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March 15, 2019

Christopher J. Kirkpatrick
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Dear Mr. Kirkpatrick:

Milbank LLP (“Milbank” or “we”) welcomes the opportunity to provide input to the Commodity Futures Trading Commission (the “Commission”) on its request for comment on the proposed rule relating to Swap Execution Facilities and the Trade Execution Requirement (RIN 3038-AE25) (the “Proposal”). We commend the Commission for proactively identifying areas where existing regulation can be improved and appreciate the thoughtful approach to implementation taken by the Commission and reflected in the Proposal.

In response to question 11 set forth in the Proposal, we respectfully submit this comment letter to address the boundaries between the Commission’s interpretation of the definition¹ of “swap execution facility” (“SEF”) under the Commodities Exchange Act (the “CEA”), as set forth in the Proposal, and the definition of “introducing broker” (“IB”) under the CEA. For the reasons explained herein, we believe that the Commission’s interpretation of the definition of SEF as articulated in the Proposal may cause some firms currently operating as IBs to be concerned that they may be inappropriately characterized as SEFs. We do not believe the Commission intended to interpret the definition of SEF to apply to such firms, so we request that the Commission clarify that it does not intend to treat these advisory-oriented swaps-only brokers as SEFs.

¹ Per section 1a(5) of the CEA, SEF is defined to mean 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.”

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Question 11: Is the Commission's view that swap broking entities, including interdealer brokers, meet the SEF definition appropriate? Please explain why or why not. Is it clear what activity falls within the SEF registration requirement and SEF definition, including the meaning of "trading"? If not, please explain.

ADVISORY AND RELATED SWAPS BROKERAGE SERVICES SHOULD BE EXCLUDED FROM THE COMMISSION'S INTERPRETATION OF SEF

We believe there are a number of firms providing necessary swaps advisory and brokerage services that may face unnecessary uncertainty as to whether they might be required to register as SEFs under the regime set forth in the Proposal. For example, in the project finance realm borrowers often engage advisors to help them structure and negotiate FX and interest rate swaps in order to hedge their exposure to these markets – in fact, it is common for these types of hedges to be required by the project's lenders. In order to seek the best terms for their clients, these advisory firms will initially engage with multiple banks, and then assist in negotiations with the preferred hedge provider(s). At the same time, these advisory firms may also be representing other clients with overlapping needs – i.e. two clients that are seeking to hedge the same FX exposure.

Today, firms providing these types of services fall within the CEA's definition of IB² and are appropriately regulated as such. However, certain aspects of the Proposal, if implemented, would call this characterization into question and, at a minimum, expose these firms to unnecessary regulatory uncertainty. Specifically, the Commission's proposal to bring certain swaps broking entities, including interdealer brokers, within the scope of SEF regulation (as set forth in the Proposal beginning on page 50) does not articulate a clear boundary between swaps broking entities that will be required to register as SEFs and those that will not. In supporting this proposed expansion of the SEF characterization, the Commission also suggests that participants have the ability to "trade" – as used in the statutory SEF definition – when a platform or system "facilitate[s] the negotiation or arrangement of swap transactions through the interaction of bids and offers."³ While it is not clear precisely what universe of activities this expanded language will cover, a plain reading implicates some of the key service functions of the advisory firms described above.

Accordingly, we are concerned that the Commission's explicit intent to regulate inter-broker dealers as SEFs will create uncertainty for swaps-only IBs outside of the market effects contemplated in the Proposal; to this end, in discussing the proposed treatment of inter-dealer brokers, the Proposal suggests that "[w]here an entity operates both a registered SEF and an affiliated swaps broking entity—such as an interdealer broker—that negotiates or arranges trades via a non-SEF trading system or platform and participates on the affiliated SEF as a market participant, the swaps broking entity could also comply with the SEF registration requirement by

² CEA section 1a(31) provides in relevant part that "[t]he term 'introducing broker' means any person (except an individual who elects to be and is registered as an associated person of a futures commission merchant) . . . who . . . is engaged in soliciting or in accepting orders for . . . the purchase or sale of any . . . swap . . ."

³ Proposal at 51.

[Addressee Name]
March 15, 2019

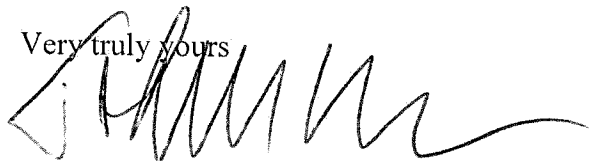
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integrating its non-SEF trading system or platform into its affiliated SEF.” Unfortunately, the Proposal does not address the effects on swaps broking entities such as advisory firms that may be unintentionally pulled within the expanded scope of SEF regulation and who generally are not affiliated with registered SEFs.

Respectfully, we suggest that the Proposal be amended to explicitly delineate the boundary between swaps broking entities that will be required to register as SEFs under the proposed regime and those that will not. We believe that the Proposal should further clarify the universe of activities intended to fall within the newly expanded scope of the interpretation of “trade” in the statutory SEF definition, and should clearly exclude advisory services such as those described above from the proposed scope of SEF regulation. We further suggest that the exclusion for advisory services be considered in the context of the proposed prohibition on pre-trade communications set forth in the Proposal.

While we understand that the Commission may feel that certain swaps broking entities such as inter-broker dealers are more properly characterized as SEFs, capturing advisory swaps-only firms within the SEF registration regime does not serve to advance the Commission’s goal of increasing liquidity and pre-trade price transparency in the swaps market. We therefore do not believe that it was the Commission’s intent to subsume the swaps-only IB regime in its entirety with this Proposal, and we hope the Commission will provide additional clarity on these issues in any further iterations.

Very truly yours

A handwritten signature in black ink, appearing to read 'John Williams', with a long, sweeping horizontal flourish extending to the right.

John Williams
Partner