



March 15, 2019

Christopher Kirkpatrick, Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

Re: *Swap Execution Facilities and Trade Execution Requirement*,  
83 Fed. Reg. 61946 (November 30, 2018); RIN 3038-AE25

Dear Mr. Kirkpatrick:

FXSpotStream LLC (“**FSS**”) writes to comment on the proposed rulemaking issued by the Commodity Futures Trading Commission (the “**Commission**” or “**CFTC**”) and entitled “Swap Execution Facilities and Trade Execution Requirements” (the “**Proposal**”).<sup>1</sup>

## I. Introduction

FSS appreciates the Commission’s efforts to promote the goals of the Commodity Exchange Act (the “**Act**”) as they relate to execution of swap transactions. However, FSS is concerned that the Commission’s proposed interpretation of the definition of “Swap Execution Facility” (“**SEF**”) will result in unintended consequences that will harm the swaps market. Specifically, if the Commission adopts the very broad definition of “Single-Dealer Aggregator Platform” outlined in the Proposal, it is likely that the number of technology infrastructure providers required to register as SEFs will increase drastically, leading to either a decrease in providers, increased costs for market participants, or both.

FSS acts as a technology vendor to price makers in the swaps market, providing technology infrastructure that enables such price makers to send pricing information to clients on a bilateral and fully-disclosed basis (for the sake of clarity, such bilateral information is provided by a price maker only to its clients on such a bilateral basis as described in more detail below). Using shared technology infrastructure allows price makers to save on costs (while still functioning solely in such a bilateral manner), thus enabling them to provide better pricing for their clients. FSS is concerned that, absent confirmation from the Commission that providers of technology infrastructure will not be required to register as SEFs, FSS and many similar technology providers would be forced to substantially increase their fees in order to continue doing business or otherwise stop providing services entirely, forcing price makers

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<sup>1</sup> Swap Execution Facilities and Trade Execution Requirement; Proposed Rule, 83 Fed. Reg. 61946 (November 30, 2018).

and their clients to use direct connections and causing market inefficiencies, price increases and lack of liquidity.

## II. FXSpotStream

### A. History and Background of FSS

FSS was formed in 2011 by six of the largest banks involved in the global FX market. These banks, together with one other global bank (the “**Consortium**”), currently hold 95% of FSS’ parent company, which in turn owns 100% of FSS. The original banks formed FSS in order to outsource a portion of their technology infrastructure for bilateral trading of FX-related products, including spot FX transactions and products that the Secretary of the Treasury determined pursuant to Section 1a(47)(E) of the Act should not be regulated as swaps (i.e., FX swaps and FX forwards).<sup>2</sup> Due to client demand, FSS added technology for FX non-deliverable forwards and FX non-deliverable swaps, as well as certain precious-metals products.

FSS provides a means for each member of the Consortium, together with other price makers (collectively, “**Liquidity Providers**”), to provide bilateral pricing for the above-mentioned products (“**Subject Products**”) to each such Liquidity Provider’s individual clients (and no others). Today, FSS has 13 Liquidity Providers, which represent the largest banks in the global FX market: Bank of America Merrill Lynch, BNP Paribas, Citibank, Commerzbank, Credit Suisse, Goldman Sachs, HSBC, J.P. Morgan, Morgan Stanley, MUFG, Standard Chartered, State Street and UBS. FSS operates as a utility rather than a profit-making entity. Its operating costs are divided evenly among the Liquidity Providers and no fees are charged to clients. Accordingly, the services provided by FSS have enabled Liquidity Providers and their clients (who pay nothing to use FSS) to reduce their technology infrastructure costs, allowing for better pricing and more efficient provision of liquidity.

FSS has retained a software technology provider which in turn integrates to each Liquidity Provider so that the Liquidity Providers can transmit their prices. These prices are transmitted directly to such Liquidity Provider’s clients (on a bilateral basis) either through FIX messages or via a user interface. The technical operations of FSS’ service are described more fully below. FSS does not negotiate prices and, significantly, does not aggregate prices among Liquidity Providers. Also, FSS does not act as counterparty to transactions, and does not settle or clear transactions. In the end, FSS (via the software and infrastructure it outsources to a third-party software provider) merely provides a common technology infrastructure for the processes that already take place on Single-Dealer Platforms.

### B. Operations

In creating FSS, the Consortium saw a need for a common technology infrastructure for clients that have individual, bilateral trading relationships with multiple Liquidity Providers. Rather than such a client having to connect via an individual interface to each such Liquidity Provider, a client can connect to FSS using a single interface and receive separate price streams from each such Liquidity Provider with which it has an established client relationship.

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<sup>2</sup> Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69694 (Nov. 20, 2012).

Similarly, rather than creating a separate connection for each of its clients, a Liquidity Provider can provide its prices to FSS, which passes such prices on to those clients with which such Liquidity Provider has an established relationship and has been onboarded to FSS as such. Using a common vendor makes it easier for Liquidity Providers to onboard clients that meet their internal criteria, allowing for increased market liquidity and price competition.

If a client wishes to receive price information using FSS' provided technology, that client must be approved by at least one Liquidity Provider. A client can only see price information from a Liquidity Provider that has confirmed to FSS that such Liquidity Provider has an established relationship with that client. Each Liquidity Provider is responsible for all know-your-customer checks and for confirming that its clients meet any applicable regulatory requirements to be able to trade Subject Products on a bilateral OTC basis. Each Liquidity Provider also has a bilateral agreement with each of its clients governing the terms and settlement of trades between such Liquidity Provider and such client.

#### **i. Provision of Prices Bilaterally from a Liquidity Provider to a Client**

Once a Liquidity Provider has provided FSS with confirmation that a client has a client relationship with that Liquidity Provider, and the client has undertaken any necessary technical steps to connect to FSS' service, such Liquidity Provider is able to send messages to FSS with price information about Subject Products that it has determined such client is eligible to receive. Each message from a given Liquidity Provider contains, among other things, the following information for each given client: the specific Subject Product, the price, the size and a code representing the Liquidity Provider making the price. A client can also request that a Liquidity Provider send a price message, and if the Liquidity Provider chooses to do so, it will contain the same information and operate in the same manner.

FSS transmits each price information message received from a Liquidity Provider to the client identified in the message. FSS cannot make changes to the information in messages sent by a Liquidity Provider or send a price meant for one client to another client. FSS transmits these messages to clients in two ways: through a FIX API or via a web-based interface.

Unlike some vendors, FSS does not combine or average the price information provided by different Liquidity Providers. On FSS, a client only sees individual prices provided by individual Liquidity Providers. FSS can create a size-weighted average price for a Specified Product based on different price and size information offered by a single Liquidity Provider, but does not provide such averages across Liquidity Providers.

To emphasize, FSS' service is completely bilateral – Liquidity Providers can send different prices to different clients based upon variations in those clients' credit profiles, among other things, and clients do not see price information offered to other clients. In addition, Liquidity Providers do not see price information offered by other Liquidity Providers. FSS does not engage in any activity related to setting prices – it merely communicates pricing information from a Liquidity Provider to an identified client of that Liquidity Provider.



## **ii. Transmission of Orders**

If a client wishes to send an order to a Liquidity Provider based on a price sent by a Liquidity Provider using FSS' service, the client sends an order message to FSS for the Liquidity Provider that provided the price or, in the more limited case of a client using FSS' "limit order" functionality, FSS will send the client's order to the Liquidity Provider with which the client is already permissioned and approved to trade based on the given Liquidity Provider that has shown the specific client the best price for the relevant Specified Product. Like all other prices sent to the client, in the case of "limit orders" the Liquidity Provider is specified in the prices shown to the client before the order is sent to that Liquidity Provider.

The technology FSS uses does not allow a client to transmit a message to a Liquidity Provider using a price provided by a different Liquidity Provider, or to otherwise place an order using a price that the Liquidity Provider did not already provide. Nor does FSS negotiate with clients or Liquidity Providers regarding orders.

## **iii. Execution – Off the FSS Service**

After the order message is sent to the relevant Liquidity Provider, that Liquidity Provider may accept or reject it. This acceptance or rejection happens at the Liquidity Provider's discretion, and is done through the Liquidity Provider's systems. FSS does not accept or reject orders; rather all that FSS does is transmit the Liquidity Provider's decision to the specific client that had sent the order message at issue.

A Liquidity Provider and its client execute, settle and clear the actual trade between themselves. At no time does FSS become party to any transaction. In addition, FSS does not submit transactions for clearing or otherwise become involved in the settlement process. Liquidity Providers and their clients settle trades on a bilateral basis without intervention from FSS.

## **III. The Regulatory Framework**

### **A. FSS and similar providers do not provide multiple-to-multiple platforms**

The Commodity Exchange Act defines a SEF as "a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that — (A) facilitates the execution of swaps between persons; and (B) is not a designated contract market."<sup>3</sup> When it first interpreted this definition, the Commission correctly determined that "one-to-many" systems or platforms, where a single price maker was party to all swap contracts, should not be considered a SEF because such platforms do not provide the ability to conduct multiple-to-multiple trading.<sup>4</sup>

The exclusions from the defined term "trading facility" in the Act are instructive. The definition of "trading facility" is very similar to that of a SEF and refers to a "facility or system

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<sup>3</sup> Commodity Exchange Act §1a(50).

<sup>4</sup> Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476 at 33482 (June 4, 2013).

in which multiple participants have the ability to execute or trade agreements, contracts or transactions—(i) by accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or (ii) through the interaction of multiple bids or multiple offers within a system with a pre-determined non-discretionary automated trade matching and execution algorithm.”<sup>5</sup> Platforms are specifically excluded from this definition if they only provide an “electronic facility or system that enables participants to negotiate the terms of and enter into bilateral transactions as a result of communications exchanged by the parties and not from interaction of multiple bids and offers within a predetermined, nondiscretionary automated trade matching and execution algorithm.”<sup>6</sup> Although it is true that the SEF definition states that the term “includes” trading facilities,<sup>7</sup> and thus there could be SEFs that are not trading facilities, FSS believes that the use of the word “including” does not indicate a Congressional intent to cover technology infrastructure which only provides for bilateral, as opposed to multiple-to-multiple, communications.

Throughout the release (the “**Final Rules Release**”)<sup>8</sup> for the final rules adopted in 2013 by the Commission (the “**Final Rules**”) as well as the Proposal, the Commission refers to SEFs as “multiple-to-multiple” venues. For example, in the Proposal, the Commission states as follows: “First, the Commission aims to effectuate the SEF registration requirement to ensure that multiple-to-multiple *trading* of swaps occurs on a SEF by requiring that swaps broking entities and certain single-dealer aggregator platforms register as SEFs.”<sup>9</sup>

However, the definition of “Single-Dealer Aggregator” in the Proposal is not, as proposed to be defined by the Commission, limited to multiple-to-multiple trading platforms. Instead, the Proposal states that “a Single-Dealer Aggregator Platform typically operates a trading system or platform that aggregates multiple Single-Dealer Platforms and, thus, enables multiple dealer participants to provide executable bids and offers, often via two-way quotes, to multiple non-dealer participants on the system or platform. Those non-dealer participants are thus able to view, execute, or trade swaps posted to the Single-Dealer Aggregator Platform’s system or platform from multiple dealer participants.”<sup>10</sup>

FSS enables its Liquidity Providers to provide bids and offers to their clients, and it does have multiple users that are Liquidity Providers and multiple users that are clients. However, as described in detail above, bids and offers are bilateral rather than multilateral, and are one-way rather than two-way. Through FSS’ service, a Liquidity Provider can transmit prices to its own client and receive orders from its own client – but neither Liquidity Providers nor clients can negotiate using FSS’ service or transact on a multilateral basis.

In contrast, there may be other platforms that do combine prices from multiple Single-Dealer Platforms and/or allow participants to trade on a multiple-to-multiple basis. Such a platform would not simply be a transmitter of price information from Single-Dealer Platforms – instead, such a platform would combine and/or aggregate price information.

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<sup>5</sup> Commodity Exchange Act §1(a)(51).

<sup>6</sup> *Id.*

<sup>7</sup> Commodity Exchange Act §1(a)(50).

<sup>8</sup> Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476 (June 4, 2013).

<sup>9</sup> Proposal at 61952.

<sup>10</sup> *Id.* at 61956.

The service provided by FSS is much more akin to a technology aggregation service or an ISV, which the Commission has previously noted are not subject to the SEF registration requirement.<sup>11</sup> For example, the Commission noted in the Final Rules Release that smart order routers (which display the best price for a particular product and then route orders to the market with the best price) or providers of front-end applications (which are used to input orders, monitor quotations and view a record of transactions) are not SEFs.<sup>12</sup>

FSS believes the Commission should distinguish between technology providers such as FSS that make available for a client multiple Liquidity Providers under a common infrastructure and price aggregators that actually combine or aggregate prices and provide multiple-to-multiple venues. Chairman Giancarlo himself articulated that the statutory text of the CEA refers to a multiple-to-multiple participant trading requirement.<sup>13</sup> A service that merely provides for the bilateral transmission of price and order information from multiple Single-Dealer Platforms is not the type of multiple-to-multiple facility contemplated by the SEF registration requirement.

## **B. FSS and similar providers do not engage in execution or trading**

The Commission notes in the Proposal that the activity that would require SEF registration is the provision of a multiple-to-multiple “trading” environment.<sup>14</sup> The Proposal defines “trading” of swaps to mean “the negotiating or arranging of swaps transactions,” and then goes on to state as follows: “Negotiating or arranging consists of facilitating the interaction of bids and offers.”<sup>15</sup>

However, the SEF definition does not refer to a service that merely allows for the negotiation of swaps – it specifically refers to a system or platform on which multiple participants have the ability to “execute or trade swaps.”<sup>16</sup> The exclusions from the definition of “trading facility” are relevant here as well. “Facilities on which bids and offers, and acceptances of bids and offers effected on the facility, are not binding” are specifically excluded from the definition of “trading facility.”<sup>17</sup> Although it is true that the SEF definition is not limited to platforms that constitute trading facilities,<sup>18</sup> FSS believes that the use of the word “including” does not indicate a Congressional intent to cover technology infrastructure which only provides for nonbinding communications.

Merely providing technology for bids and offers to be transmitted on a bilateral basis should not be characterized as providing a platform for “trading” or “execution.” FSS does not argue that the activities that Liquidity Providers and their clients engage in using the services provided by FSS eventually result in trading – only that FSS itself is not the platform on which trading occurs. Instead, FSS provides a means of allowing for bilateral, nonbinding communications that eventually lead to trading.

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<sup>11</sup> Final Rules Release at 33482 (see footnote 93).

<sup>12</sup> Final Rules Release at 33508 (see footnote 423).

<sup>13</sup> Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank (Jan. 29, 2015), at 23.

<sup>14</sup> Proposal at 61957.

<sup>15</sup> Proposal at 61958.

<sup>16</sup> Commodity Exchange Act §1a(50).

<sup>17</sup> Commodity Exchange Act §1a(51).

<sup>18</sup> Commodity Exchange Act §1(a)(50).



Even if the activities undertaken by Liquidity Providers and their clients using FSS' services constitute the "negotiating or arranging of swaps transactions," FSS itself is not negotiating or arranging such transactions – only providing a means of communication that allows its users to do so bilaterally. To say otherwise would subject not only many ISVs, but also every internet connectivity and telephone provider, to SEF registration, as swaps transactions can be arranged or negotiated bilaterally using email, chat, telephone and text. FSS believes that "trading" should be defined to exclude services that merely transmit bids and offers on a bilateral basis without providing negotiation services or matching.

### **C. The Commission should not discourage the use of technology vendors by Single-Dealer Platforms**

Stating that FSS' services do not constitute "trading" is not to say that the services provided by FSS and similar providers are unimportant. On the contrary, the services provided by FSS make it easier for clients to trade with Liquidity Providers without engaging in costly technology buildouts and incurring expensive infrastructure costs, sacrificing screen space, or using other means of communication such as email and phone that are considered outdated in today's electronified markets. Moreover, FSS is able to provide its services in a cost-effective manner, thus helping smaller market participants gain access to liquidity.

Subjecting FSS and other ISVs to the SEF registration requirements would not further the goals of the Dodd-Frank Act. Recognizing that there are some swaps that are not easily susceptible to trading on multiple-to-multiple markets, Congress did not simply require all swaps to be listed on SEFs or DCMs and prohibit the trading of any swap not listed. Instead, Congress understood that some swaps would not be listed for trading on any SEF or DCM, and allowed for direct bilateral communication between price makers and their clients in order to facilitate those trades. However, the Proposal now seeks to limit the means through which price makers and their clients can engage in such communications.

In the Final Rules Release, the Commission articulated its belief that "transparency and trading efficiency would be enhanced as a result of innovations in this field for market services" by ISVs.<sup>19</sup> However, if the interpretation of "Single-Dealer Aggregator" in the Proposed Rules is adopted unchanged, FSS is concerned that many ISVs will either need to register as SEFs, thus increasing costs to market participants, or will cease providing services entirely with respect to products subject to the new SEF rules, leading to market fragmentation and decreased liquidity.

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<sup>19</sup> Final Rules Release at 33508 (see footnote 423).

#### **IV. Timing Elements of the Proposal**

The Commission assumed that only one Single-Dealer Aggregator Platform would be required to register if the Proposal were adopted as-is.<sup>20</sup> However, if the Commission does not exclude technology providers such as FSS from its definition of Single-Dealer Aggregator Platform, FSS is concerned that many more vendors will need to register as SEFs, no longer support the products subject to the new SEF rules or wind-up their businesses entirely. In order to limit the market disruption caused by such a requirement for those that would choose to register, FSS believes the Commission should delay the registration requirement for Single-Dealer Aggregators for six months, in the same way it has provided a six-month delay of registration for swaps broking entities.<sup>21</sup>

#### **V. Conclusion**

FSS appreciates the effort and thought behind the Proposed Rules, and is grateful that the Commission is considering revising its rules to take into account its growing knowledge of swaps market practices. FSS welcomes the progress that has been made but urges the Commission to reconsider its position on Single-Dealer Aggregator Platforms to exempt providers of technology aggregation services as described in this letter.

We would be pleased to discuss our comments further with the Commission. Please feel free to contact Alan Schwarz, Chief Executive Officer of FSS, at (201) 217-8075, or Jenny Cieplak and Mitch Rabinowitz, outside counsel to FSS, at (202) 624-2500.

Sincerely,



Alan F. Schwarz  
Chief Executive Officer

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<sup>20</sup> Proposal at 62046.

<sup>21</sup> Proposal at 61960.