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March 12, 2019

Mr. Christopher Kirkpatrick, Secretary  
Commodity Futures Trading Commission  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

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

Dear Mr. Kirkpatrick:

The Investment Company Institute<sup>1</sup> appreciates the opportunity to comment on the proposed amendments to the rules governing swap execution facilities (SEFs) and the trade execution requirement.<sup>2</sup> We commend the Commodity Futures Trading Commission (CFTC or “Commission”) for taking a hard look at whether its SEF rules should be revised in light of the considerable evolution in swap markets that has taken place since the rules were adopted. Although we support the main goals of the proposal, namely increasing swap market transparency, reducing complexity, and promoting the trading of more swaps on SEFs, we believe the CFTC’s proposed drastic overhaul of SEF trading practices will not accomplish these goals and risks making markets more opaque, fragmented, brittle, and complex.

Below, we describe generally how regulated funds use swaps and the critical importance of healthy, well-functioning swap markets to them and the millions of Americans that rely on funds to pursue their investment goals. We then focus on the proposed definition of “market participant,” which we believe will improve market certainty. We encourage the Commission to adopt this definition as proposed. Lastly, we address two aspects of the proposal that pose great risk to the markets and which we urge the Commission to reconsider: (i) the proposed revisions to the impartial access requirements that would enable SEFs to exclude buy-side participants from certain markets and cause them to pay higher prices; and (ii) the proposed vast expansion of the trade execution requirement.

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<sup>1</sup> ICI is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$21.9 trillion in the United States, serving more than 100 million US shareholders, and US\$6.6 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](#), with offices in London, Hong Kong, and Washington, DC.

<sup>2</sup> *Swap Execution Facilities and Trade Execution Requirement*, 83 Fed. Reg. 61946 (Nov. 30, 2018) (to be codified at 17 C.F.R. pts. 9, 36, 37, 38, 39, and 43) (“Proposing Release”).

## I. Background

US registered investment companies, including mutual funds, ETFs and other funds that are regulated under the Investment Company Act of 1940 (“registered funds”), and non-US regulated funds<sup>3</sup> (together with registered funds, “regulated funds”) rely on their investment adviser to invest fund assets and implement the funds’ investment objectives and strategies. A regulated fund’s investment adviser employs portfolio managers and traders to carry out these functions on behalf of the fund. In managing a regulated fund’s portfolio, the portfolio manager determines which assets to buy or sell for the fund, in accordance with the objectives described in the fund’s prospectus. Traders seek to execute the transactions in the most efficient and cost-effective manner to effectuate the fund’s investment strategy. Importantly, a regulated fund’s investment adviser is a fiduciary, and owes duties of loyalty and care to its clients, including the regulated funds it manages. This fiduciary duty obligates the adviser, including its portfolio managers and traders, to act in the best interest of the fund and to seek best execution of the fund’s portfolio transactions.

Investment advisers use derivatives in a variety of ways on behalf of regulated funds. Derivatives are a particularly useful portfolio management tool in that they offer portfolio managers considerable flexibility in structuring the investment portfolios of regulated funds. A portfolio manager can use derivatives to hedge a regulated fund's positions, equitize the regulated fund's cash that it cannot immediately invest in direct equity holdings, manage the regulated fund's cash positions, and adjust portfolio duration, all in accordance with the investment objectives stated in the fund’s prospectus.

Investment advisers use SEFs to enter into swaps on behalf of their clients, including regulated funds, either by accessing the SEF directly, or indirectly through sponsored access.<sup>4</sup> ICI and its members therefore have a strong interest in the regulation of SEFs. Regulated funds generally support market structure reforms that promote competition, transparency, fairness, liquidity, innovation, and efficiency. As discussed below, we believe certain aspects of the proposal satisfy this standard while others fall significantly short.

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<sup>3</sup> For purposes of this letter, the term “non-US regulated fund” refers to any fund that is organized or formed outside the United States, is authorized for public sale in the country in which it is organized or formed, and is regulated as a public investment company under the laws of that country. For example, UCITS, or “undertakings for collective investment in transferrable securities,” are collective investment schemes established and authorized under a harmonized European Union (EU) legal framework, currently EU Directive 2009/65/EC, as amended (UCITS IV).

<sup>4</sup> While it may be theoretically possible for investment advisers to access a SEF indirectly through a liquidity provider, this is not consistent with industry practice for regulated funds.

## II. The CFTC Should Adopt Its Proposed Definition of Market Participant

ICI supports the CFTC's proposed definition of the term "market participant."<sup>5</sup> The CFTC currently does not define the term, but has stated that a "market participant," as used in part 37, means any "person that directly or indirectly effects transactions on the SEF. This includes persons with trading privileges on the SEF and persons whose trades are intermediated."<sup>6</sup> If a person is viewed to be a market participant on a SEF, the person is subject to the SEF's jurisdiction and, among other things, must satisfy recordkeeping requirements (including making records available to the SEF).

The Commission proposes to define the term "market participant" to mean any person who accesses a SEF: (i) through direct access provided by a SEF; (ii) through indirect access or functionality provided by a third-party; or (iii) through directing an intermediary that accesses a SEF on behalf of such person to trade on its behalf. We believe the Commission's proposed definition appropriately includes asset managers, including investment advisers to regulated funds, that trade on a SEF on a discretionary basis for their clients, while excluding the asset manager's clients. As correctly noted by the CFTC, clients of investment advisers typically delegate trading discretion to their adviser and do not direct trading to take place on a particular venue. Furthermore, investment advisers, rather than their clients, execute the SEF's onboarding documentation and access the SEF. Any records a SEF might need relating to trading or other activity of an investment adviser on behalf of a regulated fund should be obtained directly from the adviser. We support the CFTC's effort to clarify the term "market participant" and urge the Commission to adopt this definition as proposed.

## III. The CFTC Should Not Adopt Its Proposed Amendments to the Impartial Access Requirements

### A. Existing and Proposed Requirements Regarding Impartial Access

The Commodity Exchange Act (CEA) requires that each SEF "establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means . . . to provide market participants with impartial access to the market . . ."<sup>7</sup> When the CFTC adopted SEF regulations to implement this statutory framework, it stated that "the purpose of the impartial access requirement is to prevent a SEF's owners or operators from using discriminatory access requirements as a competitive tool against certain [eligible contract participants]."<sup>8</sup> Furthermore, in response to comments requesting that a SEF be permitted to limit access to certain types of market participants such as swap dealers, the CFTC stated that the statutory

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<sup>5</sup> See Proposed Regulation 37.2(b).

<sup>6</sup> *Core Principles and Other Requirements for Swap Execution Facilities*, 78 Fed. Reg. 33476, 33506 (June 4, 2013) ("2013 Adopting Release").

<sup>7</sup> CEA Section 5h(f)(2)(B)(i).

<sup>8</sup> 2013 Adopting Release at 33508.

impartial access requirement “does not allow a SEF to limit access to its trading systems or platforms to certain types of [eligible contract participants] . . . as requested by some commenters.”<sup>9</sup> As adopted in 2013, CFTC Regulation 37.202(a) requires that each SEF “provide any eligible contract participant and any independent software vendor with impartial access to its market(s) and market services, including any indicative quote screens or any similar pricing data displays, provided that the facility has[, among other things,] [c]riteria governing such access that are impartial, transparent, and applied in a fair and nondiscriminatory manner.”

The CFTC proposes to replace this requirement with a requirement that each SEF establish rules specifying the impartial access criteria for its markets and market services and its execution methods (including any indicative quote screens or any similar pricing data displays). The criteria would need to be “transparent, fair, and non-discriminatory and applied to all or similarly situated market participants.”<sup>10</sup> The CFTC’s proposal would appear to permit a SEF to interpret “similarly situated market participants” to include a limited subset of the market (such as bank swap dealers) and allow a SEF to exclude entire categories of market participants (such as end users or non-bank market makers) from accessing the SEF’s markets, pricing data screens, or even particular execution methods.<sup>11</sup>

B. The Proposed Changes to Impartial Access Requirements Would Harm Buy-Side Industry Participants by Reducing Their Access to Markets, Impairing Liquidity, and Diminishing Competition

The Proposing Release contemplates sweeping changes both to the Commission’s interpretation of the CEA’s impartial access requirement and to the Commission’s impartial access policy. As detailed below, by enabling a SEF to limit participation on its market to specific types of market participants, the proposal would permit market segmentation that would have negative consequences for regulated funds and the swap markets more broadly that are not considered in the Proposing Release. We urge the Commission to abandon its unwarranted proposal to rescind the impartial access protections guaranteed by the CEA.

The proposal would likely reduce the ability of regulated funds to access certain SEFs by permitting a SEF to exclude classes of industry participants from its market. In our members’ experience, some trading platforms in institutional markets seek to limit membership to certain classes of market participants, such as bank swap dealers. If the CFTC dilutes the SEF impartial access requirement, one or more SEFs might attempt to create a market composed exclusively of such dealers. Investment

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<sup>9</sup> 2013 Adopting Release at 33507-33508.

<sup>10</sup> Proposed Regulation 37.202(a)(1).

<sup>11</sup> *See, e.g.*, Proposing Release at 61995 (“ . . . a SEF could premise these criteria in different ways, such as limiting access upon the type of the market participant or the swap product itself. For example, a SEF would be able to calibrate access to serve market participants within a particular market segment, such as dealers trading in a wholesale swaps market, who may be categorized as ‘similarly situated.’”)

advisers to regulated funds would be unable to participate in these markets, which likely would exclude them from the pools of liquidity with the most favorable pricing.<sup>12</sup> This is an unfair and discriminatory result that could reduce market quality and ultimately raise costs for end investors, such as regulated funds. Furthermore, to the extent that advisers to regulated funds are barred from accessing a SEF, they likely also would be precluded from accessing the pricing and other market information that is available on the SEF's markets or systems—thereby reducing transparency of the derivatives markets and disadvantaging regulated funds and their shareholders.<sup>13</sup>

Permitting a SEF to exclude classes of industry participants from its market also would impair market quality by increasing fragmentation. The separate liquidity pools that exist for different categories of industry participants are likely to be less deep and resilient than the pools that all industry participants can access today. Indeed, Chairman Giancarlo recognized in his 2018 White Paper that the increased fragmentation of global swap markets has led to “smaller, disconnected liquidity pools and less efficient and more volatile pricing,” and that “[d]ivided markets are more brittle, with shallower liquidity, posing a risk of failure in times of economic stress or crisis.”<sup>14</sup> The Commission’s proposal regarding impartial access would exacerbate this harmful trend.

Allowing a SEF to limit the types of entities that can participate in its market inherently limits competition. The impartial access requirements in current SEF rules allow a broad range of market participants to transact on SEFs. This raises this possibility that additional market participants, such as electronic market makers, could enter swap markets. These new entrants could promote the development of deeper liquidity pools, tighter spreads and more resilient markets. By contrast, allowing a SEF to exclude such participants from its markets and services would stifle the potential for competition and innovation, along with any accompanying pricing improvements. This approach would not advance the development of competitive swap markets and would harm end-users of swaps, such as regulated funds.

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<sup>12</sup> The potentially significant difference in pricing between the dealer-to-client market and the dealer-to-dealer market has been acknowledged by the SEC and FINRA. In their public reporting rules for security-based swaps and corporate bond transactions, the SEC and FINRA, respectively, require dissemination of an indicator when both parties to a trade are dealers so that consumers of public data have this context when viewing pricing information published for the trade. See *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 80 Fed. Reg. 14564, 14578 (Mar. 19, 2015); FINRA, *Bond Trade Dissemination Service (BTDS): For OTC Corporate Bond Transactions*, Data Feed Interface Specification Version 4.6A, 8-5 (May 14, 2018) available at <http://www.finra.org/sites/default/files/BTDS-specs-v4.6A.pdf> (accessed from <http://www.finra.org/industry/trace/trace-documentation>).

<sup>13</sup> We acknowledge that the CFTC’s existing impartial access requirements have not resulted in the development of all-to-all trading on SEFs to the extent the CFTC originally anticipated, but the markets are still evolving. The CFTC should not adopt rules that would incentivize SEFs to fragment liquidity and artificially impede this evolution.

<sup>14</sup> J. Christopher Giancarlo and Bruce Tuckman, *Swaps Regulation 2.0: An Assessment of the Current Implementation of Reform and Proposals for Next Steps* 46 (Apr. 26, 2018).

We therefore urge the CFTC not to adopt its proposed amendments to the impartial access requirement, given the adverse impacts that these changes would have on buy-side industry participants and the markets generally.

#### C. The CFTC's Proposal to Allow SEFs to Offer a Greater Variety of Fee Structures Would Disadvantage Buy-Side Market Participants

In connection with its proposal to amend the impartial access requirement, the CFTC proposes to grant SEFs much more discretion when considering what fees to charge market participants.<sup>15</sup> Current regulations require that a SEF have comparable fee structures for market participants that receive comparable access to, or services from, the SEF.<sup>16</sup> The CFTC proposes to replace this requirement with a less stringent requirement that a SEF's fee structures and fee practices be "fair and non-discriminatory" to market participants.<sup>17</sup> The Proposing Release suggests that this added discretion would allow a SEF to establish bespoke fee arrangements with market participants if "based on legitimate business justifications."<sup>18</sup> We expect that buy-side participants, including advisers that trade on behalf of regulated funds, would likely face disproportionately higher costs if this change is adopted.

#### IV. Significantly Expanding the Trade Execution Requirement While Prohibiting Pre-Execution Communications Would Increase Costs and Diminish Competition, Liquidity, and Innovation

The CEA provides that any swap subject to the clearing mandate must be executed on a SEF or designated contract market (DCM) unless no SEF or DCM "makes the swap available to trade."<sup>19</sup> Congress deliberately separated the clearing mandate from the trade execution requirement to reflect the distinct goals and obligations associated with mandatory clearing and trading.<sup>20</sup> The clearing mandate was designed to reduce counterparty risk and systemic risk in the market,<sup>21</sup> while the

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<sup>15</sup> See Proposing Release at 61997.

<sup>16</sup> See 17 C.F.R. § 37.202(a)(3).

<sup>17</sup> Proposed Regulation 37.202(a)(2).

<sup>18</sup> Proposing Release at 61997.

<sup>19</sup> CEA Section 2(h)(8).

<sup>20</sup> See Section 723(a)(3) of the Dodd-Frank Act, which added the clearing mandate and set forth a specific separate framework by which the Commission must make mandatory clearing determinations.

<sup>21</sup> 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 . . .").

mandatory trading requirement focused on providing increased pre-trade price transparency.<sup>22</sup> The trade execution requirement reflected a foundational premise that the contracts subject to the requirement would be highly liquid. For example, Senator Blanche Lincoln, then Chair of the Senate Committee on Agriculture and a key drafter of Title VII of the Dodd-Frank Act, noted that “[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.”<sup>23</sup>

The CFTC has proposed a number of interconnected changes that would:

- Require many more entities to register as SEFs. The CFTC estimates that adoption of its proposal would require 60 new entities to register as SEFs—an exponential increase as compared to the current number of 25 registered SEFs.<sup>24</sup>
- Require any swap subject to the clearing mandate that is listed for trading on at least one CFTC-registered SEF or DCM to automatically be required to trade on a SEF or DCM.<sup>25</sup>
- Allow each SEF to offer any means of execution for any swap.
- Prohibit pre-execution communications from occurring away from the SEF for swaps subject to the trade execution requirement (except for swaps that are part of certain package transactions).<sup>26</sup>

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<sup>22</sup> 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.’”).

<sup>23</sup> See Statement of Senator Blanche Lincoln, 156 Cong. Rec. S5923 (daily ed. July 15, 2010).

<sup>24</sup> See Proposing Release at 62045-46.

<sup>25</sup> See Proposed Regulations Part 36. This requirement would be subject to limited exceptions that would apply if the swap:

- (i) is eligible for an exemption (such as the commercial end user exemption) from the clearing mandate under CEA section 2(h)(7) or CFTC part 50,
- (ii) is executed as a component of a package transaction that includes a component that is a new issuance bond, or
- (iii) is entered into between eligible affiliate counterparties.

<sup>26</sup> See Proposed Regulation 37.201(b). The CFTC would consider a transaction to be a package transaction if (i) execution of each component transaction is contingent upon the execution of all other component transactions, and (ii) all component transactions are priced or quoted together as part of one economic transaction with simultaneous or near-simultaneous execution of all components. To qualify for an exception from the prohibition on pre-execution communications away from a SEF, a package transaction must include at least one component transaction that is not subject to the trade execution requirement.

A primary intent of these proposals is to increase the amount of SEF trading, which is consistent with the purpose of the trade execution requirement—*i.e.*, to increase transparency and liquidity in the over-the-counter markets. We believe, however, that the proposed changes miss the mark and, if adopted as proposed, would undermine, rather than advance, these goals. We therefore urge the CFTC to rethink its approach.

The listing of a swap on a SEF or DCM merely enables market participants to begin trading the swap on that platform. Listing does not ensure that a liquid market exists on a SEF or DCM or that one will develop. It typically takes time after a SEF lists a swap for industry participants to begin trading that swap on the SEF and for liquidity in the swap to develop on the SEF. Rather than using its regulatory authority to force swap trading onto SEFs through a vast expansion of the trade execution requirement, we urge the CFTC to create appropriate incentives for industry participants to increase their use of SEFs and to impose the trade execution requirement only on a swap if sufficient liquidity exists on SEFs to satisfy trading demand for the product. We also urge the CFTC not to adopt the proposed ban on pre-execution communications for block trades or swaps that are part of certain package transactions to maintain liquidity in these critical parts of the market. We close by explaining why the continuation of current post-trade name give-up practices on SEFs would exacerbate the liquidity concerns raised by the proposal.

A. The Trade Execution Requirement Should Be Expanded Only if SEFs Provide Adequate Trading Liquidity for Listed Swaps that Are Subject to the Clearing Obligation

We respectfully disagree with the assumption in the Proposing Release that subjecting a swap to the trade execution requirement will expedite the development of liquid markets on SEFs or DCMs. To the contrary, expanding the trade execution requirement to include most swaps that are subject to the clearing mandate and that are listed on a SEF or DCM likely will reduce trading liquidity unless a swap is already actively traded on a SEF or DCM. We explain below how several factors make a decrease in liquidity likely following the premature imposition of the trade execution requirement. We also recommend principles that the CFTC should follow to ensure that imposing the trade execution requirement does not impair trading liquidity.

1. Imposing the Trade Execution Requirement Prematurely Could Impair the Development of Trading Liquidity on SEFs

The Proposing Release refers summarily to various factors that it asserts “can increase activity on SEFs,” without considering the potential for other factors to impair the development of liquid markets on SEFs if the trade execution requirement is imposed prematurely.<sup>27</sup> In practice, a number of such factors

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<sup>27</sup> See Proposing Release at 61979-80 (explaining that “more than 85 percent of [interest rate swap] and index [credit default swap] trading volume is currently subject to the clearing requirement; many, but not all, of those swaps are currently listed for trading by SEFs. Therefore, the [proposal] would both promote the statutory SEF goal of swaps trading on SEFs and help to further swaps liquidity on SEFs by requiring all counterparties to trade these swaps on a SEF, which may promote



exist. Under the proposal, industry participants would be unable to trade a mandatorily cleared swap if they are not or cannot become market participants of a SEF listing that swap. In some cases, the inability to transact might be temporary—if, for example, a SEF receives more onboarding applications than it can process—but, in other cases the market exclusion could be permanent, *e.g.*, if an industry participant belongs to a class of entity ineligible to participate on the only SEF listing a product. The Proposing Release does not consider how the inability for industry participants to access SEFs—whether on a temporary or permanent basis—could affect trading liquidity in a swap subject to the trading obligation.

The inability to access SEFs has harmful implications for buy-side industry participants, including regulated funds and their shareholders. If the trade execution requirement causes industry participants to lose the ability to transact a mandatorily cleared swap, the pool of potential counterparties will decrease and liquidity in the product likely would diminish. Moreover, the inability to transact would create serious problems for industry participants that are prevented from transacting, whether on a temporary or permanent basis. Some might be unable to assume new positions and, as a result, might lose investing or trading opportunities. Others might be unable to unwind or novate their existing exposures—exposures that they obtained in the over-the-counter market prior to the imposition of the trade execution requirement. These market participants would be burdened with risk that they do not wish to hold until SEFs develop the necessary capacity to offer trading in the product.

Factors that might impede the development of liquidity in swaps that prematurely become subject to a trading obligation include:

- *SEF Onboarding Processes.* Becoming a market participant on a SEF is time consuming and costly for an adviser to regulated funds. Before an adviser connects to a SEF it must conduct an extensive due diligence process to fulfill its fiduciary duty to its clients. The due diligence process generally includes a thorough review of the SEF's rules and policies, operational capabilities, and market quality, and an assessment of the SEF's information security capabilities. As part of its due diligence, an adviser is likely to consider whether the SEF currently offers a liquid market for a swap or can demonstrate that a liquid market is likely to develop on its platform.<sup>28</sup> In the current market structure, regulated fund advisers typically connect to, at most, a handful of SEFs because liquidity tends to aggregate on one or two venues and it generally is not practical to diligence and connect to trading venues that do not offer viable markets.

The process of onboarding new market participants also imposes burdens on SEFs. The CFTC

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increased pre-trade price transparency. A more robust trade execution requirement would help migrate and concentrate additional trading interests to available trading systems or platforms on SEFs.”) (internal citations omitted).

<sup>28</sup> The adviser also must ensure that its order and portfolio management systems are able to support connectivity to the SEF.

should consider carefully whether SEFs would have the capacity to address all the due diligence and operational inquiries they likely would receive from prospective new market participants.

- *SEF Rules and Trading Protocols.* An adviser might determine through the due diligence process that the execution methods offered by a SEF pose an unacceptable risk of leaking client trading information. Certain trading protocols, for example, can provide market makers with information about a regulated fund's trading intentions to the detriment of the fund and its shareholders, so advisers to regulated funds typically do not use these protocols. If one of these protocols is the only means of executing a particular swap on a SEF and the swap is subject to the clearing mandate, the CFTC's proposed rules would leave the adviser with the choice of not entering into the swap or executing the swap in a manner that heightens the risk of information leakage.
- *Access Criteria.* The Commission's proposal to change the impartial access requirements also raises the possibility that the only SEF(s) to list a swap exclude one or more types of industry participants from transacting on their markets. Industry participants that do not meet the participation criteria would be precluded from transacting in the swap.
- *SEF Market Dynamics.* The market dynamics on a SEF might impair the development of liquidity in a swap subject to the trade execution requirement. This could occur, for example, if the liquidity providers on the only SEF to list a swap lack adequate capacity to satisfy demand for the product. As Commissioner Berkovitz explained, "[t]oday, a small number of large dealers provide liquidity to the swaps market. Five very large banks were party to over 60 percent of interest rate swap transactions."<sup>29</sup> If the only SEF to list a swap has no major dealer—or only one—to provide liquidity, the demand to trade the product might surpass the available supply of liquidity.

## 2. Recommendations to Ensure Adequate Liquidity Exists to Support the Trade Execution Requirement

The Commission would greatly reduce the likelihood of the trade execution requirement impairing liquidity by ensuring that this requirement is imposed only after determining that any SEF(s) listing the swap have adequate liquidity and the operational capacity to support the trading requirement as applied to that swap. It is critical that this determination be made by the Commission, not the affected SEFs, which may have a conflict of interest in making this determination.<sup>30</sup> To make this determination, the Commission should consider a variety of factors including: (1) whether all categories of industry

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<sup>29</sup> Proposing Release at 62144.

<sup>30</sup> See, e.g., Letter to Mr. Christopher Kirkpatrick, Secretary, Commodity Futures Trading Commission, from Karrie McMillan, General Counsel, Investment Company Institute, dated Feb. 13, 2012; Letter to Mr. Christopher Kirkpatrick, Secretary, Commodity Futures Trading Commission, from David W. Blass, General Counsel, Investment Company Institute, dated Aug. 17, 2015.

participants can participate on SEFs listing the swaps; (2) the ability of SEF liquidity providers to satisfy demand for the swap; (3) the extent to which all categories of industry participants are already connected to SEFs listing the product; (4) the operational readiness of SEFs listing the product to onboard new users; and (5) the extent to which daily trading activity already takes place on a SEF (measured by number of trades and notional amount transacted). The Commission should utilize data from swap data repositories and SEFs to assess how these factors should inform the trade execution requirement determination and whether other factors also should be considered. The Commission should propose for public comment the factors it intends to consider and the process it plans to follow to make a trading determination. The Commission also should provide industry participants with the opportunity to comment on any trade execution requirement determinations it proposes in the future and include in such proposals the data supporting the determination.

B. The CFTC Should Continue to Permit Pre-Execution Communications for Block Trades and Package Transactions Having a Component that Is Subject to the Trade Execution Requirement

We urge the CFTC to reconsider its proposal to restrict the ability of market participants to engage in pre-execution communications away from a SEF. The Commission should continue to permit these communications for block trades to promote the efficient execution of large size transactions at fair prices. It also should permit pre-execution communications for a broader subset of package transactions that involve a swap that is subject to the trade execution requirement to facilitate the ability of market participants to manage their risks. Pre-execution communication is a standard market practice that investment advisers use to guard against information leakage and obtain pricing for large size trades and package transactions on behalf of clients. If the CFTC adopts its proposal, liquidity for block trades and packages likely will diminish and pricing will deteriorate. Additionally, the CFTC should confirm that, under the proposed rules, pre-execution communications would be permitted to occur on a SEF for any swaps that may be executed through non-competitive means, not only block trades and package transactions involving a swap that is subject to the trade execution requirement.<sup>31</sup>

C. Continuation of Post-trade Name Give-Up Would Exacerbate Liquidity Issues

The liquidity issues discussed above that likely would result from the Commission's proposed expansion of the trade execution mandate could well be exacerbated if the CFTC does not prohibit the practice of "post-trade name give-up."<sup>32</sup> As detailed in ICI's letter responding to the Commission's

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<sup>31</sup> While the CFTC proposes to prohibit pre-execution communications from occurring outside of SEFs for swaps subject to the trade execution requirement, the Proposing Release does not appear to prohibit the use of pre-execution communications on a SEF for such swaps.

<sup>32</sup> Under the practice of post-trade name give-up for swaps that are executed anonymously on SEFs and intended to be cleared, the identity of each swap counterparty is disclosed to the other after a trade has been matched anonymously on a SEF. The CFTC, in a separate release, requested comment on this practice. *See Post-Trade Name Give-Up on Swap Execution Facilities*, 83 Fed. Reg. 61571 (Nov. 30, 2018), available at <https://www.cftc.gov/sites/default/files/2018-11/2018-24643a.pdf>.

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request for comment on the practice, post-trade name give-up harms buy-side market participants, including regulated funds and their shareholders, by institutionalizing a form of information leakage that results in less favorable trading conditions for such participants.<sup>33</sup> Concerns about information leakage may cause advisers to regulated funds to avoid using venues that require post-trade name give-up of intended to be cleared swaps. The practice therefore reduces liquidity and results in more fragmented swap markets. To avoid further impairing market liquidity, the CFTC should consider the implications of post-trade name give-up concurrently with its consideration of any expansion of the trade execution requirement. To that end, the Commission should wait to finalize amendments to the SEF rules until the Commission is prepared to concurrently adopt rules that would ban post-trade name give-up.

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<sup>33</sup> See Letter to Mr. Christopher Kirkpatrick, Secretary, Commodity Futures Trading Commission, from Susan Olson, General Counsel, Investment Company Institute, dated January 29, 2019, available at <https://www.ici.org/pdf/31584a.pdf>.

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We appreciate the CFTC's attention to our comments. We support the proposed definition of "market participant" and urge the CFTC to reconsider other significant elements of its proposal on SEFs to avoid disadvantaging buy-side industry participants, including investment advisers to regulated funds. We look forward to assisting the Commission as it determines how to move forward on this proposal.

If you have any questions on our comment letter, please feel free to contact me at (202) 326-5813, Sarah Bessin, Associate General Counsel, at (202) 326-5835, or George Gilbert, Assistant General Counsel, at (202) 326-5810.

Sincerely,

/s/ Susan Olson

Susan Olson  
General Counsel

cc: The Honorable J. Christopher Giancarlo  
The Honorable Brian D. Quintenz  
The Honorable Rostin Behnam  
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