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TO:

Mr. Christopher J. Kirkpatrick
Secretary, Commodity Futures Trading Commission
Three Lafayette Centre, 1155 21st Street, N.W.
Washington, D.C. 20581

Via CFTC Portal

March 15, 2019

Re: Swap Execution Facilities and Trade Execution Requirement (RIN 3038–AE25)

Dear Mr. Kirkpatrick,

The Global Foreign Exchange Division (“GFXD”) of the Global Financial Markets Association appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (“CFTC”) on its Proposed Rule “Swap Execution Facilities and Trade Execution Requirement” (the “Proposal”).

The GFXD was formed in co-operation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Our members comprise 25¹ global foreign exchange (FX) market participants collectively representing nearly 80%² of the FX inter-dealer market.

Many of the current legislative and regulatory reforms have had, and will continue to have, a significant impact upon the operation of the global FX market. We and our members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

¹ Bank of America Merrill Lynch, Bank of New York Mellon, Bank of Tokyo Mitsubishi UFJ, Barclays, BNP Paribas, Citigroup, Crédit Agricole, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Lloyds Bank, Mizuho, Morgan Stanley, Nomura, Royal Bank of Canada, Royal Bank of Scotland, Scotiabank, Société Générale, Standard Chartered Bank, State Street, UBS, Wells Fargo and Westpac.

² According to Euromoney league tables.

We make the following comments with regard to the Proposal:

1. Preservation of U.S. Access to Foreign Markets

The FX market is the world's largest financial market, and the effective and efficient exchange of currencies underpins the global financial system.³ Sovereign entities, central banks and other government-sponsored entities rely on the FX market to be well-functioning and liquid, and corporations and investors regularly participate in the market for important operational needs: to reduce risk by hedging currency exposures; to convert their returns from international investments into domestic currencies; and to make cross-border investments and raise funding outside home markets.

U.S. Access to Foreign Trading Platforms

Given the international nature of the FX market, it is vital for market participants to have broad access to trading platforms and counterparties around the world. We are concerned that the approach taken to SEF registration under the Proposal will have a negative effect on interactions between U.S. banks and certain of their affiliates, and foreign platforms and counterparties.

Currently, CFTC staff take the position that the SEF registration requirement applies to a multilateral swaps trading platform located outside the U.S. if the platform permits access, directly or indirectly, by U.S. persons, regardless of whether such non-U.S. platform offers swaps subject to mandatory trading.⁴ This has generally been interpreted by foreign platforms to apply when they permit participation by foreign branches of U.S. banks, and has thus led to foreign trading platforms either withdrawing or denying access to foreign branches of U.S. banks, resulting in U.S. banks being deprived of the liquidity on these non-U.S. platforms. Instead, U.S. banks are left to access these foreign platforms by having their foreign affiliates (if any) access the platform and then entering into back-to-back, inter-affiliate swaps with their

³ As reported by the Bank for International Settlements in their 'Triennial Central Bank Survey: Foreign Exchange Turnover in April 2016,' trading in FX markets averaged \$5.1 trillion per day in April 2016, with over 77% of FX activity executed by market participants across five global jurisdictions, see <http://www.bis.org/publ/rpfx16.htm>.

⁴ Division of Market Oversight, Commission, "Guidance on Application of Certain Commission Regulations to Swap Execution Facilities" 2 (Nov. 15, 2013); see Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476, 33481 n.88 (Jun. 4, 2013).

foreign affiliates. This process is not only inefficient but also has negative margin and capital implications for U.S. firms.

CFTC Chairman Giancarlo raised concerns about the fragmentation of global swaps markets in his 2018 Cross-Border White Paper,⁵ noting that since the start of the CFTC’s swap execution facility (SEF) regime in 2013, swaps trading in major global financial centers had separated into distinct trading and liquidity pools containing U.S. market participants in one pool and non-U.S. market participants in another.⁶ The Chairman said that, in his view, “the current division of global swaps markets into separate U.S. person and non-U.S. person marketplaces should be ended.”⁷ The Chairman also suggested, and we agree, that fragmentation of the global swaps markets not only denies those who need it access to deep, liquid and consolidated markets for risk hedging, but also results in less resilient markets and greater volatility.⁸

Whilst the CFTC’s grant of exemptions to certain EU-regulated MTFs has helped mitigate this issue somewhat by enabling foreign branches of U.S. banks to access these CFTC-exempt platforms, importantly for FX foreign branches still face issues trading on-platform in other foreign jurisdictions (e.g., venues in Asia)⁹.

⁵ “Cross-Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation (Oct. 1, 2018)”, J. Christopher Giancarlo, Chairman CFTC, available at: https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118_0.pdf (the “Cross-Border White Paper”).

⁶ See Cross-Border White Paper, pp.27 and n.100: “According to the U.S. Treasury, the November 2013 DMO Guidance, combined with other aspects of the CFTC’s final SEF rules, prompted non-U.S. trading platforms to exclude U.S. persons in order to avoid the CFTC’s SEF registration and other regulatory requirements, contributing to market fragmentation in certain products. See [U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities: Capital Markets (Oct. 2017), available at: <https://www.treasury.gov/presscenter/press-releases/Documents/A-Financial-System-Capital-MarketsINAL-FINAL.pdf>], at 133.” The Cross-Border White Paper also cited, at n.59, ISDA, Research Note, Cross-Border Fragmentation of Global Interest Rate Derivatives: Second Half 2015 Update (May 2016), available at: <https://www.isda.org/a/OSiDE/fragmentation-final1.pdf> (noting that, as of the end of 2015, some liquidity pools continue to be split on U.S. and non-U.S. lines); ISDA, Research Note, Cross-Border Fragmentation of Global Derivatives: End-Year 2014 Update (Apr. 2015), available at: <https://www.isda.org/a/EVDDE/market-fragmentation-final.pdf>; ISDA, Research Note, Cross-Border Fragmentation of Global OTC Derivatives: An Empirical Analysis (Jan. 2014), available at: <https://www.isda.org/a/cSiDE/cross-border-fragmentation-an-empirical-analysis.pdf>; ISDA, Research Note, Footnote 88 and Market Fragmentation: An ISDA Survey (Dec. 2013), available at: <https://www.isda.org/a/5SiDE/footnote-88-research-note-20131218.pdf>.

⁷ Cross-Border White Paper, p.27.

⁸ Cross-Border White Paper, p.27.

⁹ Furthermore, even where mutual recognition has been established with a particular foreign jurisdiction, it is possible that the venues in scope for it do not include those used for FX.

We also agree with the point made by SIFMA in their comments in response to the Proposal dated March 15, 2019 that applying the SEF registration requirement in the manner described above is incongruent with similar CFTC rules and the example they give that, to preserve U.S. bank access to foreign markets, the CFTC permits foreign swap dealers to transact with U.S. banks' foreign branches without triggering CFTC registration requirements.¹⁰ By taking a different approach to SEF registration, we agree with SIFMA that the CFTC is effectively encouraging U.S. banks to trade off-facility, contrary to Dodd-Frank's goals.

In light of the above, we strongly urge the CFTC to adopt immediate guidance permitting foreign branches of U.S. banks to access foreign swaps trading platforms without causing such platforms to have to register as SEFs. As part of this guidance, the CFTC should clarify that such platforms would only need to register, or obtain an exemption from registration, if they permit access *within* the U.S. (e.g., to U.S. customers, not foreign branches of U.S. banks).¹¹

Conflicts and Inconsistencies with Foreign Jurisdictions' Trade Execution Requirements

Given the importance of efficient cross-border regulation for the FX market, we support the point made by SIFMA in their response to the Proposal dated March 15, 2019 that, to avoid potential conflicts in connection with the proposed expansion of the CEA's trade execution requirement to cover additional types of swaps covered by trade execution requirements in other foreign jurisdictions, the CFTC should coordinate the timing of any such expansion with the adoption of mutual recognition frameworks for venues in the relevant foreign jurisdictions.

We also share SIFMA's concerns regarding foreign market participants being deterred from transacting with U.S. firms and their foreign branches and affiliates if the foreign market participant would be subjected to a U.S. trade execution requirement that would not otherwise apply if it traded with someone else. We agree with SIFMA that, to address this issue, the CFTC should (a) coordinate the implementation of any expanded trade execution requirement with appropriate substituted compliance determinations for key foreign jurisdictions, and (b) retain relief from the trade execution requirement for a *de minimis* amount of trading volume in other foreign jurisdictions.

¹⁰ See Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292, 45324 (Jul. 26, 2013).

¹¹ For additional detail regarding these recommendations and the reasons for them, see SIFMA and FIA, "Promoting U.S. Access to Non-U.S. Swaps Markets: A Roadmap to Reverse Fragmentation" (Dec. 14, 2017), available at: <https://www.sifma.org/wp-content/uploads/2017/12/Non-US-Trading-Platform-and-CCP-White-Paper-12-14-2017.pdf>.

2. Pre-Execution Communications

We support the comments made by SIFMA in this regard in their response to the Proposal dated March 15, 2019.

3. Scope of the Trade Execution Requirement

We wish to support and reiterate several of the points made by SIFMA in their response to the Proposal dated March 15, 2019 in relation to the scope of the trade execution requirement:

- We are also of the view that not all mandatorily cleared swaps listed by a SEF or DCM are suitable for mandatory trading, and that mandatory clearing is therefore not an effective proxy for mandatory trading.
- We share SIFMA's concern that, in exercising discretion to determine which swaps are subject to the trade execution requirement, a SEF has a conflict of interest because it benefits economically from expanding participation, trading volume, and market share.¹²
- We agree that expanding the trade execution requirement to cover all mandatorily cleared swaps listed by a SEF or DCM would impose significant costs and lead to increased risk management and market inefficiencies.
- We would be supportive of the CFTC adopting an objective test for which mandatorily cleared swaps must be traded on a SEF or DCM which takes into account market-wide liquidity by:
 - in consultation with an advisory committee consisting of a cross-section of market participants, adopting quantitative thresholds for which swaps are subject to the trade execution requirement; or, alternatively,
 - requiring listing by multiple SEFs/DCMs and establishing swap-specific compliance schedules.
- We also support SIFMA's recommendation regarding the adoption of three additional exemptions from the trade execution requirement. In particular, the exemption

¹² In this regard, we also note that CFTC Chairman Giancarlo expressed the view during his keynote address before the ABA Business Law section at the Derivatives and Futures Law Committee Winter Meeting that a single SEF/DCM being able to force market-wide mandatory execution by quickly listing cleared swaps products is not the original intent of the Proposal, see <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo63>.

continuing to permit (but not require) market participants to execute block trades away from a SEF/DCM, but pursuant to the SEF's/DCM's rules, is very pertinent for FX.

Additionally, given the importance of efficient cross-border regulation for the FX market, we want to highlight the importance of any future trading mandates proposed for FX products being well-coordinated from a timing perspective, and consistently adopted across global jurisdictions, or this will result in regulatory complexity and fragmentation.

4. Eliminating Restrictions on Permissible Execution Methods for Swaps subject to a Trade Execution Requirement

Swaps trade through a variety of execution methods and market practices should, in our view, drive execution methods. We therefore favour more flexibility in execution methods and are supportive of the CFTC's proposal to eliminate restrictions on permissible execution methods for swaps subject to a trade execution mandate.

5. Legally Binding Documentation/Trade Evidence Record

We agree with the CFTC that SEFs should only be required to provide counterparties to a non-cleared swap transaction with a "trade evidence record" and that the trade evidence record should not include all of the terms of the swap transaction, in particular, relationship terms contained in the underlying documentation for a swap. Requiring counterparties to submit previously negotiated terms to a SEF for uncleared swaps is unnecessary and burdensome to market participants. Our view, based on the longstanding utilisation of electronic trading platforms in the FX market, is that SEF confirmations should only include the key economic terms of a transaction.

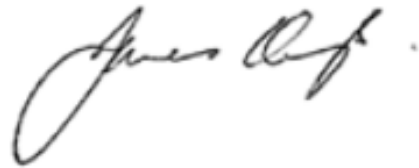
In furtherance of this, however, we agree with the point made by the International Swaps and Derivatives Association, Inc. ("ISDA") in their response to the Proposal dated March 15, 2019 that the definition of "trade evidence record" would benefit from further refinement, to avoid the same problems that currently exist with the confirmation requirement (including "footnote 195") of the current SEF rule. We are therefore supportive of ISDA's recommendation to revise proposed § 37.6(b)(1)(ii)(B) as follows:

(B) Trade evidence record means a ~~legally binding~~ written documentation (electronic or otherwise) that includes the economic terms of the trade agreed to by the counterparties on the swap execution facility ~~memorializes the terms of a swap transaction agreed upon by the counterparties and~~ where such terms legally supersedes any conflicting terms of previously-negotiated agreements

between the counterparties conflicting term in any previous agreement (electronic or otherwise) that relates to the swap transaction between the counterparties.

We are grateful for the opportunity to share our views on the points we have raised in this letter. Please do not hesitate to contact Victoria Cumings on 212-313-1141, email vcumings@gfma.org should you wish to discuss any of the above.

Yours sincerely,

A handwritten signature in black ink, appearing to read "James Kemp". The signature is fluid and cursive, with a large initial "J" and a trailing flourish.

James Kemp
Managing Director
Global Foreign Exchange Division, GFMA