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AMERICAS
WHOLESALE MARKETS BROKERS' ASSOCIATION

August 27, 2015

The Honorable Timothy Massad, Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Swap Execution Facility Regulations, Made Available to Trade Determinations, and Swap Trading Requirements

Dear Chairman Massad:

Recent statements by the Commissioners of the Commodity Futures Trading Commission ("CFTC" or "Commission") have discussed the Commission's consideration of potential revisions to various aspects of its swap regulations promulgated pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), including those reforms related to swap execution facilities ("SEFs") and trade execution.

In your keynote address before the D.C. Bar Association in July, you discussed the various steps that the Commission has taken to improve SEF trading over the past several months[1] and, separately, you have also stated that the Commission is in the midst of reviewing the SEF rules to develop ways to improve them and have indicated that such improvements may be codified through formal rulemaking processes.[2] Calls for the Commission to consider potential revisions to its Dodd-Frank Act regulations have also been raised by Commissioner Wetjen,[3] Commissioner Bowen,[4] and Commissioner Giancarlo.[5] In addition, Commission staff have indicated that they are considering potential no-action relief or guidance with respect to issues that market participants have identified as problematic.

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[1] D.C. Bar Event, CFTC Regulatory Developments (July 23, 2015).

[2] *See Regulatory Issues Impacting End-Users and Market Liquidity: Hearing Before the Senate Committee on Agriculture, Nutrition & Forestry*, 114th Cong. (May 14, 2015).

[3] *See* Statement of Commissioner Wetjen, July 15, 2015 (supporting "ways to improve swaps trading and liquidity on [SEFs]"), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/wetjenstatement071515.

[4] *See* Statement of Commissioner Bowen, Dec. 1, 2014 (stating that "the best way of viewing changes to [the CFTC's Dodd-Frank Act rulemakings] is not that [the CFTC is] tweaking them, but rather that [the CFTC is] enhancing them. Sometimes that may mean making the rules more cost-effective and leaner, but at other times that will mean making them stronger than before. Enhancing a rule can mean reducing burdens to business while strengthening protections for the public"), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/bowenstatement120114.

[5] *See* Commissioner Giancarlo White Paper, "Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank" (Jan. 29, 2015), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf; *see also* statement of Commissioner Giancarlo, Six Month Progress Report on CFTC Swaps Trading Rules: Incomplete Action and Fragmented Markets (Aug. 4, 2015), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement080415.

The Wholesale Markets Brokers' Association, Americas ("WMBAA")[6] appreciates the Commission's careful and deliberative approach to the regulation of SEFs. Since the Commission's adoption of final SEF regulations in June 2013, the WMBAA member firms have been working diligently to implement various requirements and have actively engaged Commission staff throughout the implementation process. The WMBAA continues to be committed to working with the Commission and its staff to ensure that the regulations are implemented in accordance with the underlying statutory intent of the Dodd-Frank Act and accomplish the legislation's goal to "promote the trading of swaps on swap execution facilities."

The Dodd-Frank Act clearly sets forth the statutory definition of the term SEF—a multiple-to-multiple trading system or platform "through any means of interstate commerce, including any trading facility"[7]—and delineates the framework for SEF regulation. However, the implementation of the new SEF regulatory regime has not been without its challenges and, given the unique characteristics of the over-the-counter swap market, certain requirements have proven to be impracticable to implement. Accordingly, the WMBAA supports the Commissioners' recognition that the regulations should be assessed and reconsidered on an ongoing basis.

In order to assist the Commission and its staff in such assessment of the SEF regulations, the WMBAA respectfully offers the attached matrix in Appendix A, which we have prepared based on our expertise as over-the-counter market operators for over 25 years and a combined tenure in the industry of over 100 years, and our experience to date with the implementation of the SEF related rules. For each of the following topics, the matrix notes the relevant statutory provision, describes the implementation issue experienced by market participants, references the relevant CFTC rule or staff advisory, and suggests a potential recommendation to address the issue.

The topics are not presented in order of importance, but rather represent the regulatory implementation issues that the WMBAA members are addressing:

- Position limits;[8]
- Audit trail requirements for voice-based executions;
- Financial resource requirements;
- SEF confirmation and reporting;
- Trades deemed void *ab initio*;
- Embargo rule;

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[6] The WMBAA is an independent industry body representing the largest inter-dealer brokers. The founding members of the group—BGC Partners, GFI Group, Tradition, and Tullett Prebon—operate globally, including in the North American wholesale markets, in a broad range of financial products, and have received temporary registration as swap execution facilities. The WMBAA membership collectively employs approximately 4,000 people in the United States; not only in New York City, but in Stamford and Norwalk, Connecticut; Chicago, Illinois; Jersey City and Piscataway, New Jersey; Raleigh, North Carolina; Juno Beach, Florida; Burlington, Massachusetts; and Dallas, Houston, and Sugar Land, Texas. For more information, please see www.wmbaa.com.

[7] Commodity Exchange Act ("CEA"), 1a(50).

[8] A WMBAA white paper on position limits, which was submitted to the Division of Market Oversight staff, is attached hereto as Appendix B.

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- Methods of execution;
- Block trades;
- Made available to trade process;
- Cross-border issues;
- Margin requirements; and
- SEF recordkeeping.

While each of the WMBAA member firms' SEFs has received temporary registration, the members recognize the importance of permanent SEF registration to providing the market with certainty. Accordingly, the WMBAA is hopeful that continued active engagement with the Commission and its staff on these implementation issues will serve to expedite the permanent registration process.

In addition to the specific issues addressed in the matrix, the WMBAA recommends that the Commission examine the commercial impact of its SEF regulations and other rules on the swap market. Specifically, wherever possible, the Commission should seek to ensure a level playing field between the futures and swap markets for commercially-equivalent risk management contracts by not permitting any unfair regulatory advantage to either market. The WMBAA believes that such regulatory instances, in which a swap market requirement that results in additional costs or creates disincentives for trading swaps relative to the futures market equivalent, should be reconsidered by the Commission.

Lastly, to the extent that Commission action to modify certain swap-related regulations are constrained by statutory language under the Dodd-Frank Act, the WMBAA would welcome the opportunity to work with the Commission to advocate for appropriate legislative changes before Congress. However, the attached list includes solely those issues which the WMBAA believes can be addressed through regulatory action.

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We welcome the opportunity to discuss these comments with you at your convenience. Please feel free to contact the undersigned with any questions you may have on our comments.

Sincerely,

Shawn Bernardo
Chairman, WMBAA

Enclosure

cc: The Honorable Sharon Bowen, Commissioner
Mr. Vince McGonagle, Director, Division of Market Oversight

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APPENDIX A: CFTC PART 37 SEF REGULATIONS: RECOMMENDED REVISIONS

Relevant Statutory Provision	Issue	CFTC Regulation	Proposed Solution/Revision
CEA § 5h(f)(6) (Core Principle 6) "(a) . . . a [SEF] that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators. (b) Position limits. For any contract that is subject to a position limitation established by the Commission . . . the [SEF] shall: (1) Set its position limitation at a level no higher than the Commission limitation; and (2) Monitor positions established on or through the [SEF] for compliance with the limit set by the Commission and the limit, if any, set by the [SEF]."	**Position Limits** SEFs do not possess information about a trader's position in any given swap. Rather, SEFs only have information about swap transactions that take place on their individual facilities and have no way of knowing whether a particular trade on the facility adds to an existing market-wide position or whether it offsets all or part of an existing position in that swap. For example, if five SEFs that offer a particular product set their respective limits at a level established by the CFTC, the overall aggregate position available to market participants via trading on such SEFs would be five times greater than the level set by the CFTC. As such, market participants could game these limits and rules by spreading their transactions across multiple SEFs and DCOs when reaching the limit set by each.	Rule 37.600 *Same as statutory provision*	Specify that SEFs are not obligated to impose position limits or accountability until such time as the **Commission** determines that such measures are "necessary and appropriate." Implementing position limitations or position accountability is not necessary and appropriate at this time because, for example: (1) unlike futures and options where trading and clearing is vertically integrated and each DCM has information about positions in the marketplace for any specific contract, they are not an effective tool for detecting and preventing manipulation and other abuses for swaps; and (2) individual SEFs do not possess information about a trader's position in any given swap and, therefore, have no basis of reference as to how and when a position limit should be set. In the alternative, provide specific guidance on how SEFs can practically comply with an accountability provision, reflecting that: (1) SEFs do not possess position information; and (2) swaps are fungible in terms of being traded on multiple venues and cleared by multiple DCOs. Any accountability level(s) should be established by the CFTC, taking into account the entirety of market activity in a product

	While staff has acknowledged that, in lieu of position limits, SEFs may establish accountability provisions related to trades rather than positions, the details of such accountability mechanisms and how accountability levels would be set are yet unclear.		(both on and off SEFs), and such established level(s) should be applied uniformly to all SEFs. In addition to these comments, the WMBAA has submitted to DMO staff a white paper explaining why a SEF position limits and position accountability regime is neither necessary nor appropriate. As an alternative to setting position limits, SEFs should only be required to provide data to the Commission to assist it in monitoring compliance with federal speculative position limits. The National Futures Association provided DMO staff with a similar submission. The WMBAA white paper is attached as Appendix B.
CEA § 5h(f)(2)(B)(ii) (Core Principle 2) "A [SEF] shall . . . establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means . . . to capture information that may be used in establishing whether rule violations have occurred."	**Voice Audit Trail** CFTC staff has expressed a desire that SEFs must be able to store recordings of oral communications in a digital database and convert such recordings into searchable text. In addition, CFTC staff has explored the concept of requiring SEFs to record or access not only the communications between the SEF's employees and their customers, and any communications between employees, but also the communications of Introducing Brokers. Introducing Brokers already have the obligation to record communications and SEFs have	Rule 37.205 Commission rule 37.205 sets forth the audit trail requirement for SEFs to "capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses." The Commission requires that such data is "sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades within a reasonable period of time and to provide evidence of any violations of the rules of the [SEF]." Further, an audit trail must also permit a SEF to "track a customer order from the time of receipt through fill, allocation, or other disposition, and shall include both order and trade data."	Revise the rules or provide guidance related to audit trail requirements for voice-based executions on SEFs to account for the unique characteristics of voice execution and to recognize the currently available technologies. Any such new rules or guidance would supplement the existing audit trail requirements that are tailored to electronic execution and should more accurately reflect a "technology-neutral" approach to SEF execution. In accordance with the preamble discussion to the final rule, the WMBAA believes that "the intent of the final rules is to require that a SEF establish and maintain an effective audit trail program, not to dictate the method or form for maintaining such information. *Importantly, the rule, by not being prescriptive, provides SEFs with*

	access to such information.	The elements of an acceptable audit trail program involve (1) original source documents, (2) electronic transaction history database, (3) electronic analysis capability, and (4) safe storage capability.	*flexibility to determine the manner and the technology necessary and appropriate to meet the requirements*" (emphasis added). 78 Fed. Reg. 33,476, 33,518 (June 4, 2013). The WMBAA further recommends that the CFTC consider whether the audit trail requirements may be satisfied based on exception or risk-based SEF reviews.
CEA § 5h(f)(13) (Core Principle 13) "(A) IN GENERAL.—The [SEF] shall have adequate financial, operational, and managerial resources to discharge each responsibility of the [SEF]. (B) DETERMINATION OF RESOURCE ADEQUACY.—The financial resources of a [SEF] shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the [SEF] to cover the operating costs of the [SEF] for a 1-year period, as calculated on a rolling basis."	**SEF Financial Resources** CFTC staff has indicated its preliminary belief that all SEF employees are considered part of the financial obligation, regardless of the employment arrangement, *e.g.* at-will, contractual, and guaranteed salary. As a result, SEFs with voice-based systems face significantly higher financial resources commitments than those facilities that only provide electronic trading access. The Commission's rules do not recognize that: (1) SEFs do not possess or maintain client funds or open interest; and (2) there is no practical need for any individual SEF to maintain sufficient resources for a period of one-year after an event that results in the closure of a SEF, as a SEF could wind down its operations in a much shorter time period.	Rule 37.1300 *Same as statutory provision*	Flexibly interpret the SEF financial resources requirements to reflect that SEFs are execution venues only and do not ensure contract performance, making their commercial viability less relevant on a post-transaction basis. The SEF financial resources requirement should focus on the fixed costs associated with compliant SEF operation, rather than the variable costs. The WMBAA notes that the costs associated with employing SEF brokers constitute variable costs and are not core to the compliance regime and, therefore, should be excluded from the financial resources calculation. Contrary to DMO letter 15-26, any salary or compensation for SEF employee-brokers should not be included in the calculation of projected operating expenses. In addition, the WMBAA has submitted information to DMO staff regarding liquid assets and would welcome any further communication as needed for no-action relief to reduce the burden from six months' liquid assets to three months' liquid assets.

			Any modification of the financial resource rules should take into account the fact that the exit of an individual SEF (or brokers within an operational SEF) would not have broad market-wide or systemic effects on the swap marketplace. This is because the trades previously executed on the SEF would have been fully processed and reported, and the positions resulting from all trades would be unaffected, as they are held either at a DCO for cleared trades or with the counterparties for uncleared trades. Moreover, if a SEF were to experience difficulty or choose to exit the marketplace, the wind-down process would occur quickly. As SEFs do not hold positions, the unwind process would take no longer than a few months.
CEA § 21(c)(2) "A swap data repository shall . . . confirm with both counterparties to the swap the accuracy of the data that was submitted."	**SEF Confirmation & Reporting - footnote 195 and scope of confirmation reporting** It is impracticable to require all participants to provide and keep current with all SEFs master agreements between every SEF participant for all possible counterparties and for all contract types. SEFs have jurisdictional oversight over their participants and, therefore, have the ability to request the "privately negotiated terms of a freestanding master agreement" between its customers. However,	Rule 37.6(b): "A [SEF] shall provide each counterparty to a transaction that is entered into on or pursuant to the rules of the [SEF] with a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction. The confirmation of all terms of the transaction shall take place at the same time as execution . . . ." Footnote 195: "There is no reason why a SEF's written confirmation terms cannot incorporate by reference the privately negotiated terms of a freestanding master agreement for these types of transactions, provided that the master agreement is submitted to the SEF ahead of execution	While the WMBAA appreciates the relief provided in letter 15-25, the WMBAA offers the following recommendations for the Commission to develop permanent solutions, codified in the rules. Revise SEF confirmation and reporting requirements with respect to footnote 195 to (i) exclude underlying agreements, provided that they contain no material economic terms of a swap transaction, and (ii) make clear that underlying agreements are superseded by the terms of the SEF execution if there is any conflict. Remove the need for a SEF to warehouse any agreements and any requirement that the confirmation reference specific agreements (*i.e.* a SEF should be permitted to incorporate by reference

	these bilateral arrangements are in place between market participants and, as a matter of industry practice, are not provided to other entities, including SEFs. Gathering such information in advance would involve disclosing the names of every possible counterparty and, therefore, "member" of a SEF, which is currently not standard practice. Alternatively, the "execution" process would be detrimentally affected if, at the point of "matching," SEF employees were forced to gather and process the required information from the matched counterparties before confirming the transaction. These agreements provide the non-economic contractual details of the relationship between the parties to a non-cleared swap. These details are not price-forming to SEF trades. It is also unclear what data, if any, is necessary for trade confirmation purposes, as the SEF confirmation already contains the primary economic terms data. Underlying credit information from master agreements could be requested by the SEF pursuant to a SEF's jurisdiction. Further, if the counterparties are regulated entities (*i.e.*, registered swap dealers), the	and the counterparties ensure that nothing in the confirmation terms contradict the standardized terms intended to be incorporated from the master agreement."	underlying agreements generally), and replace with a requirement that the SEF can obtain such agreements from the counterparties upon request. The confirmation requirement for SEFs should be restricted to advising counterparties that they are bound by the most recent agreements, including the credit support agreement, related to the relevant product type. SEFs should not be required to provide confirmations directly to end user clients; rather, it should be sufficient for confirmations to be provided to the member firm sponsoring access to the SEF. The member firm should be responsible for confirming the trade with the customer. At minimum, an end user customer should be permitted to opt out of receiving such confirmation directly from the SEF. In terms of the timing of a confirmation for off-facility swaps, the SEF confirmation requirement should be revised such that SEFs are required to confirm the trade after it has been reported to them by the counterparties.

	CFTC would have the ability to request such documents.		
CEA § 5h(f)(7) (Core Principle 7) "The [SEF] shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the [SEF], including the clearance and settlement of the swaps pursuant to section 2(h)(1)."	**Void *Ab Initio* Trades** Occasionally, a trade may be rejected from clearing due to a readily correctible clerical or operational error and, as a result, is treated as void *ab initio*. In addition, an error may be identified after a transaction has been cleared by a DCO.	Rule 37.702 *Same as statutory provision* DMO/DCR STP Guidance: "[T]he Divisions believe that any trade that is executed on a SEF or DCM and that is not accepted for clearing should be *void ab initio*."	While the WMBAA appreciates the relief provided in letter 15-24, the WMBAA offers the following recommendations for the Commission to develop permanent solutions, codified in the rules. Promulgate regulations that provide for a process flow for swaps rejected for clearing due to clerical or operational errors or for swaps in which a readily correctible error is identified after execution and clearing. Specifically, such regulations should permit SEFs to correct clerical or operational errors on swaps rejected for clearing. In addition, if a swap has been accepted by a DCO for clearing, and a clerical or operational error is subsequently identified, the regulations should permit a SEF to correct the error in the trade without initiating a "new trades, old terms" offset and resubmission, provided that the DCO has the operational capability to permit such a correction. Alternatively, revise the STP guidance to account for circumstances that (1) require a resubmission to correct for technical or clerical errors, and (2) require a correction of a technical or clerical error in cleared trades.

CEA § 2(a)(13)(D) "The Commission may require registered entities to publicly disseminate the swap transaction and pricing data required to be reported under this paragraph."	**Embargo Rule** As a result of the embargo rule, SEFs and DCMs that would like to continue to permit work-ups may face workflow issues because they cannot share trade information with their customers until such information is transmitted to an SDR. Such delays can have a material effect on market liquidity. To operate efficiently and competitively, information which reflects current market activity must be available to all market participants without any disruptive pauses for the occurrence of other regulatory activities. Every market participant must have real-time information on executed trades for the entire marketplace to ensure effective price discovery so that they can make informed trading decisions. This allows the market to operate properly as a single liquidity pool. In addition, those SEFs that rely on a third party to transmit information to SDRs are further hindered by the embargo rule in their ability to make available to all market participants current market information.	Rule 43.3(b)(3)(i) "If there is a registered swap data repository for an asset class, a registered [SEF] . . . shall not disclose swap transaction and pricing data relating to publicly reportable swap transactions in such asset class, prior to the public dissemination of such data by a registered swap data repository unless: (A) Such disclosure is made no earlier than the transmittal of such data to a registered swap data repository for public dissemination; (B) Such disclosure is only made to market participants on such registered [SEF] . . . ; (C) Market participants are provided advance notice of such disclosure; and (D) Any such disclosure by the registered [SEF] . . . is nondiscriminatory.	While the WMBAA appreciates the prior no-action relief provided in letter 13-68, the WMBAA believes that the problematic aspects of the requirement continue to persist and merit removing the requirement from the Part 43 rules. The CFTC should amend its regulations to permit a SEF post-initial trade work stream that promotes liquidity formation, including through SEF workups, while ensuring that the Commission's rules implementing the post-trade transparency requirement for public dissemination of swap data as soon as technologically practicable do not artificially restrict a SEF's ability to efficiently execute swap transactions. As an interim measure, DMO should issue guidance regarding the interaction between workups permitted under Part 37 and the real-time reporting requirement under Part 43 that swaps be reported to SDRs "as soon as technologically practicable after . . . [a] swap transaction is executed." Further, the Commission should consider that, due to SDR "rounding" models and "capping" of large notional transactions, the information publicly disclosed is often not identical to specific trade-level information on the SEF.

CEA § 1(a)(50) "The term 'swap execution facility' means a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that— "(A) facilitates the execution of swaps between persons; and "(B) is not a designated contract market."	**Methods of Execution** The SEF definition is broad, flexible, and contemplates execution methods beyond an order book or RFQ system. The CFTC regulation artificially restricts the permitted methods of liquidity formation and execution, which may prevent certain technologies from qualifying as a registered SEF, in contravention to Dodd-Frank's goal of promoting the execution of swaps on SEF. It also does not contain an all-to-all requirement.	Rule 37.9(a)(2) "Execution methods. (i) Each Required Transaction that is not a block trade . . . shall be executed on a [SEF] in accordance with one of the following methods of execution: (A) An Order Book . . . ; or (B) A Request for Quote System . . . that operates in conjunction with an Order Book . . . ."	Add a new clause "(C)" to the execution methods in rule 37.9(a)(2) that expands the permissible methods of execution for Required Transactions to include "or any such other system for trading as may be permitted by the Commission." Codify existing policy that certain systems, including Trading Facilities, fall within the SEF definition and qualify as a permissible method of execution for Required Transactions. Additional methods of execution for Required Transactions should include risk-mitigation. The WMBAA notes that auction-type systems meet the CEA definition of trading facility and, therefore, should be permitted as an acceptable execution method for Required Transactions in their own right and not be subject to the definitions of Order Book or RFQ.
CEA § 2(a)(13)(E)(ii), (iii). "RULEMAKING REQUIRED.—With respect to the rule providing for the public availability of transaction and pricing data for swaps . . . the rule promulgated by the Commission shall contain provisions . . . (ii) to specify the criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts; (iii) to specify the appropriate time	**Block Trade Definition** The primary purpose of the block trade concept is to provide for a delayed public trade reporting framework. Block trades are not statutorily prohibited from being executed on SEFs. Rather, permitting the execution of block trades on SEFs furthers the statutory goal of promoting swaps trading on SEFs. It also promotes transparency and regulatory oversight as such trades would be required to comport with the core	Rule 43.2: "Block trade means a publicly reportable swap transaction that . . . (2) Occurs away from the registered [SEF's] . . . trading system or platform and is executed pursuant to the registered [SEF's] rules and procedures . . ." Rule 37.9(a)(2): "Execution methods. (i) Each Required Transaction *that is not a block trade* . . . shall be executed on a [SEF] in accordance with one of the following methods of execution" (emphasis added).	While the WMBAA appreciates the relief provided in letter 14-118, the WMBAA offers the following recommendations for the Commission to develop permanent solutions, codified in the rules. Amend the block trade definition in Part 43 to remove the provision that a block trade "occurs away from" a SEF. Amend the Part 37 rules to clarify that block trades may be executed on a SEF's trading system or platform pursuant to the SEF's rules and procedures.

delay for reporting large notional swap transactions (block trades) to the public . . . ."	principles and other requirements for SEFs.		
CEA § 2(h)(8) "(A) IN GENERAL.—With respect to transactions involving swaps subject to the clearing requirement of paragraph (1), counterparties shall— (i) execute the transaction on a board of trade designated as a contract market . . .; or (ii) execute the transaction on a [registered SEF] or a swap execution facility that is exempt from registration . . . (B) EXCEPTION.—The requirements [above] shall not apply if no board of trade or [SEF] makes the swap available to trade or for swap transactions subject to the clearing exception . . . ."	**Made Available to Trade Process** The CEA does not detail a required analysis, enumerate criteria in performing a "made available to trade" analysis, or establish that SEFs or DCMs have the burden of persuading the Commission that a swap should be traded on a registered marketplace.	Rule 37.10(a)(1): "Required submission. A [SEF] that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap as a rule . . . ." Rule 37.10(c): "Applicability. Upon a determination that a swap is available to trade on any [SEF] or designated contract market . . . all other [SEFs] and designated contract markets shall comply with the requirements of section 2(h)(8)(A) of the Act in listing or offering such swap for trading."	Amend the made available to trade (MAT) process so that going forward, SEFs commence the MAT determination process by filing a petition, but the CFTC has the responsibility of making the determination based on objective criteria and subject to public notice and comment on the petition. In addition, as the WMBAA discussed at the recent DMO roundtable, the Commission should harmonize its MAT decisions with those of foreign regulators, including ESMA, in order to prevent any bifurcation of the swap markets and regulatory arbitrage.
CEA § 2(i) "The provisions of this Act relating to swaps . . . (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities— (1) have a direct and significant connection with activities in, or	**Cross-Border Concerns** The scope of the Commission's cross-border guidance is far reaching such that a permitted transaction involving two non-U.S. counterparties may be subject to SEF execution under footnote 88. This interpretation has had the practical effect of bifurcating	DSIO Advisory No. 13-69 "DSIO is of the view that a non-U.S. SD (whether an affiliate or not of a U.S. person) regularly using personnel or agents located in the U.S. to arrange, negotiate, or execute a swap with a non-U.S. person generally would be required to comply with the Transaction-Level Requirements. For the avoidance of doubt, the Division's view would also apply to a swap between a non-	Address cross-border issues through a formal rulemaking that invites and addresses public comment. Carefully consider the adoption of equivalency or substituted compliance regimes, such as the establishment of an exempt SEF category, to prevent further fracturing of markets by jurisdiction. Provide guidance regarding who is considered

effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act . . . ."	markets based on the participants' jurisdictions, impeding liquidity and redirecting activity away from SEFs and, as a result, away from U.S. markets and the oversight of U.S. regulators.	U.S. SD and a non-U.S. person booked in a non-U.S. branch of the non-U.S. SD if the non-U.S. SD is using personnel or agents located in the U.S. to arrange, negotiate, or execute such swap." CFTC staff has issued no-action relief letters pertaining to advisory 13-69, including most recently letter 15-48, which extended relief until September 30, 2016.	a U.S. person for execution purposes and, consequently, what types of transactions may be conducted off-SEF, such as in the following examples: • A foreign branch of a U.S. person conducting a trade solely in a foreign market with a foreign entity; and • A foreign branch of a U.S. prime broker, acting as a prime broker for a foreign customer. If the Commission engages in a rulemaking pertaining to an exempt SEF category, any exempt SEF should be required to comply with all material, transaction-level requirements applicable to SEFs. In addition, the Commission should work with foreign regulators to ensure they have a reciprocity provision for U.S.-registered SEFs. Any such CFTC rulemaking for exempt SEFs should condition the relief for the foreign MTF on the existence of a reciprocity provision in law or regulation of the applicable foreign jurisdiction. In addition, while non-U.S. swap dealers located in the U.S. have received no-action relief from the execution mandate, venues have not received such relief, adding to the uncertainty around the implementation of rules. In the interest of stability, no-action relief should be equally granted to participants and platforms where applicable.

CEA § 5b(c)(2)(D)(iv) "MARGIN REQUIREMENTS.—The margin required from each member and participant of a derivatives clearing organization shall be sufficient to cover potential exposures in normal market conditions."	**Margin Requirements** CFTC rules related to margin provide a significant commercial advantage to futures over swaps. Specifically, the CFTC's rules provide a five-day margin liquidation period for financial swaps, while all futures have a one-day margin liquidation period.	Rule 39.13(g)(2)(ii): "A derivatives clearing organization shall use models that generate initial margin requirements sufficient to cover the derivatives clearing organization's potential future exposures to clearing members based on price movements in the interval between the last collection of variation margin and the time within which the derivatives clearing organization estimates that it would be able to liquidate a defaulting clearing member's positions (liquidation time); provided, however, that a derivatives clearing organization shall use: (A) A minimum liquidation time that is one day for futures and options; (B) A minimum liquidation time that is one day for swaps on agricultural commodities, energy commodities, and metals; *(C) A minimum liquidation time that is five days for all other swaps . . . .*" (emphasis added).	Re-examine the Part 39 margin requirement for swaps to reflect a realistic liquidation time period for swaps. Margins should be based on the economic characteristics of the products, rather than on whether a product is classified as a future or a swap. Products with similar risk profiles should have the same margin requirements.
CEA § 5h(f)(10) "RECORDKEEPING AND REPORTING.— (A) IN GENERAL.—A swap execution facility shall— (i) maintain records of all activities relating to the business of the	**SEF Recordkeeping Requirement** CFTC rules requiring SEFs to retain all records through the life of a swap and for at least five years following a swap's termination is an onerous and impracticable requirement for	Rule 45.2(c): "All records required to be kept pursuant to this section shall be retained with respect to each swap throughout the life of the swap and for a period of at least five years following the final termination of the swap."	Provide guidance to SEFs as to what materials must be retained for five years to satisfy the recordkeeping obligation, which reduces the operational burden of maintaining all possible records, particularly those with minimal value from an audit trail perspective. For both cleared and uncleared swaps, revise

facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of 5 years . . . ."	SEFs. Following the execution of a swap, a SEF is not necessarily made aware of a swap's termination. Accordingly, it is often impracticable for a SEF to definitively ascertain the period of time for which it must retain records for a swap and can result in significantly burdensome recordkeeping costs.		the recordkeeping requirement under rule 45.2 to permit SEFs to retain records with respect to each swap for a period of five years after execution.

APPENDIX B: WMBAA WHITE PAPER REGARDING POSITION LIMITS

WMBA
AMERICAS
WHOLESALE MARKETS BROKERS' ASSOCIATION

White Paper:
SEF Position Limits and Accountability Regimes are Neither Necessary Nor Appropriate

May 21, 2015

I. Introduction

The Wholesale Markets Brokers Association, Americas,[1] the leading industry organization representing the interdealer broker industry, provides this White Paper to explain why a position limits or position accountability regime for swap execution facilities ("SEFs") is neither necessary nor appropriate.

Section 5h of the Commodity Exchange Act ("CEA"), as added by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), includes a series of core principles for SEFs. In the five years since Dodd-Frank was adopted, the Commodity Futures Trading Commission ("CFTC" or "Commission") has worked to implement Section 5h of the CEA, adopting final regulations related to the core principles and other requirements for SEFs, including core principle number 6 – position limits or accountability. An applicant SEF must comply with core principles to receive its permanent registration from the CFTC.

In practice, as explained in this White Paper, an overly prescriptive interpretation of this core principle would be unworkable, cost-intensive, and without any readily identifiable public policy benefits. While there have been calls for Congressional review of core principle 6,[2] the WMBAA believes, at this point, the Commission should consider a regulatory solution.

The approach described herein has been recently endorsed by a coalition of SEFs[3] and key industry groups.[4] The WMBAA supports such arguments, particularly that:

> The Commission should exempt SEFs from any requirement to enforce compliance with federal limits or to establish SEF limits for contracts subject to federal limits. As an alternative to setting position limits, SEFs should only be required to provide data to the Commission to assist it in monitoring compliance with federal speculative position limits.[5]

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[1] The WMBAA is an independent industry body representing the largest inter-dealer brokers operating in the North American wholesale markets across a broad range of financial products. The five founding members of the group are: BGC Partners; GFI Group; ICAP; Tradition; and Tullett Prebon. The WMBAA membership collectively employs approximately 4,000 people in the United States; not only in New York City, but in Stamford, Connecticut; Chicago, Illinois; Louisville, Kentucky; Jersey City, New Jersey; Raleigh, North Carolina; and Houston and Sugar Land, Texas. For more information, please see www.wmbaa.org.

[2] *See* Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank, CFTC Commissioner J. Christopher Giancarlo White Paper (Jan. 29, 2015), at 45, *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf.

[3] *See* SEF CCO Group Discussion Document Regarding SEF Core Principle 6 – Position Limits and Position Accountability, May 21, 2015.

[4] *See* Letter from the International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association to Ms. Melissa Jurgens, Secretary, CFTC (Feb. 10, 2014), *available at* http://www.sifma.org/comment-letters/2014/sifma-and-isda-submit-comments-to-the-cftc-on-position-limits-for-derivatives/.

[5] *Id.* at 35.

The SEF marketplace is still in its formative years. The CFTC has not yet adopted a position limits regime for swaps. The Commission should tread carefully to avoid the imposition of a rigid, unworkable requirement that, without adequate cost-benefit analysis, may harm the development of these markets. Rather, as suggested by Chairman Timothy Massad, the CFTC should work to create "the foundation for the market to thrive" and "permit innovation, freedom and competition."[6]

II. Background

A. Position Limits, Position Accountability

The CFTC glossary defines a position limit as "[t]he maximum position, either net long or net short, in one commodity future (or option) or in all futures (or options) of one commodity combined that may be held or controlled by one person (other than a person eligible for a hedge exemption) as prescribed by an exchange and/or by the CFTC." Fundamentally, a position limit caps the size of a position that a trader may hold or control for speculative purposes in a derivatives contract in a particular commodity. There are three elements of the regulatory framework for position limits: the levels of the limits, the exemptions from the limits (such as for hedging), and the policy on aggregating accounts. While the CFTC has set certain commodity position limits, it has not yet established position limits for swaps.

By contrast, the CFTC glossary defines position accountability as "[a] rule adopted by an exchange in lieu of position limits requiring persons holding a certain number of outstanding contracts to report the nature of the position, trading strategy, and hedging information of the position to the exchange, upon request of the exchange." Position accountability does not, by definition, impose a hard limitation on traders' speculative derivatives positions in a commodity. Instead, position accountability provisions grant the exchange additional powers to protect its markets, including the ability to obtain additional information from the trader and to limit the size of a trader's position, when a trader's derivatives position exceeds a specified level.

B. SEFs and Position Limits

Core principle 6 – codified as CEA Section 5h(f)(6) – mandates that a SEF "that is a trading facility" must "adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators."[7] Furthermore, "[f]or any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the [CEA], the [SEF] shall (i) set its position limitation at a level no higher than the Commission limitation; and (ii) monitor positions established on or through the [SEF] for compliance with the limit set by the Commission and the limit, if any, set by the [SEF]."[8]

The CFTC promulgated rule 37.600 by codifying the statutory language.[9] In the preamble to the final SEF rule, the CFTC noted that "[s]everal commenters stated that SEFs will have difficulty enforcing position limitations" because "SEFs will lack knowledge of a market participant's activity on other venues, and that will prevent a SEF from being able to calculate the true position of a market participant."[10] Furthermore,

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[6] Remarks of CFTC Chairman Timothy Massad before the ISDA 30th Annual General Meeting (Apr. 23, 2015), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-17.

[7] Commodity Exchange Act ("CEA") § 5h(f)(6).

[8] *Id.*

[9] 17 C.F.R. § 37.600.

[10] Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,476, 33,533 (June 4, 2013).

the CFTC describes the guidance and acceptable practices in appendix B to the part 37 rules as giving "reasonable discretion to comply with § 37.600."[11]

With respect to core principle 6, the guidance in Appendix B states that:

> For Required Transactions, a SEF may demonstrate compliance by setting and enforcing position limitations or position accountability levels only with respect to trading on the SEF's own market. For example, a SEF could satisfy the position accountability requirement by setting up a compliance program that continuously monitors the trading activity of its market participants and has procedures in place for remedying any violations of position levels.
>
> For Permitted Transactions, a SEF may demonstrate compliance by setting and enforcing position accountability levels or sending the Commission a list of Permitted Transactions traded on the SEF. Therefore, a SEF is not required to monitor its market participants' activity on other venues with respect to monitoring position limits.[12]

III. Role of Exchange-set Position Limits and Position Accountability

In contrast to SEFs and position limits, the CFTC has historically adopted position limits for certain agricultural commodities and also has required exchanges, as part of their self-regulatory responsibilities, to adopt position limits or position accountability provisions in their market surveillance programs. Unlike the OTC swap market, futures contracts traded on exchange are owned and exclusively listed by an exchange. They are unique contracts that are unavailable anywhere else.

When the CFTC first promulgated speculative position limits, it noted that "the capacity of any contract to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, i.e., the capacity of the market is not unlimited."[13] In the early 1990s, the CFTC adopted rules allowing exchanges to establish position accountability provisions, in lieu of position limits, for contracts that had been subject to exchange-set speculative position limits.

Exchange-based position limits have been adopted by designated contract markets ("DCMs"), or futures exchanges, and the position limits (or position accountability) provisions have been enforced through exchange rulebooks and their role as a self-regulatory organization conducting market surveillance programs. These protections serve as a prophylactic tool to reduce the threats of market power and to ensure the integrity of and orderly trading in the derivatives market. Exchange-set position limit and position accountability rules help prevent traders from accumulating concentrated positions that could disrupt a market and cause artificial prices and disorderly trading, such as purposefully through the exercise of market power by the position holder (e.g., actual or attempted manipulation) or to prevent one trader from negatively impacting market stability by liquidating too large of a position.

These rules obligate an exchange, as part of its market surveillance effort, to take account of large positions in their market either by imposing hard limits on traders' speculative positions or, in the case of position accountability, by providing exchanges with ways to address the market impact of large positions.

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[11] *Id.*

[12] *Id.* at 33,601.

[13] Establishment of Speculative Position Limits, 46 Fed Reg. 50,938 (Oct. 16, 1981).

IV. SEFs Cannot Adopt an Exchange-centric Position Limits or Accountability Regime

Exchange-based surveillance and position limit and position accountability regimes focus on market participants' concentrated speculative positions. CFTC staff has stated that "an acceptable market surveillance program should regularly collect and evaluate market data to determine whether markets are responding to the forces of supply and demand. An exchange also should have routine access to the positions and trading of its market participants."[14]

Exchanges can readily adopt and enforce position limits or position accountability provisions for futures and futures options because they have the means to carry out this oversight function. As mentioned before, exchanges own their contracts, the trading of which is only allowed on its respective exchange, and exchanges also own and operate the derivatives clearing organizations ("DCOs"), or direct trades to specified DCOs, that process and become the counterparty to each transaction executed on the exchange. Further, unlike futures on physical commodities for which the underlying products are in limited supply, the financial instruments underlying swaps subject to the trade execution mandate (interest rate and credit default swap indices) generally have very large or nearly inexhaustible deliverable supplies and a cash market sufficiently liquid to render swaps traded on those instruments highly unlikely to be susceptible to the threat of manipulation.

Exchanges also have "large trader reporting systems"[15] designed to obtain current information about traders' positions in their derivatives markets. Futures exchanges possess data showing the positions held by all reportable traders for each trading day based on reports from clearing members, futures commission merchants, and foreign brokers detailing close-of-business position data. Each futures exchange's "large trader reporting system" also provides information on the account's ownership and control and identifies futures and options traders who trade for the account. By assigning unique identification numbers to each trader, futures exchanges can aggregate traders' positions across different accounts at multiple clearing members to include the positions of all related affiliates.

By contrast, SEFs are trading platforms that merely foster liquidity for swap execution. They do not have any ownership or proprietary control over the products bought and sold on their platforms. SEFs do not hold customer funds. They do not guarantee performance by counterparties. And, most importantly as discussed below, SEFs do not possess information about a trader's position in any given swap.

A. Position Limits

Under Section 4a of the CEA, the Commission is required to establish position limits only after it determines that such position limits are necessary and appropriate. To date, the CFTC has not made that determination for financial swaps and, as a result, has not established position limits for these products. However, even if such limits were put in place, SEFs are limited in their ability to monitor for position limits violations. SEFs can only monitor market activity for those transactions that take place on its trading system or facility. A SEF only has information about trading activity on its facility and does not possess, and has limited means to obtain, information about its participants' positions in swaps from activity on other venues. There are currently 24 applicant SEFs, making it impossible for any one SEF to know how its participants may transact on the 23 other platforms.

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[14] *See* CFTC Division of Market Oversight, Rule Enforcement Review of ICE Futures U.S. (July 22, 2014), at 4, *available at* http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/icemarksurrer072214.pdf.

[15] *See* Large Trader Reporting Program, http://www.cftc.gov/IndustryOversight/MarketSurveillance/LargeTraderReportingProgram/ltrp.

In practice, while a participant may enter into a transaction of size on one SEF, the SEF has no way of knowing if the participant has offset (or increased) its position in the swap through trading on other platforms. A swap that is listed and traded on one SEF may, unbeknownst to that SEF, be traded on other SEFs, DCMs, or bilaterally between counterparties away from any SEF or DCM. As a result, SEFs and DCMs listing swaps do not possess information about a trader's position in any given swap.

Position limit information is more appropriately collected by other segments of the swap market, including market participants, DCOs, and swap data repositories ("SDRs"). However, even a DCO or SDR would only have information about traders' cleared positions or reported positions at its individual organization. Only the participants themselves would have information about their overall cleared and uncleared swaps position in a market.

As a result, it is the WMBAA's view that only the CFTC (or a self-regulatory body possessing position information about swap market participants from SDR and DCO reports) can effectively police the swaps market to detect position limit violations and have the enforcement tools to take meaningful action to deal with violations. Imposing a position-based requirement on SEFs would be ineffective and would incur significant redundancies, potential miscounting or double counting of trades, and significant impediments related to data standards among the 24 applicant SEFs. In addition, if all of the SEFs set their individual position limit thresholds equal to the not-yet adopted CFTC's limits, this regime could encourage "gaming" by market participants who could spread their activity across SEFs to avoid triggering a "limit check" by any one SEF.

B. Position Accountability

As the National Futures Association ("NFA") recently concluded after conducting a data-driven analysis, position accountability levels will do little to "reduce the potential threat of market manipulation or congestion, the stated goal of the [SEF core principles]."[16]

The WMBAA believes the concept of a SEF position accountability regime is flawed. Most importantly, as discussed above, position accountability is meaningful as a market surveillance tool only in the context of centralized marketplaces such as exchanges, which is due to the fact that they own the products traded and possess information about traders' actual positions in the relevant derivatives marketplace. Because SEFs do not own products, and therefore do not possess the same position information, it is not necessary or appropriate for SEFs to adopt position accountability.

Moreover, recognizing the impracticability of SEFs adopting position limits or position accountability regimes, there have been suggestions that SEFs adopt, in effect, "trading accountability" provisions as a means of complying with core principle 6 (*i.e.*, SEFs would institute enhanced oversight of and data gathering from a trader based solely on trading activity or the size of transactions). This suggestion is problematic for two reasons. First, the CEA, as amended by Dodd-Frank, does not contemplate a trading activity-based accountability regime, but rather contemplates a position management-focused component. Furthermore, there is no clear metric available for SEFs to conduct a position accountability framework. As identified by the NFA in its recent report, "[n]otional transaction size alone is a misleading measure of risk."[17] The NFA further concluded that "the swap market might not lend itself to notional transaction size accountability levels at the SEF level."[18]

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[16] NFA Swap Accountability Levels Study (Apr. 2, 2015).

[17] *Id.*

[18] *Id.*

V. Conclusions

The WMBAA has always supported efforts to promote stability, efficiency, transparency, and competition in furtherance of Dodd-Frank's goal to promote the trading of swaps on SEFs. This includes taking steps to minimize threats posed to swap markets, including market manipulation from concentrated positions in a certain swap.

For the reasons previously stated, however, the WMBAA does not believe that a SEF-based position limit or position accountability regime is necessary or appropriate to meet the purposes set forth in Dodd-Frank.

The WMBAA members and other competitor SEFs want to be part of the solution. These venues are bound by a series of core principles to ensure fair, vibrant markets. They provide daily CFTC Part 16 lists of transactions to the CFTC, and they transmit full trade details to SDRs pursuant to their Part 43 and Part 45 confirmation and reporting obligations. These data transmissions provide the CFTC with the ability to combine data across SEFs to monitor large positions and address position limit violations should the CFTC determine to establish position limits or position accountability provisions for swap contracts.

In considering ways to monitor swap markets for excessive positions, only the CFTC, or a CFTC designated neutral third-party self-regulatory organization would be in the position to collect, maintain, and synthesize the data to perform this function in an efficient, cost-sensitive manner. SEFs operating within the unique framework of the execution-only, competitive SEF landscape, in contrast to the vertically-integrated futures market structure, are ill-suited to establish a position limits or accountability regime.