January 18, 2011

Via Electronic Upload (http://comments.cftc.gov)

Commodity Futures Trading Commission
c/o David A. Stawick, Secretary
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Re: Proposed Commodity Exchange Act Rules 1.71 and 23.605 Re: Implementation of Conflicts of Interest Policies and Procedures by Futures Commission Merchants, Introducing Brokers, Swaps Dealers, and Major Swap Participants (RIN 3038-AC96)

Dear Mr. Stawick:

The Futures Industry Association ("FIA"),[1/] International Swaps and Derivatives Association, Inc. ("ISDA")[2/], and Securities Industry and Financial Markets Association ("SIFMA")[3/] (collectively, the "Associations") submit these comments in response to the Notices of Proposed Rulemaking on the Implementation of Conflicts of Interest Policies and Procedures by futures commission merchants, introducing brokers, swaps dealers, and major swap participants, in which the Commodity Futures Trading Commission (the "Commission") solicited comments on its proposed rules relating to sections 731 and 732 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Specifically, the Associations submit their comments with respect to:

1/ FIA is a principal spokesman for the commodity futures and options industry. FIA's regular membership is comprised of approximately 30 of the largest futures commission merchants in the United States. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than eighty percent of all customer transactions executed on United States designated contract markets. For more information, visit www.futuresindustry.org.

2/ The International Swaps and Derivatives Association, or ISDA, was chartered in 1985 and has over 800 member institutions from 54 countries on six continents. ISDA's members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the risks inherent in their core economic activities. For more information, visit www.isda.org.

3/ SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

(i) the Commission's proposed Rule 1.71 of the Commodity Exchange Act ("CEA") regarding conflicts of interest polices and procedures for futures commission merchants ("FCMs") and introducing brokers ("IBs"); and

(ii) the Commission's proposed Rule 23.605 of the CEA regarding conflicts of interest policies and procedures for swaps dealers ("SDs") and major swap participants ("MSPs").[4/]

I. Summary of the Associations' Comments Regarding Proposed Rules 1.71 and 23.605

The Associations' members (collectively, "firms") appreciate the opportunity to comment on the Commission's proposed Rule 1.71 and Rule 23.605 (collectively, the "Proposed Rules"). The Associations share the Commission's commitment to open, fair and competitive markets and to developing effective regulations that enhance the integrity of the markets. To that end, the Associations request that the Commission consider the comments below.

A. Potential Conflicts Related to Research

1. *Definitions.* We ask the Commission to modify the definition of and exclusions to "research report" to avoid capturing general market discussions and other communications that are not "research reports" in other regulatory contexts. We also urge the Commission to modify the definition of "research department" to avoid requiring FCMs, IBs, SDs and MSPs ("regulated entities") to impose the Proposed Rules on all of their global corporate affiliates.

2. *Prohibition on "Influencing the Content" of Research Reports*. We concur with the Commission's determination to propose rules that insulate analysts from the review, pressure, and oversight by business and clearing personnel and believe that these concerns are effectively addressed by many of the Proposed Rules. However, the proposed prohibition on "influencing the content" would unnecessarily restrict ordinary course communications between research analysts and non-research personnel and damage the ability of analysts to provide informed and relevant research reports to clients. We urge the Commission to remove this broad prohibition or to adopt a more limited prohibition on non-research personnel from "directing the views and opinions expressed in a research report."

3. *Prohibition on Input Regarding Analyst Compensation and Evaluation.* We request that the Commission modify the Proposed Rules to permit research management to solicit the views of business trading and clearing unit personnel on analyst compensation and evaluation, provided that research management maintains exclusive authority over final decisions in these areas.

[4/] 75 Fed. Reg. 70152 (Nov. 17, 2010) ("Rule 1.71 Proposing Release") and 75 Fed. Reg. 71391 (Nov. 23, 2010) ("Rule 23.605 Proposing Release") (collectively "Proposing Releases").

4. *Communications Requirements*. We urge the Commission to modify the Proposed Rules so that the requirement not to omit material facts or qualifications in written and oral communications excludes internal communications by a research analyst to other employees as such protections are not necessary for internal communications. We also ask the Commission to clarify that firms may consider the nature of the audience when assessing whether a particular communication presents sufficient facts and qualifications so as not to be misleading.

5. *Research Disclosures*. We request that the Commission clarify the types of financial disclosures an analyst is required to make in reports and during public appearances. We also urge the Commission to reconsider or clarify the vague requirement in proposed Rule 23.605 to disclose "any other actual, material conflicts of interest." We also ask the Commission to clarify the types of disclosures required to be made in connection with the distribution of third-party research reports.

6. *Application of Proposed Rules to Multi-Product Research Reports and Dual-Hatted Analysts*. We ask the Commission to clarify how the Proposed Rules should apply to research reports that cover multiple products (both derivatives and securities) and to research analysts who are registered with multiple regulated entities. In particular, we ask the Commission to address the treatment of employees who may: (1) be subject to both proposed Rules 1.71 and 23.605, which contain slightly different provisions; (2) write about both securities and derivatives in the same research report; or (3) write research reports about individual products that may be a security, a derivative, or both, depending on the facts and circumstances. We have provided suggestions to the Commission to address some of these issues.

7. Clarification Regarding Permitted Supervisory Structures The Proposed Rules provide that no research analyst may be subject to the supervision or control of any employee of a clearing or business trading unit of a regulated entity. We generally support this requirement; however, we request that the Commission clarify that the prohibition on an employee of a business trading or clearing unit from supervising a research analyst applies to direct supervisors of research analysts and not to others further up in the management chain.

B. Potential Conflicts Related to Clearing

1. *Adoption of a More Targeted Rule to Address the Potential Conflicts*. As an alternative to the Proposed Rules, we urge the Commission instead to adopt a more targeted rule to address the conduct the Dodd-Frank Act is seeking to address. This alternative is carefully drawn to address the conflicts identified by Congress in enacting §4s(j)(5) of the CEA. This alternative rule prohibits the affiliated SD or MSP from obtaining information from the affiliated FCM clearing personnel concerning transactions conducted by FCM clients and

requires the FCM clearing unit to have independent management to make the decisions regarding accepting new clearing clients.

2. *Request Clarification that Certain Communications are Permitted*. We respectfully request that the Commission make clear that the following specific practices would be permitted under the final rules which it adopts and that the Commission include these interactions as examples of acceptable communication topics between the FCM clearing unit and its affiliated SD or MSP: (a) initial cross product client sales, education and on-boarding activities and (b) assistance by sales personnel and others necessary to provide ongoing client support and to service client accounts.

3. *Clarify that the Proposed Rules do not apply to control and support functions*. We ask the Commission to clarify that the Proposed Rules are focused on traditional front office business functions and do not apply to control and support functions, such as legal and compliance, operations, credit, and human resources. These control and support functions are most effective when managed in an integrated manner. We ask that the Commission modify the definitions to clarify that such control and support functions are not included within the definitions of "business trading unit" or "clearing unit." On a related issue, we request that the Commission clarify that the prohibition on an employee of a business trading unit of the SD or MSP from supervising any employee of a clearing unit of an affiliated FCM applies to direct supervisors and not to others further up in the management chain.

4. *Clarify that criteria for accepting clearing customers will not be made public*. We request that the Commission clarify that it will not require firms to make client acceptance criteria or decisions public as is suggested in the Rule 23.605 Proposing Release. Because clearing creates credit exposures for FCMs, prudent risk management requires FCMs, when deciding to accept a prospective client, to consider a range of factors, including subjective factors such as the prospective client's expertise and business reputation.

5. *Provide some flexibility based on an organization's structure.* Proposed Rule 1.71(d) will make it virtually impossible for an SD parent of an FCM to exercise prudent oversight over many of the ordinary functions of such FCM (e.g., approving credit and risk parameters for common and distinct customers). This could cause a group of related companies to take on credit and risk obligations that are internally assessed as imprudent. An exception to the restrictions set forth in Rule 1.71(d) should be provided for parent companies exercising otherwise prohibited actions in a non-discriminatory, non-prejudicial manner for the sole purpose of complying with overall group risk and credit policies and parameters.

C. Potential Conflicts Related to Customers. We request that the Commission reconsider the proposed requirement in Rules 1.71(e) and 23.605(e) that regulated entities disclose to customers/counterparties "any material incentives and any material conflicts of interest regarding the decision of a client as to the trade execution and/or clearing of the derivatives transaction." The proposed requirement is duplicative of the disclosures required in the Business Conduct Standards. We urge the Commission to consolidate the disclosure requirements in the Proposed Rules within the proposed Business Conduct Standards, or alternatively, permit regulated entities to provide an annual disclosure document to clients.

D. Self-Regulatory Organization ("SRO") Oversight and Enforcement of the Proposed Rules. We respectfully request that the Commission allow for SRO oversight and enforcement of the Proposed Rules. This would follow the traditional model that has worked well in the regulation and oversight of securities and futures professionals.

II. The Commission's Proposed Rules Regarding Potential Conflicts of Interest Related to Research (Proposed Rules 1.71(a-c)/23.605(a-c))

A. Definitions (Proposed Rules 1.71(a)/23.605(a))

1. In General

We concur with the Commission's determination that §§731 and 732 of the Dodd-Frank Act are primarily intended to prevent undue influence by persons involved in trading or clearing activities over the substance of research reports that may be disseminated broadly and to prevent pre-publication dissemination of material information relating to research reports. We agree that a literal reading of §§731 and 732 would result in an untenable outcome that would undermine sound business practices by preventing trading or clearing personnel from engaging in necessary analysis to support their activities.

2. Definition of Research Report

As proposed, "research report" is defined as a written or electronic communication "that includes an analysis of *the price or market for any derivative*, and that provides information reasonably sufficient upon which to base a decision to enter into a derivatives transaction."[5/] (Emphasis added.) In comparison, both NASD Rule 2711, on which the Commission has based its definition, and §501(a) of the Sarbanes-Oxley Act, which the Commission cites, define a "research report" as a written or electronic communication "that includes an analysis of *equity securities of individual companies or industries*, and that provides information reasonably sufficient upon which to base an investment decision." (Emphasis added.)

5/ *See* Proposed Rules 1.71(a)(9) and 23.605(a)(9).

We believe the Proposed Rules should focus, like the NASD and Sarbanes-Oxley Act definitions, on the analysis of a specific instrument rather than on the analysis of a market or price that could be relevant to *any* derivative. Accordingly, we request that the Commission define "research report" as a communication "that includes an analysis of *a specific derivative transaction or futures contract transaction* and that provides information reasonably sufficient upon which to base a decision to enter into such transaction." Without such clarification, any communication that includes a general discussion of the markets or underlying asset class without reference to or focus on a specific derivative or futures contract transaction could be deemed a "research report" and trigger the provisions of the Proposed Rules with respect to both the communication and the author of the communication. For example, an economist who writes a broad macroeconomic report or a report that speaks to the interest rate, currency or other similar macro market might be deemed to have written a derivatives research report and therefore be deemed to be a derivatives research analyst, even though these communications do not discuss a specific transaction.

3. Exclusions from Definition of "Research Report"

a) Business Trading Unit Communications

We generally support the Commission's proposed exclusion from the definition of "research report" for "any communication generated by an employee of the business trading unit that is conveyed as a solicitation for entering into a derivatives transaction, and is conspicuously identified as such."[6/] We commend the Commission for recognizing that in addition to research reports prepared by a firm's research department, clients and counterparties in this primarily institutional market look to trading desk personnel as an important source of information about trading activity and opportunities, market developments and sentiment. These institutional investors understand that trading desk commentary on potential market opportunities and other material from desk personnel are part of the desk's trade execution and/or market making function and are not "research reports" prepared by an impartial research function.

We urge the Commission to modify this proposed exclusion for business trading unit communications to focus on whether the communication is presented as objective and impartial research, rather than on whether it is a "solicitation." Such a focus would avoid the complexity of determining whether and when a communication rises to the level of a "solicitation." We ask the Commission to clarify that communications by an employee of a business trading unit are excluded from the definition of "research report" as long as the communications are conspicuously identified as non-research and a product of the trading or sales desk. We believe that by explicitly identifying sales and trading communications and distinguishing them from research reports, this alternative branding and labeling approach will prevent such communications from being mistaken for the objective and impartial views of a firm's research function.

6/ *Id.*

b) Other Exclusions

We note that the Proposed Rules do not provide exclusions from the definition of research report for several categories of communications that are excluded by NASD Rule 2711(a)(9)(A) and SEC Regulation AC[7/] from the definition of "research report." While we recognize that some of those excluded categories of communications are more common in the securities business than in the derivatives business, we have modified these categories to reflect the derivatives industry and urge the Commission to confirm that the term "research report" does not include communications that are limited to the following:

(1) commentaries on economic, political or market conditions;

(2) analyses or commentaries concerning asset classes;

(3) analyses or commentaries concerning economic variables (e.g., rates, inflation) that are commonly referenced in derivatives;

(4) notices of ratings, forecasts, or price target changes;

(5) statistical summaries of multiple companies' financial data, including listings of current ratings; or

(6) discussions of broad-based indices and commonly used benchmarks such as on-the-run swap rates or other reference points.

These excluded categories are particularly important to incorporate in the Proposed Rules because, as discussed below in section II.E, research analysts often support both the securities and derivatives businesses.

4. Definition of Research Analyst

As defined in Proposed Rules 1.71(a)(7) and 23.605(a)(7), "research analyst" means an employee who is primarily responsible for, and any employee who reports to such research analyst in connection with the preparation of the substance of a research report, whether or not any such person has the job title of "research analyst." We support the Commission's proposed definition of "research analyst" provided that the definition of "research report" is modified as described above in sections II.A.2 and 3.

7/ *See* Exchange Act Rel No. 47384 (Feb. 20, 2003).

5. Definition of Research Department

As defined in the Proposed Rules, the term "research department" includes any department or division *of an affiliate* of a regulated entity that is principally responsible for preparing the substance of a research report relating to any derivative.[8/] "Affiliate" is defined as "any person, a person controlling, controlled by, or under common control with, such person."[9/] The Proposing Releases assert that the extension of the Proposed Rules to affiliates is intended "to address the possibility that the proposed rules could be evaded by employing research analysts in an affiliate…."[10/] However, the Commission does not present any evidence that regulated entities have moved or would move research analysts to affiliates to evade regulations, and the Associations are not aware of any such moves.

Without such evidence, we believe it is inappropriate for the Commission to impose regulations on a separate legal entity with an independent corporate existence solely on the basis of its affiliation with a CFTC-registered entity or to require regulated entities to be responsible for enforcing the Proposed Rules on the activities of all of their affiliates. The proposed breadth of the definition of "research department" creates logistical difficulties for multi-service financial institutions, some of whom have hundreds of affiliates across the world that may produce derivatives and multi-product research for their clients. In many cases, those affiliates may have no significant interaction with the regulated entity. In addition, failure to limit the extraterritorial reach of the Proposed Rules may result in rules for non-U.S. affiliates that are incompatible with home country requirements, objectionable to home country supervisors, prohibitively expensive, impossible to achieve and impractical from an operational perspective. As a general matter, we see no reason to apply the Proposed Rules to affiliates that are already subject to extensive regulations.

To the extent that the Commission is concerned about regulated entities distributing research reports prepared by affiliates, the Commission can more appropriately address those concerns by requiring disclosures on third party research reports. The Commission also has the ability to pursue unregulated entities that aid and abet violations of its regulations.

6. Definition of Public Appearance

As defined in Proposed Rules 1.71(a)(6) and 23.605(a)(6), "public appearance" means participating in a conference call, seminar, forum or other public speaking activity before 15 or more "persons," but does not include an appearance before 15 or more existing "customers." We request that the Commission clarify that "customer" includes an "entity." For example, a presentation to 16 individuals at one institutional customer should not constitute a "public appearance." This clarification is necessary to reflect that the vast majority of firms' derivatives clients are entities and not natural persons.

8/ *See* Proposed Rules 1.71(a)(7) and 23.605(a)(7).

9/ *See* Proposed Rules 1.71(a)(1) and 23.605(a)(1).

10/ Rule 1.71 Proposing Release at 70154; Rule 23.605 Proposing Release at 71392.

B. Restrictions on Interactions with Research Analysts (Rule 1.71(c)(1), (c)(3)/23.605(c)(1), (c)(3))

1. Prohibitions on Influencing the Content

As stated previously, we concur with the Commission's determination to propose rules that insulate analysts from the review, pressure, and oversight by business and clearing personnel. We believe that these concerns are effectively addressed by the Proposed Rules that prohibit research analysts from being subject to the supervision or control of any employee of a business trading unit or clearing unit, prohibit business trading and clearing personnel from approving draft reports and reviewing draft reports, except under limited controlled circumstances, and prohibit such personnel from directly or indirectly retaliating or even threatening to retaliate against research analysts.

However, the Commission has gone one step further by proposing a rule which would prohibit non-research personnel from "*influence[ing] the content* of a research report."[11/] We believe that this prohibition is significantly broader than the restrictions contemplated by §§4s(j)(5) and 4d(c) and the statutory language of §§731 and 762, is unnecessary given the other proposed protections, will have a chilling effect on ordinary course communications between research analysts and non-research personnel,[12/] and will damage the ability of analysts to provide informed and relevant research reports to clients.

Non-research personnel who trade and structure derivative products provide valuable market information and insight to research analysts on trading volume, supply/demand imbalances in trading, client interest and market flow and other information. Such information is often not available from other sources and is critical to the analyst's fundamental analysis of a derivative product, which in turn benefits external clients as well as the markets more broadly.

For example, there may be situations where seemingly illogical price discrepancies exist between similar products. Trading and sales personnel are in the best position to be aware of the flows of these products and help the analyst understand whether price discrepancies are attributable specifically to the name or to macro events that may dissipate over time. Additionally, persons responsible for trading and structuring are the product experts. Given the vast array of derivative products and the fact that derivative products evolve and develop over time, it is critically important that research analysts discuss these products with these market experts on a regular basis to fully understand the structure and nature of the product and how clients are using and trading them.

The Proposed Rules also would prevent sales and trading personnel from communicating topics of interest from clients. Currently, analysts obtain valuable information from traders and salespeople about derivative instruments, asset classes and trading trends that clients and

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[11/] *See* Proposed Rules 1.71(c)(1)(i) and 23.605(c)(1)(i).

[12/] "Non-research personnel" is defined as "any employee of the business trading unit or clearing unit, or any other employee of the [FCM, IB, SD, MSP] who is not directly responsible for, or otherwise involved with, research concerning a derivative, other than legal or compliance personnel."

counterparties are interested in. Salespeople generally know about investors' desired coverage areas and investors' questions about and reactions to published research, while traders have a current and expansive understanding of market flows, frequency and breadth of client inquiries into particular derivatives, liquidity, and pricing drivers for specific derivatives. Analysts benefit from gathering and synthesizing such information and perspectives from non-research personnel.

Based on these concerns as well as the protections afforded by sections (c)(1)(iii) and (c)(1)(iv) of the Proposed Rules, we believe that the prohibition on "influencing the content" of research reports should be eliminated. Alternatively, we ask the Commission to replace this language with a more limited prohibition on non-research personnel "directing the views and opinions expressed in the report," which would not prohibit the types of communications referenced above. We also ask the Commission to acknowledge in the rules that discussions regarding research coverage should be permissible, as long as research management has exclusive authority over final coverage decisions, and that discussions related to the content of published research reports are permissible, as long as they are comparable to the types of discussions that research analysts have with clients and other third parties.

2. Prohibition on Influencing the Evaluation or Compensation of Research Analysts

The Proposed Rules prohibit business trading and clearing unit personnel from having influence over the evaluation or compensation of research analysts.[13/] While we generally support the Commission's efforts to prevent inappropriate influence over research activities and the conduct of research analysts, we believe research management should be permitted to seek input from business trading and clearing personnel when making decisions regarding analyst evaluations and compensation, provided that research management maintains exclusive authority over final decisions in these areas.[14/]

Permitting these types of communications is critical because they allow research management to receive feedback that non-research personnel receive from clients regarding analyst performance and the quality of their research product. While research management receives some feedback directly from clients, dozens of individuals at a client may use a research analyst's services. Because research management is not always able to speak to multiple parties at each client with respect to each research analyst, research management augments direct client feedback with feedback from sales and trading personnel who can provide more aggregated information. Salespeople are regularly in touch with many contacts within each client and are therefore in a good position to aggregate the feedback and to compare the relative performance of analysts who work with their client. Because of their expertise in the markets about which analysts write, traders' feedback about the quality of an analyst's written work product is also important to research management. Research management should be permitted to take this feedback into consideration as they evaluate analysts and make compensation decisions. The risk of improper pressure on research analysts is addressed by requiring the views of business trading and clearing to be communicated only to research management, who will have the

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13/ *See* Proposed Rules 1.71(c)(1)(ii) and (c)(3) and 23.605(c)(1)(ii) and (c)(3).

14/ Such input is generally permitted pursuant to the equity research regime established by NASD Rule 2711.

exclusive authority to weigh such inputs against their own views as well as other permissible inputs such as direct client feedback and industry surveys.[15/] Any effort by sales and trading personnel to exert improper influence over a research analyst would be addressed by the Proposed Rules' prohibition on retaliation against research analysts and restriction on the supervision and control of research analysts.

Finally, we ask the Commission to clarify that "personnel engaged in trading or clearing activities"[16/] solely would not include personnel (like senior management and human resources and other administrative personnel) who are not employed in the business trading or clearing unit.

3. Clarification Regarding Permitted Supervisory Structures

The Proposed Rules provide that no research analyst may be subject to the supervision or control of any employee of a clearing or business trading unit of a regulated entity.[17/] We generally support this requirement; however, we suggest one clarification. Given the broad definitions of "business trading unit" and "clearing unit" in the Proposed Rules, it is possible that a clearing or business trading unit may be housed within the same corporate division or business line of a multi-service financial institution as its research department. In such cases, the research department may ultimately report to an employee who also has responsibility over a clearing or business trading unit. In light of the wide variation of corporate organization that is possible, we request that the Commission clarify that employees of business trading and clearing units of a regulated entity are prohibited from acting as direct supervisors of research analysts.

C. Restrictions on Communications by Research Analysts (Rules 1.71(c)(2)/23.605(c)(2))

Proposed Rules 1.71(c)(2) and 23.605(c)(2) would require that any written or oral communication by a research analyst to a current or prospective customer or counterparty, or to any employee of the regulated entity relating to any derivative must not omit any material fact or qualification that would cause the communication to be misleading to a reasonable person.

1. Consideration of the Nature of the Audience

We support the Commission's goal of ensuring that communications with customers and prospective customers do not omit any material fact or qualification that would cause the communication to be misleading. Consistent with long-established securities industry regulations regarding communications with the public, however, we ask the Commission to acknowledge that the scope of necessary facts and qualifications provided by analysts will

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15/ We ask the Commission to recognize that research management's decisions may still be subject to the overall compensation guidelines approved by a company for all employees, as long as such guidelines are non-discriminatory and non-prejudicial with respect to the research department. For example, senior management of a company should be able to implement compensation guidelines consistent with regulation (e.g., the remunerations rules of the Capital Requirements Directive III) or mandate an across-the-board reduction or increase to compensation for all employees, including those in the research department.

16/ See Proposed Rules 1.71(c)(1)(ii) and 23.605(c)(1)(ii).

17/ *See* Proposed Rules 1.71(c)(1)(ii) and 23.605(c)(1)(ii).

depend on the nature of the audience to which the communication is directed.[18/] Certain communications may warrant different levels of explanation depending on the nature of the audience and context of the communication. For example, an email about a derivative transaction from a research analyst to an institutional client who is familiar with the relevant instrument and trading strategy and the analyst's research reports about that instrument should not need to include all of the facts and qualifications that may be appropriate for the research reports themselves, which are distributed to a broader audience. Similarly, a research alert following up on an extensive research report should not require the same set of facts and qualifications as the original research report. We urge the Commission to clarify that firms may consider the nature of the audience and context of the communication when assessing whether a specific communication contains required material facts or qualifications.

2. Internal Communications

The Proposing Releases do not offer an explanation for proposing that this restriction on communications be applied to internal-only communications even though it would impose an extraordinary burden. Indeed, this regulation of internal communications seems inconsistent with the Commission's decision to exclude internal communications from the definition of "research report." The proposed regulation of internal communications is simply unworkable because firms are unable to review every internal communication by a research analyst to determine whether any material fact or qualification is omitted. It is also impractical to require an analyst to pause before every internal conversation that may occur in passing and determine whether her comment omits any material fact or qualification. There is no equivalent rule in the securities regulatory regime for internal communications of research analysts. NASD Rule 2210 and other similar SRO rules focus only on communications *with the public* and do not apply to internal communications between employees.

We urge the Commission to strike "or to any employee" from the types of communications covered by Proposed Rules 1.71(c)(2) and 23.605(c)(2).

D. Disclosure Requirements (Rules 1.71(c)(5)/23.605(c)(5))

1. Scope of Financial Interest Disclosures

The Proposed Rules would require disclosure in research reports and public appearances of whether the research analyst maintains, *from time to time*, a financial interest in any derivative *of a type* that the research analyst follows, and the general nature of the financial interest. It is not clear what the Commission means by "*from time to time*" and how long a period of time the disclosure must cover. Unlike equity research and equity research analysts who are the focus of NASD Rule 2711 and §501(a) of the Sarbanes-Oxley Act, derivatives analysts generally do not

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[18/] *See e.g.*, NASD IM-2210-1 (2) (stating "[m]embers must consider the nature of the audience to which the communication will be directed. Different levels of explanation or detail may be necessary depending on the audience to which a communication is directed. Members must keep in mind that it is not always possible to restrict the audience that may have access to a particular communication with the public. Additional information or a different presentation of information may be required depending upon the medium used for a particular communication and the possibility that the communication will reach a larger or different audience than the one initially targeted").

follow particular derivative instruments or initiate formal research coverage of a particular derivative instrument. Derivatives research analysts may write about a particular derivative transaction or futures contract transaction only once and never revisit it.

We urge the Commission to consider requiring research reports and public appearances to disclose generally that the analyst *may* have a financial interest in the types of derivatives that the analyst follows, at the time of publication of the report or at the time of a public appearance. In that regard, we also request that the Commission clarify that "*of a type that the research analysts follows*" refers to the four major categories of swaps: 1) rates swaps, (2) credit swaps, (3) equity swaps, and (4) and other commodity swaps.[19/]

2. Other Actual Material Conflicts of Interest

Proposed Rule 23.605 requires SDs and MSPs also to disclose *any other actual, material conflict of interest of the research analyst or SD or MSP of which the research analyst has knowledge* at the time of publication of the research report or at the time of the public appearance. (Emphasis added.)[20/] We urge the Commission to delete this disclosure requirement from proposed Rule 23.605 because the vague and open-ended requirement to disclose "other, actual material conflicts of interest" is difficult and burdensome to implement.

Absent specific regulatory guidance, it is difficult to conceive of all material conflicts that could arise in a vacuum. Prior to the publication of each report and each public appearance, a firm would have to discuss the potential existence of all other actual material conflicts of interest with the analyst and also among various business units whose activities may relate to or affect specific derivatives.

This unwieldy process is likely to require significant resources and present difficult interpretive issues. Disclosures of the type proposed by the Commission require the creation and maintenance of intricate databases that are able to retrieve and store information from multiple U.S. and non-U.S. affiliates and other sources. These disclosures require constant, real-time updates and the collection of information that may not be stored in the regular course of business. The compliance costs will be far greater than the Paperwork Reduction Act of 1995 ("PRA") calculations and Office of Management and Budget (OMB) estimates set forth in the Rule 23.605 Proposing Release. This process is also likely to result in publication delays. As the Commission is aware, the value of research to an investor is directly related to its timeliness.

Based on these considerations, we respectfully request that the Commission limit the disclosure requirements in research reports of SDs and MSPs to the financial interests held by the research analyst and to remove the requirement from proposed Rule 23.605 for disclosures of "other, actual material conflicts of interest." If the Commission is unwilling to remove the other, actual material conflicts provision, we ask the Commission to permit SDs and MSPs to provide more general disclosure of potential material conflicts of interest that the research analyst or SD/MSP may have.

[19/] These categories are consistent with the major categories of swaps proposed by the Commission in connection with its continued efforts to define MSP and SD. *See* 75 Fed. Reg. 80174 (Dec. 21, 2010).

[20/] Proposed Rule 1.71 does not impose this obligation on FCMs and IBs.

3. Third-Party Research Reports

The Proposed Rules would require regulated entities to make certain disclosures when they distribute or make available independent third-party research reports. In particular, the proposal would appear to require the regulated entity to disclose its research analyst's ownership of derivatives and, in the case of SDs and MSPs, other, actual material conflicts of interest known to the research analyst at the time of publication of the research report. It is not clear what those disclosures would be and why they would be relevant when the regulated entity and its research analysts by definition have no role in the content or creation of an "independent third party research report." Accordingly we ask the Commission to clarify what disclosures must be made in connection with the distribution of independent third-party research reports or to clarify that no disclosures are required.

E. Other Interpretive Issues

We request that the Commission provide guidance addressing the following:

1. Multi-product reports

Investors are increasingly interested in receiving research reports that analyze multiple instrument types, including cash instruments and derivatives. Therefore, research departments often produce multi-product reports written by their securities and derivatives analysts working together or by dual-hatted research analysts who write about both securities and derivatives. Because of the differences between the rules and regulations imposed on securities analysts and derivatives analysts, it would be very difficult to impose both regulatory regimes on the entirety of a multi-product report and/or on all the contributors to that report. For example, securities analysts are not prohibited from having a reporting line to a business trading unit, but if a securities analyst were deemed to be a derivatives analyst by virtue of authoring the securities portion of a multi-product report, he or she would be in violation of the Proposed Rules. Accordingly, we ask the Commission to clarify that where derivatives analysts contribute to a multi-product report, only the section of the report that discusses derivatives and only the conduct of derivatives research analysts will be subject to the Proposed Rules. In addition, we urge the Commission to harmonize its Proposed Rules with NASD Rule 2711 to the extent requested in this letter in order to reduce the confusion created by the imposition of multiple regulatory regimes on a single communication or a single analyst.

2. Dual-Hatted Personnel

Many integrated financial services firms are likely to include CFTC regulated entities as well as securities broker-dealers (e.g., holding each of these registrations within the same firm or holding these registrations among affiliated entities). Accordingly, their employees may be registered with both the Commission and the securities regulators. For example, a research analyst associated with an SD may cover derivatives and also cover securities as a registered representative of an SEC-registered broker-dealer. Given the complexity of applying two sets of rules to a dual-hatted employee, we appreciate the Commission's effort to adapt parts of the Proposed Rules from the NASD framework, and as discussed above, we urge the Commission to modify other parts of the Proposed Rules to be more consistent with the securities regulations.

Because of the inevitable differences that will remain, however, we also request that the Commission confirm that these dual-hatted individuals may comply with the Commission's rules when acting in their capacity as a research analyst, as defined in the Proposed Rules, and to comply with NASD and other securities regulations when acting in their capacity as a registered representative of a broker-dealer.

III. The Commission's Proposed Rules Regarding Potential Conflicts of Interest Related to Clearing (Proposed Rules 1.71(d) & 23.605(d))

The Commission under the general, catch-all provision of §732 of the Dodd-Frank Act, has proposed Rules 1.71(d) and 23.605(d), which would create barriers between the business trading units of an SD or MSP and its affiliated FCM's clearing personnel. In doing so, the Proposed Rules go beyond the requirements of §732 of the Dodd-Frank Act. The Commission has premised the Proposed Rules on the basis that, "although the ultimate determination as to whether to accept a client for clearing would be made at an FCM, an affiliated SD or MSP could have incentives to try to influence that decision improperly."[21/] To address this concern, the Proposed Rules regarding clearing would alter the business operations of integrated financial service firms to the detriment of clients and in a manner which is disproportionate to achieving the regulatory goals that the Commission has identified.

We note that certain concerns identified by the Commission in the Proposing Releases, such as interference with customer access to clearing, are addressed directly in Dodd-Frank and by the Commission in relevant Business Conduct Standards.[22/] Specifically, where there is a choice of whether to clear a particular transaction, the Dodd-Frank Act provides the customer with the unfettered discretion to make that choice, as well as to choose the clearinghouse through which to clear a trade. Additionally, the Commission's proposed business conduct standards for SDs and MSPs would require disclosure of these rights to swap counterparties. We believe these provisions adequately address the Commission's concerns in this area.

Accordingly, we propose an alternative that may address the issues identified by the Commission without imposing the burdens created by the Proposed Rules. We also request that the Commission in the final regulations (1) permit certain specified types of sales and on-boarding discussions and continued involvement and coordination in the establishment and ongoing support of client relationships between the FCM clearing unit and its affiliated SD or MSP; (2) clarify that the definition of "business trading unit" is focused on traditional front office businesses and does not apply to control and support functions, such as legal, compliance, operations, credit, and human resources personnel; and (3) clarify that the prohibition on supervision or control of the FCM's clearing unit personnel by an employee of the affiliated SD or MSP business trading unit applies only to direct supervisors.

21/ 75 Fed. Reg. 70155.

22/ *See Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties*, 75 Fed. Reg. 80638 (Dec. 22, 2010).

A. The Proposed Clearing Rules

Proposed Rule 1.71(d) provides that no FCM shall permit any affiliated SD or MSP "to directly or indirectly interfere with, or attempt to influence, the decision of the clearing unit personnel of the FCM with regard to the provision of clearing services and activities, including but not limited to" the following:

- Whether to offer clearing services and activities to customers;
- Whether to accept a particular client for the purpose of clearing derivatives;
- Whether to submit a transaction to a particular derivatives clearing organization;
- Setting risk tolerance levels for particular clients;
- Determining acceptable forms of collateral from particular customers; or
- Setting fees for clearing services.

Proposed Rule 1.71(d) continues by requiring that the FCM create and maintain an informational partition between the business units of the affiliated SD or MSP and clearing unit personnel of the FCM that at a minimum requires that:

- No employee of a business trading unit of an affiliated SD or MSP may review or approve the provision of clearing services and activities by clearing unit personnel of the FCM, make any determination regarding whether the FCM accepts clearing customers or participate in any way with the provision of clearing services and activities by the FCM;
- No employee of a business trading unit of an affiliated SD or MSP shall supervise, control or influence any employee of a clearing unit of the FCM, and
- No employee of a business trading unit of an affiliated SD or MSP shall influence or control compensation or evaluation of any employee of the clearing unit of the FCM.

In addition, each FCM and IB must adopt and implement written policies and procedures that mandate the disclosure to its clients of any material incentives and any material conflicts of interest regarding the decision of a client as to trade execution and/or clearing of the derivatives transaction.[23/]

B. The Proposed Rules Are Beyond the Statutory Language

The proposed prohibitions and information partitions that would apply to SDs, MSPs and FCMs are far broader than the statutory language supports. Section 4s(j)(5) requires the SD or MSP to

> establish structural and institutional safeguards to ensure that the activities or any person within the firm . . . acting in a role of providing clearing activities or making determinations as to accepting clearing clients are separated by appropriate informational

[23/] Proposed Rule 23.605(d) would impose similar prohibitions on SDs and MSPs. Except as indicated in the text of this letter, the discussion of issues relating to Rule 1.71 also apply to Rule 23.605.

> partitions within the firm from the review, pressure or oversight of persons whose involvement in pricing, trading or clearing activities might potentially bias their judgment or supervision and contravene the core principles of open access and the business conduct standards [of the CEA].

Nevertheless, Proposed Rule 1.71(d)(2), broadly provides that an FCM must create and maintain an informational partition between the SD or MSP and the FCM's clearing unit personnel that, among other things, requires that no employee of an SD or MSP business trading unit shall *participate in any way with the provision of clearing services and activities* by the FCM. The Proposed Rules also substitute a list of specific decisions that SD or MSP personnel may not "attempt to influence,"[24/] for the more narrowly crafted language of the CEA which prohibits trading personnel from pressuring clearing personnel to bias their judgment or supervision and contravening the core principles of open access and business conduct standards. Thus, the Proposed Rules substitute an entirely different standard from that of the CEA, and as discussed below, would restrict routine contacts between trading and clearing personnel to the detriment of customers, impair a regulated entity's ability to follow risk management best practices, and call into question various forms of completely benign and beneficial conduct.[25/]

C. The Proposed Rules Erect Barriers to Servicing Client Accounts to the Detriment of Clients Who Benefit from the Integrated Nature of Multi-Service Financial Institutions

Multi-service financial institutions are likely to include an SD or MSP and an FCM in order to provide their clients with seamless and efficient service. Certain over-the-counter ("OTC") swaps end-users may have a primary client relationship with only one of the business units that will be involved with cleared OTC swaps. The requirements of the Dodd-Frank Act, however, make it likely that any potential client who trades cleared OTC swaps will need to familiarize itself with both the execution and clearing groups within the firm with whom they do business.

[24/] These decisions include whether to offer clearing services and activities to customers, whether to accept a particular customer for clearing derivatives, whether to submit a transaction to a particular derivatives clearing organization, setting risk tolerance levels or determining acceptable forms of collateral and setting fees for clearing services.

[25/] In addition, §4d(c) of the CEA provides that the Commission shall require that FCMs and IBs implement conflict of interest procedures that establish safeguards to ensure that the activities of any person within the firm relating to research or analysis are separated from the review, pressure or oversight of persons involved in clearing or trading, and such other issues as the Commission determines to be appropriate. Despite the clear application of §4d(c) only to information partitions for research personnel of the FCM, the Commission has created an entirely new set of requirements for FCMs related to clearing. These requirements are based upon the conflict of interest provisions of §4s(j)(5) (which apply to SDs and MSPs) and the single, hypothetical illustration that an affiliated SD or MSP might attempt to interfere with an affiliated FCM's decision to offer clearing services to a particular client because of a perceived competitive threat. This wholesale extension to FCMs of the conflict of interest provisions that apply to SDs and MSPs is not contemplated by the statute.

Clients themselves tend to look at clearing and execution holistically, and look to their salesperson to provide advice and service with respect to both services in order to make informed decisions about their transactions. For example, information relating to the level and type of collateral that may be required for a particular transaction is likely to be very important to the trading decisions of many market participants prior to entering into a transaction. This information requires joint input from clearing and execution personnel. Prohibiting a market participant from obtaining all desired information from a single source at a firm will likely result in the participant having less information to inform its trading decisions, a result that is contrary to the fundamental policies and goals of the Dodd-Frank Act. Furthermore, the proposed barriers between an SD or MSP and an affiliated clearing unit will make it more difficult for regulated entities to comply with other rules proposed by the Commission.[26/] And in certain circumstances, clients acting as financial advisors are required to consider both execution and other services offered by a dealer (including clearing services) in determining where to transact. The restrictions included in the Proposed Rule would unnecessarily complicate this process. Additionally, financial services firms that provide integrated execution and clearing services rely on information sharing arrangements and operational coordination in order to minimize fails and facilitate better customer pricing. It is in the best interest of clients for firms to view their clients holistically in order to provide the proper mix of services and coverage that will best meet client needs.

Swaps end-users may choose to transact some or all of their transactions bi-laterally. Even if they clear, they may have a choice of clearinghouses or may wish to consider exchange-traded futures in addition to swaps. Because of this range of choices, the firm's SD (or MSP) and FCM units will necessarily coordinate to provide the highest level of client education and service. Client questions regarding choice of and risks associated with Central Counter Party ("CCP") clearing, electronic execution facilities, and types of and protection of collateral, will all be best addressed by an integrated sales and client on-boarding effort.

Coordination should not stop when the client first commences business with a firm. The need for such coordination may be especially important in an environment where the end-user has the ability to opt in favor of clearing some transactions, but is not required to clear all transactions. For example, a firm may offer clients unified portfolio margining or collateral management across various products, including bi-lateral swaps, cleared swaps and futures. Such collateral arrangements would require on-going inter-affiliate coordination. In calling into question such basic efforts in which the incentives of clearing personnel and trading personnel are fully aligned in servicing customers, the proposed rules would erect unnecessary and disproportionate barriers that would impair the ability of trading personnel from properly servicing client accounts.

[26/] For example, Proposed Rule 23.402(c), which would establish a ''know your counterparty'' requirement on SDs and MSPs, would require each SD or MSP to use reasonable due diligence to know and retain a record of the essential facts concerning each counterparty and the authority of any person acting for such counterparty, including facts necessary to: (1) comply with applicable laws, regulations and rules; (2) effectively service the counterparty; (3) implement any special instructions from the counterparty; and (4) evaluate the previous swaps experience, financial wherewithal and flexibility, trading objectives and purposes of the counterparty. An SD or MSP may only be able to fully meet these requirements if it is able to communicate with the clearing unit as discussed herein.

For these reasons, we respectfully request that the Commission make clear that client sales and on-boarding discussions by an integrated team and coordination by salespersons and others in the establishment and ongoing support of a client relationship are permitted communications between personnel of a firm's various business units or affiliates.

D. The Proposed Rules Would Dampen the Ability of the FCM, the SD or MSP To Carry Out Important Risk Management Functions

Proposed Rule 1.71(d)(1) prohibits SD or MSP personnel from "directly or indirectly. . . attempt[ing] to influence" decisions of the FCM clearing unit personnel. Mirroring the prohibitions of Proposed Rule 1.71(d)(1), Proposed Rule 1.71(d)(2)(i) would require the FCM to create informational partitions that, among other things, would prohibit any employee of a business trading unit of an SD or MSP from "participat[ing] in any way with the provision of clearing services and activities by the futures commission merchant." If adopted, the Proposed Rules would restrict personnel of the FCM and SD or MSP from sharing basic information regarding a client's sophistication, trading patterns and history that is essential to prudent risk management decisions.

In the event of a clearing customer default, the clearing member must have access to swap price information and trading assistance to manage the liquidation of the defaulted customer portfolio and its associated market risk. Additionally, as part of a clearing member default at a CCP, the default management process will generally require non-defaulting clearing members to price, bid on, liquidate or hedge all or part of the swap portfolio of the defaulting clearing member. Each of these risk management responsibilities depends on FCM personnel having the ability to seek price and market information from swap dealer personnel. Such consultation and coordination appears to be prohibited by the language of the Proposed Rule.

E. Alternative Approach

The Commission has requested comment on alternative approaches "that would address an attempt by a SD's trading desk personnel to interfere with an affiliated FCM's decision to offer clearing services to a particular client because of a perceived competitive threat."[27/]

The specific example that the Commission raises of possible undue influence involves a client of an SD or MSP being prevented from accessing the affiliated FCM's clearing services due to a perceived competitive threat to the affiliated SD or MSP. This concern is most likely to arise either where the clearing client is itself an independent SD or MSP with its own clients or is an end-user counterparty of a number of SDs or MSPs in addition to the affiliated SD or MSP. In either case, the Commission appears to be concerned both about the SD's access to information about the FCM's clients and its potential influence over the client's ability to trade with other counterparties. The following alternative approach addresses both of these concerns.

[27/] 75 Fed. Reg. 70155.

A firm acting as a Prime Broker acts on behalf of its client to clear all of the client's transactions, including both those in which an affiliate acts as executing broker and those transactions in which the client uses other, non-affiliate firms as the executing broker. When another firm is used as the executing broker, the trade is "given-up" to the Prime Broker for clearing. Recognizing the potential for conflicts, integrated financial institutions have long-established conflict of interest rules governing their Prime Broker business which prevent the trading unit personnel from gaining information relating to trades executed by an independent executing broker. These established practices protect the privacy of the client's transactions with independent executing brokers without disadvantaging those clients that prefer to maintain their business relationship with the affiliates of a single integrated firm. Similarly, a rule that prohibits the affiliated SD or MSP from obtaining information from the affiliated FCM clearing personnel concerning transactions conducted by FCM clients with either their own clients or with independent SDs or MSPs would completely address the possible conflicts that might arise while preserving the integrated financial service firm's ability to fully service its clients.

In addition to the informational barriers we propose, we further support a rule requiring that the FCM clearing unit have independent management that makes its own final decisions regarding clients to which it will offer clearing services as well as the terms for those services.[28/]

We submit that this more appropriately tailored alternative would address the conflicts identified by Congress in enacting §4s(j)(5) of the CEA and separate clearing personnel at the FCM from "review, pressure or oversight" of those in trading, pricing or clearing activities that would bias their judgment and "contravene the core principles of open access."

F. Additional Clarifications

1. The Proposed Rules should Clarify That They Do Not Apply to Integrated "Back Office" and Support Functions

We also ask the Commission to clarify that the Proposed Rules apply to trading personnel and not to personnel involved in control and support functions, such as legal and compliance, operations and credit. Control and support personnel operate as integrated teams and are critically important to appropriate regulatory and risk management safeguards. However, the definitions of "business trading unit" and "clearing unit" might be so broadly drafted as to be read to include control and support staff. [29/]

For example, many firms have a single, consolidated legal and compliance department. Approaching the legal and compliance functions on an integrated basis across different entities ensures better decision making with regard to these critical control functions. Operations in

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[28/] As discussed in section III.F below, firms should continue to be permitted to exchange information necessary to manage risk appropriately.

[29/] The definition of "business trading unit" under proposed §1.71(a)(2) is very broad. As drafted it would apply to any department, division, group, or personnel of an FCM or its affiliates that performs *or is involved in* any pricing, trading, sales, marketing, advertising, solicitation, structuring or brokerage activities. Similarly, the proposed definition of "clearing unit" includes any individual of an FCM who performs *or is involved in* any clearing activities. As described above, control and support personnel, such as the legal and compliance department, operations and credit department, may be *involved* in the provision of trading and clearing services to a client.

many firms are also integrated and are likely to become more so as swap execution and clearing adapt to the requirements of the Dodd-Frank Act. In addition, credit determinations are usually made by a fully integrated credit department that looks across a client's entire relationship with the firm.[30/]

Because of the essential nature of such functions, we believe that the Commission should clarify that the Proposed Rules are not intended to apply to control and support personnel.

On a related issue, Proposed Rule 1.71(d)(2)(ii) provides that no employee of a business trading unit of the SD or MSP may supervise any employee of a clearing unit of an affiliated FCM. We do not oppose the requirement in concept. However, business trading units and clearing units of a multi-service financial institution may be housed within a single division of a firm. In such cases, employees of both the business trading unit of the SD or MSP and the clearing unit of an affiliated FCM may ultimately be supervised by the same manager. In light of the wide variation of corporate organization that is possible, we request that the Commission clarify that an employee of an SD or MSP is prohibited from acting as a *direct* supervisor of non-managerial personnel of the clearing unit of an affiliated FCM.[31/]

2. Personnel Associated with Multiple Registered Entities

As discussed above in section II.E.2, personnel may be associated with both the SD or MSP and the FCM. Salespeople often have multiple registrations because clients wish to discuss and compare transactions using futures, swaps and cleared swaps, which are often close economic substitutes, and salespeople need to be registered and able to discuss all of these products. The Proposed Rules should be modified to permit persons with multiple associations to act on behalf of their clients as the clients' needs dictate.

3. Public Decisions on Acceptance of Clients by SDs and MSPs

In the Rule 23.605 Proposing Release, the Commission states that to prevent anti-competitive discrimination in providing access to central clearing, all decisions "regarding the acceptance of clients for clearing should be made in accordance with publicly disclosed, objective, written criteria."[32/] This proposal raises a number of concerns.

Unlike exchanges and other market facilities and utilities, the failure of an FCM to accept a customer is not a *de facto* denial of access to a market service, at least so long as there remains competition among FCMs. Given the existence of competition among FCMs, no FCM, whether or not it has an affiliated SD or MSP, has any economic incentive to reject a prospective clearing

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[30/] An integrated credit department is essential to make prudent credit determinations and decisions on risk tolerance levels in a holistic manner. There is every reason to permit the credit department to adjust risk tolerance levels taking into account the mix of cleared and un-cleared transactions in which the client engages. Similarly, it is sound risk policy to permit a client to make use of a mix of types of collateral across all of its transactions. These sound practices would be defeated if such decisions cannot be made by an integrated credit department.

[31/] We also ask the Commission to confirm that where the FCM's execution unit is separate from the FCM's clearing unit, the employees of both the business trading unit of the SD or MSP and the execution unit of the affiliated FCM may ultimately be supervised by the same manager.

[32/] 75 Fed. Reg. at 71393.

customer, absent *bona fide* risk concerns. However, clearing does create credit exposures for FCMs. Prudent risk management necessitates that FCMs approach decisions on accepting prospective clients based on a number of factors, including subjective criteria, such as the prospective client's expertise, risk appreciation, judgment and business reputation.

Finally, a requirement to make customer acceptance criteria public may very well enable prospective clients to tailor the information that they provide, potentially exposing firms to higher levels of risk. While the Commission did not specifically include the public disclosure requirement in the Proposed Rules, we request that the Commission clarify that it is not requiring nor suggesting that firms make their client sales and on-boarding decisions public. At the most, the Commission should prohibit FCMs, like SDs, from discriminating against prospective clearing customers in a manner that would act as a restraint on trade or impose a material anti-competitive burden.

IV. Potential Undue Influence on Customers (Proposed Rules 1.71(e) and 23.605(e))

Proposed Rules 1.71(e) and 23.605(e) require disclosure to customers/counterparties of any material incentives and any material conflicts of interest regarding the decision of a client as to the trade execution and/or clearing of the derivatives transaction. We do not disagree with the requirement in concept. However, we believe that this requirement is covered by the proposed Business Conduct Standards for Swap Dealers and Major Swap Participants.[33/] In order to avoid the confusion caused by separate rules addressing the same conduct and potentially resulting in differing standards being applied, we urge the Commission to consolidate the disclosure requirements within the proposed business conduct standards. Alternatively, we respectfully request that the Commission narrow these Proposed Rules and provide guidance regarding the specific types of conflicts it is attempting to manage through the adoption of these disclosure provisions. As written, it is very difficult to appreciate the scope and significance of this disclosure provision, particularly in light of the fact that whether and where to clear is the client's decision. As an alternative, we respectfully request that the Commission require regulated entities to provide an annual disclosure document to clients that contains a description of the potential conflicts that may exist among the firm, its affiliates, its clients, and employees. Such an approach would protect investors while providing firms with more clarity regarding the format and content of required disclosures.

V. Request SRO Oversight and Enforcement of the Proposed Rules

We respectfully request that the Commission allow for SRO oversight and enforcement of Rules 1.71[34/] and 23.605.[35/] This would follow the traditional model that has worked well in

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[33/] See footnote 22.

[34/] Section 4d(c) of the CEA does not prescribe the manner in which the Commission must implement the conflicts of interest provisions, but rather simply directs the Commission to require FCM/IBs to implement conflicts of interest systems and procedures. Therefore the Commission is free to delegate the regulation of conflicts at FCMs/IBs to an SRO.

[35/] Should the Commission require SD/MSPs to register with an SRO, the CFTC should also consider making use of the traditional role of SROs in the oversight of sales practices of those entities that do business with the

the regulation and oversight of securities and futures professionals. The highly technical nature of the Proposed Rules likely will require frequent amendment to keep pace with the industry and significant interpretive guidance as they are established. The leveraging of industry expertise through the use of an SRO also has the benefit of bringing additional regulatory resources to bear in the effort to implement these new and extensive requirements.

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We appreciate the opportunity to provide comments to the Commission regarding Proposed Rules 1.71 and 23.605, and we would be pleased to discuss any questions or comments the Commission might have with respect to this letter. Questions about this letter may be directed to any of the signatories below or their respective staff members.

Sincerely,

John M. Damgard
President
FIA

Robert G. Pickel
Executive Vice Chairman
ISDA

Kenneth E. Bentsen, Jr.
Executive Vice President
Public Policy and Advocacy
SIFMA

cc: Honorable Gary Gensler, CFTC, Chairman
Honorable Michael Dunn, CFTC, Commissioner
Honorable Jill E. Sommers, CFTC, Commissioner
Honorable Bart Chilton, CFTC, Commissioner
Honorable Scott O'Malia, CFTC, Commissioner
Sarah E. Josephson, Associate Director, CFTC, Division of Clearing and Intermediary Oversight
Ward P. Griffin, Counsel, CFTC, Office of General Counsel

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public. Specifically, the Commission could set the framework under Regulation 23.605 and instruct the appropriate SRO to write the detailed compliance requirements. Although §4s(j)(7) provides that the Commission shall prescribe rules governing SDs and MSPs, nothing would preclude the Commission from establishing the framework for such regulation and in doing so relying upon the SRO to carry out audit and compliance functions, including providing specific guidance to registrants with respect to the standards for meeting the Commission's requirements. The guidance would be subject to the Commission's review and approval.