

March 15, 2019

***Submitted Electronically***

Mr. Christopher Kirkpatrick  
Secretary  
U.S. Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st St., N.W.  
Washington, DC 20581

**Re: Swap Execution Facilities and Trade Execution Requirement; Proposed Rule  
RIN 3038–AE25**

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. (“ISDA”)<sup>1</sup> appreciates the opportunity to submit these comments on the proposed revisions to the regulations of swap execution facilities (“SEFs”) and the trade execution requirement (“Proposal”) published by the U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”) on November 30, 2018.<sup>2</sup>

We commend the Commission’s efforts to further improve swaps trading on SEFs. We agree with the Commission that certain amendments are needed to better reflect the intent and goals of Congress, reverse certain negative market consequences that have resulted from the current regulations, and provide market participants with a choice in terms of the manner of trade execution that best suits their business needs. We believe that refining specific areas of existing swaps trading regulations and practices will foster innovation and the efficient operations of derivatives markets. The net result will be improved competition, liquidity, and transparency.

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<sup>1</sup> Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 70 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s website: [www.isda.org](http://www.isda.org). Follow us on Twitter @ISDA.

<sup>2</sup> *Swap Execution Facilities and Trade Execution Requirement; Proposed Rule*, 83 Fed. Reg. 61,946 (Nov. 30, 2018), available at <https://www.cftc.gov/sites/default/files/2018-11/2018-24642a.pdf> [hereinafter, Proposal].

We strongly support the Commission's decision to revise existing trading protocols to better reflect the unique nature of the swaps market and to accommodate a diverse range of swaps contracts. We also support the Commission's proposal to offer permanent solutions to longstanding compliance challenges associated with certain trade execution practices that are currently subject to Staff no-action relief. In addition, we agree with the Commission's proposed changes to allow for more flexibility in the regulatory oversight of SEFs in order to reduce unnecessary and costly compliance burdens.

Notwithstanding the foregoing, we are concerned with three key aspects of the Proposal, which are explained in more detail below:

- Off-SEF Pre-Execution Communications. We strongly disagree with the Proposal's approach to eliminate off-SEF pre-execution communications for swaps subject to the trade execution requirement. We believe that other aspects of the Proposal achieve the goal of encouraging more trading on-SEF, and the elimination of off-SEF pre-execution communications will decrease trading efficiency.
- Trade Execution Requirement. While the changes to the trade execution requirement may improve trading liquidity, such expansion should be done in a measured fashion (specifically where the liquidity, maturity, or technological readiness of a market will not support such an expansion and with due consideration of cross-border impacts). The Proposal should also take into account input from market participants and provide an opportunity for exemptions where necessary.
- Block Trade Transactions. We disagree with the Proposal's prohibition on off-SEF pre-execution communications and pre-arranged trading for block transactions. The proposed approach is a major shift from the current regulatory treatment of these transactions (and longstanding market practices), which will result in market participants receiving less competitive pricing without commensurate regulatory benefit.

We also provide recommendations with respect to the proposed changes to certain trading protocols, including confirmation requirements for both cleared and non-cleared swaps, error trade policies, straight through processing requirements, and trade monitoring requirements. We have organized our comments based on the aspects of the Proposal that are of particular interest to our membership.

### **Discussion**

The current swap trading rules were developed at a time when market participants had little or no experience with centralized swap trading. Certain aspects of the current swaps trading framework work well, and there have been some enhancements in market functioning, including improved liquidity and pre- and post-trade price transparency. This has enabled dealers to make better markets and customers to get better execution. At the same time, there have been significant challenges surrounding the implementation of certain aspects of the trade execution rules, including accommodating a broader spectrum

of products that can be executed on a SEF. Thus, the Commission's decision to make the necessary adjustments to the rules is timely,<sup>3</sup> and any changes to the swap trading rules should be evaluated in light of further improving competition, liquidity, and price transparency in the global swaps market.

Our recommendations below are informed by our members' experience to date operating under the current SEF regime and cumulatively reflect the views of a cross-section of the market.

## 1. Prohibition Against Pre-Execution Communications

The Proposal provides an outright prohibition on pre-execution communications for swaps subject to the trade execution requirement, reasoning that such prohibition would ensure that "the trading of swaps actually occurs within the confines of the SEF."<sup>4</sup> We strongly disagree with this approach. The migration of all pre-execution communications onto a SEF platform is unnecessary and costly. Significantly, such migration would not promote pre-trade price transparency and trading on a SEF;<sup>5</sup> instead, it would most likely discourage the achievement of these goals.<sup>6</sup> We urge the Commission to re-consider the proposed prohibition on pre-execution communications, with a lens towards the potential costs and benefits of the prohibition.

### *A. The Ban on Off-SEF Pre-Execution Communications Does Not Achieve Any Regulatory Goals and Should be Eliminated*

We believe the current rules for pre-execution communications have worked well under the existing trading regime and do not see a need for regulatory change. The Commission, explains that the regulatory benefit of prohibiting off-SEF pre-execution communications is that "market participants would receive the protections associated with SEF trading."<sup>7</sup> We disagree. Off-SEF pre-execution communications are already subject to CFTC oversight. Existing recordkeeping and reporting rules allow SEFs and

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<sup>3</sup> We support the Commission's SEF rule reforms. Given the breadth and complexity of the Proposal, should the Commission decide to prioritize finalizing certain aspects of the Proposal, we suggest first addressing the challenges associated with the made available to trade ("MAT") determination process and restrictive methods of execution.

<sup>4</sup> Proposal at 62059.

<sup>5</sup> Section 5h(d)(1) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 7b-3(d)(1).

<sup>6</sup> We note that Chairman Giancarlo has indicated that certain aspects of the Proposal, including the pre-execution communication proposed rules, may have unintended consequences and, as a result, the Commission is seeking industry input on several aspects. *See e.g.*, Remarks of CFTC Chairman J. Christopher Giancarlo at the DerivCon 2019 Conference, New York, NY (Feb. 27, 2019), *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo65>; CFTC Chairman Giancarlo, Keynote Address Before the ABA Business Law Section, Derivatives & Futures Law Committee Winter Meeting (Jan. 25, 2019), *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo63>.

<sup>7</sup> Proposal at 62059.

the Commission to examine such activities.<sup>8</sup> In addition, a SEF may request information from its market participants and the CFTC may always use its broad oversight authority to obtain additional information.<sup>9</sup>

Moreover, bringing these pre-execution communications on-SEF would result in a split audit trail for the same transaction across different SEFs. Participants may initiate the communications on one SEF and then submit a Request for Quote (“RFQ”) on another SEF. Therefore, unless the Proposal requires a cross-SEF communication integration (which we do not consider feasible), it is hard to see how the Commission will benefit from this requirement.

Not only will the prohibition on off-SEF pre-trade communications not improve trading liquidity, but it may also hinder liquidity formation and robust pricing altogether, especially in the context of client-dealer trading. Trading discussions and communications between clients and dealers often develop organically and are critical to adequately meeting the risk management needs of clients. Initial discussions may arise from routine relationship calls or chats, market color inquiries, or simply a discussion of particular trade structures. This prohibition would leave clients with the option of either restricting these communications altogether or bringing them to the limited on-SEF communication functionalities as only very few SEFs offer chat functionalities today and none offer SEF-sponsored telephone options.

Furthermore, it will be difficult to determine from a compliance perspective at what point a general conversation with a client about market color develops into a prohibited pre-execution communication. In other words, when conducting a market color or general communications call, it is impossible to know whether the call will lead to a transaction. Such ambiguity creates compliance challenges and difficulties for SEF users without commensurate regulatory benefit. If finalized, the pre-execution prohibition will likely discourage important client-dealer discussions and stifle buy-side clients’ access to market color that allows them to evaluate various trade combinations to achieve their business objectives. Such limited information flow between dealers and clients will hamper the ability of dealers to price transactions as precisely as currently possible which may lead to more expensive executions for clients.

Thus, the prohibition on pre-execution communications is a direct contradiction to the goal of providing pre-trade price transparency and promoting SEF trading and therefore should be eliminated.

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<sup>8</sup> 17 C.F.R. §§ 23.200-206. These rules include robust audit trail requirements, such as pre- and post-execution records of all communications with clients.

<sup>9</sup> In the recent final rule setting the *de minimis* level for Swap Dealer registration, the Commission found that at least 98% of transactions reported to an SDR have a registered swap dealer as a counterparty. See CFTC Swap Dealer De Minimis Exception Final Staff Report, available at [https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/dfreport\\_sddeminis081516.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/dfreport_sddeminis081516.pdf). As noted above, these Swap Dealers are subject to comprehensive recordkeeping and business conduct requirements and are required to produce records to the SEF and CFTC upon request.

*B. The Ban on Off-SEF Pre-Execution Communications is Not Supported by the Cost Benefit Analysis*

We believe that, at a time when market participants continue to work tirelessly to bring their global operations into compliance with various regulatory regimes, the Commission should consider the impact that a fundamental shift in its regulatory approach to trade execution would have on firms' operations. Counterparties to a swap transaction will have to change their existing trading practices, establish new complex and costly processes to comply with new obligations with respect to pre-trade communications, and at the same time, ensure that they still meet their clients' commercial needs. SEFs will also have to build new communication systems and surveillance programs to ensure regulatory compliance on multi-dealer communication platforms, and will be presented with the challenge of integration of communications with other SEFs.<sup>10</sup>

Such a significant change in existing trading practices can only be justified if there is a serious regulatory concern or a potential market abuse issue that is not being captured under current regulations and therefore requires an immediate change of course. The Proposal does not assert that pre-execution communications under the current regulatory regime have escaped proper oversight or caused market abuses. Thus, the net benefit of the proposed change is unclear. The Proposal simply notes that pre-execution communications stand in the way of greater transparency and increased SEF trading. We disagree. Regardless, such policy aspirations cannot justify the cost of all of the aggregate changes that would need to take place in order to comply with the proposed prohibition.

When analyzing the potential costs that the prohibition may impose on market participants, the Commission notes the out-of-pocket costs for phone and other technologies and highlights that the costs to SEF users may be mitigated "to the extent that SEFs elect to incur the costs of providing telephone or other systems for their market participants to use pre-execution communications."<sup>11</sup> This is an extremely narrow measure that speculates about what functionality SEFs may offer (which is not evident to the market today) and significantly underestimates the overall compliance costs (i.e., the costs of all necessary actions needed to take place to comply with the prohibition on pre-execution communications).

Specifically, the Proposal:

- Fails to take into account that market participants would be required to develop interconnectivity to communications systems and monitor their activity on such systems in order to fulfill their supervisory and recordkeeping obligations, including for Swap Dealers, under Part 23 of the Commission's regulations;
- Does not discuss the benefits of the existing recordkeeping and supervisory requirements for pre-execution communications or any gaps in such requirements;

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<sup>10</sup> We note that not all SEFs currently have the functionality for market participants to engage in pre-execution communications on SEF platforms. Market participants would have to rely on SEFs to develop such systems and SEF users must ensure that the systems are fit for purpose.

<sup>11</sup> Proposal at 62061.

- Has not reasonably estimated the cost to dealers of conducting pre-execution communications on-SEF (besides telephone costs), especially for products that require an extensive client-dealer interaction or involve highly complex trading structures;
- Does not include the increased costs to buy-side participants due to the fact that dealers would not be able to fully meet their clients' commercial needs;
- Does not explain the unnecessary increased costs and reduced options for customized product structures to financial end-users and buy-side clients, who are key users of swaps; and
- Does not consider a less costly alternative of allowing off-SEF pre-execution communications.

The absence of these key data points prevents the Commission from providing a sufficient assessment of the overall costs and benefits of the Proposal, which is a prerequisite to adopting the prohibition. Thus, the costly approach to pre-execution communications would stifle the very innovation the Proposal seeks to achieve.

*C. The Ban on Off-SEF Pre-Execution Communications Raises Privacy and Confidentiality Concerns*

The proposed ban on pre-execution communications raises concerns regarding the privacy and confidentiality of commercially sensitive communications. Even if SEFs could theoretically offer comprehensive and flexible modes through which participants could conduct pre-execution communications, sensitive information that extends beyond the specifics of the trade in question is often communicated alongside communications about the swap trade. Having that information captured on for-profit, third-party platforms raises a range of privacy and confidentiality concerns. In particular, forcing all pre-execution communications to take place on-SEF has the potential to create conflicts of laws issues given privacy requirements in certain non-U.S. jurisdictions. Additionally, it is unclear who owns the information that is exchanged on a SEF. Development of appropriate data use policies and protections and ongoing monitoring would therefore be necessary, adding further costs to implementation without commensurate regulatory benefit.<sup>12</sup>

Accordingly, we ask the Commission to re-consider adopting the proposed prohibition on pre-execution communications, given the lack of a compelling regulatory reason for the change, the existence of robust regulatory oversight, and associated privacy and confidentiality concerns.

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<sup>12</sup> In this regard, Commissioner Stump recently announced a data protection initiative that seeks to review the CFTC regulatory requirements against the sensitivity of the data and potential for unauthorized access. See Statement of CFTC Commissioner Dawn D. Stump on Data Protection Initiative (Mar. 1, 2019), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement030119>.

## 2. Expanded Trade Execution Requirement

We agree with the Commission that Section 2(h)(8) of the Commodity Exchange Act (“CEA”) does not explicitly require the formulation of a made available to trade (“MAT”) process.<sup>13</sup> However, Congress recognized that it is essential that swaps required to be traded on SEFs maintain sufficient trading liquidity and underscored the importance of developing liquid markets, and not just listed markets, in the swaps traded on a SEF.<sup>14</sup> For this reason, the CEA supports the view that there should be an independent determination as to whether or not a particular swap possesses adequate liquidity to be traded on a SEF and that such determination should be made separate from the clearing determination. Section 5h(d)(1) of the CEA states that:

[the CFTC] may promulgate rules defining the universe of swaps that can be executed on a swap execution facility. These rules shall take into account the price and non-price requirements of counterparties to a swap and the goals of [promoting trading of swaps on SEFs and pre-trade price transparency].<sup>15</sup>

In connection with the trade execution mandate and when it will not apply, Congress used the phrase “unless no [SEF] makes the swap available to trade . . .”<sup>16</sup> not the phrase “unless no [SEF] lists” the swap to trade. This distinction is important as the Proposal appears to suggest that Congress intended all swaps subject to mandatory clearing to be subject to mandatory trading unless no SEF lists the swap for trading.<sup>17</sup> This view is not supported by the text of the CEA. If Congress meant to apply mandatory SEF execution to swaps subject to mandatory clearing that are “listed” by a SEF, Congress would have explicitly said so.<sup>18</sup>

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<sup>13</sup> 7 U.S.C. § 2h(8).

<sup>14</sup> See Cong. Rec. Vol. 156, Number 105, p. S5923 (July 15, 2010) (“[I]n determining whether a swap execution facility ‘makes the swap available to trade,’ the CFTC should evaluate not just whether the swap execution facility permits the swap to be traded on the facility, or identifies the swap as a candidate for trading on the facility, but also whether, as a practical matter, it is in fact possible to trade the swap on the facility. The CFTC could consider, for example, whether there is a minimum amount of liquidity such that the swap can actually be traded on the facility. The mere ‘listing’ of the swap by a 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.”).

<sup>15</sup> 7 U.S.C. § 7b-3(d)(1).

<sup>16</sup> *Id.*

<sup>17</sup> We note that the trade execution requirement applies to Designated Contract Markets as well.

<sup>18</sup> Congress has used the word “list(s)” frequently in the CEA, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, tit. VII, 124 Stat. 1376 (2010) (codified as amended in various sections of 7 U.S.C.), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-12242a.pdf> (“DFA”). For instance, in DFA section 717 (amending CEA section 2(a)(1)(C)) Congress used “listing for trading;” in DFA section 718 Congress used “list or trade a novel derivative product;” in DFA section 721 (amending CEA section 1a) Congress used “listed and traded on or subject to the rules of a [DCM];” in DFA section 723 Congress used “listed for clearing;” in DFA section 733 (adding CEA section 5(h)) Congress used “list for trading;” and in DFA section 735 (amending CEA section 5) Congress used

Not only would an objective determination process be consistent with Congressional intent, but it would also ensure that there is sufficient trading liquidity in a particular product type. If adopted as proposed, the trade execution requirement could be triggered for any product that is subject to the clearing requirement simply upon and as soon as any single SEF offered or “listed” that product for trading on its platform. This would swing the pendulum too far. Additional factors should be evaluated in determining whether a mandatory cleared swap should be subject to the trade execution requirement.

We appreciate that Chairman Giancarlo recognizes the need for an independent assessment of trading liquidity as envisioned by Congress, and agree that “bringing swaps subject to the clearing mandate into scope of the trading mandate should be done properly and in stages with a relative degree of consensus of buy-side, sell-side and major SEF market participants.”<sup>19</sup>

Consistent with Chairman Giancarlo’s view, the final rule should implement a process that includes input from market participants and considers a range of quantitative and qualitative factors, such as those discussed in subsections A and B below. The Commission could form an advisory committee to gather input from market participants or it could rely on the existing Market Risk Advisory Committee (“MRAC”) or Global Markets Advisory Committee (“GMAC”) which, by charter, include a broad range of market participants.<sup>20</sup> The Commission could also proceed as proposed but modify its compliance schedule based on input from a committee of market participants evaluating the factors further described below.<sup>21</sup>

#### *A. Trading Liquidity Should Not Be Equated with Clearing Liquidity*

While clearing liquidity depends on sufficient pricing data being available for the relevant clearing house to adequately margin cleared positions on a particular product,

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“the board of trade shall list on the contract market.” Note, this is not an exclusive list of instances where Congress used “list” or some derivative in the DFA.

<sup>19</sup> CFTC Chairman Giancarlo, Keynote Address Before the ABA Business Law Section, Derivatives & Futures Law Committee Winter Meeting (Jan. 25, 2019), *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo63>.

<sup>20</sup> The MRAC’s charter contemplates a composition inclusive of end-users, exchanges, SEFs, Swap Data Repositories, clearinghouses, intermediaries, market makers, service providers, academia, public interest groups, and regulators. *See* CFTC Renewal Charter of the Market Risk Advisory Committee (May 9, 2018), *available at* [https://www.cftc.gov/sites/default/files/2018-05/mrac\\_charter050918.pdf](https://www.cftc.gov/sites/default/files/2018-05/mrac_charter050918.pdf). The GMAC’s charter contemplates a composition inclusive of exchanges and clearinghouses, brokers and market intermediaries, derivatives dealers, financial end users, commercial end users, providers of software and other services, and non-exchange self-regulatory organizations. *See* CFTC Renewal Charter of the Global Markets Advisory Committee (Sept. 14, 2018), *available at* [https://www.cftc.gov/sites/default/files/2018-09/gmac\\_charter091418.pdf](https://www.cftc.gov/sites/default/files/2018-09/gmac_charter091418.pdf).

<sup>21</sup> Alternatively, the Commission could provide sufficient time for trading liquidity between dealers and clients to develop in a particular contract prior to requiring a certain category of market participants to comply with the trade execution requirement. For example, once sufficient trading liquidity has developed between dealers and clients for mandatorily cleared swaps denominated in Mexican pesos, then the Commission’s proposed compliance schedule will take effect (90 days for dealers, 180 for commodity pools and private funds, and 270 days for all other market participants).



trading liquidity depends on the existence of sufficient trading activity in such a product. Therefore, if a mandatorily cleared swap is only listed by one SEF (or a limited number of SEFs) that does not attract trading activity beyond a limited number of transactions, such a swap should not be brought within the scope of the trade execution requirement. Similarly, illiquid and customized swaps that are currently not listed by any SEFs should not be subject to the trade execution requirement. For example, forward-dated/forward-starting swaps are often traded as part of a larger complex hedging strategy or associated with a specific transaction and are typically extremely customized to the specific strategy or deal.

In addition, there are certain products with complex pricing structures that are not suitable for SEF trading, regardless of how frequently they trade. One example is leveraged forwards. Pricing in these contracts is determined over a long period of time and involves a series of client-dealer interactions that go beyond an initial phone call. On-SEF execution of contracts with complex pricing structures does not contribute to price transparency. Instead, it will make it challenging for counterparties to accurately validate price curves, which will result in wider pricing and higher transaction costs, or as an extreme outcome, the elimination of the product altogether.

Bringing an over-expansive list of insufficiently liquid swaps under the trade execution requirement would not only be problematic for the reasons explained above, but it would also cause clients, asset managers, and other buy-side participants who may only occasionally trade these products, to be forced to onboard to a SEF(s). The SEF onboarding process includes the imposition of fees, the build out of the connectivity and access mechanisms, and the development of internal compliance processes as required by each SEF's rulebook. These costs would be significant to any market participant, but particularly to those participants who only infrequently trade these swaps, creating trading inefficiencies without promoting SEF trading or improving price transparency.

The view that trading liquidity should not be equated with clearing liquidity is also supported by the recommendations in the 2017 U.S. Treasury Department's report on capital markets. The report advises the Commission to "reevaluate the MAT determination process to ensure sufficient liquidity for swaps to support a mandatory trading requirement."<sup>22</sup>

Furthermore, the relaxation of certain requirements applicable to SEFs (such as the minimum order book functionality) and the absence of an objective trading liquidity determination process may incentivize SEFs to list mandatorily cleared products for trading even where such products do not possess sufficient trading liquidity or where SEFs lack the capability to fully support trading of such products. Therefore, the inherent conflicts of interest that SEFs currently have under the existing MAT process could be

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<sup>22</sup> U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities: Capital Markets at 145 (Oct. 2017), available at <https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf>.

further exacerbated if the Proposal is finalized without due consideration to the issues ISDA has outlined.

Accordingly, any committee or determination process informing a trade execution requirement decision should consider quantitative factors, including the minimum number of SEFs listing the swap for trading, the length of time the SEF(s) has listed the swap, the number and diversity of market participants trading the swap on SEFs, and liquidity metrics, such as the minimum trading activity as measured by notional volume, turnover, or some similar metric.

*B. Any Trade Execution Requirement Determination Should Consider SEF Functionalities and Other Operational Issues*

A SEF's willingness to offer a product for trading and the liquidity of that product should not be the only considerations in triggering the trade execution requirement. The determination of whether a swap should be subject to the trade execution requirement should also consider whether a sufficient number of SEFs are willing and capable of offering the execution methods favored by market participants. If only a limited number of SEFs are capable of offering the market's preferred method of execution and those SEFs list a product for trading, market participants could be subject to the pricing and policies of such SEFs, unchecked by sufficient competition. Resiliency in that product could also be harmed by effectively mandating concentration onto a few or even only one SEF.

There may be situations where a mandatorily cleared swap has been listed by one SEF, triggering the trade execution requirement, but this SEF does not offer a functionality to execute such a swap in a manner consistent with current market practices (e.g., a swap that is commonly traded by voice is listed by one SEF to be executed via an RFQ system, but no SEF offers suitable voice functionality). By not ensuring that appropriate SEF trading functionalities are in place for all swaps subject to the trade execution requirement, the Commission will run the risk of materially diminishing liquidity in such swaps, until such SEF functionalities are established.

Other factors should also be considered, including the reasonable ability of market participants to connect to and trade on SEFs, and cross border implications taking into account the existence of a trade execution requirement in the product in other major markets.

We are encouraged by Chairman Giancarlo's recent statements that "minimum conditions (such as listing on multiple SEFs) with adequate time for SEF connectivity and onboarding before any new mandatorily cleared swaps become mandatorily SEF traded" may be appropriate.<sup>23</sup>

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<sup>23</sup> CFTC Chairman Giancarlo, Keynote Address Before the ABA Business Law Section, Derivatives & Futures Law Committee Winter Meeting (Jan. 25, 2019), *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo63>.

### 3. Exemptions from the Trade Execution Requirement

We generally support the expansion of the trade execution requirement and agree with the Proposal that certain package transactions that contain a component that is subject to the trade execution requirement should be exempt from mandatory SEF trading.<sup>24</sup> As described further below, we believe that additional exemptions from the trade execution requirement are necessary to preserve certain markets and minimize the effect of technological disruptions.

#### *A. An Exemption from the Trade Execution Requirement Should be Permitted for Cleared/Futures Package Transactions*

We ask the Commission to exempt package trades from the trade execution requirement where at least one individual swap component is subject to mandatory clearing and at least one other component is a contract for the purchase or sale of a commodity for future delivery, i.e., futures contract (“Cleared/Futures Package Transactions”).

Cleared/Futures Package Transactions composed of interest rate swaps and U.S. Treasury futures are heavily traded; market participants execute the swap components off-SEF pursuant to the requirements provided in the current CFTC no-action relief<sup>25</sup> and execute the futures component through an Exchange for Related Position (“EFRP”). Without relief, these transactions would not be available for execution as a package because only the swap leg could be executed on-SEF, and the current Designated Contract Market (“DCM”) structure does not: (i) provide access to the swaps used; and (ii) does not allow for the execution of EFRP trades where the related position component is traded on an exchange.

#### *B. An Exemption from the Trade Execution Requirement Should Be Permitted in the Case of SEF Outages or Other System Disruptions*

As we have noted in our past submissions,<sup>26</sup> we ask the Commission to confirm in its final rule that counterparties may be temporarily exempted from the trade execution requirement in the event of a SEF disruption or outage and may execute trades off-SEF for a designated period of time. This commonsense approach would protect against market disruptions in certain asset classes and products.

<sup>24</sup> See generally, Proposal at 61987 – 61988 and n. 334, 339 (citing CFTC No Action Letter 17-55 (Oct. 31, 2017)), available at

<https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/17-55.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> ISDA’s Response to CFTC Project KISS (Oct. 19, 2017), available at [https://www.isda.org/a/nVKDE/ISDA-KISS-Response\\_29-September-2017\\_Appendix\\_Links\\_version\\_FINAL.pdf](https://www.isda.org/a/nVKDE/ISDA-KISS-Response_29-September-2017_Appendix_Links_version_FINAL.pdf).

#### 4. SEF Trading Protocols

We agree with the Commission that the unnecessary restrictions on the methods of execution under the current SEF rules run counter to Congressional intent to establish trading venues that would operate “through any means of interstate commerce” and impede a SEF’s ability to foster liquidity and provide competitive pricing.<sup>27</sup> We support the Commission’s decision to revise existing trading protocols to better reflect the unique nature of the swaps market and to accommodate a diverse range of swaps contracts. However, we note that the implementation of new trading protocols may increase the complexity of compliance with SEFs’ rulebooks, and market participants will need time to create compliance policies and procedures around each of these new methods. Thus, SEFs should provide ample time to SEF users to comply with such protocols. Separately, certain trading protocols such as the execution of block trades have worked well under the current trading regime and we see no reason for the proposed changes.

Below we provide additional recommendations on how the proposed framework can be further improved.

##### *A. Commission Regulation Should Not Dictate Where and How Block Trades Can be Executed*

The CEA requires the Commission to regulate block trades in two ways: (1) the CFTC must establish the “criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts”; and (2) the CFTC must establish “the appropriate time delay for reporting large notional swap transactions (block trades) to the public.”<sup>28</sup> Congress authorized the Commission to regulate block trades only with respect to cap size limits and delayed real-time reporting requirements. Congress did not authorize the Commission to prescribe execution mechanisms for block trades, restrict the ability of market participants to pre-arrange block transactions, or put limitations around pre-execution communications.

Due to their large size, block trades often expose counterparties to more risk because a dealer is committing to a price for a large trade that may need to be hedged via multiple transactions. The dealer’s inability to pre-arrange the terms of the transaction may lead to an inadvertent disclosure of price information, making it difficult for the dealer to hedge its position—thus tying up its capital.

The current no-action relief<sup>29</sup> allows market participants to negotiate block trades bilaterally with their counterparties, and then submit the trade to a SEF for execution (via

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<sup>27</sup> Some of our members see the benefits associated with the current trading protocols and recommend that the Commission continue to require that SEFs offer basic methods of execution, including RFQ-to-3 system and order books.

<sup>28</sup> Sections 2(a)(13)(E)(ii)-(iii) of the CEA, 7 U.S.C. §§ 2(a)(13)(E)(ii)-(iii).

<sup>29</sup> CFTC Letter No. 17-60, Re: Extension of No-Action Relief for Swap Execution Facilities from Certain “Block Trade” Requirements in Commission Regulation 43.2 (Nov. 14, 2017), *available at*

RFQ-to-1 system or other SEF functionality). This has worked very well and has assisted market participants in complying with other regulatory requirements, including pre-execution credit checks under § 1.73 of the Commission’s regulations.<sup>30</sup> The ability to execute blocks on-SEF after bilateral pre-arrangement should be retained as it enhances clients’ ability to meet their risk management needs.

It is also important to preserve the ability of market participants to engage in off-SEF pre-execution communications when executing block trades that contain a mandatorily traded contract. Some larger sized orders in mandatorily cleared contracts (that will become mandatorily traded if the Proposal is finalized as currently drafted) are traded by fewer counterparties, and almost all of them are institutional. Trading liquidity in these products can be episodic and can be linked to various external market and economic conditions. The episodic nature of liquidity in certain mandatorily cleared swaps, the presence of fewer participants, and the size of these transactions make it even more important for market participants to be able to conduct off-SEF pre-execution communications.

The inability to engage in pre-execution communications for blocks will result in market participants receiving less competitive pricing when they do not have the capability to trace liquidity during the pre-execution period. There are likely to be increased costs, decreased efficiency (i.e., less ability to negotiate), and corresponding negative impacts on liquidity.

Separately, we agree with the Commission that the “occurs away” requirement in the current definition of “block” contained in the definitions section of the Part 43 Real Time Public Reporting Rules<sup>31</sup> should be eliminated. The “occurs away” definitional requirement appears to reflect the Commission’s attempt to use futures block trading on DCMs as a guide for how swap blocks should trade on SEFs. In doing so, the Commission incorrectly interpreted the DCM block rules<sup>32</sup> (which allow block trades to

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<https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/17-60.pdf>; CFTC Letter No. 16–74, Re: Extension of No-Action Relief for Swap Execution Facilities from Certain “Block Trade” Requirements in Commission Regulation 43.2 (Oct. 7, 2016), *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/16-74.pdf>; CFTC Letter No. 15–60, Re: Extension of No-Action Relief for Swap Execution Facilities from Certain “Block Trade” Requirements in Commission Regulation 43.2 (Nov. 2, 2015), *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/15-60.pdf>; CFTC Letter No. 14–118, No-Action Relief for Swap Execution Facilities from Certain “Block Trade” Requirements in Commission Regulation 43.2 (Sept. 19, 2014), *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/14-118.pdf>.

<sup>30</sup> 17 C.F.R. § 1.73.

<sup>31</sup> 17 C.F.R. § 43.2.

<sup>32</sup> The Commission rules on execution of futures blocks arose as an exception to Commission Rule 1.38, which otherwise requires all futures and options to be executed in an open and competitive manner in the DCM’s centralized market (i.e., central limit order book). The Commission recognized that it was appropriate to allow blocks legally to be executed outside the centralized market because prices for the execution of large transactions may diverge from the prevailing market prices, the centralized market may not offer sufficient liquidity to execute without a significant risk premium, and the reasonable possibility exists that such large orders could not be filled at a single price but would need to be broken up and

be lawfully executed outside of the DCM’s centralized market, e.g., “away from the DCM”) and mandated that a swap must be executed “away from the SEFs trading system or platform” in order to be considered a “block”. This condition associated with the definition of “block” was not mandated by the CEA and serves no positive regulatory purpose in the context of block trading on SEFs. The Staff no-action relief noted above remedies the difficulties caused by the unnecessary “occurs away” requirement for swaps “blocks”.

While we agree that the “occur away” requirement should not be included in the definition of a block, at the same time, we believe that the Commission should preserve bilateral off-SEF execution. Such a flexible block execution regime would permit trading of larger sized transactions in a manner that incentivizes dealers to provide liquidity and capital without creating market distortions, and be in line with Congressional intent.<sup>33</sup>

For these reasons, the final rule should: (1) continue to permit pre-execution communications and bilateral pre-arrangement for SEF-executed block trades; and (2) allow for flexibility in the execution of block trades either on- or off-SEF but continue to require these trades to be subject to the rules of a SEF (including appropriate pre-trade risk checks).

*B. Swap Documentation Requirements for Non-Cleared Swaps: Trade Evidence Records Should Only Contain Economic Terms Agreed to On-SEF*

We agree with the Commission 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 of a swap.<sup>34</sup>

We believe that the definition of “trade evidence record” would benefit from further refinement. The Proposal defines a trade evidence record as a “legally” binding document that “memorializes the terms of a swap transaction.”<sup>35</sup> The language may imply that trade evidence records include *all* terms of a swap transaction, including those terms contained in previously-negotiated underlying agreements, such as ISDA Master Agreements, thus creating the very same problem that currently exists with the confirmation requirement (including “footnote 195”) of the current SEF rule and that the Commission intends to address.

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executed at different prices in the centralized market. *See generally* 69 Fed. Reg. 39880 (Jul 1, 2004); 73 Fed. Reg. 54097 (Sept. 18, 2008). These “centralized market” effects and considerations do not apply in SEF execution of swap blocks given the manner in which swaps are traded.

<sup>33</sup> With respect to pre-trade risk checks, we note that currently no mechanism exists to enable a pre-execution checks where blocks are executed away from a SEF; however, we ask the Commission to maintain flexibility in the execution of blocks so as not to preclude participants from developing and using such a mechanism in the future.

<sup>34</sup> Proposal at 61973.

<sup>35</sup> *See* Proposal at 62096 (proposed § 37.6(b)(1)(ii)(B)).

In our view, the phrase “legally binding” is not necessary as the proposed enforceability rule explicitly states that a swap transaction executed on a SEF shall not be void, voidable or rescinded.<sup>36</sup> Moreover, many SEF rulebooks already contain similar language that provides SEF users with legal certainty of execution on SEFs.<sup>37</sup> Accordingly, we recommend to revise proposed § 37.6(b)(1)(ii)(B), to read 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.~~

The revisions set forth above ensure that the terms in a trade evidence record would legally supersede terms in previously negotiated agreements. The revisions also acknowledge that the trade evidence record is a memorialization of the terms agreed to on the SEF and does not include all terms of the transaction (e.g., relationship terms), and that the obligation to issue a confirmation for the transaction will be with a Swap Dealer (or Major Swap Participant) counterparty to the trade as per the requirements under § 23.501 of the Commission’s regulations.

While we recommend that trade evidence records should not include all “primary economic terms” as such terms are used under Part 45 of the Commission’s regulatory reporting regulations, and instead should only include those economics terms agreed to on the SEF platform, we note that this may impose compliance challenges with respect to the trade reporting obligations for SEF-executed trades. Since the Commission expressed its intention to substantially amend the current Part 43 (real-time) and Part 45 (regulatory) reporting regulations,<sup>38</sup> it is difficult for ISDA to make definitive recommendations on the reporting aspect of this proposal at this time. We therefore suggest that the Commission consider the reporting of SEF-executed trades in conjunction with any proposed amendments to the Commission’s reporting rules.<sup>39</sup>

<sup>36</sup> See Proposal at 62096 (proposed § 37.6(a)).

<sup>37</sup> See e.g., Bloomberg SEF LLC Rule 318:

A transaction entered into on or pursuant to the BSEF Rules shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable as a result of: (a) a violation by BSEF of the provisions of section 5h of the Act or CFTC Regulations; (b) any CFTC proceeding to alter or supplement a Rule, term, or condition under section 8a(7) of the Act or to declare an emergency under section 8a(9) of the Act; or (c) any other proceeding the effect of which is to: (i) alter or supplement a specific term or condition or trading rule or procedure; or (ii) require BSEF to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action, available at <https://data.bloomberglp.com/professional/sites/10/BSEF-2018-R-091.pdf>.

<sup>38</sup> See CFTC Roadmap to Achieve High Quality Swaps Data (July 10, 2017), available at [https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmo\\_swapdataplan071017.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf).

<sup>39</sup> Parts 43 and 45 of the Commission’s regulations.

Should the Commission finalize the SEF rules prior to finalizing any changes to the reporting rules, in the interim, we recommend that the Commission maintain the status quo to minimize compliance costs.

*C. Swap Documentation Requirements for Cleared Swaps: SEFs Should Only be Required to Issue Trade Evidence Records*

Consistent with the Commission's proposed changes for non-cleared swaps, we believe that for trades that are intended or required to be cleared, SEFs should only be required to issue trade evidence records (which include only those economic terms agreed to on the SEF platform), rather than confirmations. Requiring SEFs to provide confirmations for subsequently cleared transactions is unnecessary because the terms agreed to by the counterparties on the SEF will ultimately be replaced by the terms as confirmed by the relevant registered or exempt Derivatives Clearing Organization ("DCO") upon acceptance of the trade for clearing pursuant to the rules of that clearing house.<sup>40</sup> Requiring SEFs to issue, and counterparties to receive and maintain, records of a confirmation for a trade that soon after execution is replaced with a cleared trade imposes duplication and compliance burdens on both SEF users and SEFs with no apparent regulatory benefit.<sup>41</sup>

*D. Proposed Error Trade Policy is in Line with Market Practices*

We support the proposed error trade policy that would allow a SEF to implement its own protocols to correct trades that are rejected by a DCO due to an operational or clerical error. We agree with the Commission that SEFs are better positioned to develop and adopt a more efficient approach to correcting erroneous trades, taking into account the nature of the transaction, types of errors, as well as their own operational and technological capabilities.<sup>42</sup> However, it may not be necessary for all market participants to be notified of a single error trade on a SEF.<sup>43</sup> The pre-trade price value of a trade in a liquid swap that is even a few minutes post-execution is of extremely limited value in relation to price formation. We therefore ask the Commission not to impose this requirement.

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<sup>40</sup> Under this approach, Swap Dealers and other counterparties would only be required to maintain records of Beta and Gamma swap confirmations; a Swap Dealer would also still maintain execution records related to the Alpha swap.

<sup>41</sup> We note that our suggestions are in line with the approach currently reflected in § 23.501(a)(4)(ii) of the Commission's regulations which provides that, for any swap submitted for clearing by a DCO, the confirmation requirements under Part 23 of the Commission's regulations are deemed satisfied if certain conditions are met, such as timely submission of the trade for clearing and confirmation of all terms of the trade taking place at the same time the trade is accepted for clearing pursuant to the rules of the clearing house.

<sup>42</sup> Proposal at 62001.

<sup>43</sup> Proposed § 37.203(e) establishes a minimum set of notification requirements for SEFs. While we understand that the goal of proposed § 37.203(e) is to limit market misinformation, we do not believe it is necessary.



*E. The Existing “As Quickly As Technologically Practicable if Fully Automated Systems are Used” (AQATP) Standard for the Processing and Routing of SEF Trades Should be Maintained<sup>44</sup>*

While we appreciate the Commission’s proposal to streamline straight-through processing requirements between SEFs and DCOs, we note that the industry has been operating under the AQATP standard for a number of years and has already expended significant capital to ensure that their systems meet such standard. Replacing the AQATP standard with another qualitative standard (“prompt, efficient, and accurate”) may require firms to build out new or adjust existing compliance systems, and review and amend internal compliance policies, as appropriate, in order to ensure compliance with the new standard. This change would increase costs to market participants without commensurate regulatory benefit.

We note that after the AQATP standard was adopted, Commission staff interpreted the AQATP standard as requiring that “trades are routed to and received by the relevant DCO no more than 10 minutes after the execution of the trade.”<sup>45</sup> ISDA, however, agrees with the Proposal that imposing a specific time frame is no longer workable given the expansion of both the trade execution requirement and available methods of execution.<sup>46</sup> Additionally, as the Proposal notes, “the inability to comply with a specific time frame could hinder the anticipated growth of trading in additional products on SEFs and impede the ability to utilize flexible means of execution.”<sup>47</sup> Accordingly, we recommend that the Commission maintain the current AQATP standard for processing and routing SEF trades, without codifying the 10-minute standard, but rather keeping the 10-minute standard as Staff guidance.

*F. More Clarity Should be Provided with Respect to Trade Monitoring Requirements*

We support the Commission’s proposal to return to the principles-based regulatory regime that Congress established for SEFs. The existing rules contain a litany of prescriptive requirements that dictate every detail of a SEF’s operation. We believe that more flexible principles-based regulation would allow trading platforms to keep pace with rapidly changing technologies and markets. We recommend that further clarifications should be made with regard to SEFs’ trade monitoring requirements and SEFs’ obligations to ensure financial integrity of transactions.

Specifically, with respect to the trade monitoring requirements, proposed § 37.401(b) would require a SEF to “collect and evaluate data on its market participants’ trading activity away from its facility, including trading in the index or instrument used as a

<sup>44</sup> While we recommend that the current AQATP standard be maintained, should the Commission switch to a new standard, conforming changes must be made to CFTC Letter 13-70 (Nov. 15, 2013), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/13-70.pdf>.

<sup>45</sup> See CFTC Letter No. 15-67, Straight Through Processing and Affirmation of SEF Cleared Swaps (Dec. 21, 2015), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/15-67.pdf>.

<sup>46</sup> Proposal at 62022.

<sup>47</sup> Proposal at 62022.

reference price, the underlying commodity for its listed swaps, or in related derivatives markets.” We are concerned that SEFs will not be able to fulfill this obligation as in many instances they will not have the authority to get this information from SEF users.

Also, proposed § 37.403(b) would require SEFs, for cash-settled products, where the reference price relies on a third-party index or instrument, to “monitor the continued appropriateness of the index or instrument and take appropriate action, including selecting an alternate index or instrument for deriving the reference price” when there is a threat of manipulation or market disruption. It is not clear how SEFs will determine what an “appropriate action” is and make amendments to indexes formulated by third parties. A better way would be to require the SEF to stop listing a particular swap if there is a threat of market abuse. The proposed language may also have a negative impact on CDS credit event auctions. Credit indices (swaps subject to CFTC jurisdiction) that cash settle based on an auction process where the instrument being valued is a single name CDS (a swap subject to the jurisdiction of the Securities and Exchange Commission). It would be damaging to the CDS market if a SEF has the authority to change a well-established CDS credit event auction process, especially when SEFs do not have the expertise to make such changes.

Finally, with respect to the financial integrity of transactions, we believe that proposed § 37.702(b) should include both registered and exempt DCOs.

## **5. SEF Registration and Cross-Border Impact**

The proposed codification of “footnote 88”, coupled with the expansion of products subject to the trade execution requirement, will exacerbate existing challenges in cross-border trading.<sup>48</sup> The Proposal creates the potential for products subject to the CFTC’s trade execution requirement to diverge materially from that of other major non-U.S. jurisdictions that have active trading in those same products and therefore risks further market fragmentation.

As we have stressed in the past, the Commission should fully implement a substituted compliance regime before extending the scope of its regulations to entities and activities

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<sup>48</sup> Separately, ISDA asks the Commission to confirm in its final rulemaking that over-the-counter prime brokerage intermediation arrangements do not function as SEFs. In the most basic form of prime brokerage intermediation arrangement, a client of a prime broker (“PB”) negotiates with a counterparty that has a trading relationship with its PB (such counterparty may be a dealer, another prime brokerage client of the same or a different PB or other market participant) and commits to a transaction on behalf, and for the account, of its PB, and following the application of pre-agreed conditions, the PB enters into equal but offsetting transaction(s) to flatten out its market risk. Unlike a SEF or a Swap Broking Entity, the main purpose of prime brokerage intermediation is to provide a credit intermediation, not trade execution, service where the PB becomes a party to a set of trades the economic terms of which have been negotiated by a PB client on the PB’s behalf (subject to pre-agreed conditions being met). As such, ISDA believes that over-the-counter prime brokerage intermediation arrangements do not function as SEFs.

conducted outside the United States.<sup>49</sup> Absent such a regime, non-U.S. trading platforms that have not been granted equivalence<sup>50</sup> will continue to deny access to U.S. persons, including non-U.S. branches of U.S. banks, to avoid subjecting themselves to the expanded SEF registration requirements. Market participants may become subject to duplicative trading obligations that they would not be able to satisfy absent trading venue equivalency; thus, diminishing access to foreign sources of liquidity for U.S. participants, while adding further complexity and inefficiency to cross-border trading.

To avoid the negative consequences of the expanded registration and trade execution<sup>51</sup> requirements on cross-border trading, the Commission should first establish a comprehensive framework for regulating cross-border trading,<sup>52</sup> including issuing trading venue equivalence for other jurisdictions. This approach would incentivize SEF trading while reducing the Commission's cross-border regulatory overreach and minimizing market fragmentation.

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<sup>49</sup> Additionally, for smaller, emerging market jurisdictions, where issuing equivalency may not be possible, the Commission should allow for a *de minimis* trading exception.

<sup>50</sup> The Commission's efforts to harmonize cross-border trading has already started. We appreciate the Commission issuing US/EU trading venue recognition last year, and US/Singapore trading venue recognition earlier this week. *In the Matter of the Exemption of Multilateral Trading Facilities and Organised Trading Facilities Authorized Within the European Union from the Requirement to Register with the Commodity Futures Trading Commission as Swap Execution Facilities Exemption Order*, Order of Exemption (Effective Jan. 3, 2018), available at [https://www.cftc.gov/sites/default/files/idc/groups/public/@requestsandactions/documents/ifdocs/mtf\\_otfor der12-08-17.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@requestsandactions/documents/ifdocs/mtf_otfor der12-08-17.pdf); *In the Matter of the Exemption of Approved Exchanges and Locally-Incorporated Recognised Market Operators Authorized within Singapore from the Requirement to Register with the Commodity Futures Trading Commission as Swap Execution Facilities*, Order of Exemption (Effective March 13, 2019), available at <https://www.cftc.gov/sites/default/files/2019-03/SingaporeCEASection5hgOrder.pdf>. We ask the Commission to issue trading venue recognition to other non-U.S. jurisdictions, including Japan which has had mandatory trading obligations in place since September 2015. As is the case with the US-EU and US-Singapore trading venue recognition, we believe recognition should be granted to other non-US trading venues using a holistic, outcomes-based approach and regardless of the differences in the scope of products subject to the trading obligations.

<sup>51</sup> The proposed trade execution requirement will expand the products under overlapping mandatory trading requirements in the U.S. and in other jurisdictions (e.g., yen denominated interest rate swaps) furthering already existing disjunctions among legal regimes. To avoid such negative impact, the Commission should establish a risk-centered, outcomes-based recognition framework for regulating cross-border trading. See ISDA Whitepaper Cross-Border Harmonization of Derivatives Regulatory Regimes: A Risk-Based Framework For Substituted Compliance via Cross-Border Principles (Sept. 2017), available at <https://www.isda.org/a/DGiDE/isda-cross-border-harmonization-final2.pdf>.

<sup>52</sup> We underscore the importance of issuing holistic, outcomes-based substituted compliance determinations when assessing foreign regulatory regimes for comparability. Aside from issuing comparability determinations for trading venues, in the past, the Commission often issued substituted compliance determinations that contained complex conditions and exclusions which diminished the ability for market participants to rely on such determinations.

### Conclusion

We appreciate the opportunity to submit our comments in response to the Proposal. We commend the Commission for its efforts to foster trading on SEFs and look forward to working with the Commission as it proceeds to finalize the Proposal. Our members are strongly committed to maintaining the safety and efficiency of the U.S. swaps markets and hope that the Commission will consider our suggestions, as they reflect the extensive knowledge and experience of trading professionals within our membership.

Please contact me or Bella Rozenberg, Senior Counsel & Head of Regulatory Legal Practice Group, (202)-683-9334, should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "S. O'Malia". The signature is fluid and cursive, with a large initial "S" and "O".

Scott O'Malia  
Chief Executive Officer  
International Swaps and Derivatives Association, Inc.

## APPENDIX

### ANSWERS TO THE PROPOSAL'S QUESTIONS

**Question 1:** Is the Commission's proposed definition of "market participant" clear and complete? Please comment on any aspect of the definition that you believe is not clear or adequately addressed.

No, the proposed definition of "market participant" is not clear. In the preamble of the Proposal, the Commission notes that proposed definition of market participant "does not alter any person's obligations under § 1.35."<sup>1</sup> Current CFTC Rule § 1.35, however, refers to "members" of SEFs. The CFTC should therefore clarify whether (1) market participants, as defined by proposed § 37.2, are "members" of SEFs (and make the necessary clarifications to § 1.35); or (2) there is another category of persons that are considered "members" within the new SEF framework.

**Question 16 & 17:** Is the delay of two years for Eligible Foreign Swaps Broking Entities an adequate delay? If not, then how long of a delay should the Commission consider and why? Are there additional considerations that the Commission should take into account in establishing this delay?

No. As discussed more fully in Section 5 of our letter, the proposed registration requirements will exacerbate the existing challenges in cross-border trading. Absent a substituted compliance regime, non-U.S. trading platforms that have not been granted equivalence will continue to deny access to U.S. persons to avoid subjecting themselves to more comprehensive SEF registration requirements. To avoid the negative consequences of the expanded registration requirements on cross-border trading, the Commission should first establish a comprehensive framework for regulating cross-border trading—including issuing trading venue equivalence for other jurisdictions—and then assess the necessity of the proposed registration requirements.

**Question 20:** Should the Commission require a SEF to include a minimum set of terms in a trade evidence record, e.g., material economic terms? Should the Commission specify those terms in the proposed regulation?

No, we do not believe it is necessary for the Commission to specify in its regulations the precise terms that must be included in a trade evidence record. We think that it is sufficient for the Commission to state that the terms included in trade evidence records are those terms agreed to on the SEF platform. We believe that different products require counterparties to agree to different terms (i.e., no one size fits all), and SEFs and the parties trading on SEF should determine (for existing and new products) which parameters need to be agreed to on-SEF for each particular product.

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<sup>1</sup> Proposal at 61955.

**Question 21:** Should the Commission require a SEF to include any of the ‘‘primary economic terms,’’ as defined under § 45.1, in a trade evidence record? If so, which terms should be included?

No, as further explained in Section 4(B) and (C) of our Letter, trade evidence records should only contain those terms agreed to on the SEF platform. For further details please refer to our response in Section 4(B) and (C).

**Question 22:** Should the Commission specify that a trade evidence record (i) serves as evidence of a legally binding agreement upon the counterparties; and (ii) legally supersedes any previous agreement, rather than any conflicting term in any previous agreement, as proposed? With respect to (i), are there terms that are generally contained within previously-negotiated, underlying agreements between the counterparties that are necessary to make a transaction legally binding, and therefore must be submitted to the SEF?

- (i) No, the Commission should not specify that a trade evidence record ‘‘serves as evidence of a legally binding agreement upon the counterparties.’’ As discussed more fully in Section 4(B) of our letter, the phrase ‘‘legally binding’’ is not necessary as the proposed enforceability rule explicitly states that a swap transaction executed on a SEF shall not be void, voidable or rescinded.<sup>2</sup>
- (ii) Yes, the Commission may specify that the terms of a trade evidence record legally supersede conflicting terms included in previously-negotiated agreements. In Section 4(B) of our letter, we proposed to define ‘‘trade evidence records’’ in a manner that ensures that: (1) the terms in a trade evidence record would legally supersede terms in previously negotiated agreements; and (2) the trade evidence record is a memorialization of the terms agreed to on the SEF and do not include all terms of the transaction. We encourage the Commission to adopt our proposed definition for the reasons articulated in Section 4(B) of our letter.

**Question 23:** Should the Commission specify in its regulations that notwithstanding the trade evidence record requirement, a SEF is allowed to incorporate by reference underlying, previous agreements containing terms governing a swap transaction into any trade evidence record associated with the transaction?

No, we do not believe that this is necessary because counterparties will already be issuing confirmations under their Part 23 obligations, which will incorporate previous agreements. Moreover, as the Proposal correctly points out, SEFs are not familiar with the terms included in previously-negotiated agreements<sup>3</sup> and therefore should not be required or allowed to incorporate such terms by reference.

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<sup>2</sup> See Proposal at 62096 (proposed § 37.6(a)).

<sup>3</sup> Proposal at 61973.

**Question 29:** What are market participants' current pre-execution communication practices? How often do market participants currently engage in pre-execution communication? What level of trade detail is discussed during such pre-execution communications? What role, if any, should pre-execution communications continue to have in the SEF market structure?

Today, trading discussions and communications between clients and dealers often develop organically. Initial discussions may arise from routine relationship calls or chats, market color inquiries, or simply a discussion of particular trade structures. It will be difficult to determine from a compliance perspective at what point, during the course of a phone conversation, a general conversation with a client about market color devolves into prohibited off-SEF pre-execution communications.

As discussed more fully in Section 1 of our letter, if finalized, the pre-execution prohibition will effectively eliminate client-dealer discussions and stifle clients' access to market color which allows them to evaluate market conditions and various trade combinations to achieve their business objectives. We therefore ask the Commission to eliminate the proposed prohibition on pre-execution communications.

**Question 30:** Is the Commission's proposal to require a SEF to prohibit market participants from conducting pre-execution communications away from a SEF with respect to swaps that are subject to the trade execution requirement appropriate? In light of the Commission's proposal to allow SEFs to offer flexible execution methods, are there any impediments for market participants to execute those swaps, in particular those that would become subject to the Commission's proposed approach to the trade execution requirement?

No. The Commission's proposed prohibition on pre-execution communications away from a SEF for swaps that are subject to the trade execution requirement is not appropriate. Migrating all pre-execution communications onto a SEF platform is unnecessary, costly, and does not achieve or advance the dual goals of SEF trading: to promote pre-trade price transparency and trading on SEFs.

Critically, as discussed more fully in Section 1 of our letter, the prohibition of off-SEF pre-trade communications will also hinder liquidity formation and robust pricing altogether as trading discussions and communications between clients and dealers often develop organically, and it is difficult to determine (from a compliance perspective) at what point, during the course of a phone conversation, a general conversation with a client about market color devolves into prohibited off-SEF pre-execution communications. Because of such compliance challenges, prohibiting pre-execution communications may discourage dealers and clients from engaging market color discussions altogether, thereby stifling buy-side access to market color and hindering dealers' ability to provide competitive pricing to clients.

Finally, the ability of SEFs to offer flexible methods of execution should not be linked to the longstanding practice of engaging in pre-trade discussions prior to executing a trade on a centralized platform. Pre-trade discussions allow market participants to make informed decisions on whether to enter into a particular trade in the first place. Such discussions, whether or not they involve a mandatorily cleared swap, should continue to exist outside the SEF paradigm. Otherwise, market participants will incur unnecessary costs and will not be able to achieve their trading strategies.

**Question 33:** Should the Commission allow an exception to the proposed prohibition against pre-execution communications for communications involving “market color”? If so, how should the Commission define “market color”? For example, should such a definition consist of views shared by market participants on the general state of the market or trading information provided on an anonymized and aggregated basis? Should such a definition exclude (i) an express or implied arrangement to execute a specified trade; (ii) non-public information regarding an order; and (iii) information about an individual trading position? Are these elements appropriate and should the Commission consider additional elements?

We support a broad interpretation of pre-execution communications, which includes market color. As explained more fully in our letter and answers to Questions #29 and 30, the Commission should abandon the proposed prohibition on pre-execution communications as it imposes excessive costs on market participants and prevents market participants from achieving their trading strategies without commensurate regulatory benefit.

**Question 34:** Should the Commission allow an exception to the proposed prohibition against pre-execution communications for communications intended to discern the type of transaction—which may or may not be a swap—that a market participant may ultimately execute on a SEF? The Commission understands that these types of communications are common in the dealer-to-client market and allow a dealer to assist a client with determining which financial instruments may be best suited to manage the client’s risks or to establish certain market positions. If so, please describe the nature and scope of these communications that would support an exception to the proposed prohibition.

*See Answer to Questions #29, 30, and 33.*

**Question 57:** Should the Commission require SEFs to notify all market participants of an error trade and the resolution of such trade or only a smaller subset of participants? Should the Commission provide any time frame for such notice?

No. We do not believe that such a requirement is necessary. The pre-trade price value of a trade in a liquid swap that is even a few minutes post-execution is of extremely limited value in relation to price formation.



**Question 70:** The Commission has observed that SEFs may provide input into market pricing information, such as third-party indexes, that is available to market participants, which includes executed prices, prices from executable or indicative bids and offers, views of trading specialists, or prices from related instruments in other markets. Should the Commission’s general market monitoring requirements require SEFs to monitor this type of information—for example, pricing provided by its own trading specialists?

No, unlike Designated Contract Markets (“DCMs”), SEFs do not formulate their own price indices and rely on third party providers. Therefore, SEFs will not have jurisdiction to obtain and monitor such indices.

**Question 96:** Are there additional package transactions that should be exempt from the trade execution requirement? If so, then please describe in detail why such package transactions should be exempt from the trade execution requirement, especially in light of the flexible means of execution the Commission is proposing to allow for all swaps listed by a SEF.

Yes, Cleared/Futures Package Transactions should be exempt from the trade execution requirement. As noted in Section 3(A) of our letter, packages composed of interest rate swaps and U.S. Treasury futures are heavily traded, and market participants currently execute the swap components off-SEF pursuant to the requirements provided in the current CFTC no-action relief<sup>4</sup> and execute the futures component through an Exchange for Related Position (“EFRP”). Without an exemption from the trade execution requirement, these transactions would not be available for execution as a package because only the swap leg could be executed on-SEF and the current DCM structure does not: (i) provide access to the swaps used; and (ii) does not allow for the execution of EFRP trades where the related position component is traded on an exchange.

**Question 106:** Should the Commission allow all swap block trades on SEFs to be negotiated through pre-execution communications and then submitted to SEFs for execution? Please explain why or why not.

Yes. *See* Section 4(A) of our letter.

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<sup>4</sup> *Id.*