LOOKING FORWARD

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Article:
Project KISS: Looking Forward to the Future of the CFTC
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On May 3, 2017, the Commodity Futures Trading Commission (“CFTC”) voted to seek input from the public on how the CFTC could simplify and modernize its rules (“Project KISS”). Project KISS is designed to identify areas of CFTC rules, regulations and practice that can be simplified in order to make them less burdensome and less costly to market participants. Project KISS is related to a February 2017 executive order regarding the current administration’s regulatory reform agenda aimed at stimulating economic growth.²

A number of exchanges, market participants, industry groups and members of the legal community, among others, submitted comments in response to Project KISS relating to five general topics: registration; reporting; clearing; executing; and miscellaneous. All letters submitted in response to Project KISS are currently publicly available on the CFTC’s website. The following is a brief description of some of the comments provided in response to Project KISS, which may impact the manner in which the CFTC carries out its regulatory mandate in the future.

1. Identifying the Appropriate Regulatory Approach

Several commenters made recommendations to the CFTC regarding the appropriate regulatory approach that the CFTC should take going forward. For example, the Derivatives and Futures Law Committee of the American Bar Association (“ABA Derivatives Committee”), in its comment letter on Project KISS, identified a recurring debate over whether the CFTC’s regulations should be more principles-based and less prescriptive, or more prescriptive and less principles-based, and how the CFTC’s prevailing regulatory approach has shifted along the spectrum between these two points of view over time, particularly since the enactment of the Commodity Futures

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² The CFTC is not covered by the executive order. Commissioner Giancarlo, however, has stated that the CFTC will review its rules “with the ultimate goal to reduce regulatory burdens and costs for participants in the markets the agency oversees.” CFTC Requests Public Input on Simplifying Rules, PR 7555-17 (May 3, 2017). See also 82 Fed. Reg. 23765 (May 24, 2017).
Modernization Act of 2000.\textsuperscript{3} While acknowledging that such debate is often framed as an “either/or” choice between prescriptive or principles-based regulation, the ABA Derivatives Committee suggested in its letter that regulators, including the CFTC, should not be confined to choosing between solely prescriptive and solely principles-based rules in all cases. Rather, according to the ABA Derivatives Committee letter, the appropriate choice in any given circumstance may be a balance between the two approaches that will achieve a particular regulatory objective while also avoiding unnecessary complexity and undue burden on those subject to the rules.

In order to assist the CFTC in determining how to strike this balance going forward, the ABA Derivatives Committee proposed a framework wherein more prescriptive regulation is viewed as more appropriate where the CFTC has a significant regulatory interest in mandating or proscribing specific conduct, identifying acceptable (or unacceptable) market practices or requiring the submission of particular information to enable the CFTC to make a licensing or other regulatory determination. On the other hand, according to the ABA Derivatives Committee’s proposed framework, a more principles-based approach may be a better choice where the CFTC has a strong regulatory interest in achieving a particular outcome, but not as significant an interest in the specific manner in which market participants arrive at that outcome.

Other commenters suggested that, in their view, the current principles-based regulatory structure overseen by the CFTC “is a superior framework” that has resulted in innovation and market growth and encouraged the CFTC to “preserve this framework to continue to promote innovation while maintaining essential regulatory safeguards.”\textsuperscript{4}

2. Coordination with Other Regulators

Commenters also encouraged the CFTC to work together with other agencies in connection with its rulemakings. For example, the ABA Derivatives Committee recommended in its letter that the CFTC work more closely with the prudential regulators on the application and enforcement of the Volcker Rule. In addition, the ABA Derivatives Committee recommended that the CFTC consider working with the Securities and Exchange Commission (“SEC”) to further harmonize each agency’s respective rulemakings under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) as it relates to swaps-related activities. In the view of the ABA Derivatives Committee, such harmonization could advance the overall goal of strong and efficient markets, without sacrificing market integrity.\textsuperscript{5}

In addition to working with domestic regulators to enhance regulatory efficiency and promote economic growth, while safeguarding markets, the ABA Derivatives Committee’s letter also recommended that the CFTC engage actively with international regulators to harmonize the

\textsuperscript{3} ABA Derivatives Committee, Comment Letter Regarding Project KISS Input – Miscellaneous (RIN 3038-AE55), at 3-6 (Sept. 29, 2017).

\textsuperscript{4} CME Group, Comment Letter Regarding Request for Public Input on Simplification and Modernization of Rules (Project KISS) – RIN 3038-AD52, at 1 (Sept. 29, 2017).

\textsuperscript{5} See also Intercontinental Exchange, Inc., Comment Letter Regarding Comments on Project KISS, RIN 3038-AE55, at 2 (Sept. 29, 2017) (recommending that the SEC coordinate with the CFTC on derivatives market oversight).
global regulatory framework, particularly with respect to swaps. As noted in the letter, in recent years, separate U.S. and non-U.S. pools of liquidity have developed in certain markets, which has negatively impacted market participants’ ability to manage risk under certain circumstances. The ABA Derivatives Committee encouraged the CFTC to evaluate the impact of its rulemakings on such liquidity fragmentation. Other commenters similarly encouraged the CFTC to work with international regulators and, among other things, to tailor its rules in such a manner as to permit the CFTC “to focus its resources on the [swaps-related] activity that most directly impacts U.S. markets.”

3. Reconsideration of Certain Registration Requirements

Certain commenters proposed that the CFTC consider changes to its current registration requirements for certain firms that are dually registered with the CFTC and the SEC. For example, these commenters recommended that the CFTC exempt from registration as a commodity pool operator (“CPO”) any CPO of a private fund that is also registered as an investment adviser with the SEC (or any affiliate of such registered investment adviser), consistent with a prior exemption that was rescinded by the CFTC in 2012. Another commenter recommended that the CFTC retain the current $8 billion de minimis threshold applicable in the context of swap dealer registration and only modify that threshold after sufficient study and through notice and comment rulemaking.

4. Modernizing CFTC Rules

In light of the increase in the number of technology-driven trading firms, one commenter proposed that the CFTC consider changes to its definition of “qualified eligible person” (“QEP”) for purposes of Rule 4.7 to permit certain employees of such firms that have previously worked at a technology company, rather than a financial services firm, to be deemed to be QEPs and thus permit the CPO to qualify for the Rule 4.7 exemption. According to the comment letter, such a change is appropriate in light of the fact that “[f]inancial firms to varying degrees have become technology firms, and frequently attract talent from technology companies,” and that certain employees of such firm “may be intimately involved with the design and deployment of trading strategies, yet because they come from technology firms they may not be able to invest in the exempt pools to which they provide services for two years.”

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6 Futures Industry Association, Comment Letter Regarding Project KISS (RIN 3038-AE55), at 3 (Sept. 28, 2017). See also Credit Suisse Holdings USA, Comment Letter Regarding Commodity Futures Trading Commission’s Request for Public Input on Simplifying Rules, Project KISS, in RIN 3038-AE55, at 7 (Sept. 30, 2017) (encouraging the CFTC to grant permanent relief to non-U.S. swap dealers from the U.S. reporting requirements for swaps with non-U.S. counterparts).

7 See Managed Funds Association, Comment Letter Regarding Project KISS, at 5-6 (Sept. 29, 2017); Securities Industry and Financial Markets Association, Comment Letter Regarding Request for Information regarding Project KISS (RIN 3038-AE55), at App’x 1, p. 21 (Sept. 29, 2017).

8 See FIA comment letter, supra note 6, at 16-17.

9 MFA comment letter, supra note 7, at 11-12. Rule 4.7 (17 C.F.R. § 4.7) generally grants an exemption from certain reporting, disclosure and recordkeeping requirements for registered CPOs of commodity pools whose investors are all QEPs.

10 Id. at 12.
Other commenters proposed generally that the CFTC should review its rules and make appropriate changes to eliminate or update outdated or obsolete language or concepts.\(^1\) For example, one commenter noted that a number of CFTC rules contain language associated with open outcry trading and encouraged the CFTC to “carr[y] forward [such regulations] to the electronic markets of today with appropriate rewording that ensures they can be meaningfully applied.”\(^1\)

5. **Reevaluation of Current Rulemaking Proposals**

Although Commissioner Giancarlo indicated that Project KISS was not intended to be a platform for identifying existing rules for repeal or revision, a number of commenters did provide input on currently existing rules as well as certain rulemakings that the CFTC is currently considering, such as proposed Regulation AT. For example, several commenters requested that the CFTC allow its Part 20 large trader swaps reporting rule to sunset, on the grounds that such rule was adopted only as a stop-gap measure until swap data repositories began to process swaps data.\(^1\) Other commenters encouraged the CFTC to re-consider its approach to regulating algorithmic trading and, ultimately, to take a principles-based approach that emphasizes “broad market integrity objectives” rather than prescriptive requirements.\(^4\) Another recommended that the CFTC withdrawal its re-proposed position limits rule.\(^5\)

6. **Other Housekeeping Proposals**

A number of commenters recommended certain housekeeping changes aimed at assisting market participants in better complying with CFTC rules and guidance. For example, the ABA Derivatives Committee recommended, among other things, that the CFTC periodically review whether any of its rules that are subject to a significant number of no-action letters should be amended to resolve the issue or issues that were addressed by the relevant no-action relief. The ABA Derivatives Committee also proposed that, for rule areas where the CFTC staff receives frequent inquiries on how the rules apply, the CFTC should make the staff’s informal views public on the CFTC’s website (for example through a log summarizing the advice given). Another commenter similarly suggested that the CFTC consider having a dedicated webpage for staff “frequently asked questions” that have been issued in connection with important rulemakings.\(^6\)

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\(^1\) See, e.g., ABA Derivatives Committee comment letter, *supra* note 3, at 9 (recommending that the CFTC review its regulations periodically to identify and eliminate outdated requirements or terminology); ICE comment letter, *supra* note 5, at 5.

\(^2\) ICE comment letter, *supra* note 5, at 5.

\(^3\) See, e.g., FIA comment letter, *supra* note 6, at 10-11; BP Energy Company and BP Products North America Inc., Comment Letter Regarding Project KISS (RIN 3038-AE55), at 1 (Sept. 29, 2017). Rule 20.9 (17 C.F.R. § 20.9) generally provides that, except as otherwise determined by the CFTC, the Part 20 rule “shall become ineffective and unenforceable upon a Commission finding that, through the issuance of an order, operating swap data repositories are processing positional data and that such processing will enable the Commission to effectively surveil trading in paired swaps and swaptions and paired swap and swaption markets.”


\(^5\) FIA comment letter, *supra* note 6, at 16.

As noted by several commenters in connection with Project KISS, the Dodd-Frank Act mandated that the CFTC engage in substantial rulemaking, often within a short period of time.\textsuperscript{17} Such rulemaking introduced significant complexity into the regulatory landscape and, in the views of some, has resulted in unnecessary regulatory burdens and overlapping or contradictory requirements, particularly in the area of cross-border activities. As such, commenters hope that Project KISS will provide the CFTC with the opportunity to reassess its current framework and identify those areas where its current regulations can be streamlined and improved. Although it is too early to know what impact Project KISS will ultimately have on the CFTC’s regulatory approach going forward, it is hoped that the comments provided will assist the CFTC in achieving the goals underlying Project KISS.

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\textsuperscript{17} See, e.g., ABA Derivatives Committee comment letter, supra note 3, at 2 (noting that, “[p]artly in response to the mandates of the Dodd-Frank Act,” the CFTC has promulgated a “significant number” of new regulations).