1204(d) and 38.854(d).
[29] Proposal at 19667, 19668.

reasons, we respectfully request that this new requirement be removed. Alternatively, we request that the Commission remove the language "and made available to the Commission for inspection" from the regulatory text. We do not believe the Board's self-assessment is the type of document that should be used in the ordinary course to facilitate the Commission's oversight of the DCM or SEF. Moreover, the Commission has plenary authority to request the self-assessment in the event extraordinary circumstances warrant its provision to the Commission.

C. Proposed Structural Governance Requirements for Identifying, Managing and Resolving Actual and Potential Conflicts of Interest

i. Regulatory Oversight Committee – §§ 37.1206, 38.857

The Commission "proposes requiring ROC annual reports to contain a list of any actual or potential conflicts of interest that were reported to the ROC, including a description of how such conflicts of interest were managed and resolved and an assessment of the impact of any conflicts of interest on the SEF's or DCM's ability to perform its market regulation functions, as well as requiring disclosure of details relating to all actions taken by the board of directors pursuant to recommendations of the ROC."[30]

Further, the proposed annual report must include details related to all actions taken by the board of directors of a DCM or SEF pursuant to a recommendation of the ROC, including the following: (i) the recommendation or action of the ROC; (ii) the rationale for such recommendation or action of the ROC; (iii) the rationale of the board of directors for rejecting such recommendation or superseding such action of the ROC, if applicable; and (iv) the course of action that the board of directors decided to take that differs from such recommendation or action of the ROC, if applicable.

The MIH Entities respectfully request that the details required under Proposed Rules 37.1206(g)(vi) and 38.857(g)(vi) be eliminated. The MIH Entities believe that requiring the specific details enumerated in the proposed regulations would have a deleterious chilling effect on the deliberations of the board, including its ability to assess and propose solutions for the management and resolution of conflicts. In order to be effective, board members must be able to express their differing viewpoints candidly and without concern that specific arguments, viewpoints, or rationales will be attributed to individual directors and provided to the Commission. In addition, we believe this information pertaining to the board's deliberations is of limited value to the Commission, given that the annual report will discuss how all conflicts of interest were addressed by the board.

In addition, the Proposal also would require the minutes of the ROC to include certain information, including "a summary of all meeting discussions."[31] Further, the ROC would

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[30] *Id*. at 19672.

[31] Proposed Rules 37.1206(f)(1)(iii) and 38.857(f)(1)(iii).

be required to "maintain documentation of the committee's findings, recommendations, deliberations, or other communications related to the performance of its duties."[32] The MIH Entities similarly believe that these requirements would have a negative impact on the deliberations of the ROC. As with the board of directors, it is critical that members of the ROC be able to speak and debate freely, without concern that their discussions will be memorialized in great detail. Minutes should document at a high level the topics presented to the ROC and items discussed, along with all final decisions. However, the level of detail contemplated in the proposed regulation (*e.g.*, an itemized account of all topics discussed, along with all findings recommendations or deliberations) goes well beyond that requirement and will likely have a chilling effect on the ROC's deliberations. The MIH Entities respectfully request that the proposal be revised to require DCMs and SEFs to maintain minutes of ROC meetings, without specifying the content of those minutes.

The Proposal would also revise the current Part 38 Appendix B guidance language regarding the ROC "[r]eview[ing] regulatory proposals and advise the board as to whether and how such changes may impact regulation."[33] In the proposed regulatory text, the Commission has inserted "all" and "prior to implementation," so that the requirement is now that the ROC shall "review[] all regulatory proposals prior to implementation and advis[e] the board of directors as to whether and how such proposals may impact market regulation functions."[34] The MIH Entities assert that it is not practical or appropriate for the ROC to review "all" regulatory proposals that may impact a DCM or SEF "prior to implementation." Regulatory proposals are constantly being developed and updated and oftentimes there is not sufficient time for committees, such as the ROC, to review each proposal prior to implementation. Given this reality, the MIH Entities submit that "all" and "prior to implementation" not be including in any final rule.

Lastly, the Proposal does not define "market regulation functions" for purposes of Proposed Rules 37.1206(a) and 38.857(a). The preamble includes language suggesting that the scope of "market regulations function" in this context is the same as under Proposed Rules 37.1201(b)(9) and 38.851(b)(9), but stops short of establishing complete alignment.[35] For clarity of implementation, the MIH Entities respectfully request that the Commission define "market regulations functions" identically in each of these proposed regulations.

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[32] Proposed Rules 37.1206(f)(2) and 38.857(f)(2).

[33] 17 CFR Appendix B to Part 38.

[34] Proposal at 19671.

[35] Proposal at 19670 ("Given that SEFs and DCMs face similar pressures that may conflict with their market regulation functions—such as trade practice surveillance, market surveillance, real-time market monitoring, audit trail enforcement, investigations of possible rule violations, and disciplinary actions – the Commission believes that SEFs and DCMs would benefit from the protections that are offered by a ROC.").

ii. Chief Regulatory Officer ("CRO") § 38.856

Lastly, the Commission proposes that the "board of directors or the senior officer of the DCM, in consultation with the DCM's ROC, must approve the compensation of the CRO."[36] The MIH Entities agree with the Commission's determination that "involving the ROC in approving the compensation of the CRO further ensures that the CRO's role is insulated from improper influence or direction from the DCM's commercial interests."[37] However, in the preamble, the Commission goes on to note that "while some portion of compensation may be in the form of equity, DCMs should avoid tying a CRO's salary to business performance in order to avoid potential conflicts of interest."[38]

For the reasons discussed above under Section II.B.iv, the MIH Entities believe that if a DCM "avoid[s] tying a CRO's salary to business performance," then this requirement may severely limit the ability of smaller or newer DCMs to attract qualified individuals to serve as CROs. As discussed above, we believe that DCMs should retain the flexibility to develop compensation packages for CROs, approved by the ROC, that suit the specific needs of the DCM.

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The MIH Entities appreciate the opportunity to comment on the Proposal and look forward to continued engagement with the CFTC as this rulemaking progresses. Please feel free to contact me at 609-524-3230 or jkamnik@miaxglobal.com if you have any questions regarding our comments.

Sincerely,

Joseph P. Kamnik

Joseph P. Kamnik
VP, Senior Counsel
Miami International Holdings, Inc.

cc: Honorable Chairman Rostin Behman
Honorable Commissioner Christy Goldsmith Romero
Honorable Commissioner Kristin N. Johnson
Honorable Commissioner Summer K. Mersinger
Honorable Commissioner Caroline D. Pham

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[36] *Id*. at 19675.
[37] *Id*.
[38] *Id*.