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September 30, 2017

Filed Electronically at www.cftc.gov/projectkiss

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
Telefacsimile: (202) 418-5521

Re: Commodity Futures Trading Commission's Request for Public Input on Simplifying Rules, *Project KISS*, in RIN 3038-AE55

Dear Mr. Kirkpatrick:

The International Energy Credit Association ("IECA") appreciates the efforts of the Commodity Futures Trading Commission ("CFTC" or "Commission") and its Staff undertaking the Commission's Project KISS initiative, thereby requesting the public to submit "suggestions about how the Commission's existing rules, regulations or practices could be applied in a simpler, less burdensome, and less costly manner."[1] The Commission has requested that all Project KISS comments be divided into the following five categories for submission: (i) Registration; (ii) Reporting; (iii) Clearing; (iv) Trading and Execution; and (v) Miscellaneous.

On that basis, the IECA respectfully submits these comments ("Comments") offering suggestions, which have been divided into each of the Commission's proposed five categories:

INDEX OF KISS COMMENTS:

[1] See Project KISS Request for Information, 82 Fed. Reg. 21494, RIN3038-AE55 (published on May 9, 2017); and Correction thereto, 82 Fed. Reg. 23765 at 23765, RIN 3038-AE55 (published on May 24, 2017

Section II - IECA's KISS comments on **Reporting** (beginning on page 5);

A. Modification of Part 45, Reporting and Recordkeeping Requirements, to track improvements in other CFTC recordkeeping requirements applicable to commercial end-users.

B. The Commission's No-Action Relief granted in Staff Letter No. 13-09 with respect to the reporting of inter-affiliate swaps should be modified and codified.

C. The IECA urges the CFTC to adopt, as a guiding principle with respect to its Reporting Roadmap and to reporting in general, a policy of encouraging commercial end-users and hedging affiliates to utilize futures and swaps to hedge commercial risk.

D. Clarify in rule text under CFTC Regulations 1.31(a)(1), 45.2(c), and 46.2(c), that there is no CFTC recordkeeping requirement or retention period for the records of oral communications of commercial end-users of swaps.

E. Eliminate the unique swap identifier (USI) recordkeeping requirement under CFTC Regulation 45.5 for non-reporting entities, particularly for the USIs of any swap data repository ("SDR") which requires non-reporting entities to pay onboarding fees equivalent to reporting entities to access USIs created by such SDR for the reporting/non-reporting counterparty-pair.

F. Eliminate the verification of swap reporting party data under CFTC Regulation 45.14(b) by non-reporting commercial end-users..

G. Eliminate the reporting of swap corporate events under CFTC Regulations 45.4(c)(1) and 45.4(d)(1) by commercial end-users.

Section III - IECA's KISS comments on **Clearing** (beginning on page 12);

A. The Commission's definition of "Hedging or mitigating commercial risk" should emphasize that: "A hedge should make business sense to the commercial end-user attempting to genuinely hedge or mitigate its exposure to commercial risk."

B. The Commission's regulations implementing the Hedging Affiliate Exception under CEA Section 2(h)(7)(D), as amended by the Consolidated Appropriations Act, 2016, should codify the statement in the Staff's No-Action Letter No. 14-144 accepting book entries or other internal accounting treatment in lieu of back-to-back inter-affiliate swaps.

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C. The Commission's regulations defining "Financial Entity" in Section 1.3(mmm)(1)(vi) should make clear that an entity that predominantly enters into swaps, provided it uses those swaps to hedge its and its affiliates' exposure to commercial risk and provided such entity is a member of a corporate group that does not include any banking company, shall not be designated as a Financial Entity.

Section IV - IECA's KISS comments on **Trading and Execution** (beginning on page 14); and

A. Transactions entered into pursuant to FERC regulated tariffs, even if entered into on a bilateral basis, should be exempt from the CFTC's definition of a Swap.

B. Change the definition of "member" of a DCM or SEF under CFTC Regulation 1.3(q)(1)(ii) to exclude non-CFTC-registered entities, i.e. commercial end-users.

C. Eliminate the requirement in the interpretive guidance portion of the Products Definition Final Rule, which requires written confirmations of scheduling book-outs under the Brent Interpretation.

Section V – IECA's **Miscellaneous** KISS comments (beginning on page 15).

A. The Commission's extensive use of Interpretive Guidance, No-Action Letters, and Frequently Asked Questions (FAQs) is not an efficient way to regulate the swaps industry; The CFTC should only use such tools as a means of quickly addressing issues with the intention of subsequently codifying such "rules" in its regulations in the Code of Federal Regulations.

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I. REGISTRATION – The IECA offers the following KISS comments applicable to Registration.

A. Eliminate the automatic reduction from $8 billion to $3 billion of the De Minimis threshold for registration as a Swap Dealer ("SD") in the definition of SD in CFTC Regulation Section 1.3(ggg)(4).

As long as this automatic reduction remains in the Commission's definition of SD, it will deter many non-SD market participants from entering into longer-term swaps that would extend beyond the date of this automatic reduction and will deter such non-SD market participants from entering into larger swap positions that could aggregate to an "aggregate gross notional amount" in excess of $3 billion.

The presence of this automatic reduction in the De Minimis threshold for registration has the adverse impact of reducing the pool of market participants with whom commercial end-users can enter into larger swaps and swaps with a longer term needed to hedge their exposure to market risks. Acting now to eliminate the automatic reduction in the current De Minimis threshold will provide legal certainty to non-SD market participants and will therefore benefit commercial end-users who benefit directly from a larger and more competitive pool of willing counterparties, both non-SDs and SDs, in order to hedge their exposure to commercial risk at a reasonable cost.

As we note later in these Comments, the CFTC should endorse policies which encourage commercial end-users to hedge their exposure to commercial risk and avoid policies that discourage commercial end-users from using swaps to hedge their exposure to commercial risk. Any policy which reduces the pool of entities willing to enter into swaps with commercial end-users, without achieving some other legitimate regulatory objective, should not be endorsed by the Commission.

B. Maintain the current $8 billion De Minimis threshold for registration as a SD in the definition of SD in CFTC Regulation 1.3(ggg)(4).

As demonstrated by the Commission Staff's 2015 Preliminary Report, over 3400 non-financial, non-registered entities traded swaps between Q2/2014 and Q1/2015, of those only 12 unregistered entities traded over 5,000 swaps in a year, and less than 5 non-financial entities are registered as a SD. The IECA submits that it makes little sense to impose the De Minimis threshold reduction to capture merely 12 non-financial firms that trade in excess of 5,000 swaps annually.

Based on the CFTC Staff's 2015 Preliminary Report, there does not appear to be any legitimate regulatory objective that would be achieved by reducing the current $8 billion De Minimis threshold to $3 billion. The IECA therefore encourages the Commission to maintain the current $8 billion threshold.

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II. REPORTING - The IECA offers the following KISS comments applicable to Reporting.

A. Modification of Part 45, Reporting and Recordkeeping Requirements, to track improvements in other CFTC recordkeeping requirements applicable to commercial end-users.

To provide regulatory certainty and lessen regulatory burdens and costs on commercial end-users, it would be helpful if the CFTC interpreted its Part 45 swap data reporting and recordkeeping rule consistently with other CFTC recordkeeping rules that have evolved over time.

Specifically, as explained further below, IECA respectfully requests that, consistent with recent amendments made to other CFTC regulations, the CFTC interpret the Part 45 swap data recordkeeping requirements applicable to commercial end-users that are not swap dealers, major swap participants or otherwise required to be registered with the CFTC as follows:

- The commercial end-users are required to retain only transaction records pertaining to executed swap transactions (such as master or bespoke agreements, confirmations, and associated swap transaction data stored in an end-user's trade capture system), and not to retain any pre-trade communications (such as communications by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media).

- To the extent that the commercial end-users record their traders' telephone calls in the ordinary course of their business, the CFTC does not require them to retain the recordings. Alternatively, to the extent that the CFTC expects such recordings to be retained, a retention period of one year after the call, rather than five years after the life of a swap, would apply.

Following enactment of the Dodd-Frank Act, one of the first subjects addressed by the CFTC was recordkeeping for swaps. Before the CFTC even adopted any rule interpreting what is and is not a "swap," the CFTC issued an interim final rule and then a permanent final rule to preserve "swap" data.[2] In the interim final rulemaking order, the CFTC found that the Dodd-Frank Act does not explicitly require counterparties to swaps to retain data.[3] Nonetheless, the CFTC reasoned that in order to fulfill the reporting requirements in the Dodd-Frank Act, it is necessary for data related to the terms of a

[2] *Reporting Certain Post-Enactment Swap Transactions*, 75 Fed. Reg. 78892 (Dec. 17, 2010); *Swap Data Recordkeeping and Reporting Requirements*, 77 Fed. Reg. 2136 (Jan. 13, 2012).
[3] 75 Fed. Reg. at 78894.

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swap transaction to be retained.[4] The CFTC was sensitive to burdens on counterparties, such as commercial end-users. Therefore, it limited swap data retention to "material information" relating to the terms of a swap retained in the existing format used by a counterparty in its ordinary course of business.[5]

Providing guidance to swap market participants, the CFTC also explained helpfully the types of information that it believed counterparties to swaps routinely retain, consistent with reasonable business practice, and therefore would be covered by the interim swap data retention requirement, such as:

> (i) information necessary to identify and value the transaction (*e.g.*, underlying asset and tenor);
> (ii) the date and time of execution of the transaction;
> (iii) the volume (*e.g.*, notional or principal amount);
> (iv) information relevant to the price and payment of the transaction until the swap is terminated, reaches maturity, or is novated;
> (v) whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization, and if so, the identity of such agency or organization;
> (vi) any modification(s) to the terms of the transaction; and
> (vii) the final confirmation of the transaction.[6]

This list helped swap counterparties understand what types of information the CFTC expected them to retain during the interim period before the CFTC adopted its permanent final rule. It also helped achieve the CFTC's regulatory goal of preserving material information necessary for swap data reporting.

From there, however, the CFTC's permanent final rule took an unwieldy turn. Ultimately, the CFTC adopted a swap data recordkeeping regulation more broadly and vaguely stating:

> (b) *Recordkeeping by non-SD/MSP counterparties. All non-SD/MSP counterparties subject to the jurisdiction of the Commission shall keep full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty,* including, without limitation, all records demonstrating that they are entitled, with respect to any swap, to elect the clearing requirement exception in CEA section 2(h)(7).
>
> (c) *Record retention.* All records required to be kept pursuant to this section shall be retained with respect to each swap throughout the life of

[4] *Id.*
[5] *Id.*
[6] 75 Fed. Reg. at 78894, 78896.

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> the swap and for a period of at least five years following the final termination of the swap.[7]

At the time such regulation was proposed, commenters expressed concern that the regulation would impose unnecessarily burdensome or costly obligations on commercial end-users that are not swap dealers or major swap participants. [8] They also expressed concern about a lack of regulatory certainty arising from the broad and vague language in the proposed rule. Accordingly, commenters asked the CFTC to clarify the scope of the recordkeeping obligation and provide examples of the types of information that must be retained. Some asserted, in particular, that pre-trade information, preceding the execution of the final terms of a swap, should not be subject to the recordkeeping requirement.

For example, the Edison Electric Institute and Electric Power Supply Association stated:

> The Commission's proposal would require non-SD/MSP counterparties to keep full, complete, and systematic records, including all pertinent data and memoranda, with respect to each swap to which they are counterparty. The Commission needs to define what constitutes 'all pertinent data and memoranda.' The recordkeeping requirements should apply to the official business records memorializing the legal terms of the reportable swap and upon which the end-user relies to pay or be paid under the swap. Such records would include master or bespoke agreements, long or short-form confirmations, amendments and associated swap transaction data stored in an end-user's trade capture system. Such records should not include data extraneous to the reportable swap transaction, including records that do not memorialize the final terms of the swap such as valuation data.[9]

Similarly, the American Gas Association ("AGA") stated:

> Counterparties need clear rules delineating their recordkeeping obligations in order to build effective compliance programs. AGA, therefore, requests that the Commission provide additional detail as to the specific information that would need to be retained by individual market participants in compliance with the proposed rules. In particular, the Commission should clearly spell out, and include examples of, the information that would fall into the category of "pertinent data and memoranda" under proposed § 45.2(b).[10]

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[7] 17 C.F.R. § 45.2 (b),(c) (2017).

[8] *E.g.*, Comments of Coalition of Energy End-Users, including Edison Electric Institute and Electric Power Supply Association, RIN No. 3038-AD19, at p. 1 (Feb. 7, 2011); Comments of American Gas Association, RIN No. 3038-AD19, at p.p. 4-5 (Feb. 3, 2011).

[9] Comments of Coalition of Energy End-Users, including Edison Electric Institute and Electric Power Supply Association, RIN No. 3038-AD19, at p. 2 (Feb. 7, 2011).

[10] Comments of American Gas Association, RIN No. 3038-AD19, at p.4 (Feb. 3, 2011).

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Additionally, the Committee on the Investment of Employee Benefit Assets ("CIEBA") stated:

> We believe the non-SD/MSP counterparty should only be required to retain the final executed trade Confirmation with respect to [a] swap entered into with any SDs or MSPs which, by the proposed definition of Confirmation in 45.1(b), includes the final executed swap agreements and memorializes "all terms of a swap" (including all required swap creation data and all required swap continuation data as required by Proposed Rule 45.2(b)).[11]

Under the direction of then-Chairman Gensler, the CFTC declined to modify or even clarify its proposed regulation by providing any specific examples of the types of information that must be retained. The CFTC justified its stance on the ground that the broad language in its final swap data recordkeeping regulation was drawn from a pre-existing recordkeeping regulation adopted in the context of futures. The CFTC stated that futures market participants have been able to retain such records and, because the phrase "all pertinent data and memoranda" is not defined in the futures regulation, the CFTC should not delineate the meaning of that phrase for purposes of compliance with the new swap data recordkeeping regulation.[12]

But, the old futures regulation did include some examples of records that must be retained by registrants in the context of pit trading in the futures market (*e.g.*, orders, trading cards, signature cards, street books, journals, ledgers, canceled checks, confirmations, and statements of purchase and sale).[13] It also was interpreted pragmatically, in case law, not to mandate the retention of recordings of telephone calls.[14] In any event, clarification is needed in the context of swaps because the structure and legislative history of the Dodd-Frank Act evidence that Congress did not intend the CFTC to impose on commercial end-users the same level of regulatory burdens and associated costs imposed on other registrants, such as swap dealers or major swap participants.[15]

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[11] Comments of the Committee on the Investment of Employee Benefit Assets, RIN No. 3038-AD19, at p. 7 (June 3, 2011).
[12] 77 Fed. Reg. at 2141.
[13] See 17 C.F.R. § 1.35 (a) (2010).
[14] *Gilbert v. Lind-Waldock*, 1996 CFTC LEXIS 115 (June 17, 1996).
[15] *See, e.g.*, Letter from the Honorable Blanche Lincoln, Chairman of U.S. Senate Committee on Agriculture, Nutrition and Forestry, and the Honorable Christopher Dodd, Chairman of U.S. Senate Committee on Banking, Housing and Urban Affairs, to the Honorable Barney Frank, Chairman of U.S. House of Representatives Committee on Financial Services, and the Honorable Colin Peterson, Chairman of U.S. House of Representatives Committee on Agriculture (June 30, 2010).

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As recognized previously by Commissioner Giancarlo, who is now Chairman of the CFTC, the CFTC should "balance the public's interest in collecting commercial information for use in investigations and enforcement, against costs and burdens placed on American commerce and industry and the jobs they generate."[16] This is important because compliance costs are ultimately passed along to consumers "through higher costs for everyday items like a loaf of bread or a gallon of gasoline, milk or winter heating oil."[17]

With the burden on commercial end-users in mind, the CFTC ultimately adapted the old futures recordkeeping regulation to incorporate swaps[18] and amended it[19] to reduce the recordkeeping obligations of commercial end-users that are not swap dealers, major swap participants or other types of registered entities. The regulation, as currently structured in 17 C.F.R. § 1.35, now requires that if these commercial end-users have trading privileges on a designated contract market or swap execution facility, they must keep their transaction records for trades they execute,[20] but not any pre-trade communications.

Unlike other registered entities, such commercial end-users are not required by 18 C.F.R. § 1.35 to retain "oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and any related cash or forward transactions . . . whether transmitted by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media."[21] IECA respectfully submits that the CFTC should consistently interpret the scope of its swap data recordkeeping regulation, in 17 C.F.R. § 45.2 (b), to require commercial end-users that are not swap dealers, major swap participants or other types of registered entities to retain only records of executed swap transactions, such as master or bespoke agreements, confirmations, and associated swap transaction data stored in an end-user's trade capture system, and not to require such commercial end-users to retain any pre-trade communications.

Clarification and harmonization of the length of the swap data retention period also would be appreciated so that commercial end-users can consistently structure their record retention policies and minimize costs. IECA understands that the CFTC does not require commercial end- users that are not swap dealers, major swap participants or other types of registered entities to record their telephone communications, and, hence, keep

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[16] *Records of Commodity Interest and Related Cash or Forward Transactions*, 80 Fed. Reg. 80247, 80257 (Dec. 24, 2015).
[17] *Id.*
[18] *Adaption of Regulations to Incorporate Swaps – Records of Transactions*, 77 Fed. Reg. 75523 (Dec. 21, 2012), as corrected in 78 Fed. Reg. 21045 (April 9, 2013).
[19] , 80 Fed. Reg. at 80247.
[20] Even with respect to transaction records, text messages are excluded from the retention requirement for such commercial end-users.
[21] *See* 17 C.F.R. § 1.35 (a)(1)(iii) (2017). *Cf.* 17 C.F.R. § 1.35 (a)(6) (2017).

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recordings of such communications.[22] Recording of traders' telephone calls is common in the electric and natural gas industries, however, for other business purposes. To the extent that calls are recorded voluntarily in the ordinary course of business, a retention period of five years after the life of the swap, like that set forth in 17 C.F.R. § 45.2 (c), would be unnecessarily excessive, as the CFTC recognized in amendments it made more recently to other rules. Indeed, as shown in 17 C.F.R. § 23.203 (b)(2), even registered swap dealers and major swap participants were only required to keep records of "oral communications communicated by telephone, voicemail, mobile device, or other digital or electronic media . . . for a period of one year."

Most recently, the CFTC amended its general rule, in 17 C.F.R. § 1.31, governing the retention period for all books and records required to be kept by the Commodity Exchange Act or CFTC regulations, to state that a "records entity that is required to retain oral communications, shall keep regulatory records of oral communications for a period of not less than one year from the date of such communication."[23] IECA therefore believes that recordings of telephone calls, to the extent that they are even required to be kept at all, should be retained for a period of not less than "one year" from the date of the call, rather than for a period of at least "five years" following the final termination of the swap set forth in 17 C.F.R § 45.2 (c). The one year retention period in 17 C.F.R. § 1.31 (b) (2), however, is prefaced by an earlier clause stating "[u]less specified elsewhere in the . . . Commission regulations," thereby calling into question whether the longer five-year period in 17 C.F.R § 45.2 (c) applies instead of the general one year period . Accordingly, it would be helpful for the CFTC to clarify that, to the extent commercial end-users record their traders' telephone calls in the ordinary course of their business, the CFTC does not require them to retain the recordings. Alternatively, to the extent that the CFTC does expect such recordings to be retained, a retention period of one year after the call, rather than five years after the life of a swap, would apply.

B. The Commission's No-Action Relief granted in Staff Letter No. 13-09 with respect to the reporting of inter-affiliate swaps should be modified and codified.

In CFTC Staff Letter No. 13-09[24], the Commission provided no-action relief to non-swap dealers/major swap participants ("non-SDs/MSPs") from the Part 45 and Regulation 50.50(b) reporting requirements for "intra-group swaps" between certain corporate affiliates. As the Commission Staff acknowledged in the letter, "such intra-group swaps are used only for managing risk within a corporate group, and therefore do

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[22] *See* 77 Fed. Reg. at 75528, 75540. *See also* 17 C.F.R. § 1.35 (a)(6)(2017). Cf. 17 C.F.R. § 1.35 (a)(1)(iii)(2017).

[23] *Recordkeeping*, 82 Fed. Reg. 24479, 24486 (May 30, 2017).

[24] See CFTC Staff Letter No. 13-09, No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements Under Parts 45, 46, and Regulation 50.50(b) of the Commission's Regulations (Apr. 5, 2013).

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not increase overall systemic risk or warrant the same reporting requirements as external swaps." The IECA supports this relief and suggests that such relief should be continued.

With respect to non-SDs/MSPs that enter into intra-group swaps with foreign affiliates, however, the sixth condition in Section III of Letter No. 13-09 undermines the relief granted by arguably requiring foreign affiliates to report swaps that they enter into with unaffiliated foreign counterparties to an SDR:

> All swaps entered into between either one of the affiliated counterparties and an unaffiliated counterparty (regardless of the location of the affiliated counterparty) must be reported to an SDR registered with the Commission, pursuant to, or as if pursuant to, parts 43, 45, and 46 of the Commission's regulations.

Such swaps would otherwise be non-jurisdictional and outside the scope of the Commission's reporting requirements. To keep all market participants on a level playing field and avoid inadvertently imposing what amount to additional and non-jurisdictional requirements on certain market participants, the Commission should clarify that the sixth condition only applies to swaps that are otherwise reportable under the Commission's reporting requirements.

As we note generally in Section V of these Comments, the IECA urges the Commission to codify the relief provided in Letter No. 13-09 in the CFTC's regulations. Market participants, both new entrants and those who have been participants in the swaps markets for years, often are unaware of the modifications to the CFTC's regulatory requirements that have been provided by its various No-Action Letters and other similarly non-binding but critical guidance provided by the CFTC to market participants. This approach to regulation worked well when applied to futures markets, because each futures exchange had its own rulebook, with which futures markets participants knew they must comply. Applied to over-the-counter swaps markets, this approach leaves swap market participants totally unaware of both regulatory requirements and valuable regulatory relief.

C. The IECA urges the CFTC to adopt, as a guiding principle with respect to its Reporting Roadmap and to reporting in general, a policy of encouraging commercial end-users and hedging affiliates to utilize futures and swaps to hedge commercial risk.

As we said in our comments on the Reporting Roadmap, choosing not to hedge commercial risk is inherently speculative and imprudent. If, however, the CFTC imposes unnecessarily burdensome reporting obligations on commercial end-users and hedging affiliates with respect to swaps used for hedging, then the costs of complying with the CFTC's policies will discourage those commercial end-users and hedging affiliates from using futures and swaps to hedge their exposure to commercial risk.

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The IECA believes that financial derivatives markets, including futures and swaps markets, exist for the primary purpose of allowing commercial end-users (such as farmers, energy companies, manufacturers, airlines and others in the real economy), and their hedging affiliates, to hedge exposure to commercial risks. As such, any policy that discourages commercial end-users and hedging affiliates from using swaps or futures to hedge legitimate exposure to commercial risk is a policy that the CFTC should avoid.

Accordingly, the IECA encourages the DMO to avoid imposing unnecessary reporting burdens on commercial end-users and hedging affiliates with respect to swaps used for hedging. The IECA also urges the DMO to establish, as a guiding principle for its Reporting Roadmap and for reporting in general, a policy of encouraging commercial end-users and hedging affiliates to utilize futures and swaps to hedge commercial risk, together with a corollary policy of avoiding rules that are likely to discourage commercial end-users and hedging affiliates from utilizing futures and swaps to hedge exposure to commercial risk.

D. Clarify in rule text under CFTC Regulations 1.31(a)(1), 45.2(c), and 46.2(c), that there is no CFTC recordkeeping requirement or retention period for the records of oral communications of commercial end-users of swaps. (Additional discussion can be made available upon request.)

E. Eliminate the unique swap identifier (USI) recordkeeping requirement under CFTC Regulation 45.5 for non-reporting entities, particularly for the USIs of any swap data repository ("SDR") which requires non-reporting entities to pay onboarding fees equivalent to reporting entities to access USIs created by such SDR for the reporting/non-reporting counterparty-pair. (Additional discussion can be made available upon request.)

F. Eliminate the verification of swap reporting party data under CFTC Regulation 45.14(b) by non-reporting commercial end-users. (Additional discussion can be made available upon request.)

G. Eliminate the reporting of swap corporate events under CFTC Regulations 45.4(c)(1) and 45.4(d)(1) by commercial end-users. (Additional discussion can be made available upon request.)

III. CLEARING - The IECA offers the following KISS comments applicable to Clearing.

A. The Commission's definition of "Hedging or mitigating commercial risk" should emphasize that: "A hedge should make business sense to the commercial end-user attempting to genuinely hedge or mitigate its exposure to commercial risk."

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If the proposed hedge transaction satisfies corporate tax and generally applicable accounting standards, it should be viewed as a legitimate, valid, and bona fide hedge. Similarly, if a proposed hedge transaction reduces risk or anticipated risks, it should be treated as a legitimate, valid, and bona fide hedge.

B. The Commission's regulations implementing the Hedging Affiliate Exception under CEA Section 2(h)(7)(D), as amended by the Consolidated Appropriations Act, 2016, should codify the statement in the Staff's No-Action Letter No. 14-144 accepting book entries or other internal accounting treatment in lieu of back-to-back inter-affiliate swaps.

The CFTC Staff's Letter No. 14-144 made clear that entering into back-to-back swap transactions between an end-user affiliate and a hedging affiliate (or treasury affiliate) is not required to comply with the hedging affiliate exception under CEA Section 2(h)(7)(D). When CEA Section 2(h)(7)(D) was amended by the Consolidated Appropriations Act, 2016, while many of the Staff's conditions in Letter No. 14-144 were incorporated into the revised text of CEA Section 2(h)(7)(D), this statement from Letter No. 14-144 was not included.

Accordingly, the IECA recommends that Section 1.3(kkk) of the Commission Regulations be modified to make clear that a book entry or other internal accounting treatment will satisfy the requirements of the hedging affiliate exception under CEA Section 2(h)(7)(D), so long as the hedging affiliate identifies the end-user affiliate whose commercial risk is being hedged.

C. The Commission's regulations defining "Financial Entity" in Section 1.3(mmm)(1)(vi) should make clear that an entity that predominantly enters into swaps, provided it uses those swaps to hedge its and its affiliates' exposure to commercial risk and provided such entity is a member of a corporate group that does not include any banking company, shall not be designated as a Financial Entity.

The Bank Holding Company Act ("BHCA") provision quoted in the definition of Financial Entity lists additional activities that a banking company will be allowed to perform, including, among other things, entering into swaps and owning armored trucks. Nowhere does the law suggest that a company predominantly engaged in only one of those enumerated additional activities, but which is not a banking company and is not affiliated with any banking company, should be considered a Financial Entity.

For example, it would make very little sense for the CFTC to say that a company, which is predominantly engaged in owning armored cars and which has no affiliation with any banking company, is a Financial Entity. And yet, the CFTC has said that a company, which is predominantly engaged in entering into swaps and which has no affiliation with any banking company, is a Financial Entity.

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The IECA submits that "keeping it simple stupid" supports clarifying the definition of a Financial Entity in Section 1.3(mmm)(1)(vi) to exclude any entity that predominantly enters into swaps, provided it uses those swaps to hedge its and its affiliates' exposure to commercial risk and provided such entity is a member of a corporate group that does not include any banking company.

IV. TRADING AND EXECUTION - The IECA offers the following KISS comments applicable to Trading and Execution.

A. Transactions entered into pursuant to FERC regulated tariffs, even if entered into on a bilateral basis, should be exempt from the CFTC's definition of a Swap.

Pursuant to Section 4(c)(6) of the Dodd-Frank Act, the CFTC is allowed to grant an exemption from the requirements of the CEA for:

> "an agreement, contract or transaction that is entered into (A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission; (B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or (C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f))."

The CEA, as amended by the Dodd-Frank Act, allows the CFTC to grant an exemption from CFTC regulation for "agreements, contracts or transactions" entered into pursuant to a "tariff or rate schedule approved or permitted to take effect by the [FERC]" and the CFTC has already granted such an exemption for transactions entered into on markets administered by Independent System Operators and Regional Transmission Operations ("ISOs/RTOs").

The IECA submits that transactions for these same products that are entered into by entities on a bilateral basis, i.e., outside of the markets administered by the ISOs/RTOs, are also entered into pursuant to "tariffs or rate schedules approved or permitted to take effect by the FERC," and, as such, are fully subject to federal regulation and oversight, including the FERC's requirement that such transactions are "just and reasonable" under the Federal Power Act and the FERC's authority to prohibit and penalize market manipulation.

As such, the IECA submits that these additional agreements, contracts or transactions entered into pursuant to a tariff or rate schedule approved or permitted to take effect by the FERC, but which are entered into bilaterally instead of within the

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markets administered by the ISOs/RTOs, are equally deserving of an exemption from the CFTC's swap jurisdiction.

If necessary, the CFTC could reserve its jurisdictional authority over fraud and market manipulation with respect to any such transactions that are granted an exemption from all other CFTC regulations applicable to swaps. Such an exemption could be modeled after the CFTC's Trade Option exemption, which preserves the CFTC's jurisdiction to protect the markets and market participants from inappropriate market behavior, without appreciably interfering with or disrupting the day-to-day functioning of these physical energy markets, which energy companies and energy consumers rely on for safe, reliable and reasonably-priced energy supplies.

B. Change the definition of "member" of a DCM or SEF under CFTC Regulation 1.3(q)(1)(ii) to exclude non-CFTC-registered entities, i.e. commercial end-users. (Additional discussion can be made available upon request.)

C. Eliminate the requirement in the interpretive guidance portion of the Products Definition Final Rule, which requires written confirmations of scheduling book-outs under the Brent Interpretation. (Additional discussion can be made available upon request.)

V. MISCELLANEOUS - The IECA offers the following Miscellaneous KISS comments.

A. The Commission's extensive use of Interpretive Guidance, No-Action Letters, and Frequently Asked Questions (FAQs) is not an efficient way to regulate the swaps industry; The CFTC should only use such tools as a means of quickly addressing issues with the intention of subsequently codifying such "rules" in its regulations in the Code of Federal Regulations.

Market participants, especially commercial end-users, who do not spend every day entering into swaps rely on a review of the CFTC's regulations to determine the rules they must comply with in entering into swaps to hedge their exposure to commercial risk. Yet many of the "rules" applicable to the CFTC's regulation of swap market participants cannot be found in the CFTC's regulations that are set forth in Title 17 of the Code of Federal Regulations ("CFR").

Instead, new market participants are left to guess whether there is an "Interpretive Guidance," "No-Action Letter," or "FAQ" containing "rules" applicable to any particular topic. Typically, these swap market participants are unaware of such "rules."

In addition, such Interpretive Guidance documents, No-Action Letters, and FAQs all indicate that they are not binding on the CFTC and they may be changed at any time. As such, swap market participants that rely on those forms of guidance do so at their peril. Similarly, at least one appellate court has held that the CFTC would bear a

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substantial burden if it sought to enforce a regulatory compliance action against a market participant based on that market participant's failure to comply with the CFTC's "interpretive guidance."

We encourage the use of No-Action Letters and FAQs when used by the Commission and its Staff to respond quickly to issues of concern to market participants. We also encourage the use of FAQs as a means of providing explanation of various policies to market participants. The IECA submits, however, that the CFTC's reliance on Interpretive Guidance documents, No-Action Letters and FAQs to establish long-term policies is not the "best approach" to regulation for either the Commission or those it seeks to regulate.

The IECA urges the Commission to codify its "rules" and only use the No-Action Letters, Interpretive Guidance documents and FAQs, as a means of quickly addressing matters with the intention of codifying such "rules" subsequently in its Regulations in the CFR.

VI. About the IECA

The IECA is an association of over 1,400 credit, risk management, legal and finance professionals that is dedicated to promoting the education and understanding of credit and other risk management-related issues in the energy industry. For over ninety years, IECA members have actively promoted the development of best practices that reflect the unique needs and concerns of the energy industry.

The IECA seeks to protect the rights and advance the interests of a broad range of domestic and foreign energy market participants, representatives of which make up the IECA's membership. These entities finance, produce, sell, and/or purchase for resale substantial quantities of various physical energy commodities, including electricity, natural gas, oil and other energy-related physical commodities necessary for the healthy functioning of the energy markets and the "real economy". Many of these energy market participants rely on cleared and uncleared swap transactions to help them mitigate and manage (i.e., hedge) the risks of physical energy commodity price volatility to their commercial energy businesses, which millions of Americans and the American economy rely on for safe, reliable and reasonably-priced energy supplies.

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VII. Conclusion

The IECA appreciates the opportunity to submit this Request as part of the CFTC's Project KISS initiative and respectfully requests that the CFTC modify its various regulations, interpretations and procedures as more fully set forth herein. We would welcome the opportunity to discuss this Request further should you require any additional information on any of the topics discussed herein.

Yours truly,
INTERNATIONAL ENERGY CREDIT ASSOCIATION

/s/ Phillip G. Lookadoo	*/s/ Jeremy D. Weinstein*
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cc: Michael Gill, Regulatory Reform Officer