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September 28, 2017

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

Re: Project KISS (RIN 3038-AE55)

Dear Mr. Kirkpatrick:

The Futures Industry Association ("**FIA**") welcomes the opportunity provided by "Project KISS" to suggest ways in which the Commodity Futures Trading Commission's ("**CFTC**" or "**Commission**") existing rules, regulations, and practices can be made simpler, less burdensome, and less costly.[1] FIA strongly supports the Commission's effort to conduct a holistic review of its regulatory framework. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("**Dodd-Frank Act"**) required the Commission to issue an unprecedented number of new regulations on a wide variety of topics. The Dodd-Frank Act also required the Commission to issue many of these new rules on a short timeframe, which added to the burdens placed on the Commission, including its staff ("**Staff**"), as well as market participants (*e.g*., clearing customers, clearing firms, exchanges and clearinghouses). The Commission now has the opportunity, with the benefit of several years of experience in implementing and enforcing its expanded regulatory authority, to review its regulatory framework with an informed eye and assess its effectiveness.

The announcement of Project KISS coincided with FIA's own review of financial regulations applicable to futures and cleared derivatives, which culminated in the publication in May 2017 of FIA's *Roadmap to Smarter Regulation & Healthier Markets* ("***FIA Roadmap***").[2] The *FIA Roadmap* was designed to assist the CFTC and other financial regulators in conducting a comprehensive review of the regulation of cleared derivatives markets and identifying areas where regulation can be improved. The *FIA Roadmap*

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[1] FIA is the leading global trade organization for the futures, options, and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets; protect and enhance the integrity of the financial system; and promote high standards of professional conduct.

[2] The *FIA Roadmap* is available on FIA's website at: https://fia.org/sites/default/files/content_attachments/2017-05-11_FIA_US_Policy_Whitepaper.pdf.

recommends statutory, regulatory, and policy changes premised upon principles-based regulation that would allow U.S. derivatives markets to thrive globally with appropriate regulatory oversight.

FIA's recommendations in this letter echo and build upon the themes and positions in the *FIA Roadmap*. Consistent with the stated scope of Project KISS, as well as consideration of the costs associated with regulatory change, our suggestions focus on areas where the CFTC can take immediate steps to make its regulatory regime more effective and efficient without requiring significant agency resources or resulting in significant costs for market participants. In the interest of comprehensiveness, we also have identified areas where we believe that the most appropriate mechanism for improvement is a modification of an existing rule or pending rule proposal.[3]

We appreciate the agency's willingness to solicit and consider industry input on how it can more efficiently carry out its regulatory mandate, which is a critical component of the safe and effective global markets on which our members depend. We look forward to working with the Commission and CFTC Staff on the issues and challenges addressed herein and commend the agency for the hard work and progress it has already made in a number of these areas.

I. Executive Summary

FIA's Project KISS recommendations fall into three general categories:

(1) Priority issues on which the Commission should take immediate action consistent with Project KISS;

(2) Opportunities to promote smart regulation through simplification, modernization, and harmonization of CFTC and related rules; and

(3) Solutions in progress where FIA is closely engaged with CFTC Staff toward resolving a regulatory challenge.

We summarize our recommendations in each of the categories in turn below.

Priority Issues for Project KISS. FIA urges the Commission to take swift action on these issues to better align the Commission's regulatory framework with the goals of the Dodd-Frank Act and the Commodity Exchange Act ("**CEA**") and remove unnecessary, but substantial, burdens on the industry. Consistent with the spirit of Project KISS, we have focused on changes that will not require significant resources from the Commission or impose significant costs on market participants.

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[3] FIA has worked cooperatively with the International Swaps and Derivatives Association ("**ISDA**") and the Securities and Financial Markets Association ("**SIFMA**") to streamline industry responses to the KISS initiative and to reduce duplication of efforts among our shared membership. Where appropriate, we have tried to include the issues on which FIA is best suited to speak for our members and to allow other trade associations to cover in more detail issues more specific to their missions. In doing so, we have coordinated responses, and we express general support for the positions set forth in the ISDA and SIFMA responses to the KISS initiative.

- *Tackle Market Fragmentation*. The Commission should reevaluate when its swaps regulatory regime should apply to cross-border activity. In broadly applying U.S. swaps rules to activity in foreign markets that, in many cases, is already subject to comparable local regulation, the current cross-border guidance threatens to fragment derivatives markets without a commensurate regulatory benefit to market participants. Appropriately tailored swaps rules would allow the Commission to focus its resources on the activity that most directly impacts U.S. markets.

- *Promote More Predictable Enforcement*. While we welcome recent guidance on how the agency will weigh self-reports and cooperation during investigations in assessing penalties, the Commission can further enhance the predictability and transparency of its enforcement process by:

    - Adopting certain protections outlined in the Financial CHOICE Act;

    - Engaging in the development of new rules and or new policies through a notice and comment process rather than through enforcement actions;

    - Minimizing duplicative enforcement by the Commission and self-regulatory organizations ("**SROs**"); and

    - Not pursuing claims for failure to supervise solely because an underlying regulatory violation is alleged to have occurred.

- *Sunset Swaps Large Trader Reporting*. The Commission should sunset its Part 20 swaps large trader reporting rule, which was intended as a temporary measure until the development of swap data repositories ("**SDR**"). SDRs have been collecting swap data for more than four years; however, Part 20 continues to impose substantial and unnecessary burdens on swap dealers and clearing member firms to report certain swap data directly to the Commission. Rather than continue to strain agency and industry resources for Part 20, the Commission should focus its efforts on improving the available SDR data.

- *Clarify Aspects of Rule 1.73*. Commission guidance on CFTC Rule 1.73, which requires futures commission merchants ("**FCMs**") to impose risk-based limits on certain trades, has caused regulatory uncertainty for FCMs. FIA urges the Commission to clarify the following aspects of Rule 1.73:

    - An FCM must apply risk-based limits for block trades executed away from a swap execution facility ("**SEF**") platform when the trade is reported to a SEF or delivered to an affirmation or similar platform that screens the trade prior to reporting it to the SEF;

    - Agency-executed transactions on a SEF are not subject to risk-based limit requirements for "give-up" transactions; and

    - Bunched orders that are given up for clearing are subject to the risk-based limit requirements for bunched orders, not the requirements for give-up transactions.

- *Adopt Principles-Based Clearing Conflicts Rules*. At present, the Commission's internal clearing conflicts rules are overly broad and may unintentionally prevent open access to clearing by prohibiting communications between the business trading unit of a swap dealer and Clearing Unit personnel. FIA urges the Commission to re-examine its clearing conflicts rules applicable to swap dealers and FCMs and implement principles-based rules that do not have unintended, potentially harmful consequences for the marketplace.

- *Withdraw the Position Limits Reproposal*. The Commission should withdraw the re-proposed position limits rule because it does not define the point at which speculation becomes excessive for a particular market. By not identifying the point at which speculation becomes excessive, the Commission does not have a sufficient basis to determine that the proposed position limits are necessary or that the size of the proposed limits are appropriate.

- *Retain the $8 Billion Swap Dealer De Minimis Threshold*. The Commission should act to prevent the automatic drop of the swap dealer *de minimis* threshold from $8 billion to $3 billion. The August 2016 Staff report on the swap dealer *de minimis* threshold made clear that the Staff could not determine, based upon the current criteria for identifying dealing activity, that another threshold is more appropriate than the current threshold. The Commission should affirmatively retain the current $8 billion threshold to provide time to further analyze whether it should modify the threshold.

- *Permit Public Input for Systemically Important Derivatives Clearing Organization ("**SI-DCO**") Rules and Rule Amendments.* Similar to the self-certification process for all registered entities to submit rules or rule amendments for approval under CFTC Rule 40.6, the Commission's approval process for SI-DCO rules and amendments under CFTC Rule 40.10 should require an opportunity for public comment when a SI-DCO rule raises novel or complex issues. We believe this would result in a more informed and deliberative rulemaking process that ultimately benefits both DCOs and market participants.

- *Address CCP Risk Issues*. The Commission should address a number of central counterparty ("**CCP**") risk issues to better protect the financial system in the event of a systemic shock or market failure. In particular, the Commission should:

    - Implement the improvements to CCP risk management practices in the CPMI-IOSCO Report on Resilience of CCPs;

    - Work with regulators globally to compare initial margin models to prevent a race to the bottom and ensure that initial margin models are sufficient to deal with recent stressed environments;

    - Ensure that a CCP's own capital contributions (so-called "skin in the game") are at an appropriate level and that a CCP's parent company and/or shareholders bear losses alongside clearing members in order to incentivize the CCP and its shareholders to engage in prudent risk management; and

    - Ensure that clearing members are not responsible for a CCP's non-default losses.

Promote Smart Regulation. FIA appreciates the Commission's commitment to streamlining and modernizing its regulatory regime and promoting responsible financial technology innovation. For the issues identified below, FIA believes that the Commission could streamline and modernize its regulatory regime and promote coordination across financial regulators and SROs.

- *Streamline Duplicative Reports*. The Commission and the exchanges impose overlapping futures large trader position reporting and ownership and control reporting requirements. Rather than requiring FCMs (and other reporting firms) to submit data to both the Commission and the exchanges, the Commission should centralize the process into a single futures large trader report and single ownership and control report available to the Commission and the relevant exchange.

- *Enhance Flexibility for FCM Risk Management Programs*. The Commission should enhance the flexibility for FCMs to administer a risk management program under CFTC Rule 1.11 by modifying existing obligations that are unnecessarily rigid. In particular, the Commission should:

    - Empower an FCM to determine the appropriate frequency to review and test its risk management program. The requirement in CFTC Rule 1.11(f) for an FCM to review and test its risk management program annually is unnecessary because an FCM already develops quarterly risk exposure reports and addresses the risk management program in its annual certification to the Commission; and

    - Provide flexibility to allow the risk management unit to report a material change in risk exposure of the FCM to senior management and the governing body under CFTC Rule 1.11(e)(2) in the upcoming quarterly risk exposure report or, if the risk management unit deems necessary, provide an interim report that only addresses the material change in risk exposure.

- *Support Modernization of SEC Record Retention Rules*. The CFTC should encourage the Securities and Exchange Commission ("**SEC**") to harmonize the SEC's outdated requirements regarding the form and manner for broker-dealers to maintain records with the CFTC's modernized form and manner requirements. Although the CFTC's updated rule provides needed flexibility for market participants to maintain required records, dual-registrants do not benefit from the CFTC's modernization effort because the current SEC rule does not provide similar flexibility.

- *Update the MOU Between the CFTC and SEC*. The CFTC and SEC should modernize and update the 2008 memorandum of understanding ("**MOU**") that sets out a process to coordinate areas of common interest between the agencies. An updated MOU could address topics not considered before the 2008 financial crisis and would re-affirm the commitment of both agencies to regulatory coordination, market innovation, and access.

- *Coordinate on Cybersecurity Initiatives*. Prior to issuing any proposed rules related to cybersecurity, the Commission should coordinate and consult with the industry to ensure that the proposal preserves needed flexibility for firms to protect against cyber risk. Furthermore, to prevent duplicative regulations, the Commission should coordinate and consult with other domestic and foreign regulators and work to harmonize cybersecurity initiatives across governmental authorities.

- *Adopt the ABA's Suggested Amendments to Part 190*. The Commission should initiate a rulemaking proceeding to revise the current Part 190 regulations governing a commodity broker bankruptcy proceeding under subchapter IV of chapter 7 of the Bankruptcy Code, as recommended by the Part 190 Subcommittee of the Business Law Section of the American Bar Association ("**ABA**").

- *Review Investments Available to FCMs under CFTC Rule 1.25*. FIA welcomes the opportunity to review with Staff the current options available for FCMs to invest customer assets pursuant to CFTC Rule 1.25. Such a review would help ensure that available investments are optimized while also preserving principal and liquidity.

- *Ensure Prudential Capital Rules Allow for Healthy Derivatives Markets.* We applaud Chairman Giancarlo's recognition that there are capital rules that negatively impact a bank clearing member's ability to provide client clearing services. We urge the CFTC to continue to monitor and work with the prudential regulators on a holistic capital framework that does not harm cleared derivatives markets.

- *Lift Barriers to Clearing for U.S. Swaps Customers Attempting to Access Foreign Markets.* We recommend that the Commission develop a regime for exempting foreign CCPs to clear swaps for U.S. customers similar to the exemption regime applicable to foreign futures. The Commission's current approach decreases U.S. customer access to swaps cleared abroad. U.S. customer access to foreign CCPs that elect to register with the Commission has also presented legal and operational challenges due to the need to comply with overlapping Commission and foreign regulatory requirements. Our suggested approach to develop a regime to exempt foreign CCPs from registration with the CFTC to clear swaps based upon the existing framework for foreign futures should decrease the unnecessary costs to comply with both U.S. and foreign regulatory frameworks and enhance the choice for U.S. persons to clear through foreign CCPs, all within a framework that is familiar to both market participants and the Commission.

- *Harmonize Trade Data Requirements.* The Commission should undertake a review of its rules defining the trade data that market participants must retain along with exchange audit trail requirements in order to modernize and clarify the obligations of various market participants. FIA is undertaking a similar assessment and would welcome an opportunity to share its recommendations with Staff when FIA's assessment is completed.

Solutions in Progress. FIA commends the Commissioners and Staff for their willingness to address and continue working on the following issues that FIA has brought to their attention.

- *Continue to Reevaluate OCR*. FIA thanks the Staff for its efforts to finalize no-action relief that continues to limit the ownership and control data that reporting firms must report about their customers and counterparties. Because the no-action relief is designed to provide time to amend the rule, FIA will work with Commissioners and Staff to suggest rule amendments that tailor the ownership and control data to information necessary for the Commission's regulatory objectives. FIA will also work with Staff on ways to improve Staff outreach to reporting firms on OCR data submissions.

- *Withdraw Proposed Regulation AT and Consider Alternatives*. FIA appreciates the Staff's consideration of FIA's comments to the proposals regarding automated trading and willingness to recognize existing, industry-implemented safeguards. The Commission should withdraw proposed Regulation Automated Trading because it is too prescriptive and unnecessarily burdensome to market participants without commensurate benefits or protections for U.S. markets.
- *Implement Position Limits Aggregation Amendments.* FIA appreciates Staff's recent issuance of time-limited no-action relief designed to implement the Commission's amendments to its position limit aggregation requirements in a reasonable and cost-efficient manner. FIA further supports the Commission and Staff's consideration of rule amendments to codify the various aspects of the no-action relief before the relief expires.
- *Modify the Proposed Capital Requirements for FCMs and Swap Dealers*. FIA and the FIA Principal Traders Group ("**FIA PTG**")[4] reiterate their comments in response to the Commission's proposed capital requirements for FCMs and swap dealers, and thanks the Commissioners and Staff for their consideration of the concerns raised in both letters.

II. Priority Issues on Which the Commission Should Take Immediate Action Consistent with Project KISS

FIA believes that the Commission should act promptly to better align the regulatory requirements identified below with the goals of the CEA and to remove unnecessary burdens on the industry. FIA believes that the Commission could implement FIA's suggested changes efficiently and without imposing significant costs on market participants.

A. The Commission Should Reevaluate When the Commission's Swaps Regulations Should Apply to Cross-Border Activity

At present, the Commission's expansive view of applicability of its regulatory regime to cross-border activity has burdened market participants and contributed to fragmented markets. As set forth in the *FIA Roadmap*, the Commission should continue to act as a leader in the recognition of foreign regulatory regimes. When regimes are comparable, the U.S. and foreign regulators should defer to one another in an effort to minimize duplicative regulation.

Specifically, the Commission's 2013 policy statement regarding when its swaps rules apply to cross-border activity ("**2013 Cross-Border Policy**") is overly broad and unnecessarily complicated.[5] It focuses too much on concerns about theoretical evasion of U.S. regulations. As a result, the 2013 Cross-Border

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[4] FIA PTG is an association of more than 20 firms that trade their own capital on exchanges in futures, options and equities markets worldwide. FIA PTG members engage in manual, automated, and hybrid methods of trading, and they are active in a wide variety of asset classes, including equities, fixed income, foreign exchange and commodities. FIA PTG member firms serve as a critical source of liquidity, allowing those who use the markets, including individual investors, to manage their risks and invest effectively. FIA PTG advocates for open access to markets, transparency, and data-driven policy.

[5] *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45292 (July 26, 2013).

Policy attempts to impose Commission regulations on a broad swath of activity and employs an incredibly complex framework for market participants to determine when Commission regulations may apply. Furthermore, because the Commission wrote the 2013 Cross-Border Policy before many foreign regulators implemented a regulatory framework for over-the-counter ("**OTC**") derivatives, the Commission's standards for comparability rely heavily on its own regulations. This comparability analysis results in a line-by-line review of foreign regulatory regimes that is too inflexible. FIA is concerned that these features of the 2013 Cross-Border Policy have contributed to market fragmentation. Unfortunately, this fragmentation appears to have disadvantaged U.S. markets as foreign participants try to limit the application of U.S. regulations that may be duplicative of their home regulatory regime.

FIA recommends that the Commission reevaluate when its swaps regulations should apply to cross-border activity and when it would be appropriate to defer to a comparable regulatory regime.

B. The CFTC Should Enhance the Transparency and Predictability of the Enforcement Process

Effective regulation and safe markets depend on the CFTC having a credible and robust enforcement program. FIA believes that enforcement of compliance with regulations provides the greatest deterrent when the process is clear and predictable. Although the CFTC's Division of Enforcement's recent cooperation advisories constitute important milestones for the agency in providing transparency to market participants,[6] we believe the Commission could further enhance the fairness and effectiveness of its enforcement program through a number of relatively simple measures.

1. Adopt the Changes to the Enforcement Process Outlined in the Financial CHOICE Act

As set forth in the *FIA Roadmap*, the House Financial Services Committee proposed the Financial CHOICE Act, in part to improve the enforcement process at the SEC.[7] FIA believes that these improvements should serve as a model for administrative enforcement generally, and that the CFTC should incorporate the following aspects of the Financial CHOICE Act into its enforcement process, none of which require legislative action:

- *Require notice to subjects of investigations when the Commission has decided not to pursue an enforcement action*. As the Commission is aware, market participants incur substantial legal, operational, document retention, and other costs while being the subject of an investigation.

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[6] *See* Division of Enforcement, CFTC, *Cooperation Factors in Enforcement Division Sanction Recommendations for Companies* (Sept. 25, 2017), available at: http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf; Division of Enforcement, CFTC, *Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals* (Sept. 25, 2017); available at: http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf.

[7] Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

Under current practice, the CFTC's Division of Enforcement often declines requests to provide closing letters even in investigations in which no activity has occurred for as long as five years. If the Commission decides not to proceed with an enforcement action, the CFTC's Division of Enforcement should be required to send a closing letter to the subject of an investigation.

- *Grant the subjects of enforcement matters the right to appear before the Commissioners or Staff*. The Commissioners and Staff would benefit from allowing persons who have been informed that the CFTC's Division of Enforcement intends to recommend an enforcement action against them to appear before them in person to discuss the factual, legal, and policy reasons why the Commission should not authorize such an action. Many CFTC enforcement actions raise complex factual and legal issues that require having a first-hand and intimate understanding of the markets and the roles of intermediaries. They also raise broad public policy issues that can have significant impacts on market participants beyond the person who is the subject of the investigation. In-person meetings will help ensure that the persons responsible for deciding whether to authorize the initiation of an enforcement action have a full and balanced understanding of the issues raised by the potential investigation.

- *Create an enforcement ombudsman*. The creation of an ombudsman would help ensure consistency across the CFTC's Division of Enforcement regarding how it conducts an investigation, decides whether to proceed with an enforcement action, and assesses penalties.

- *Require publication of an Enforcement Manual*. An enforcement manual that outlines in detail the practices and procedures followed by the CFTC's Division of Enforcement in investigations would promote transparency and consistency in the enforcement process.

2. Adopt New Rules and New Policies Through Rulemaking, Not Enforcement Actions

Markets thrive when the rules of the road are clear. The rulemaking process affords market participants an opportunity to take the steps necessary to comply with those rules in advance. By contrast, when regulatory agencies adopt a new position through an enforcement proceeding, the agency does not provide participants with an advance opportunity to comment on and comply with a regulatory requirement. Furthermore, rulemaking through enforcement has the potential to chill legitimate market activity.

To promote a strong culture of compliance in the derivatives industry, the CFTC should follow notice and comment rulemaking to create new rules or policy or amend/reinterpret existing rules. This process puts market participants on notice of the rules to which they will be held accountable.[8] The Commission should not use the enforcement process as a substitute for rulemaking or a mechanism for reinterpreting the law. When an agency creates or reinterprets rules through an enforcement action,

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[8] Furthermore, the development of required practices through enforcement actions may create unintended barriers to entry for new market participants because they need to devote extensive time and resources to identifying the scope of obligations mandated not only by formal Commission rules, but also by enforcement actions.

the subject of the action is held to a different standard than what the regulation provided at the time the conduct occurred.

3. Minimize Duplicative Enforcement

The Commission should work with SROs to more efficiently allocate their enforcement responsibilities. FIA has noticed increased Commission involvement in matters that historically were handled by the exchanges and other SROs. These duplicative efforts impose substantial costs on market participants to respond to separate inquiries from the Commission and an SRO that involve the same set of underlying facts.

To preserve the Commission's resources, the Commission should focus on overseeing the SRO enforcement process rather than conducting duplicative enforcement inquires. SROs have expertise and resources that can—and should—be leveraged by the Commission to protect derivatives markets. To the extent that the Commission intends to commence its own enforcement investigation, it should coordinate requests for information and the overall investigative process with the relevant SRO.

4. Not Pursue Claims for Failure to Supervise Solely Because an Underlying Regulatory Violation Is Alleged to Have Occurred

FIA is concerned that in recent years the CFTC's Division of Enforcement has aggressively pursued registrants for failure to supervise under CFTC Rule 166.3 based solely upon the occurrence of an underlying regulatory violation. Although the Commission can and should pursue an enforcement action for a regulatory violation (*e.g.,* recordkeeping), the Commission should not assume that the occurrence of a regulatory violation necessarily means that a registrant failed to diligently supervise relevant individuals. As the Commission previously noted, "[t]he focus of an inquiry to determine whether Rule 166.3 has been violated is on whether review occurred, and if it did, whether it was diligent."[9] Diligent supervision is an attainable standard; perfect supervision is not. Supervisory violations should be based on analysis of a firm's supervisory system and its implementation rather than just upon the occurrence of an underlying regulatory violation.

C. The Commission Should Sunset the Part 20 Swaps Large Trader Reporting Rule and Focus on Improving Swap Data Available at SDRs

FIA urges the Commission to utilize the sunset provision built into its swaps large trader reporting rule in Part 20 ("**Swaps LTR**"). The Commission designed Swaps LTR as a <u>temporary</u> data collection measure until SDRs became operational. CFTC Rule 20.9 provides that the Commission may render all or part of Swaps LTR ineffective upon a finding by the Commission that "operating [SDRs] are processing positional data and that such processing will enable the Commission to effectively surveil trading in paired swaps

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[9] *In re First Investors Group of the Palm Beaches*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. ¶ 29,767 at 56,210 (CFTC May 24, 2004). *See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants*, 77 Fed. Reg. 20,128, 20,154 (Apr. 3, 2012).

and swaptions and paired swap and swaption markets." As SDRs have been processing swap data for over four years, there is no longer a need for this temporary reporting requirement. Rather than continuing to invest resources in Swaps LTR, FIA suggests that the Commission identify ways that it can utilize SDR data for the benefit of the CFTC. For example, as part of its outreach to industry on improving its SDR reporting rules, Staff should consult with the industry on ways it can improve the swap data available to SDRs to allow SDRs to calculate swap positions.[10]

In 2011, the Commission adopted Swaps LTR requiring that swap dealers and clearing members report to the Commission futures equivalent position data associated with certain physical commodity swaps.[11] At the time of adopting Swaps LTR, the Commission believed it would soon adopt position limits on futures and economically equivalent swaps, but it did not have a swap reporting rule in place to monitor compliance with the soon to be established limits.[12] The Commission determined that it "may be considerable time before SDRs are able to reliably convert [swap] transaction data into positional data," and adopted Swaps LTR to allow it to monitor swap positions subject to the soon to be established position limits.[13] However, the Commission acknowledged in 2011 that Swaps LTR may not be necessary in the future because of swap reporting to SDRs and therefore incorporated a sunset provision that renders all or part of the rule ineffective upon a finding by the Commission that SDRs provide the Commission with swap positional data.

As the Commission is aware, the regulatory landscape today is significantly different from 2011 when it adopted Swaps LTR. SDRs have been operational and receiving swap data for over four years, and are required to have policies and procedures in place to calculate positions for position limits purposes.[14] FIA also notes that the Commission has yet to establish position limits for physical commodity swaps six years after adopting Swaps LTR. The reasons for which the Commission originally adopted Swaps LTR may no longer be present; however, both swap dealers and clearing members continue to spend significant time and resources identifying physical commodity swaps subject to Swaps LTR, converting the swap transactions into futures equivalent positions, and validating position data in advance of submission. The Commission also undoubtedly invests significant time and resources receiving, verifying and analyzing Swaps LTR reports that it could redirect to improving the quality of SDR data.

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[10] On July 10, 2017, the CFTC's Division of Market Oversight announced that it is launching a "comprehensive review of its swap reporting regulations," which is available here: http://www.cftc.gov/PressRoom/PressReleases/pr7585-17.

[11] *See Large Trader Reporting for Physical Commodity Swaps*, 76 Fed. Reg. 43851 (Jul. 22, 2011).

[12] *See id.* at 43852.

[13] *See id.*

[14] *See* CFTC Rule 49.11.

D. The Commission Should Clarify Various Aspects of Rule 1.73 Requiring FCMs to Establish Risk-Based Limits

CFTC Rule 1.73 sets forth the obligations related to clearing member risk management. FIA has sought interpretations of CFTC Rule 1.73 that will eliminate uncertainty for FCMs. FIA would appreciate the CFTC confirming the following requested interpretations.

1. An FCM Complies with Rule 1.73 if it Applies Risk-Based Limits to "Away" SEF Blocks when the Trade Is Reported to the SEF

CFTC Rule 1.73(a)(2) details the requirements for an FCM to screen trades against its risk-based limits. The method and timing of the FCM's screening obligation is dependent upon the nature of the trade, recognizing that not all types of screens are possible on certain types of transactions.[15] Despite this recognition in the rule,[16] interpretative guidance issued on September 26, 2013,[17] indicates that FCMs are required to screen swaps above the minimum block size that are executed "away" from the platform (*e.g.*, voice execution) pursuant to the rules of a SEF and that are intended to be cleared ("**Away SEF Blocks**") on a pre-trade basis.[18]

The September 2013 guidance is problematic because FCMs are not involved in the execution of Away SEF Blocks, have no way to implement a pre-trade screen of Away SEF Blocks, and have no way to force the counterparties to implement a screen of the trade prior to concluding the transaction. Given the

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[15] The language of subsections (ii) and (iii) of Rule 1.73(a)(2) merely requires an FCM to have systems "reasonably designed to ensure compliance with the limits." Such requirement is markedly different from the language of Rule 1.73(a)(2)(i), which requires an FCM to "use automated means to screen orders for compliance with the limits." The different standard expressed in these subsections was intentional. Indeed, in the adopting Release, the Commission notes that it revised subsections (ii) and (iii) in response to comments received from, among others, the FIA that "pre-execution" screening of orders is not feasible in all markets. 77 Fed. Reg. at 21,288.

[16] An Away SEF Block is a transaction "executed bilaterally and then submitted for clearing" and therefore subject to 1.73(a)(2)(iii), which does not require a pre-trade screen. Moreover, an Away SEF Block could not, by definition, be subject to Rule 1.73(a)(2)(i), the only subsection of Rule 1.73 that requires a pre-trade screen, because it is not an "order". (CFTC Rule 1.3(kkkk) defines "order" as "an instruction or authorization provided by a customer to a futures commission merchant . . . regarding trading in a commodity interest on behalf of the customer.")

[17] *See Staff Guidance on Swaps Straight Through Processing* (Sept. 26, 2013), available at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/stpguidance.pdf.

[18] The Commission's Division of Market Oversight has issued no-action relief that permits blocks to be executed on the SEF non-Order Book trading system or platform with the condition that a risk-based limit screen under Rule 1.73 is performed "at the time the order for a block trade enters the SEF's non-Order Book trading system or platform." *See* CFTC Letter No. 14-118 (Sept. 19, 2014) and CFTC Letter No. 15-60 (Nov. 2, 2015). Such condition is consistent with how FCMs can screen SEF Blocks. However, the no action relief only permits market participants to execute SEF Blocks on the SEF trading system; it does not require SEF Blocks to be executed in that manner. As a result, market participants are still able to choose to execute SEF Blocks "away" from the platform without the FCM's knowledge or involvement.

guidance's incompatibility with market structure, FCMs need resolution of their Rule 1.73 obligations for Away SEF Blocks.

Such resolution could be in the form of guidance or no-action relief clarifying that an FCM satisfies Rule 1.73 by screening an Away SEF Block for compliance with the FCM's risk-based limits when the Away SEF Block has been reported to the SEF (or delivered to an affirmation or similar platform that screens the trade prior to reporting it to the SEF).[19]

2. CFTC Rule 1.73(a)(2)(iv) Does Not Apply to Agency-Executed Transactions on SEFs

As SEF markets evolved, FCMs recognized that the language of Rule 1.73 (which was based on previously existing futures markets) did not fully contemplate or work with developments in SEF trading. Accordingly, FIA has also requested confirmation that agency-executed transactions on SEFs are not "give-up" transactions under Rule 1.73(a)(2)(iv). In the absence of written guidance, FCMs face continuing uncertainty about whether they are meeting the Commission's expectations for compliance.

Rule 1.73(a)(2)(iv) specifically addresses give-up transactions. It provides that if an FCM executes a customer order, but gives it up to another FCM for clearing, the executing firm and clearing FCM must enter into an agreement, pursuant to which the executing firm will screen orders for compliance with the clearing FCM's risk-based limits. These arrangements are necessary for give-up transactions executed on or subject to the rules of a contract market (futures exchange) because give-up transactions are accepted for clearing before they are made known to the clearing FCM. The clearing FCM, therefore, has no ability to screen the transaction for compliance with its risk-based limits. If the clearing FCM subsequently rejects a transaction, the executing firm (or its FCM), must carry, transfer or close out the trade. The transactions are not voided.

SEF processes for swap execution and clearing are materially different. SEF rules contemplate that swaps will be entered into directly by the parties to the swap, who then identify their respective clearing FCM. Alternatively, if a party uses an agent to execute the swap, the agent will identify to the SEF the FCM expected to accept the trade for clearing. In either case, before the transaction is executed on the SEF and accepted for clearing, it will be screened automatically, as facilitated by the SEF, either by the clearing FCM or the SEF or through a credit hub, for compliance with the clearing FCM's risk-based limits. If the clearing FCM rejects the transaction, it is deemed void ab initio. No transaction in excess of the clearing FCM's limits will exist.

Because the clearing FCM has the opportunity to screen the agency-executed swap transaction on a SEF for compliance with its limits before the transaction is accepted for clearing, the executing agent has no need to screen swap orders for compliance with these limits. Thus, FIA requests confirmation that agency-executed transactions on a SEF are not "give-up" transactions under Rule 1.73(a)(2)(iv).

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[19] FIA has been engaged with Staff on this issue and previously requested this relief. The most recent written request is in its Letter from Walt L. Lukken, President and Chief Executive Officer, FIA to Timothy G. Massad *et al.*, Chairman, CFTC (Oct. 22, 2014).

3. For Bunched Orders Given Up for Clearing, FCMs Must Apply the Limits Described in CFTC Rule 1.73(a)(2)(v) for Bunched Orders, Not the Limits Described in CFTC Rule 1.73(a)(2)(iv) for Give-Up Transactions

FIA worked extensively with the Division of Clearing and Risk ("**DCR**") to develop a framework for FCMs to meet the requirements of and implement Rule 1.73(a)(2) with respect to give-up transactions and bunched orders. We understood from DCR that bunched orders are subject to Rule 1.73(a)(2)(v) and are not subject to Rule 1.73(a)(2)(iv), even if the bunched order, once executed, is given up for clearing. However, a more recent letter from DCR, dated August 27, 2013, contains language that seemingly contradicts the position previously confirmed by DCR. During subsequent discussions with FIA, DCR Staff indicated that it would issue a letter correcting its statement in the August 27, 2013 letter. Therefore, FIA requests that DCR revise its August 27, 2013 letter as described below.

Rule 1.73(a)(2)(iv) for "give-ups" applies where a firm executes an order on behalf of a customer and gives-up the executed transaction for clearing. Rule 1.73(a)(2)(v), on the other hand, applies where an account manager bunches orders on behalf of multiple customers for execution and then allocates positions post-trade to individual customers. Because a bunched order, by its very nature, does not identify at the time of execution the customers on whose behalf the order is executed or the amount of the order that is due to a particular customer, an initial clearing firm (in futures this is the executing broker or its clearing firm) would not be able to apply and screen an individual customer limit as would be required if the trade were also subject to the requirements for a "give-up" under Rule 1.73(a)(2)(iv). The bunched order, however, is subject to screening by the initial clearing firm against limits set by that firm with respect to the bunched order pursuant to Rule 1.73(a)(2)(v). Accordingly, FIA renews its request that DCR's August 27, 2013 letter be revised to state that:

> Bunched orders are subject to Rule 1.73(a)(2)(v) and are not subject to Rule 1.73(a)(2)(iv), even if the bunched order is given up.

E. The CFTC Should Revise the Clearing Conflicts Rules to Eliminate Harmful Unintended Consequences

In 2012, the CFTC finalized rules requiring swap dealers and FCMs to adopt clearing conflicts procedures with the goal of "promoting open access to clearing."[20] As implemented, however, the clearing conflicts rules are overly broad and may unintentionally <u>restrict</u> access to clearing, in contravention of the Commission's stated objective. FIA urges the CFTC to implement a principles-based approach that accomplishes the CEA's goal without prohibiting activity that could benefit the customers of swap dealers and FCMs.

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[20] *See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants*, 77 Fed. Reg. 20,128, 20,154 (Apr. 3, 2012).

1. The Commission Should Adopt a Principles-Based Approach Implementing Clearing Conflicts Rules

CFTC Rules 1.71(d) and 23.605(d), which implement CEA Section 4s(j)(5) regarding safeguards that swap dealers must implement for clearing personnel, are overly broad and may unintentionally prevent or limit open access to clearing. In place of the current rules, FIA recommends that the Commission develop a high-level principle that prohibits the BTU of a swap dealer from "materially impeding or attempting to materially impede" client access to clearing services at an affiliated FCM.

In contrast to the FIA's recommended principles-based approach, current CFTC Rules 1.71(d) and 23.605(d) create a broad prohibition on communications between the BTU of a swap dealer and its affiliated Clearing Unit personnel. In particular, these rules require that the BTU of a swap dealer not "directly or indirectly interfere with or attempt to influence the decision of the clearing unit of any affiliated clearing member of a derivatives clearing organization to provide clearing services and activities to a particular customer." Although the rules prohibit communications or activities that might interfere with access to clearing, they also arguably prohibit the BTU of a swap dealer from encouraging swap clearing, contrary to the statutory goal of promoting open access to clearing. In addition, as written, these clearing conflicts rules apply to futures, so they could be read to prohibit traditional FCMs from operating consolidated execution and clearing activities. FIA does not believe the CFTC intended the clearing conflicts rules to require the break-up of traditional FCM businesses or to discourage the Clearing Unit of a swap dealer-affiliated FCM from taking on new futures clients.

Furthermore, CFTC Rules 1.71(d) and 23.605(d) require the implementation of "an appropriate informational partition" between the BTU of the swap dealer and its affiliated Clearing Unit. These rules, however, do not define or provide guidance as to what such informational partitions must entail. More fundamentally, an informational partition between the BTU of the swap dealer and its affiliated Clearing Unit is not required by the CEA. The CEA only requires an informational partition with respect to safeguards for research personnel.[21] And, as discussed above, an "informational partition" would not be necessary if the rules (more appropriately) only prohibited detrimental influence or interference.[22]

Accordingly, the Commission should replace the current clearing conflict rules with a high-level principle that prohibits the BTU of a swap dealer from "materially impeding or attempting to materially impede" client access to clearing services at an affiliated FCM.

2. Narrow the Scope of the Business Trading Unit to the Part of an Entity that Engages in Uncleared Swaps with Clients on a Principal-to-Principal Basis

The CFTC's clearing conflicts rules broadly define "business trading unit" ("**BTU**") in a manner that could be read to implicate businesses/desks that are not swap dealer businesses, such as agency execution desks and derivatives prime brokerage. The broad scope of the BTU definition imposes a substantial

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[21] CEA Section 4d(c)(1) requires that FCMs "establish structural and institutional safeguards" that protect "persons within the firm relating to *research or analysis* of the price or market for any commodity" from "pressure" by supervisors or others who "might potentially bias [their] judgment" (emphasis added).

[22] As noted above, CEA Section 4s(j)(5) requires that swap dealers implement safeguards for clearing personnel and not contravene open access to clearing.

burden on large firms to track business lines that are not part of their swap dealing business. FIA recommends that the CFTC define the scope of the BTU to include only the part of an entity that engages in uncleared swaps with clients on a principal-to-principal basis. At a minimum, the rule should expressly exclude certain business lines such as agency execution and derivatives prime brokerage.

F. The Commission Should Withdraw the Position Limits Reproposal and Reevaluate Whether Position Limits Are Necessary

The Commission should withdraw its December 2016 re-proposed position limits rule ("**Position Limits Reproposal**") because it may adversely impact the market without preventing excessive speculation.[23] As the Commission is aware, Congress adopted Section 4a of the CEA to address its concern about the potential negative impact of excessive speculation. Although the Commission intended for the Position Limits Reproposal to combat excessive speculation, the Position Limits Reproposal did not attempt to define the point at which speculation becomes excessive for a particular market.[24]

Without a working definition of excessive speculation, the Commission does not have a rational basis to determine that the proposed position limits are necessary or that the size of the limits are appropriate.[25] Furthermore, the Commission cannot conclude that, as required by the CEA, it set limits that, to the maximum extent practicable, ensure sufficient market liquidity for *bona fide* hedgers and that the price discovery function of the underlying market is not disrupted.[26] Prior to proposing a position limits rule, the Commission should define speculative activity, identify the point at which speculation becomes excessive in a particular market, and thereafter rely on this empirical data to propose position limits subject to public comment. To the extent that the Commission chooses to adopt a position limits rule, whether based on the Position Limits Reproposal or a separate reproposed rule, FIA urges the Commission to consider its prior comments concerning all aspects of the proposed rules.

G. The Commission Should Retain the $8 Billion Swap Deal *De Minimis* Threshold

Absent Commission action, the swap dealer *de minimis* threshold will drop from $8 billion to $3 billion on January 1, 2019.[27] Because the threshold applies to the prior twelve-month period, absent Commission action before the end of this year, firms will need to start monitoring toward the $3 billion threshold on January 1, 2018. However, in the August 15, 2016 Staff report on the swap dealer *de minimis* threshold ("**Staff *De Minimis* Report**"), Staff could not, based upon the existing criteria for

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23 *Position Limits for Derivatives*, 81 Fed. Reg. 96,704 (Dec. 30, 2016).

24 Letter from Walter L. Lukken, President and CEO, FIA, to Christopher J. Kirkpatrick, Secretary, CFTC (Feb. 28, 2017), available at https://commodities.fia.org/file/5023/download?token=m5lkDKrItxLHm1x-gXGCupwIQ9jZnnGofKQGxF8kOoM

25 *See* CEA Section 4a(a)(2)(A).

26 *See* CEA Section 4a(a)(3)(B)(iii) and (iv).

27 *See Order Establishing De Minimis Threshold Phase-In Termination Date*, 81 Fed. Reg. 71,605 (Oct. 18, 2016).

identifying swap dealing activity, recommend a swap dealer *de minimis* threshold to the Commission.[28] Consequently, the Commission should remove the automatic reduction of the *de minimis* threshold from $8 billion to $3 billion until it conducts a comprehensive review of the *de minimis* threshold.[29] If, after conducting that review, the Commission determines that it should modify the $8 billion threshold, it should only modify the threshold through notice and comment rulemaking.

H. Similar to the Self-Certification Process for All Other Registered Entities, the Commission's Rule 40.10 Certification Procedure for SI-DCOs Should Provide an Opportunity for Public Comment if the Commission Determines that a Rule Raises Novel or Complex Issues

FIA urges the Commission to provide a public comment period under CFTC Rule 40.10 when a SI-DCO submits a rule for Commission review that the Commission believes raises novel or complex issues. This would align the CFTC Rule 40.10 rule approval process for SI-DCOs with the self-certification process for all registered entities in CFTC Rule 40.6. Just as CFTC Rule 40.10 recognizes that submissions that raise novel or complex issues would benefit from public comment, the Commission should provide for the same public input on submissions by SI-DCOs that raise novel or complex issues.

CFTC Rule 40.6 sets forth the process for a registered entity (*e.g.*, a DCO) to self-certify that a new or amended rule complies with the CEA. Under this rule, the Commission has 10 days to review the rule, after which and in the absence of agency action the rule is deemed approved. However, the Commission can issue a stay if it determines that the rule raises novel or complex issues.[30] Upon issuance of a stay, the Commission extends its review period and must also provide a 30-day public comment period.

Notwithstanding the self-certification process in CFTC Rule 40.6, if an SI-DCO's new rule or rule amendment could materially affect the nature or level of risks presented by the SI-DCO, then the SI-DCO must follow the approval process set forth in CFTC Rule 40.10.[31] The CFTC Rule 40.10 process provides the Commission and the Board of Governors of the Federal Reserve with a 60-day review period after which the rule is deemed approved. Although the Commission can extend the review period if the SI-DCO rule raises novel or complex issues, unlike the self-certification process in CFTC Rule 40.6, the Commission is not required to provide for public comment related to the SI-DCO rule.[32] FIA believes that a public comment process is necessary when an SI-DCO rule could materially affect the nature or level of risks presented by the SI-DCO and the Commission believes the rule raises novel or complex

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[28] *See Swap Dealer De Minimis Threshold Final Staff Report* (Aug. 15, 2016), available at: http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis081516.pdf.

[29] FIA also urges the Commission to consider the comments raised in the FIA Principal Traders Group letter to the Commission in response to the Staff Swap Dealer *De Minimis* Exception Preliminary Report. *See* Letter from Mary Ann Burns, Chief Operating Officer, FIA, to Christopher Kirkpatrick, Secretary, CFTC (January 27, 2016), available at https://ptg.fia.org/articles/fia-ptg-comment-letter-swap-dealer-de-minimis-exception-preliminary-report.

[30] *See* CFTC Rule 40.6(c).

[31] *See* CFTC Rule 40.10(a).

[32] *See* CFTC Rule 40.10(f).

issues. Like the self-certification process under CFTC Rule 40.6, the Commission's analysis of any novel and complex issues raised in a SI-DCO submission would benefit from public comment, and, accordingly, CFTC Rule 40.10(f) should incorporate a public comment period.

I. The Commission Should Address a Number of CCP Risk Issues to Better Protect the Financial System in the Event of a Systemic Shock or Market Failure

In addition to supporting efforts to bring more standardized products into clearing, FIA also appreciates that the centralization of risk requires policymakers to carefully review how CCPs manage risk for their clearing members, clients, and the markets in general. FIA has previously published papers with recommendations to improve CCP risk arrangements, including the publication of a CCP Risk Position Paper in April 2015.[33] We support the substantial improvements that have been made in CCP risk management practices over the last decade but believe there is still work to do in order to ensure that CCPs are sufficiently sound and resilient given their systemic importance to the financial system. Accordingly, we believe that the following CCP risk issues should be addressed by the Commission.

1. Implement the Improvements to CCP Risk Management Practices Contained in the CPMI-IOSCO Report on Resilience of CCPs

The Committee on Payments and Market Infrastructure ("**CPMI**") and the Board of the International Organization of Securities Commissions ("**IOSCO**") recently published a report describing a number of improvements to CCP risk management practices ("**CPMI-IOSCO Report**").[34] The Commission should implement the improvements to risk management described in the CPMI-IOSCO Report, including in the areas of CCP governance, claims in return for clearing member contributions to CCP recovery and resolution, and variation margin gains haircutting.

2. Work with Regulators Globally to Compare Initial Margin Models to Prevent a Race to the Bottom

It is vital that initial margin requirements are effective, transparent, and predictable to all participants. Initial margin is the foremost risk mitigation technique in a clearing member default scenario to avoid broader losses, systemic consequences, and, ultimately, the need for recovery and resolution. FIA believes there should be further structured governance around initial margin models, bringing together the quantitative and risk management experience and resources of clearing members, CCP regulators, and individual CCPs. In particular, the Commission should work with regulators globally to compare initial margin models to ensure CCPs are not competing to reduce their initial margin requirements, and that initial margin levels are sufficient to deal with stressed market environments.

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[33] *See FIA Global CCP Risk Position Paper* (Apr. 2015), available at: https://fia.org/sites/default/files/content_attachments/FIAGLOBAL_CCP_RISK_POSITION_PAPER.pdf.

[34] *See* CPMI-IOSCO, Final Report, Resilience of Central Counterparties CCPs: Further Guidance on the Principles for Financial Market Infrastructure (PMFI) (July 2017), available at: http://www.bis.org/cpmi/publ/d163.pdf.

3. Address CCP Capital Contributions

A CCP's own capital contributions ("skin in the game") are a means to align the interests of CCPs with clearing participants. FIA's clearing members believe that a CCP's contribution to the default waterfall should be an amount that is material to the CCP and aligned with the amount of risk relating to the CCP's activities. An appropriate level of skin in the game will incentivize the CCP and its shareholders to engage in prudent risk management both prior to and during a stress event because they would share in any resulting losses. This contribution better aligns the motivations of clearing participants, on the one hand, and the CCP and its equity holders, on the other hand. Therefore, the Commission should ensure that DCOs make sufficient capital contributions to align the interests of a CCP and clearing members, and that the DCO has engaged with stakeholders to determine the amount of the CCP's capital contributions. In addition, a DCO's parent company and/or equity holders should bear losses alongside clearing members when loss recovery tools are used. This sharing of losses ensures DCOs are properly incentivized to exercise prudent risk management and focus on CCP risk management.

4. Ensure that Clearing Members Are Not Responsible for a CCP's Non-Default Losses

In order to avoid a CCP default, CCPs must have sufficient capital and/or insurance to cover all non-default losses. Non-default losses that are under the exclusive control and governance of the CCP, such as operational, legal, general business, cyber, credit, and liquidity risks, should not be borne by the clearing members. Because only the CCP is able to quantify and manage these risks, clearing members should not have any responsibility for such losses. Potential conflicts of interest arise for CCP management if clearing members have responsibility for losses that are within the CCP's sole control. It is crucial for CCPs to consider and stress-test each potential non-default loss scenario to ensure available funding. In the event funding is insufficient, the CCP's parent company and/or equity holders should bear the losses.

III. The Commission Should Promote Smart Regulation Through Simplification, Modernization, and Harmonization of the Rules of the CFTC, Other Financial Regulators, and SROs

FIA appreciates the Commission's commitment to streamlining and modernizing its regulatory framework and to promote responsible financial technology innovation. As discussed below, FIA believes that the Commission could streamline and modernize its data collection and data preservation efforts. The Commission also could remove unnecessary burdens on the FCM community by streamlining the requirements of an FCM's risk management program.

In addition, FIA urges the Commission to promote coordination and harmonization when the Commission's regulatory interest overlaps with that of an exchange or another financial regulator (*e.g.*, the SEC). Coordination among the CFTC, SEC and SROs would help reduce costs for firms, particularly when the regulators seek similar information.

A. The Commission and the Exchanges Should Centralize Futures Large Trader and Ownership and Control Reporting

The Commission and the exchanges impose separate futures large trader reporting rules and separate ownership and control reporting rules. Rather than require one report to the Commission and a separate report for each exchange, the Commission should centralize these duplicative reports into a single futures large trader report and single ownership and control report available to the Commission and the relevant exchange.

Each of the Commission and the exchanges require FCMs to submit futures large trader data detailing the FCM's customer and house reportable positions.[35] Even though the Commission's and the exchanges' large trader reporting rules seek the same high-level data (*i.e.*, reportable positions), variations in the reporting requirements force FCMs to process and submit separate sets of data to the Commission and the relevant exchange. The ownership and control reporting requirements impose a similar redundancy because both the Commission and the exchanges seek the same high-level data (*i.e.*, ownership and control associated with an account), but the differing rules force FCMs to develop separate reports.[36]

FIA understands the need for the Commission and the exchanges to have access to futures large trader and ownership and control data. However, the Commission could streamline the duplicative reports to reduce unnecessary burdens on FCMs. Therefore, FIA recommends that the Commission consolidate the large trader reports to the Commission and the exchanges into a single report available to both the Commission and the relevant exchange and adopt the same process for ownership and control reporting.

B. Provide FCMs with More Flexibility to Administer Risk Management Programs

CFTC Rule 1.11 details the requirements for an FCM's risk management program. FIA believes that certain aspects of the rule are unnecessarily rigid and therefore recommends that the Commission provide FCMs with increased flexibility to administer certain required elements of the risk management program. FIA details its suggested modifications below.

1. Provide Flexibility for FCMs to Determine the Frequency to Review and Test the Risk Management Program

The Commission should empower an FCM to determine the frequency with which to review and test its risk management program. The current requirement in CFTC Rule 1.11(f)(1) and (2) for FCMs to utilize internal audit staff to review and test the risk management program on an annual basis is unnecessarily rigid and burdensome. The Commission already obligates an FCM to analyze and document the effectiveness of the risk management program in quarterly risk exposure reports.[37] Furthermore, the

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[35] *See e.g.*, CFTC Rules 15 and 17; CME Rule 561; and ICE Futures US Rule 6.15.

[36] *See e.g.*, CFTC Rules 17 and 18; CME Rule 561; and ICE Futures US Rule 6.15.

[37] *See* CFTC Rule 1.11(e)(2).

annual report of the FCM's chief compliance officer ("**CCO**") assesses the effectiveness of the FCM's policies and procedures, including those related to risk management.[38]

In light of the quarterly risk exposure reports and annual CCO report, a separate requirement for internal auditors to review and test an FCM's risk management program is unnecessary. FIA recommends that the Commission eliminate the requirement in CFTC Rule 1.11(f) to review and test the risk management program on an annual basis and, instead, allow FCMs to determine how frequently to conduct appropriate review and testing.

2. Allow the Risk Management Unit to Identify Material Changes to an FCM's Risk Exposure in a Subsequent Risk Exposure Report, or Prepare an Interim Report, if Necessary

Pursuant to CFTC Rule 1.11(e)(2), the risk management unit of an FCM must provide senior management and the governing body of the FCM with quarterly risk exposure reports. In addition to the quarterly reports, if the FCM's risk management unit detects a material change in the risk exposure of the FCM, the risk management unit must provide a risk exposure report "immediately" to senior management and the governing body. Instead of requiring this immediate risk exposure report, FIA believes that the FCM's risk management unit should have more flexibility in notifying senior management of a material change. By providing additional flexibility to the risk management unit, FIA believes that the Commission could make the existing process of notifying senior management and the governing body of material risk changes more efficient.

In particular, the Commission should allow the risk management unit to include material changes in the risk exposure of the FCM in the upcoming quarterly risk exposure report. To the extent that the risk management unit believes there is an immediate need to report the material change, the risk management unit should be allowed to prepare an interim report to senior management and the governing body that only addresses the relevant risk creating the material change. FIA's suggested process puts the administration of the risk management unit in the hands of the risk management professionals of the FCM to determine when to escalate risk issues immediately, and when to detail risk issues in the upcoming quarterly risk exposure report. In addition, the ability to prepare an interim report allows the risk management unit to focus any immediate report on the issue(s) creating the immediate concern. This framework avoids the need to prepare an immediate report that addressees the full spectrum of immediate and non-immediate issues.

C. The CFTC Should Encourage the SEC to Harmonize the SEC's Record Retention Form and Manner Requirements

The CFTC should encourage the SEC to harmonize the SEC's outdated requirements regarding the form and manner in which a registered broker-dealer ("**BD**") must retain records with the CFTC's recently

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[38] *See* CFTC Rule 3.3(e)(2)(ii)*; see also Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants*, 82 Fed. Reg. 21,330 (May 8, 2017) (proposed rule).

updated form and manner requirements in CFTC Rule 1.31. As the CFTC is aware, its updated recordkeeping rule removes onerous and obsolete provisions, such as the requirement to retain records in native file format, store records on optical disks or CD-ROMs, and retain a technical consultant when using electronic storage media. Although the CFTC modernized Rule 1.31 to provide much needed flexibility in the form and manner in which records must be retained,[39] FCM-BD dual registrants must still follow outdated and inflexible SEC requirements in SEC Rule 204.17.[40] The discrepancies in the CFTC and SEC form and manner requirements preclude FCM-BD dual registrants from the benefit of the CFTC's modernized rule, which limits the ability for dual-registrants to manage their records as efficiently and effectively as other market participants that are subject only to CFTC Rule 1.31. This outcome is not desirable for market participants in either the securities or derivatives industry and could be avoided by harmonization between the agencies.

D. The CFTC and SEC Should Update the 2008 MOU Regarding Areas of Common Interest

FIA recommends that the CFTC and SEC modernize and update the 2008 MOU that sets out a process to coordinate areas of common interest between the agencies.[41] Because this MOU was executed before the implementation of the Dodd-Frank Act, FIA believes that executing an updated "2.0 version" of this MOU would ensure the capture of new products and regulations not considered before the 2008 financial crisis. An updated MOU would also re-affirm the commitment of both agencies to regulatory coordination, market innovation, and access.

E. The Commission Should Consult with Industry Participants as well as with Domestic and Global Regulators Prior to Proposing a Cybersecurity Regulatory Framework

Cyber risk is a significant and ever-evolving threat that financial firms face on a daily basis.[42] The nature of the threat necessitates that a firm's cybersecurity systems be sufficiently flexible and evolve over time. To the extent that the Commission contemplates proposing cybersecurity requirements, it should consult extensively with the industry participants to leverage industry practice and preserve needed flexibility for firms to protect against cyber risk.[43]

FIA also notes that regulators at the state, federal, and foreign level are pushing forward with individual cybersecurity initiatives applicable to industry members that may fall within each regulator's respective

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[39] *See Recordkeeping*, 82 Fed. Reg. 24,479, 24,484 (May 30, 2017).

[40] FIA notes that other CFTC-SEC dual registrants (*e.g.*, swap dealer-BDs) may incur similar issues.

[41] *See Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Regarding Coordination in Areas of Common Regulatory Interest* (Mar. 11, 2008).

[42] *See* Statement of Commissioner J. Giancarlo before the American Enterprise Institute (Sept. 21, 2016).

[43] *See* Statement of Commissioner J. Giancarlo before the ISDA Annual Asia Pacific Conference (Oct. 26, 2015) ("I favor bottom-up, principles-based market solutions. I believe that markets themselves, reflecting the myriad actions of the broad sway of participants, remain the most efficient agents of change known to humankind.").

jurisdiction.[44] These overlapping initiatives have the potential to be duplicative and create unnecessary burdens on market participants. Therefore, FIA urges the Commission to lead the way in coordinating with U.S. and foreign regulators in an effort to harmonize cybersecurity initiatives across the financial industry.[45]

F. The Commission Should Amend Its Part 190 Regulations as Recommended by the ABA Part 190 Subcommittee

The Commission's Part 190 Rules govern a trustee's liquidation of an FCM or DCO in a bankruptcy proceeding under subchapter IV of chapter 7 of the U.S. Bankruptcy Code. The Commission first adopted the rules in 1983 and has amended them several times. The rules have worked well, but the cleared derivatives markets have become much more complex over the past several decades, and the recent MF Global and Peregrine Financial Group bankruptcies have revealed areas where the rules should be updated and improved. FIA believes that now is an appropriate time for the Commission to consider comprehensive revisions to the Part 190 rules to assure that they provide a clear and understandable road map to enable a trustee to take timely and prudent action when administering the liquidation of a failed commodity broker in a subchapter IV proceeding.

FIA understands that the Part 190 Subcommittee of the ABA Business Law Section ("**ABA Part 190 Committee**") is submitting a proposed set of model rules to replace and update the existing Part 190 Rules. FIA encourages the Commission to undertake a rulemaking process to amend the Part 190 rules as recommended by the ABA Part 190 Committee. The model rules proposed by the ABA Part 190 Committee are the culmination of a long and thoughtful process to identify areas where the Commission can update and clarify existing regulations to better align its regulations with the complexities of today's markets. The model rules reflect input from many perspectives, including private practitioners who work extensively in the areas of derivatives law or bankruptcy law; attorneys who serve as, or who represent, trustees in FCM bankruptcies; and representatives of FIA, FCMs, exchanges and clearinghouses. FIA generally supports adoption of the proposed model rules, but reserves the right to comment on specific elements of the proposal in any public comment process.

G. FIA Welcomes the Opportunity to Review Permissible Investments under CFTC Rule 1.25 with Staff

CFTC Rule 1.25 has long been premised upon allowing the investment of customer assets in a manner that preserves principal and maintains liquidity. Accordingly, in order to control systemic risk, permissible investments have been limited to those that can be quickly converted to cash at a

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[44] *See e.g.*, 17 C.F.R. Part 242, Subpart 0 - Systems Compliance and Integrity; 17 C.F.R. Part 248, Subpart C - Regulation S-ID: Identity Theft Red Flags; 17 C.F.R. Part 248, Subpart A - Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Personal Information; Standards for the Protection of Personal Information of Residents of the Commonwealth, 201 C.M.R. 17.00 *et seq.*; and Cybersecurity Requirements for Financial Services Companies, 23 N.Y.C.R.R. Part 500.

[45] This coordination should include consideration of current standards that may be available. *See, e.g.*, National Institute of Standards and Technology ("**NIST**") Cybersecurity Framework, available at https://www.nist.gov/cyberframework.

predictable value. Over the last several years, the Commission has revisited portions of CFTC Rule 1.25 to ensure that options for investment have been updated and reviewed for continued suitability. Given the significant regulatory and market changes that have transpired in the derivatives market, we welcome the opportunity to review currently permitted investments under Rule 1.25 with the Staff to make sure that permitted investments are optimized while also preserving principal and liquidity.

H. The CFTC Should Continue to Monitor and Work with the Prudential Regulators to Ensure the Capital Rules Allow for Healthy Derivatives Markets

The CFTC should continue to monitor and work with the prudential regulators on a holistic view of capital that does not harm derivatives markets. We applaud Chairman Giancarlo, the Commission and Staff for their support and for emphasizing that there are capital rules that negatively impact a bank clearing member's ability to provide client clearing services. Indeed, certain capital rules are placing extreme burdens on many market participants, including commercial end-users whose activity did not contribute to the financial crisis. It is becoming clear that the cumulative impacts and costs of these rules are making it more challenging for market participants to access these markets and hedge risk, consequently reducing liquidity in key derivatives markets.

Four features of the capital rule are adversely impacting hedging and liquidity in the client cleared derivatives markets:

- The lack of an offset for client margin under the Leverage Ratio;
- The proposal to include cleared OTC derivatives in the Globally Systemically Important Bank surcharge on interconnectedness and complexity;
- The need to implement a revised counterparty credit risk model; and
- The need to recalibrate the shock that is applied to cleared derivatives in Capital Analysis and Review's large counterparty shock scenario.

Reforms are necessary in each of these areas to preserve healthy derivatives markets. We encourage the CFTC to analyze these issues and continue to work with the prudential regulators to understand their impact to clearing firms and their customers.

I. The Commission Should Develop an Exemption Regime to Enable U.S. Customer to Access Foreign CCPs to Clear Swaps

In order to expand clearing and improve U.S customer access to foreign CCPs, FIA believes the Commission should use a range of tools in existing law to establish a regime for clearing foreign swaps that is similar to the regime that the Commission has overseen for foreign futures and options under Part 30 since 1988. The Dodd-Frank Act allows for an exemption for foreign CCPs when the foreign CCP is comparably and comprehensively regulated. The development of a framework to exempt foreign CCPs from CFTC registration to clear swaps based on the existing exemption regime for foreign futures would reduce operational and legal risks by leveraging a framework that is familiar to both market participants and the Commission. The Commission would also expand U.S. customers' access to swaps cleared abroad.

As part of the Dodd-Frank Act's comprehensive swaps market reform, Congress amended the CEA to authorize the Commission to exempt a foreign CCP from CFTC registration for the clearing of swaps if the Commission determines that the CCP is subject to comparable, comprehensive supervision and regulation by the appropriate government authorities in the CCP's home country.[46] However, the Commission to date has limited its exemption framework for foreign CCPs to those CCPs that do not clear swaps for U.S. customers. As a result, for a U.S. customer to access a foreign CCP, the CCP would need to register with the Commission, the customer would need to clear solely through registered FCMs, and FCMs would need to become direct members of such foreign CCPs.

The Commission's current approach decreases U.S. customer access to swaps cleared abroad because not all foreign CCPs can or wish to register with the Commission. U.S. customer access to foreign CCPs that elect to register with the Commission has also presented several legal and operational challenges due to the need to comply simultaneously with Commission requirements and foreign regulatory requirements. In addition, the ability of U.S. FCMs to become direct members of all foreign CCPs at which their customers wish to clear is limited. FIA's suggested approach to develop a regime to exempt foreign CCPs from registration with the CFTC to clear swaps based upon the existing framework for foreign futures should decrease the unnecessary costs to comply with both U.S. and foreign regulatory frameworks and enhance the choice for U.S. persons to clear through foreign CCPs.

We similarly recommend that the Commission encourage its foreign regulatory counterparts to apply comparable recognition policies to U.S. CCPs offering services to clearing firms and customers in their jurisdictions.

J. The Commission Should Work with the Exchanges and Industry to Develop a Defined Audit Trail

The Commission recently undertook a much-needed effort to modernize and streamline the form and manner in which market participants must retain required records.[47] FIA believes that the Commission should undertake a similar effort to define the scope of trading records that various market participants must retain. This review should prioritize coordination at both the Commission and exchange level. Efficient and clear rules are particularly important where regulatory obligations intersect with technology. Similar to the update to the form and manner requirements, an update to the scope of required records should promote financial innovation through the use of a flexible, principles-based approach.

FIA recently embarked on a comprehensive review of certain Commission regulations and the audit trail rules of U.S. futures exchanges. Although FIA's review is in the early stages, FIA members have identified a number of areas where rules are duplicative, confusing, and may impose unnecessary costs on market participants. Given these challenges, FIA would welcome the opportunity to engage with the Staff when we are farther along in our assessment. We believe that the rules can be clarified and

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[46] *See* CEA Section 5b(h).

[47] *See Recordkeeping*, 82 Fed. Reg. 24,479, 24,484 (May 30, 2017).

streamlined to reduce the burdens on market participants while still meeting the CFTC's and exchanges' important regulatory objectives.

IV. Solutions in Progress Where FIA Is Working with Staff to Resolve Regulatory Challenges

A. CFTC Staff Should Issue No-Action Relief to Continue to Delay its Ownership and Control Reporting Rule in Order to Provide Time to Appropriately Tailor the Data Collection Through an Amendment to the Rule

For the past several years, FIA has worked diligently with the Commission to implement an ownership and control reporting ("**OCR**") framework that effectively and efficiently serves the agency's regulatory objectives.[48] However, as FIA has explained in the past, the scope of data required and the timeframes to report under the Commission's 2013 OCR rule are unworkable.[49] We commend CFTC Staff for acknowledging our concerns and issuing the no-action relief requested by FIA to continue to delay implementation of certain aspects of the 2013 OCR rule.[50] FIA will continue to work with Commissioners and Staff to find the appropriate balance of OCR data necessary for reporting firms to provide the Commission.

The 2012 OCR rule obligates certain reporting firms (*i.e.*, FCMs, clearing members, foreign brokers, and swap dealers) to report ownership and control information about their customers and counterparties.[51] The CFTC, in turn, can directly contact the customer or counterparty to obtain additional data about the customer or counterparty using the Form 40/40S. FIA believes that it is appropriate for reporting firms to provide the Commission and the exchanges with information about their customers and counterparties necessary for the agency to carry out its market oversight responsibilities.

Unfortunately, the Commission's 2013 OCR rule obligates reporting firms to report very broad and detailed internal data of their customers and counterparties that the reporting firms do not have in their possession. For example, the new Form 102A requires clearing members to report all "Natural Person Controller(s)" of reportable accounts even though such data are in the sole possession of the customer. Absent no-action relief, the 2013 OCR rule would require reporting firms to report this data within 1 business day of an account being reportable and to update the data within 1 business day if it changes. These requirements force reporting firms to engage in extensive, costly, and largely unproductive

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[48] On November 18, 2013, the Commission revised its OCR rules to create an electronic format for reporting and to increase significantly the OCR data that the CFTC receives. *See Ownership and Control Reports, Forms 102/102S, 40/40S, and 71*, 78 Fed. Reg. 69178 (Nov. 18, 2013).

[49] On June 26, 2015, FIA submitted a petition for rulemaking to modify the OCR rules. *See* Letter from Allison Lurton, Senior Vice President and General Counsel, FIA, to Christopher Kirkpatrick, Secretary, CFTC (June 26, 2015) (FIA Petition for Amendment of the OCR Final Rule); *see also* Letter from Allison Lurton, Senior Vice President and General Counsel, FIA, to Vincent A. McGonagle, Director, Division of Market Oversight, CFTC (Feb. 24, 2016).

[50] *See* CFTC Letter No. 17-45 (Sept. 25, 2017); Letter from Allison Lurton, Senior Vice President and General Counsel, FIA, to Amir Zaidi, Director, Division of Market Oversight, CFTC (June 9, 2017).

[51] The exchanges each have their own version of OCR reporting requirements.

outreach to customers and counterparties to request, attempt to collect, and keep up-to-date OCR data with minimal, if any, benefit to the agency.[52]

1. Eliminate Unnecessary Double-Checks of OCR Data Submissions

FIA believes it is important that the CFTC have reliable market data to carry out its surveillance responsibilities. We nevertheless have concerns with how Staff scrutinize the reporting firm data submissions. For example, Staff dedicated resources to comparing stale data reported on the old Form 102 to current data reported on the new Form 102A and asked reporting firms to research the reasons behind the differences.[53] This exercise was unnecessary because the old Form 102 and the new Form 102A request substantially different data sets, which explains the differences. More recently, Staff have been questioning why firms have filed a change update even though the rule mandates that firms file such change update if the OCR data changes. These types of inquiries do not add value to the Commission's surveillance program, yet they impose a significant burden on reporting firms to manually re-verify a typically automated submission.

B. The Commission Should Withdraw Proposed Regulation Automated Trading and Reconsider Existing Industry Safeguards

Proposed regulation automated trading, including the supplemental proposal (collectively, "**Proposed Reg AT**"), is not appropriate to address the risks posed by automated trading and has the potential to harm the market.[54] FIA appreciates the Commission's consideration of FIA's comments to Proposed Reg AT and its desire to reconsider the proposed regulation. Rather than trying to alter and finalize select pieces of a flawed proposal,[55] the Commission should withdraw Proposed Reg AT and reconsider the risks of automated trading and existing industry safeguards from a fresh perspective.

FIA remains focused on potential challenges associated with automated trading. FIA member firms have taken a leadership role in identifying risks and strengthening safeguards with respect to automated trading in the futures markets globally. Since April 2010, FIA has published six papers proposing industry best practices and guidelines related to these important topics.[56] As FIA pointed out in its comments to

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[52] FIA also supports the no-action relief request from the Commodity Markets Council regarding modifications to the Form 40/40S.

[53] In certain instances, the data on the old Form 102 was more than 10 years old.

[54] *See Regulation of Automated Trading*, 80 Fed. Reg. 78,824 (Dec. 17, 2015) (proposed rule); *Regulation Automated Trading*, 81 Fed. Reg. 85,334 (Nov. 25, 2016) (supplemental proposed rule).

[55] For example, as FIA has commented in the past, Proposed Reg AT focuses too heavily on the identification of new registrants. The designation of AT Persons and the creation of a new category of floor traders are not necessary and, in any event, should not be triggered by a "bright-line" volumetric threshold or any other arbitrary quantitative test.

[56] These papers were published by FIA, FIA Principal Traders Group, and/or FIA European Principal Traders Association: *Market Access Risk Management Recommendations* (Apr. 2010); *Recommendations for Risk Controls for Trading Firms* (Nov. 2010); *Order Handling Risk Management Recommendations for Executing Brokers* (Mar. 2012); *Software Development and Change Management Recommendations* (March 2012); *Drop Copy*

Proposed Reg AT, FIA member firms have taken robust steps—on their own initiative and in consultation with the exchanges—to address risks of automated trading.[57] The Commission should capitalize on the robust efforts of the industry to promote sound risk management for automated trading. FIA believes that the industry should continue to lead efforts to address the concerns associated with automated trading.

We are encouraged that the Commission is taking a deliberative approach toward the proposed rules and believe that the market would benefit greatly from the Commission withdrawing Proposed Reg AT to reconsider the risks of automated trading and the existing industry safeguards.[58]

C. The Commission Should Codify the Staff No-Action Relief from the CFTC's Position Limit Aggregation Requirements Because the Relief Implements the Rule in a Reasonable and Cost-Efficient Manner

FIA commends the Commission and Staff for issuing no-action relief from the Commission's recently amended position limits aggregation requirements.[59] The no-action letter provides market participants with welcomed relief from certain notice and other requirements of CFTC Rule 150.4, while preserving the Commission's ability to perform surveillance functions and monitor positions for compliance with federal limits. The Staff established the relief for a two-year period to provide time to assess the impact of the relief and to consider codifying the relief through a rule amendment. FIA supports the Staff's

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Recommendations (Sept. 2013); *Guide to the Development and Operation of Automated Trading Systems* (Mar. 2015).

[57] *See* Letter from Walter L. Lukken, President and CEO, FIA, to Melissa D. Jurgens, Secretary, CFTC (Dec. 11, 2013), available at https://secure.fia.org/downloads/CFTC_Concept_Release_on_Risk_Controls_121113.pdf (response to 2013 Concept Release on Risk Controls and System Safeguards for Automated Trading Environments); Letter from Walter L. Lukken, President and CEO, FIA, to Christopher J. Kirkpatrick, Secretary, CFTC (Mar. 16, 2016), available at https://fia.org/sites/default/files/content_attachments/2016-03-16_Regulation_AT_Comment_Letter.pdf (response to Commission's first NPRM on Regulation AT); Letter from Walter L. Lukken, President and CEO, FIA; Stuart J. Kaswell, Executive Vice President and General Counsel, Managed Funds Association; Katherine Tew Darras, General Counsel, ISDA; Laura Martin, Managing Director and Associate General Counsel, SIFMA AMG to Christopher J. Kirkpatrick, Secretary, CFTC, (June 24, 2016), available at https://fia.org/sites/default/files/2016-06-24_RegAT_Roundtable_Group_Comment.pdf (industry response to Staff Roundtable on Elements of Regulation Automated Trading); Letter from Walter L. Lukken, President and CEO, FIA to Christopher J. Kirkpatrick, Secretary, CFTC (May 1, 2017), available at https://fia.org/sites/default/files/content_attachments/2017-05-01_CFTC_RegAT_0.pdf (response to Supplemental NPRM regarding Regulation AT).

[58] To the extent the Commission decides that federal regulation is necessary, the Commission should consider a principles-based approach (subject to notice and comment) that engages market participants to evaluate risk and allows practices to evolve as risks evolve. The location and extent of trading controls should be a function of the exchanges, in coordination with industry, evaluating market structure, the nature of the product being traded, the type of trading being conducted, efficiency, and cost. By comparison, the one-sized fits all approach in Proposed Reg AT is not tailored to a specific risk, and FIA expects it to be very burdensome without effectively addressing the risks posed by automated trading.

[59] *See* CFTC Letter No. 17-37 (Aug. 10, 2017); *Aggregation of Positions*, 81 Fed. Reg. 91,454 (Dec. 16, 2016).

consideration of more a permanent solution and urges the Staff to evaluate rule amendments in the immediate future.

As FIA has commented to the Commission in the past, market participants need to devote considerable time and resources to comply with changes to position limits rules.[60] Given the expiration of no-action relief in two years and the time needed to finalize potential amendments, the Staff should start to consider amendments to the rule. FIA will continue to work with Commissioners and Staff to recommend rule amendments that align the requirements of the rule with the no-action relief.

D. The Commission Should Modify the Proposed Capital Requirements for FCMs and Swap Dealers

In December 2016, the Commission proposed capital requirements for swap dealers, major swap participants, and proposed amended capital requirements for FCMs.[61] In response to the proposed rule FIA submitted comments raising concerns regarding the treatment of proprietary swaps and security-based swaps in the capital calculation, the fact that neither standardized market risk and credit risk charges nor the use of market risk and credit risk internal models are viable alternatives for FCMs, and the need for an extended compliance date after the issuance of a final rule.[62]

FIA PTG also submitted a comment letter[63] highlighting that the proposed rule creates problems for market participants. FIA PTG believes the standardized market and credit risk charges are impractical, highly burdensome to firms, and do not reflect risk. FIA PTG further believes the rule creates unnecessary barriers to entry in requiring swap dealers that use internal models to maintain $100 million in tentative net capital and in requiring that swap dealers maintain net capital in excess of 8 percent of the risk margin.

FIA reiterates the comments in both letters and is willing to work with the Commission Staff to improve the proposed capital rule.

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[60] *See* Letter from Walter L. Lukken, President and CEO, FIA, to Christopher Kirkpatrick, Secretary, CFTC (Feb. 28, 2017), available at https://commodities.fia.org/sites/default/files/content_attachments/2017-02-28_Reproposal_Position_Limits.pdf.

[61] *See Capital Requirements of Swap Dealers and Major Swap Participants*, 81 Fed. Reg. 91,252 (Dec. 16, 2016); *Capital Requirements of Swap Dealers and Major Swap Participants*, 82 Fed. Reg. 13,971 (Mar. 16, 2017).

[62] *See* Letter from Walter L. Lukken, President and CEO, FIA, to Christopher Kirkpatrick, Secretary, CFTC (May 15, 2017), available at https://fia.org/sites/default/files/content_attachments/2017-05-15_CFTC_Capital_Requirements_for_SD.pdf.

[63] *See* Letter from Joanna Mallers, Secretary, FIA PTG, to Christopher Kirkpatrick, Secretary, CFTC (May 24, 2017), available https://ptg.fia.org/sites/default/files/content_attachments/2017-05-24_Capital_Requirements_SDs_MSPs.pdf.

V. Conclusion

FIA appreciates the opportunity to provide these suggestions as part of Project KISS. FIA views this initiative as an important first step toward refining and improving the Commission's regulations in light of the CFTC's extraordinary efforts to implement rules mandated by the Dodd-Frank Act. We look forward to engaging with the Commission on the matters discussed herein and are ready to assist the Commission and Staff in effecting the improvements.

Please contact Allison Lurton, Senior Vice President and General Counsel, at 202-466-5460, if you have any questions about this letter.

Respectfully Submitted

Walt L. Lukken

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President and Chief Executive Officer

cc: Chairman J. Christopher Giancarlo
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