



September 18, 2023

**Via On-Line Submission**

Mr. Christopher Kirkpatrick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Center  
115521 Street NW  
Washington, DC 20581

**Re: Comments Responding to Commission Advance Notice of Proposed Rulemaking for Risk Management Program Regulations for Swap Dealers, Major Swap Participants, and Futures Commission Merchants**

Dear Mr. Kirkpatrick,

R.J. O'Brien & Associates, LLC ("RJO" or the "Firm") appreciates the opportunity to comment on the above-referenced Advanced Notice of Proposed Rulemaking (the "Notice")<sup>1</sup> issued by the Commodity Futures Trading Commission ("CFTC" or the "Commission") regarding Risk Management Program ("RMP") regulations for Swap Dealers ("SDs"), major swap participants, and Futures Commission Merchants ("FCMs"). SDs and FCMs are currently bound by extensive risk management requirements under a variety of different regulations issued by the Commission, exchanges, SROs, governmental authorities, and other regulators. RJO summarizes these requirements and its views below and supports a principles-based, flexible approach that allows firms to apply the requirements to their specific business model, rather than a "one size fits all" approach.

We reviewed the Notice through our perspective as an independent FCM and as a unique participant within the industry. Below, we respectfully state our principal concerns and comments in the Notice. As an active member of the Futures Industry Association ("FIA"), we are also generally supportive of the well-reasoned and thoughtful comments that are being submitted by the FIA.

**I. Background**

**A. R.J. O'Brien & Associates, LLC**

Chicago-based RJO, which celebrated its Centennial in 2014, is the nation's oldest and

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<sup>1</sup> Risk Management Program Regulations for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 88 Fed. Reg. 45826 (July 18, 2023).

largest independent futures brokerage firm and the last surviving founding member of the Chicago Mercantile Exchange (now CME Group). RJO offers 24-hour execution and clearing on futures exchanges worldwide. RJO, together with its global affiliates, has more than 500 employees, with a presence in Chicago, New York, Denver, Des Moines, Houston, Orlando, Toronto, Montreal, Winnipeg, London, Paris, Dubai, Hong Kong, Singapore, and Beijing.

Clearing more than 80,000 client accounts, RJO provides a full range of services to the industry's largest global network of introducing brokers (IBs) and to commercial, institutional, international, and individual investors. These include more than 300 IBs and many of the world's largest financial, industrial, and agricultural institutions. RJO does not engage in speculative proprietary trading; all its business focuses on valued clients.

RJO is one of the last 'boutique' futures firms in the industry. It is majority-owned by the O'Brien family of Chicago. The O'Brien family was instrumental in the development of the futures industry and remains committed to the continued growth of the company and RJO's leadership within the industry.

As part of RJO's leadership, Gerald F. Corcoran has served as Chief Executive Officer since 2000 and Chairman of the Board since 2007. Mr. Corcoran joined RJO in 1987 as Chief Financial Officer, and he was named Chief Operating Officer in 1992.

Mr. Corcoran is a leading voice in the futures industry and has been an advocate for fair markets and appropriate customer protections. In 2014, he was elected Chairman of the FIA (formerly Futures Industry Association), serving in that position until 2016. Mr. Corcoran is also a member of the FIA's Executive Committee and several other committees. He has been a member of FIA's Board of Directors since March 2008 and has also served as Vice Chairman from 2013 until 2014. Since 2018, Mr. Corcoran has also served on the CFTC's Global Markets Advisory Committee as well as since 2006 serving as a member of the Board of Directors of the National Futures Association ("NFA"), the self-regulatory organization for the futures industry. Following the collapse of MF Global in 2011, Mr. Corcoran testified before the House Committee on Agriculture and advised on ways to strengthen the customer asset protection regime. He also served on the NFA's SRO Committee that implemented several changes strengthening customer protection, including electronic verification of segregated fund deposits by FCMs at depositories. Later in 2012, after the downfall of Peregrine Financial Group, the NFA's Board of Directors appointed Mr. Corcoran to a special committee tasked with overseeing the implementation of recommendations designed to improve the operations of NFA audits.

## **B. The Advanced Notice of Proposed Rulemaking**

The Notice asks for public comment regarding potential regulatory amendments under the Commodity Exchange Act governing the RMPs of SDs and FCMs. The Commission is specifically seeking information and public comment on issues stemming from the adoption of RMPs in areas including: the governance and structure of such programs, the enumerated risks these programs monitor and manage, and the specific risk considerations that are accounted for under the RMPs. The Notice was issued by the CFTC in connection with several concerns, some of which have been amplified due to recent events. The CFTC is looking to provide SDs and FCMs with enhanced clarity regarding risk management rules, and to further define what constitutes compliance. In addition, the CFTC seeks to provide more concise guidance surrounding governance, such as who is defined as senior management within a SDs or FCM. Next, the CFTC has acknowledged the variance between SDs and FCMs risk exposure reports and

has noted inconsistencies in both the substance and delivery of these reports. Lastly, the Notice requests comments from registrants as to whether the risk management program rules need updating to keep pace with technological innovations.

## **II. Risk Management Program Governance**

SDs and FCMs are currently required to develop RMPs and associated policies and procedures. Accompanying these RMPs is the requirement that SDs and FCMs develop a risk management unit.<sup>2</sup> However, these risk management units are required to be independent of the Firm's front office and business unit personnel. In addition, the risk management unit must report to the Firm's senior management, and the policies and procedures must be approved by the Firm's governing body.

### **A. Risk Management Program's Definition of Governing Body and Senior Management**

Under the CEA's RMP definitions, the term "governing body" is defined as: "a board of directors; a body performing a function similar to a board of directors; any committee of a board or body; or the chief executive officer of a registrant, or any such board body, committee, or office of a division of a registrant, provided that the registrant's swap activities for which registration with the Commission is required are wholly contained in a separately identifiable division."<sup>3</sup> Specifically, the Commission seeks comment as to whether the definitions of governing body encompass the variety of business structures and entities used by SDs and FCMs. In addition, the Commission has asked whether it should expand or amend the definition of "governing body". RJO believes the definitions of governing body encompass the variety of business structures and entities used by SDs and FCMs and that no amendment or expansion of the definitions is necessary. RJO believes the definition is sufficient as is and is defined broadly enough to encapsulate a variety of businesses. If the Commission expands or amends the definition, it may risk creating definitions that may apply more directly to certain business models as opposed to others. For example, a bank FCM may be organized within a complex corporate and governance structure, whereas an independent FCM may be organized as a standalone regulated entity. The definition should remain as is in order to be understood and applied with ease to a variety of FCMs and SDs with different business models and corporate governance.

Similar to the above, the Commission asks whether it should consider amending the definition of "senior management." Under the CEA's RMP definitions, the term "senior management" is defined as: "with respect to a registrant, any officer or officers specifically granted the authority and responsibility to fulfill the requirements of senior management by the registrant's governing body."<sup>4</sup> RJO believes this definition also sufficiently encompasses the variety of businesses and corporate governance structures within FCMs and SDs and that no amendment or expansion of the definitions is necessary. RJO believes that expanding the definitions would cause the required roles or functions to be too prescriptive, and potentially favor one business model (i.e., a bank FCM) over another. Requiring specific roles or functions would potentially lead to burdensome corporate governance issues for unique FCMs and SDs, such as independent or boutique FCMs or dually registered FCMs. RJO urges the CFTC to not apply a "one size fits all" approach to this requirement and to allow

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<sup>2</sup> 17 CFR 23.600(b)(5).

<sup>3</sup> 17 CFR 23.600(a)(4).

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

for the definition to remain broad and applicable to a variety of firms within the industry.

## **B. Reporting lines and qualification standards for Risk Management Unit personnel**

The CEA requires FCMs and SDs to establish and maintain a risk management unit (“RMU”) with sufficient authority; qualified personnel; and financial, operational, and other resources to carry out the RMP established pursuant to this regulation. The RMU is required to report directly to senior management and is also required to be independent from the business trading unit.<sup>5</sup> The Commission is requesting comment as to whether the RMP regulations should specifically address or discuss reporting lines within a SD or FCM’s RMU. Similarly, the Commission is also requesting comment as to whether it should propose and adopt standards for qualifications of certain RMU personnel.

RJO believes that the regulations should not specifically address or discuss reporting lines within an RMU. FCMs and SDs should be able to judge for themselves what is appropriate and necessary for their specific business model. The Commission may seek to provide best practices or guidelines, but prescriptive rules may do more harm than good. Reporting lines may vary depending on each firm’s business model, regulatory status, risk profile, governance structure, and other factors specific to different business models. RJO believes the Commission may use benchmarks or standards when evaluating RMU reporting lines, but that FCM and SD should be able to judge for themselves what is appropriate for their RMU and tailor it to meet their business’s risk profile, rather than attempting to navigate a “one size fits all” approach.

With respect to the Commission’s proposal to adopt standards for qualifications of certain RMU personnel, RJO believes that the Commission should not adopt a prescriptive standard for evaluating whether an RMU’s staffing is adequately qualified. An RMU should be tailored to the firm’s business, and the necessary qualifications may vary depending on that business’s size, customer profile, risk profile, jurisdiction, governance structure, and regulatory status. If the Commission wishes to establish standards or benchmarks with respect to evaluating RMU personnel, it should do so by calling out certain areas of subject matter expertise that RMU personnel should be equipped with, rather than requiring specific years of experience or direct experience in specific disciplines (i.e., audit, information technology, accounting, or law). Furthermore, the size of certain FCMs and SDs may lead to varying RMU staffing levels. For instance, a dual registered FCM may have a large RMU, whose staff may have more specialized experience and qualifications. In contrast, a boutique FCM that focuses on agricultural clients and markets may have a smaller RMU, whose staff may touch on multiple areas and responsibilities of risk management.

## **III. Enumerated Risks in the Risk Management Program Regulations**

### **A. Proposal to Amend Regulation 1.11(e)(3)**

The current rules enumerate categories of risks that a RMP must contemplate and address. While the requirements for SDs and FCMs are not identical, there is some overlap with the categories of risk that each address. The categories of risk that SDs must include within their policies and procedures to monitor and manage include market risk, credit risk, liquidity risk, foreign currency risk, legal risk, operational risk, and settlement risk.<sup>6</sup> FCMs are required to include within their policies and procedures to monitor and manage segregation risk, operational risk, and capital risk.<sup>7</sup> These enumerated risks must

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<sup>5</sup> 17 CFR 23.600(b)(5)

<sup>6</sup> 17 CFR 23.600(c)(1).

<sup>7</sup> 17 CFR 1.11(e)(1)(i).

be addressed in both the SD's and FCM's RMPs. However, the difference between the two regulated entities is that SD's policies and procedures are required to consider each category of risk, while the FCM's are only required to address segregation, operational, and capital risks. The CFTC is requesting comment as to whether definitions should be added for each of the existing enumerated risks, and whether those definitions should be the same for both SDs and FCMs. The CFTC is also asking whether FCMs should be required to contemplate every one of the enumerated risks within their policies and procedures, in addition to segregation, operational, and capital risks. Other request for comments from the CFTC includes whether registrants should be required to consider technological risk, whether the CFTC should enumerate other types of risk, and comments regarding technical aspects surrounding the rules regarding SDs contemplating market and credit risk.

With respect to Regulation 1.11(e)(3), the Commission proposes to amend the regulation to require that FCM's RMPs include, but not be limited to, policies and procedures necessary to monitor and manage all of the enumerated risks identified in Regulation 1.11(e)(1) that an SD's RMP is required to take into account, rather than just segregation, operational, and capital risk (i.e., market risk, credit risk, liquidity risk, foreign currency risk, legal risk, settlement risk, and technological risk). And if so, whether the Commission should adopt specific risk management considerations for each enumerated risk, like those described in Regulation 23.600(c)(4)<sup>8</sup>.

FCMs should be required to perform an analysis of additional risks that apply to their specific business and use that analysis as the basis for the RMP, rather than all FCMs being required to monitor and manage the same enumerated risks. Not every FCM is alike, and therefore different factors and risks affect different FCMs. For instance, a bank FCM that primarily provides its services to financial institutions, and primarily solicits orders for financial futures, would need to monitor and manage risks such as foreign currency risk as opposed to liquidity risk. Conversely, an agricultural focused FCM that primarily provides its services to agricultural clients would need to monitor and manage risks such as liquidity risk, credit risk, or settlement risk as opposed to foreign currency risk.

Additionally, the Commission asks registrants whether it should consider adding definitions for any or all the enumerated risks. And if so, whether the enumerated risks should be identical for SDs and FCMs. RJO does not endorse the addition of definitions for the enumerated risks because the definitions may lead to a flat approach that would contemplate and favor the business models of some registrants over others and not adequately capture the risk of others. Also, there is a risk of the definitions being drafted with over-influence from recent events, which could lead to future risks not being adequately addressed. Therefore, the Commission should consider not adding definitions, but rather allowing registrants to interpret them in the context of their business's risk. Registrants should analyze the risks themselves and interpret them against their business model, rather than be held to a singular standard that may not apply to their business.

## **B. Technology, Cybersecurity, and other Enumerated Risks**

The Commission specifically asks registrants for comments regarding technological risk, which is identified in Regulation 1.11(e)(1)(i)<sup>9</sup> as a type of risk that an FCM's RMP must account for within its RMP. The Commission also asks whether cybersecurity risk should be a standalone category of risk, whether it should define technological risk, whether it should mirror another regulatory authority's definition of technological risk, whether SDs and FCMs should have separate definitions, and finally, whether the Commission should consider providing examples of "information technology assets" to incorporate risks that may arise from the use of certain emerging technologies.

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<sup>8</sup> 17 CFR 23.600(c)(4).

<sup>9</sup> 17 CFR 1.11(e)(1)(i).

Technology has been at the forefront of the futures and derivatives industry for decades. In 1987, CME pioneered electronic futures trading with the development of the CME Globex platform. The industry hasn't looked back since, as technological developments have continued to foster innovation and create new efficiencies for market participants and regulatory authorities. However, these developments have not been without issues or new risks. In February 2023, ION Markets, a widely used vendor within the industry, suffered a cybersecurity breach due to a ransomware attack. Events like these have become increasingly common, further highlighting the need to manage and mitigate technology-related risks. RJO strongly believes that cybersecurity risk should be a standalone risk that must be managed and mitigated separately. Technology and cybersecurity are at the core of registrants' businesses, from collecting personal and private client information electronically for onboarding, to abiding by recordkeeping requirements. If cybersecurity risk was interwoven within other areas of risk, it would be difficult to effectively manage. The Commission should also seek to implement the NIST Cybersecurity Framework ("NIST CSF") as a part of its standard for managing and mitigating this area of risk. The NIST CSF is widely accepted throughout many different industries and would set a universal standard and best practices for registrants to follow.

The Office of the Superintendent of Financial Institutions ("OSFI") definition of technology risk<sup>10</sup> referenced by the Commission in its Notice could provide an adequate definition for registrants to interpret, as it is broad enough to capture both established technological risks and those connected to emerging developments, such as digital assets, ransomware, or artificial intelligence ("AI"). However, RJO believes that definitions for any risk should be drafted in a way in which they stand the test of time. Meaning, they should not be drafted in a way that is too tailored to recent technological developments or issues. RJO also believes that the Commission should not differentiate between FCMs and SDs as it relates to providing definitions for technological risk, as this would lead to unnecessary burdens for dually registered registrants.

The Commission also proposes whether other areas of risk should be enumerated, such as geopolitical risk, ESG risk, climate-related financial risk, reputational risk, funding risk, collateral risk, and others. RJO believes that, aside from cybersecurity risk, no further risks should be enumerated. Several of the proposed enumerated risks are already monitored and derive from other presently enumerated risks. For example, climate risk may be monitored as a part of market risk. Environmental risk may be considered a large part of the monitoring of commodity risk. Reputation risk could stem from any of the enumerated risks depending on the circumstances. In addition, as mentioned throughout this response, the business models of FCMs and SDs vary greatly, and the proposed enumerated risks may not be as relevant for some registrants as others. For example, climate risk may be more necessary to monitor for by an agriculturally focused FCM, while it may not be as relevant for a bank FCM.

#### **IV. Periodic Risk Exposure Reporting by Swap Dealers and Futures Commissions Merchants**

##### **A. Frequency of Risk Exposure Reports and Other Potential Changes**

RJO, and other registrants, are required to submit Risk Exposure Reports ("RERs") to the CFTC periodically<sup>11</sup>. RERs play a vital role in helping registrants understand, quantify, and manage their exposure to various risks. They serve as a foundation for prudent risk management practices, regulatory compliance, and maintaining financial stability. Additionally, they provide a basis for transparency and communication with stakeholders and regulators. The Commission seeks comments from registrants regarding RERs. Specifically, whether the Commission should change the frequency with which SDs and

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<sup>10</sup> See OSFI Guideline B-13, Technology and Cyber Risk Management (July 2022), available at <https://www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/b13.aspx>. The final Guideline B-13 will be effective as of January 1, 2024.

<sup>11</sup> 17 CFR 23.600(c)(2).

FCMs furnish copies of their RERs to the Commission, whether the Commission should consider allowing registrants to furnish to the Commission internal risk reporting maintained by individual firms, whether the Commission should prescribe certain minimum content and formatting requirements with internal risk reporting, and whether the Commission should consider prescribing the standard FCMs use when determining what is a material event.

RJO supports the Commission maintaining the current RER regime. If the Commission seeks to increase the frequency with which RERs are filed, it should do so in a way that it is not required for a registrant to present the RER to its governing body prior to filing with the Commission. RJO would support the Commission requiring more frequent RER filings after the occurrence of certain material events but does not think that RERs otherwise should be filed more frequently than at present. RJO does not support the CFTC amending the rules to require filing by a certain day.

RJO also does not support harmonizing or aligning RER content requirements with those of the National Futures Association (“NFA”)’s SD monthly risk data filings. This change would require the filings to be revised to align with an FCM’s business, which would introduce unnecessary burdens and costs for both registrants and regulators. As mentioned above, RJO recommends the adoption of a materiality threshold to the requirement that RERs include information related to changes to the RMP, the recommended time frame for implementing recommended changes, and the status of any incomplete implementation of previously recommended changes to the RMP.

FCMs should be able to design their RMP and RERs to be calibrated to their definition of risk. A prescriptive, universal requirement is not as useful for the industry with the range and variety of FCMs and SDs.

## **V. Potential Risks Posed by Affiliates, Lines of Business, and All Other Trading Activity**

### **A. Management of Affiliate Risk**

FCMs and SDs are, depending on each organization’s corporate structure and profile, sometimes subject to risks and challenges posed by transactions and relationships involving affiliated entities within a larger corporate enterprise. This may include risks associated with subsidiaries, foreign affiliates, or other related entities. Managing affiliate risk is essential for regulatory compliance and risk management. The Commission is soliciting comments from registrants generally on the requirements related to risks posed by affiliates and related trading activity found within the RMP regulations. This includes non-bank affiliated SDs and FCMs.

RJO’s stance on this area is that the risks posed by affiliates and related trading activity are adequately addressed by current regulations. FCMs and SDs are currently subject to robust risk management rules and regulations, which are promulgated by the CFTC, government agencies, exchanges, SROs, and other regulatory authorities. For example, in the preamble of the final rule implementing Rule 1.11, the Commission expressly recognizes that the parent company “is in the best position to evaluate the risks that an affiliate of an FCM may pose to the enterprise.”<sup>12</sup> Staff Advisory Notice 16-24 provides FCMs with guidance surrounding RMP regulatory requirements and best practices with implementing an RMP<sup>13</sup>. CFTC Rule 1.73 provides requirements for an FCM’s risk management<sup>14</sup>. JAC Alert 22-02 reminds FCMs that it must take into account risks posed by affiliates, all lines of business of the FCM and all other trading activity engaged in by the FCM<sup>15</sup>. CFTC Rule 1.12 requires

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<sup>12</sup> 78 Fed. Reg. at 68519.

<sup>13</sup> Division of Swap Dealer and Intermediary Oversight, Staff Advisory No. 16-24, re: Risk Management Programs (Mar. 2, 2016).

<sup>14</sup> CFTC Rule 1.73.

<sup>15</sup> Joint Audit Committee Regulatory Alert #22-02.

FCMs to provide notice of a substantial reduction of capital, including equity capital of an affiliate<sup>16</sup>.

Affiliate risk is not a material risk for RJO, and it should not be a required risk. RJO is constantly in touch with its global affiliates and has open lines of communication with what is going on with its affiliates. As mentioned in Rule 1.11, RJO and other firms are in the best position to evaluate the risks that an affiliate may pose to its enterprise. In addition, the current rules and regulations under the CFTC's jurisdiction provide a well-balanced framework that promotes transparency, mitigation of conflicts of interest, adequate capitalization, and proactive risk management practices as it relates to affiliate risk.

**VI. Conclusion**

If the Commission or any member of staff have any questions or inquiries regarding the matters discussed herein, please contact Melissa Zierk, Managing Director, General Counsel at [Mzierk@rjobrien.com](mailto:Mzierk@rjobrien.com). RJO thanks the Commission for the opportunity to provide comment and feedback on the proposals discussed in the Notice.

Respectfully submitted,



Melissa Zierk

Managing Director, General Counsel

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<sup>16</sup> CFTC Rule 1.12.