

COMMENT LETTER

August 17, 2015

ICI Files Comment Letter with CFTC Regarding the Made Available to Trade Process

August 17, 2015 Mr. Christopher Kirkpatrick, Secretary Commodity Futures Trading Commission Three Lafayette Centre 1155 21st Street, N.W. Washington, D.C. 20581 Re: CFTC Division of Market Oversight Roundtable Regarding the Made Available to Trade Process Dear Mr. Kirkpatrick: The Investment Company Institute (“ICI”)¹ is pleased to submit this letter as a follow-up to the public roundtable hosted by the Division of Market Oversight of the Commodity Futures Trading Commission (“CFTC” or “Commission”) on July 15, 2015 regarding the “made available to trade” (“MAT”) determination process.² The MAT process refers to the CFTC rules pursuant to which a swap becomes subject to mandatory trading on a swap execution facility (“SEF”) or designated contract market (“DCM”). We commend the CFTC and its staff for initiating a dialogue on the MAT process. This letter is intended to supplement our previous comment letter regarding the MAT process³ and to elaborate on our recommendations to address the risks and problems inherent in the current process. The current MAT process turns over to SEFs and DCMs the authority to cause a swap to become subject to mandatory trading with only a limited CFTC role in the process, and no requirement for a SEF or DCM to demonstrate that there is sufficient liquidity of the swap to trade on the SEF or DCM, or sufficient operational readiness of market participants to support mandatory trading in the swap. This process is fundamentally flawed. In our view, MAT determinations, which are binding on the entire market and can significantly limit market participants’ trading and risk 1 ICI is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding and otherwise advance the interest of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$18.0 trillion and serve over 90 million shareholders. 2 The webcast of the roundtable is available at:

<https://www.youtube.com/watch?v=cL2rg3YoC5s&feature=youtu.be>. 3 Letter to Mr. David A. Stawick, Secretary, CFTC, from Karrie McMillan, General Counsel, ICI, dated February 13, 2012, available at <https://www.ici.org/pdf/25910.pdf> (“ICI 2012 Letter”). Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 2 of 13 management strategies, should be subject to a robust review process that includes objective, principle- based standards and requires affirmative and substantive approval by the Commission. We urge the CFTC to implement the following reforms of the MAT process: • Provide the CFTC with a more significant role in the MAT approval process; • Establish more quantitative and comprehensive standards for proposed MAT determinations, and the CFTC’s evaluation and

approval of such determinations; • Require a mandatory 60-day public comment period for all proposed MAT determinations; • Require that package transactions be reviewed as an integrated unit for purposes of assessing applicability of the MAT criteria; • Establish a compliance period of at least 90 days for implementing MAT determinations; and • Establish a robust process and standards for determining that a swap is no longer available to trade that allows the CFTC to respond to changes in the market.

I. Background U.S. funds that are regulated under the Investment Company Act of 1940 (“registered funds”) use swaps and other derivatives in a variety of ways. Derivatives are a particularly useful portfolio management tool in that they offer registered funds considerable flexibility in structuring their investment portfolio. Uses of swaps and other derivatives include, for example, hedging positions, equitizing cash that a registered fund cannot immediately invest in direct equity holdings, managing a registered fund’s cash positions more generally, adjusting the duration of a registered fund’s portfolio, or managing a registered fund’s portfolio in accordance with the investment objectives stated in a registered fund’s prospectus. ICI members, as market participants representing millions of investors, generally support the goal of providing effective oversight of the swap markets and the maintenance of efficient markets for swaps trading.

II. Framework for the MAT Determination Process The Commodity Exchange Act (“CEA”), as amended by the Dodd-Frank Act,⁴ provides that any swap subject to the clearing requirement must be executed on a SEF or DCM unless no SEF or DCM “makes the swap available to trade.”⁵ Congress deliberately separated the clearing requirement from the trade execution requirement in order to be consistent with the different goals and

⁴ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173 (July 21, 2010) (“Dodd-Frank Act”).

⁵ CEA Section 2(h)(8). Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 3 of 13 requirements of mandatory clearing and trading.

⁶ The clearing requirement was designed to reduce counterparty risk and systemic risk in the market,⁷ while the mandatory trading requirement was instead focused on providing increased pre-trade price transparency.⁸ The trade execution requirement included an underlying assumption that the contracts subject to the requirement would be highly liquid. For example, Senator Blanche Lincoln, Chairman of the Senate Committee on Agriculture and a key draftsman of the swap legislation, noted “[t]he mere ‘listing’ of the swap by the swap execution facility, in and of itself, without a minimum amount of liquidity to make trading possible, should not be sufficient to trigger the Trade Execution Requirement.”⁹ The same principles that Congress emphasized when it adopted the Dodd-Frank Act should guide the CFTC as it considers reshaping the current MAT process. First, the MAT determination should be a separate and distinct process that does not assume that all swaps subject to the clearing requirement will become subject to the trading requirement. It simply is not the case that all cleared contracts are sufficiently standardized to be appropriate for mandatory trading. Different considerations underlie the mandatory clearing and trading determinations, and it is therefore critical that they be made independently, based on the relevant criteria for each. Second, the MAT process should require a showing that the contract is sufficiently liquid, such that only the most liquid swaps become subject to mandatory trading.

III. Recommended Reforms of the MAT Determination Process

A. The Current MAT Determination Process Provides the CFTC with an Insufficient Decision-Making Role and Should be Replaced The current MAT determination process is fundamentally flawed. The process affects the entire swaps market, yet relies on determinations submitted by financially-motivated, for-profit SEFs and DCMs and provides the CFTC with limited ability to challenge those determinations. For the reasons discussed below, the current process should be revised significantly. A MAT determination is binding on all swap market participants and results in the prohibition of all over-the-counter (“OTC”) trading in swaps subject to the determination. If a swap with limited

⁶ See Section 723(a)(3) of the Dodd-

Frank Act, which added the clearing requirement and set forth a specific separate framework by which the Commission must make mandatory clearing determinations. 7 See S. REP. No. 111-176 (Apr. 30, 2010) at 33 (“With appropriate collateral and margin requirements, a central clearing organization can substantially reduce counterparty risk and provide an organized mechanism for clearing transactions. . . . While large losses are to be expected in derivatives trading, if those positions are fully margined there will be no loss to counterparties and the overall financial system . . .”). 8 See Congressional Research Service, The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title VII, Derivatives, quoting Section 733 of the Dodd-Frank Act (“The goal of the trading requirement is ‘to promote pre-trade price transparency in the swaps market.’”). 9 See Statement of Senator Blanche Lincoln, 156 Cong. Rec. S5923 (daily ed. July 15, 2010). Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 4 of 13 or no liquidity on any SEF or DCM becomes subject to a MAT determination, that determination has the practical effect of prohibiting all bilateral trading in the swap. Even the trading of very liquid OTC products (e.g., invoice swaps) could be stifled if they become subject to a MAT determination before SEFs and DCMs are able to support the trading of such products or there is sufficient liquidity in the product on SEFs and DCMs. Despite the far-reaching ramifications of a MAT determination, the CFTC currently has an insufficient decision-making role in the MAT determination process. Under rules adopted by the CFTC,¹⁰ a SEF or DCM may submit a proposed MAT determination through either the approval process pursuant to CFTC Rule 40.5 or the “self-certification” process pursuant to CFTC Rule 40.6. Under the self-certification process, a SEF or DCM’s MAT determination may become certified in potentially as few as 10 business days.¹¹ Under both rules, a proposed determination will become effective or certified unless the CFTC finds that the determination is inconsistent with the CEA or the CFTC’s regulations.¹² The current standard provides the CFTC with minimal ability to reject, or require that SEFs or DCMs revise, proposed MAT determinations. Under CFTC regulations, a SEF or DCM is only required to “consider” one or more of six broadly-worded factors when submitting a proposed MAT determination.¹³ As a result, it is unclear under what circumstances the CFTC would be able to find that a proposed MAT determination is “inconsistent with” the CEA or the CFTC’s regulations, as long as the SEF or DCM asserted in its proposed MAT determination that it “considered” at least one of the six factors.¹⁴ Even the CFTC itself has recognized the cursory nature of the current MAT process. In its cost-benefit analysis for the rules adopting the MAT process, the CFTC estimated that one 10 See Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 Fed. Reg. 33606 (June 4, 2013) (“MAT Process Adopting Release”). 11 See CFTC Rule 40.6(b). CFTC Rule 40.6(c)(1) provides the CFTC with the authority to issue a 90-day stay that delays the effectiveness of a rule proposal if the rule presents novel or complex issues that require additional time to analyze, the rule is accompanied by an inadequate explanation, or the rule is potentially inconsistent with the CEA or the CFTC’s regulations. 12 See CFTC Rule 40.5(b); CFTC Rule 40.6(c)(3). 13 CFTC Rules 37.10(b) and 38.12(b) provide that SEFs and DCMs, respectively, shall consider, as appropriate, the following factors with respect to a swap: (1) whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions; (3) the trading volume; (4) the number and types of market participants; (5) the bid/ask spread; or (6) the usual number of resting firm or indicative bids or offers. The CFTC has stated that exchanges are not required to consider more than one factor when issuing a MAT determination. MAT Process Adopting Release, *supra* note 10, at 33613. 14 See Commissioner J. Christopher Giancarlo, CFTC, Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank (Jan. 29, 2015) n. 103; Commissioner Jill E.

Sommers, CFTC, Opening Statement Before the Sixth Open Meeting to Consider Final Rules Pursuant to the Dodd-Frank Act (“[G]iven the lack of any mandatory, objective criteria contained in the rules, it is difficult to envision how the Commission could find a [MAT] determination to be inconsistent with the Act or regulations.”). Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 5 of 13 compliance staff person at a SEF or DCM, assisted by an economist, could on average prepare a MAT submission in only eight hours, a shockingly short period of time for such a complex rule submission.¹⁵ The CFTC’s limited role with respect to MAT determinations is concerning given the inherent conflict of interest SEFs and DCMs face in submitting proposed MAT determinations. A SEF or DCM has a strong financial incentive to cause as many swaps as possible to become subject to mandatory trading, regardless of whether the swaps are readily tradable on a SEF or DCM. The CFTC has stated that MAT determinations are “trading protocols” subject to the same rulemaking process under CFTC Rules 40.5 and 40.6 that governs the approval and certification of other rules proposed by CFTC registered entities.¹⁶ A MAT determination, however, unlike a rule of a registered entity that applies only to the participants or members of that registered entity, affects the participants of all other SEFs and DCMs by limiting the methods of execution for the applicable swap on those SEFs and DCMs, and affects all market participants by prohibiting them from executing OTC trades in the applicable swap. We are not aware of other contexts in which the CFTC has applied CFTC Rules 40.5 and 40.6, with their limited standard of CFTC review, to the approval and adoption of rules with such general and wide applicability as MAT determinations, or evidence that Rules 40.5 and 40.6 were intended to govern rules such as MAT determinations.¹⁷ Recent events have demonstrated that the CFTC’s limited role with respect to MAT determinations is not a theoretical risk. In October 2013, Javelin SEF, LLC (“Javelin”) became the first SEF to submit a proposed MAT determination to the CFTC.¹⁸ Javelin’s proposed determination was 15 MAT Process Adopting Release, supra note 10, at 33621. 16 A registered entity is defined in Section 1a(40) of the CEA to include a DCM, SEF, derivatives clearing organization and a swap data repository. 17 We understand that the current process under Rules 40.5 and 40.6 derives from Section 5c(c) of the CEA, as amended by Section 745 of the Dodd-Frank Act. Further, as noted above, we understand that the CFTC has previously interpreted MAT determinations to constitute “trading protocols” that fit within the scope of Rules 40.5 and 40.6. See MAT Process Adopting Release, supra note 10, at n. 57. However, MAT determinations are significantly distinct from all other rule proposals currently subject to Section 5c(c) and Rules 40.5 and 40.6, as MAT determinations are binding on all market participants and affect the entire swap market. Further, as the CFTC noted when it adopted the current process, Section 8a(5) of the CEA authorizes the CFTC to promulgate regulations that are reasonably necessary to accomplish any of the purposes of the CEA. See MAT Process Adopting Release, supra note 10, at n. 57. Thus, we do not believe that the CEA requires MAT determinations to be subject to the narrow confines of Rules 40.5 and 40.6, and we urge the CFTC to adopt a separate framework that is appropriately tailored to MAT determinations. See Dissenting Statement of Commissioner Scott D. O’Malia (May 16, 2013), MAT Process Adopting Release, supra note 10, at 33631 (“[T]he Commission’s determination under the rule approval process (§ 40.5) or the rule certification process (§ 40.6) is intended to apply to only one particular DCM or SEF that requested such rule approval or submitted such rule certification.”). 18 See Javelin Determination of Made Available to Trade of certain Interest Rate Swaps made Pursuant to Parts 37 of the Rules of the Commodity Futures Trading Commission, Submission No. 13-06 (Oct. 18, 2013), available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/javelin_sef101813.pdf. Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 6 of 13 widely viewed as overly broad.¹⁹ Instead of limiting the determination to the most standard and liquid

benchmark tenors for interest rate swaps (such as 1 year, 5 years, 10 years), the Javelin determination included interest rate swaps with any tenor from one month to 51 years. Thus, the determination also covered non-standard tenors (such as 7.5 years) and it expressly applied to forward-starting swaps (i.e., swaps having an effective date in the future). Instruments, such as forward-starting swaps and swaps having non-standard tenors, are typically customized between the parties and, thus, are not instruments for which there are broad, liquid trading markets. The CFTC's practical inability under the MAT process to modify or reject overly broad MAT determinations was highlighted by Javelin's inclusion in its proposed MAT determination of non-standard tenors and instruments with limited liquidity. If the Javelin determination had been adopted as initially submitted, it is possible that trading in a number of important instruments would have ceased in the U.S. swap market. Although Javelin ultimately narrowed its proposed MAT determination in response to extensive public criticism, the process highlighted the potential that an unworkable MAT determination easily could have been approved. To prevent similar future situations that could result in serious damage to the U.S. swap market and its participants, the CFTC should replace the current framework for the approval or certification of MAT determinations with a new framework that provides the Commission with greater oversight of, and a more significant role in, the process, as discussed below.²⁰ This framework should also include more quantitative and comprehensive standards for proposed MAT determinations, and the review of those submissions.

B. The CFTC Should Have a Greater Decision-Making Role in MAT Determinations We recommend that the CFTC adopt a framework for the MAT determination process that provides the CFTC with a meaningful decision-making role, including the ability to substantively review and reject proposed MAT determinations. Specifically, we recommend that the MAT process require an affirmative determination²¹ by the CFTC that the designated swap meets objective standards, including evidence that the swap is sufficiently liquid to support regular trading in the swap on the particular SEF or DCM. This determination should include a requirement that a SEF or DCM

¹⁹ Even Javelin itself recognized the excessive breadth of its proposed determination and later amended its determination and conceded that the initial determination had raised significant operational and logistical readiness issues regarding the trading of certain swap products. See Press Release, Javelin SEF Streamlines its Interest Rate Swap MAT Submission Citing Operational Readiness Concern (Nov. 29, 2013), available at <http://www.thejavelin.com/press-releases/Javelin+SEF+Streamlines+its+Interest+Rate+Swap+MAT+Submission> (“[W]hat has become clear is that considerable operational hurdles remain as the market prepares for the swap trading mandate.”).

²⁰ See supra note 17.

²¹ Under this framework, no MAT determination would become self-certified, deemed approved based upon a lapse of time, or otherwise become effective, without an affirmative determination by the CFTC. Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 7 of 13 demonstrate that the swap already trades on the SEF or DCM with sufficiently liquidity to support its appropriateness for mandatory trading.²² Requiring the CFTC to make an affirmative determination would provide the CFTC with a significantly greater role than it has under the current standard. Currently, the Commission must approve a MAT determination unless the determination is inconsistent with the CEA or the Commission's regulations. Under our recommended alternative, we suggest that the CFTC consider whether the SEF or DCM adequately has met the current list of six factors when making its affirmative determination, although we recommend that the CFTC enhance and expand these factors, as discussed below. This framework would preserve the ability of SEFs and DCMs to propose MAT determinations, but require the SEFs and DCMs to submit more robust proposals with sufficient data to support approval under this affirmative standard of review. In proposing a stricter standard of review for MAT determinations, the CFTC should be guided by the core principle that only

the most liquid swaps, for which there are a number of market participants, are appropriate for mandatory trading.²³ The standard that we recommend—requiring there to be sufficient liquidity in the swap to support regular trading in the swap on a SEF or DCM— would help prevent the issuance of MAT determinations under circumstances in which there is insufficient liquidity in a swap to support trading on a SEF or DCM, even if there is sufficient OTC trading in that swap. Further, an affirmative determination by the CFTC should be required because the CFTC, rather than a SEF or DCM, is in the best position to evaluate objectively the data supporting a MAT determination and the potential implications of a MAT determination. The higher standard of review that we recommend would require SEFs and DCMs to submit proposed MAT determinations with higher-quality data that would support the CFTC’s determination, and would deter SEFs and DCMs from submitting overly-broad or weak proposals. Finally, we recommend that proposed MAT determinations be required to address, and the CFTC’s review of these determinations should take into consideration, all of the MAT determination factors, including those recommended below, or provide a reasonable explanation for why a factor is not applicable or appropriate.

C. The CFTC Should Convert the Existing Six Factors to Quantitative Criteria and Expand the Factors to Include Operational Criteria

We recommend that the CFTC, over time, convert the existing six factors considered in the MAT determination process to more quantitative criteria. We further recommend that the CFTC expand the current six factors to include a requirement that, in any proposed MAT determination, a ²² The CFTC may also wish to consider the number of SEFs and DCMs currently trading the swap and the volume of trading in the swap on SEFs and DCMs compared to OTC trading. ²³ See supra note 9 and accompanying text. Specifically, the CFTC should ensure that there are at least 3-5 liquidity providers for the swap. Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 8 of 13 SEF or DCM must evaluate, and the CFTC should consider, criteria relating to the technological and operational readiness of market participants. We discuss these recommendations in more detail below. When the CFTC adopted the current rules governing the MAT process, the CFTC stated that it would consider adopting objective criteria in a future rulemaking based upon an empirical analysis of swap trading data.²⁴ Although we understand that there may be some challenges in developing objective or quantitative criteria, the obstacles to developing such criteria have diminished significantly in recent years. First, there has been a dramatic increase in the availability and amount of swap data as a result of the CFTC’s swap reporting rules. Second, now that swaps have been mandatorily-traded on SEFs for over a year, the CFTC has much more experience overseeing the trading of swaps on SEFs, and should have a deeper understanding of how swaps trade on regulated platforms. Thus, consistent with the CFTC’s stated intent, we urge the CFTC to move forward and develop objective, quantitative criteria to serve as the basis for a proposed MAT determination. The CFTC should collaborate with market participants (including buy-side and sell-side firms) and leverage the data that firms have reported to the CFTC under the swap reporting rules. The CFTC should also examine internal data and records of the SEFs and DCMs. The current six factors for MAT determinations already address, in a qualitative manner, many of the key aspects of swap liquidity and market participation. We recommend that, over time, the CFTC convert these factors, as appropriate, to more objective, quantitative criteria.²⁵ We encourage the CFTC to consider also implementing some of the other objective or quantitative criteria that have been recommended by other commenters, including several of the participants at the roundtable. The current six factors for MAT determinations relate primarily to a swap’s liquidity. Although liquidity is, and should be, an essential element of a MAT determination, a swap should only be subject to a MAT determination if that liquidity actually can be sustained on a SEF or DCM. Thus, we recommend that the CFTC expand the factors for evaluating a MAT determination to include the operational and technological readiness of

the swap for trading on a SEF or DCM. We emphasize that this factor should not be limited to the operational and technological readiness of the SEF or DCM submitting the proposed MAT determination, because the readiness of a SEF or DCM is meaningless if market participants do not have the capabilities to actually trade the swap on the SEF or DCM.²⁶ Thus, MAT determinations should take into account the operational readiness of both SEFs and DCMs and market participants (including both buy-side and sell-side firms). We recommend that the CFTC include a requirement that, in any proposed MAT determination, a SEF or DCM must evaluate, and the CFTC should consider, whether the SEF or DCM and its members have in place the necessary infrastructure, technology and processes to allow for trading of the specific swap or swaps subject to the 24 See MAT Process Adopting Release, *supra* note 10, at 33613. ²⁵ For example, one of the factors that may be considered in MAT determinations is the swap's trading volume. We recommend that this factor eventually be converted to a specific minimum average daily trading volume threshold. ²⁶ ICI's members and many swap dealers have reported that the trading of swaps subject to the initial round of MAT determinations was plagued by technological and operational problems. Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 9 of 13 proposal. While some of the operational and technological requirements for trading on a SEF or DCM are common to all swaps, such as whether the SEF or DCM and its members have in place the necessary infrastructure and processes to allow for trading, reporting, clearing, credit checks, trade allocations and operation of a central order book and requests for quotes ("RFQ") to three participants, certain types of swaps (such as certain types of package transactions) may require the development of additional infrastructure before they can be traded on a SEF or DCM.

D. The MAT Process Should Include a Mandatory 60-Day Public Comment Period Due to the broad implications of a MAT determination, we recommend that the CFTC require a mandatory 60-day public comment period for all MAT determinations. The current MAT process is controlled almost entirely by one segment of the swap market—the SEFs and DCMs—and even if the CFTC implements reforms to allow for greater Commission input into the MAT determination process, it is likely that the SEFs and DCMs will continue to play a primary role in the process. Participants from all segments of the swap market routinely provide the CFTC with valuable commentary, insights and data on the effects of new rules and help ensure that rules are implemented in a fair and orderly manner. Thus, it is imperative that all market participants and stakeholders continue to have a voice in the MAT determination process and act as a check on the financially-motivated interests of the SEFs and DCMs that currently control the process. The importance of the public comment period was demonstrated in Javelin's decision to amend its initial, over-broad MAT submission, which was strongly influenced by public comments on the initial submission. Under the current MAT determination process conducted pursuant to CFTC Rules 40.5 and 40.6, it is possible for a MAT determination filed under either rule to become effective without a public comment period. CFTC Rule 40.5 does not require any comment period, and CFTC Rule 40.6 only provides for a public comment period if the CFTC elects to stay the determination for an additional 90-day period.²⁷ Although we understand that the CFTC routinely solicits public comments on rule proposals submitted pursuant to Rule 40.5 and may continue the practice of issuing stays on proposed MAT determinations submitted pursuant to Rule 40.6, we believe strongly that the public comment process should be required for all determinations. The public comment process is the only way to ensure that the CFTC will be provided with the full range of information needed to properly evaluate a proposed MAT determination. For the above reasons, we urge the CFTC to revise its rules to require a public comment period for all MAT determinations. Because MAT determinations are data intensive, we believe that a 60-day comment period would be appropriate so that market participants can have sufficient time to analyze the data presented by SEFs and DCMs and prepare their own data and analyses, as well as comment

effectively on operational and technological implications. 27 See CFTC Rule 40.6(c)(2). If the CFTC does not issue a stay, it is possible for a proposed MAT determination submitted pursuant to CFTC Rule 40.6 to become effective in 10 business days without any public comment. Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 10 of 13 E. Package Transactions The treatment of “package transactions”²⁸ under the MAT process is another important issue for ICI members, as many of our members execute a large number of these trades and rely on them to carry out particular investment strategies. The CFTC currently takes the position that the leg of a package transaction that is subject to the mandatory trading requirement will not be exempt from the requirement solely because another leg of the transaction is not subject to the requirement. As a result, market participants wishing to execute a package transaction are currently required to either (i) execute the whole package transaction on a SEF or DCM, which often is not possible or (ii) execute each leg of the package transaction independently, which may increase costs and expose the counterparties to execution risks. We urge the CFTC to revisit this position and require package transactions to be reviewed as an integrated unit for purposes of assessing applicability of the MAT criteria. At a minimum, we urge the CFTC to extend, for at least an additional year, the current no-action relief for package transactions, which is scheduled to expire, in part, on November 14, 2015.²⁹ The CFTC also should provide similar relief to other common package transactions. If the CFTC does not extend its no-action relief and alter the treatment of package transactions, the trading of many package transactions will effectively cease, as these transactions currently cannot, for a variety of reasons, be executed on SEFs or DCMs through the required execution methods. We do not believe that the trade execution requirement was intended to effectively result in the prohibition of legitimate swap strategies, and we urge the CFTC to reconsider its current position. F. The Compliance Date for MAT Determinations Should Be At Least 90 Days after Effectiveness For swaps that already are subject to mandatory clearing, the CFTC’s rules currently provide that the compliance date for a MAT determination is 30 days after the date the determination is certified or approved.³⁰ This 30-day period is inadequate given the complex operational and technological steps and linkages that must be completed by market participants in order to effectively trade a new swap on a SEF or DCM. 28 A “package transaction” is defined as a transaction involving two or more instruments: (1) that is executed between two or more counterparties; (2) that is priced or quoted as one economic transaction with simultaneous or near simultaneous execution of all components; (3) that has at least one component that is a swap that is made available to trade and therefore is subject to the CEA section 2(h)(8) trade execution requirement; and (4) where the execution of each component is contingent upon the execution of all other components. See CFTC Letter No. 14-62 (May 1, 2014). 29 See CFTC Letter No. 14-137 (Nov. 19, 2014). 30 CFTC Rule 37.12(a); CFTC Rule 38.11(a). Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 11 of 13 As discussed in more detail in the ICI 2012 Letter,³¹ it is important for all market participants to have adequate time following a final MAT determination to prepare their systems and procedures before that determination is made effective. For example, other DCMs and SEFs that would be required to make the swap available to trade may need to update their systems or make other technological changes to effect the change. Having an adequate period of time for preparation would mitigate the effects of a “first mover” advantage for the SEF or DCM that first makes the swap available to trade. Market participants also need time to receive notice of the final MAT determination and update their systems, processes, and procedures accordingly. This notice is important not only for swaps traded on SEFs and DCMs, but also for OTC trading, because once a swap is deemed made available to trade, it will no longer be eligible for trading in the OTC markets. As we previously noted, the trading of swaps following the effective date of the initial round of MAT determinations was plagued by technological and operational problems.³² In order

to prevent such problems in the future, we recommend that the compliance date for a MAT determination should be at least 90 days after the determination has been approved or certified. G. The CFTC Should Adopt a Process for Determining a Swap is No Longer Available to Trade That Allows it to Respond to Changes in the Market We appreciate that the CFTC incorporated into the rules for MAT determinations a process for determining that a swap is no longer available to trade.³³ However, we do not believe that the current standard provides the CFTC with any meaningful ability to remove swaps from mandatory trading when they no longer are sufficiently liquid or readily traded. Under the current rules, a swap will only be deemed no longer available to trade if all SEFs and DCMs have delisted that swap. This narrow standard creates substantial risk that swaps will continue to be subject to mandatory trading even when there is insufficient liquidity or trading participation in the market. For example, if any single SEF or DCM continues to list for trading a swap that is subject to a MAT determination, even if there is no trading in that swap, the CFTC has no option under this standard to issue a determination that the swap is no longer available to trade. Such an outcome could be detrimental for both buy-side swap market participants, such as registered funds, and dealers, because none of these entities would be authorized to trade such a swap bilaterally in the OTC market. As a result, such an instrument would effectively be removed from the trading market. 31 See *supra* note 3. 32 We understand that, among other problems, counterparties were unable to complete trades electronically over the SEF or DCM, and had to complete such trades over the telephone. In some cases, these trades were very difficult to match. Counterparties have also faced significant challenges with respect to pre-trade credit checks required for swaps traded over SEFs. See, e.g., CFTC No-Action Letter No. 14-118 (Sept. 19, 2014), avail. at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-118.pdf>. 33 CFTC Rule 37.10(d); CFTC Rule 38.12(d). Mr. Christopher Kirkpatrick, Secretary August 17, 2015 Page 12 of 13 We recommend that the CFTC replace the current standard with a standard that requires the CFTC to determine that a swap is no longer available to trade if the swap no longer satisfies the criteria for an initial MAT determination (which, under our proposal, would be that the swap is sufficiently liquid to support regular trading in the swap on a SEF or DCM) for a meaningful period of time.³⁴ Under this standard, the CFTC would remove from mandatory trading a swap with limited liquidity. Further, once the CFTC implements objective, quantitative criteria for MAT determinations, a swap that no longer satisfies those criteria for a meaningful period of time also should be removed from MAT status. We recommend that the CFTC's rules provide the CFTC with the option, on its own motion, to identify swaps that should no longer be deemed MAT, and preserve or expand the CFTC's existing authority to obtain additional information from SEFs and DCMs³⁵ that may be necessary for the CFTC to determine whether a swap should no longer be deemed MAT. These rules should also impose an appropriate obligation on SEFs and DCMs to report swaps to the CFTC that may no longer satisfy the criteria for a MAT determination. Finally, these rules should provide market participants, which are most directly affected by MAT determinations, with a simple and cost-effective method to formally request that the CFTC determine whether particular swaps no longer satisfy the MAT criteria.³⁶ * * * * * 34 We believe the standard should acknowledge that a swap's failure to satisfy one or more of the MAT criteria temporarily due to transitory circumstances should not automatically lead to a conclusion that the swap should be removed from MAT status. 35 See CFTC Rules 40.2(b) and 40.3(a)(10). 36 We note that there is a process under Section 8a(7) of the CEA that permits market participants to challenge SEF and DCM rules. As the CFTC acknowledged, however, the process under Section 8a(7) is procedurally complex (for example, the process requires an opportunity for a hearing). See MAT Process Adopting Release, *supra* note 10, at n.140. We believe that a simpler process is necessary to give market participants a meaningful role in the removal of swaps from MAT status. Mr. Christopher

Kirkpatrick, Secretary August 17, 2015 Page 13 of 13 If you have any questions on our letter, please feel free to contact me directly at (202) 326-5815, Sarah Bessin at (202) 326-5835, or Jennifer Choi at (202) 326-5876. Sincerely, /s/ David W. Blass David W. Blass General Counsel cc: The Hon. Timothy G. Massad, Chairman The Hon. Mark P. Wetjen, Commissioner The Hon. Sharon Y. Bowen The Hon. J. Christopher Giancarlo Vincent A. McGonagle, Director, Division of Market Oversight Nancy Markowitz, Deputy Director, Division of Market Oversight Roger Smith, Special Counsel, Division of Market Oversight

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