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*Deputy General Counsel,  
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September 18, 2023

Mr. Christopher J. Kirkpatrick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

**Re: Risk Management Program Regulations for Swap Dealers, Major Swap Participants, and Futures Commission Merchants (RIN 3038-AE59)**

Dear Mr. Kirkpatrick:

PNC Bank, National Association (“PNC”) appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the “CFTC” or “Commission”) on the advance notice of proposed rulemaking regarding potential regulatory amendments under the Commodity Exchange Act (the “CEA”) governing the risk management programs of swap dealers, major swap participants, and futures commission merchants.<sup>1</sup> PNC is registered with the Commission as a swap dealer and is a member of the National Futures Association (“NFA”). PNC’s swap business is a small part of its overall business and is limited to swap dealing in support of its customers’ banking activities. PNC also enters into swaps for asset-liability management.

PNC supports the Commission’s efforts to seek further feedback on its swap dealer risk management program regulations codified in Rule 23.600 for swap dealers and major swap participants (the “RMP Regulation”).<sup>2</sup> At the outset, we note that many of the issues and questions raised by the Proposal flow from the fact that the same, “one-size-fits-all” rule is meant to address all swap dealers, despite great diversity in swap dealer business models and the extent of overlap with supervision by other regulators. Rather than exacerbating these issues by adopting additional or more prescriptive requirements or guidance that apply to all swap dealers, the Commission should, as it has in other areas, tailor its risk management program regulations to take into account differences in business models and supervision by other regulators. Further

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<sup>1</sup> Risk Management Program Regulations for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 88 Fed. Reg. 45,826 (July 18, 2023) (the “Proposal”), available at <https://www.federalregister.gov/documents/2023/07/18/2023-15056/risk-management-program-regulations-for-swap-dealers-major-swap-participants-and-futures-commission>.

<sup>2</sup> 17 C.F.R. § 23.600.

tailoring to certain aspects of the RMP Regulation would permit registered swap dealers to better align their risk management programs for more thoughtful oversight across such programs.

### I. The RMP Regulation Should Be Tailored to Address the Diverse Swap Dealer Industry

The swap dealer market contains a particularly broad amount of diversity in business models, and a number of different types of entities are registered as swap dealers. For example, there are swap dealers that are large, global systemically important banks, and swap dealers that are smaller “Main Street” banks that focus primarily on traditional banking products to commercial and retail customers. There are swap dealers that are not banks, such as those that are stand-alone, nonbank subsidiaries of bank holding companies, or those that are commercial, commodities-focused firms. There are also broker-dealers and futures commission merchants that are registered as swap dealers. Each of these entities is a dealer in swaps, but has a distinct mode of business and operations, driven by different customer bases, product mixes, range of non-swap dealing businesses and oversight by other regulators.

The Commission has considered and accounted for differences among regulated swap dealers in developing other aspects of the regulatory apparatus. The Commission’s capital rules take into account these differences and include “alternative capital frameworks” to meet the Commission’s requirements, with different approaches leveraging Federal Reserve and Securities and Exchange Commission (“SEC”) capital rules and another tailored for physical commodities firms, which were designed with the understanding that swap dealers may be subject to different types of regulatory oversight and have different business models.<sup>3</sup> Capital in particular is integrally related to risk management, and, as a result, it is incongruous for the Commission’s RMP Regulation not to make similar distinctions among swap dealers. There are a number of governance matters where additional tailoring is necessary to ensure that swap dealers can appropriately align their risk management programs with capital requirements. For example, currently, a bank whose swap dealing business is a small part of its overall business mix and also engages in swaps to hedge its lending and other non-dealing businesses either must have senior personnel who are distant from the swap dealing business responsible for swap dealer governance or must have personnel who manage the swap dealing business exercise oversight over non-dealing swap activities (for example, asset-liability management), even though such activities are not otherwise within scope of their ordinary authority or expertise.<sup>4</sup>

In addition, the RMP Regulation overlaps, and sometimes conflicts, with other regulations, particularly where risk is managed on an integrated basis across swap versus non-

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<sup>3</sup> Capital Requirements of Swap Dealers and Major Swap Participants, 85 Fed. Reg. 57,462, 57,467, 57,480 (Sept. 15, 2020), *available at* <https://www.federalregister.gov/documents/2020/09/15/2020-16492/capital-requirements-of-swap-dealers-and-major-swap-participants>.

<sup>4</sup> In this letter, “non-dealing” activities refers to those swap activities that would not count towards the swap dealer *de minimis* threshold. In particular, non-dealing activities would encompass activities that are not “proprietary” under the Volcker Rule because they would not fall within the definition of “proprietary trading” under Section 13 of the Banking Holding Company Act. *See* 12 U.S.C. § 1851(h)(4) and 12 C.F.R. § 255.3. However, non-dealing activities do not include hedging of client-facing market-making or other dealing activities.

swap activities and supervised by a prudential regulator, such as in the case of credit risk. There has been concern about these conflicts since the Commission originally proposed the RMP Regulation, including from the prudential regulators.<sup>5</sup> For example, the Acting Comptroller of the Currency noted in a 2011 letter to the Commission providing comments from the Office of the Comptroller of the Currency staff on certain CFTC proposed rules that the RMP Regulation, if adopted, “would impose risk management requirements for bank operations that are already subject to comprehensive prudential supervision, including areas of operation that are wholly unrelated to swaps, and create uncertainty and opportunities for regulatory conflict and control failures.”<sup>6</sup> The Commission has never adequately addressed these concerns. PNC continues to believe that further tailoring could address this issue.

## II. Recommendations to Tailor the RMP Regulation

There are a number of ways that the RMP Regulation could be tailored to appropriately align the Commission’s risk management requirements with other areas of swap dealer regulation, including the capital rules. This letter addresses tailoring recommendations with respect to key items that would enhance governance of swap dealers and align with existing CFTC capital regulations that are closely connected to risk management, while causing minimal disruption to the existing RMP Regulation. In addition, further tailoring could assist the Commission and NFA in managing supervisory resources by enabling both to leverage prudential oversight of the banks’ non-swap dealing businesses.

### *De Minimis Exceptions for Prudentially-Regulated Swap Dealers*

The Commission should adopt an exception from the RMP Regulation, other than the periodic risk exposure reporting requirements in Rule 23.600(c)(2),<sup>7</sup> for a swap dealer (i) that has a prudential regulator and (ii) whose (a) swap dealing business is both a *de minimis* portion of its annual revenues and (b) notional amount of swaps outstanding is not significant to the market as a whole. Such an exception would be subject to set thresholds for determining the *de minimis* activities of a swap dealer to satisfy the criteria in (ii), such as less than 5% of annual revenues and less than 0.5% of the notional amount of swaps outstanding across all registered swap dealers.

A risk management-focused exception for swap dealers subject to prudential regulation would be consistent with the fact that the CFTC does not regulate capital or margin for these swap dealers, and the CFTC should not be a primary regulator of risk management, which is closely tied to capital and margin. This type of risk management-focused exception would present no material risks given the role of the prudential regulator in exercising comprehensive safety and soundness oversight over such entities and the similarities between the

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<sup>5</sup> Letter from John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency, to Gary Gensler, Chair, CFTC (June 30, 2011).

<sup>6</sup> *See id.* The letter addresses the broad scope of “business activities” of banks that are subject to the RMP Regulation although they are already closely supervised by the prudential regulators, and the risk that the conflict and uncertainty created by this overlap could reduce or hinder effective risk management.

<sup>7</sup> 17 C.F.R. § 23.600(c)(2).

Commission’s RMP Regulation and federal banking regulators’ guidance and supervision.<sup>8</sup> In addition, the exception would be further limited to only prudentially-regulated swap dealers with *de minimis* swap activity. Although there may be some benefit to layering swap dealer-specific RMP Regulation on top of prudential oversight for a bank whose swap activities are material to the bank or market as a whole, that justification does not extend to situations where swap activities lack such materiality.

In the past, the Commission has considered but rejected a substituted compliance regime for risk management regulation by a prudential regulator because the CEA does not grant the prudential regulators exclusive authority to prescribe risk management rules, which it does for capital and margin requirements.<sup>9</sup> However, the CEA only requires a swap dealer “establish robust and professional risk management systems adequate for managing the day-to-day business of the swap dealer”<sup>10</sup>; it does not require the prescriptive requirements set forth in the RMP Regulation. A swap dealer compliant with risk management oversight by a prudential regulator would, by virtue of such oversight, have robust and professional risk management systems adequate for managing its day-to-day business and thus satisfy the CEA’s statutory risk management requirement.

In this regard, we note that security-based swap dealers are subject to a substantially similar risk management requirement under the Securities Exchange Act of 1934 (“Exchange Act”),<sup>11</sup> but the SEC took a different approach and did not adopt similar prescriptive risk management rules for all security-based swap dealers. Instead, the SEC adopted a baseline requirement that all security-based swap dealers establish, maintain and enforce procedures reasonably designed to comply with the Exchange Act’s statutory risk management requirement.<sup>12</sup> The SEC then established additional risk management requirements *only* for nonbank security-based swap dealers.<sup>13</sup> This approach recognizes that certain security-based

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<sup>8</sup> In the adopting release of the RMP Regulation, the Commission stated that many of its regulations were modeled on the prudential regulations and guidance, such as the new product policy in Rule 23.600(c)(3). *See* Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20,128, 20,129, 20,138 (Apr. 3, 2012), *available at* <https://www.federalregister.gov/documents/2012/04/03/2012-5317/swap-dealer-and-major-swap-participant-recordkeeping-reporting-and-duties-rules-futures-commission> [*hereinafter* CFTC Risk Management Release].

<sup>9</sup> CFTC Risk Management Release at 20,129.

<sup>10</sup> CEA Section 4s; 7 U.S.C. § 6s(j)(2).

<sup>11</sup> Section 15F of the Exchange Act requires a security-based swap dealer to “establish robust and professional risk management systems adequate for managing the day-to-day business of the security-based swap dealer or major security-based swap participant.” 15 U.S.C. § 78o–10(j)(2).

<sup>12</sup> *See* 17 C.F.R. § 240.15Fh-3(h)(2)(iii)(I).

<sup>13</sup> Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, 84 Fed. Reg. 43,872, 43,905–7 (Aug. 22, 2019), *available at* <https://www.federalregister.gov/documents/2019/08/22/2019-13609/capital-margin-and-segregation->

swap dealers may be compliant with the Exchange Act requirements based on other regulatory risk management requirements (such as prudential regulation).

This exception would be consistent with other areas of swap dealer regulation where the Commission has extended deference to other regulatory bodies. In particular, the Commission has made substituted compliance determinations for non-U.S. swap dealers in connection with risk management.<sup>14</sup> Substituted compliance is not addressed in the CEA; instead, the Commission has authority to determine that certain regulations are comparable to the CFTC’s regulations and that comity with such regulations is appropriate.<sup>15</sup> It seems odd that the Commission would extend comity/deference to foreign regulators but not extend the same to domestic regulators, such as the prudential regulators. Similarly, the SEC has extended deference to the CFTC with respect to dually registered swap dealers/security-based swap dealers. The proposed exception would be consistent with the SEC’s decision in relation to dually registered swap dealers/security-based swap dealers to defer to the Commission’s rules for swap dealers/security-based swap dealers whose security-based swap business is small relative to their overall business and the security-based swap market.<sup>16</sup>

### *Governance Structure*

The Commission also requested comment on the governance structure in the RMP Regulation, and in particular, the definitions of “governing body” and “senior management” as defined in Rule 23.600.<sup>17</sup> We commend the Commission for seeking comment on whether the definition of “governing body” in the RMP Regulation encompasses the variety of business structures and entities used by swap dealers, and whether there are other regulatory regimes the Commission should consider in its holistic review of the RMP Regulation.<sup>18</sup> We strongly support the suggestion raised in the Proposal to consider harmonizing the RMP Regulation with the risk management regimes of the prudential regulators.

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requirements-for-security-based-swap-dealers-and-major-security-based [hereinafter SEC SBSB Requirements].

<sup>14</sup> For example, the Commission has provided affirmative comparability determinations to the European Union, Canada, Switzerland, Japan, Hong Kong and Australia for certain entity-level requirements including risk management obligations, and the Commission has provided affirmative comparability determinations to the European Union, Japan and Australia for swap dealer margin requirements. See CFTC, “Comparability Determinations for Substituted Compliance Purposes,” available at <https://www.cftc.gov/LawRegulation/DoddFrankAct/CDSCP/index.htm>.

<sup>15</sup> See, e.g., Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013), available at <https://www.federalregister.gov/documents/2013/07/26/2013-17958/interpretive-guidance-and-policy-statement-regarding-compliance-with-certain-swap-regulations>.

<sup>16</sup> SEC SBSB Requirements at 43,943–46.

<sup>17</sup> 17 C.F.R. § 23.600(a)(4) and (6).

<sup>18</sup> Proposal at 45,628–29.

In furtherance of that suggestion, the Commission should permit a swap dealer that has a prudential regulator to exclude its non-dealing swap activities from the RMP Regulation (including governance requirements) where those non-dealing activities (i) take place exclusively opposite registered swap dealers or derivatives clearing organizations; (ii) are conducted by a different business or organizational unit from where swap dealing activities take place; and (iii) are designed solely for balance sheet risk management purposes, including interest rate risk management. These non-dealing swap activities should not need to fall within the firm's swap dealer risk management program because these activities are subject to prudential regulator oversight, pose less systemic risk and counterparty risk because they take place opposite Commission registrants, and would be managed by a different business or organizational unit engaged in balance sheet risk management.

Under this approach, the Commission should specifically permit a swap dealer that is subject to prudential regulation to designate the head of the swap dealing or capital markets business as "senior management" and the risk committee responsible for the swap dealing or capital markets business as the "governing body" in compliance with the RMP Regulation without requiring those individuals to exercise oversight of non-swap dealing businesses such as asset-liability management activities. This would permit such swap dealers to strengthen the governance of their swap dealer business by utilizing persons for risk management oversight that are best positioned for such roles and providing consistency with the oversight functions established for compliance with related prudential regulations.

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Thank you for the opportunity to comment on the Proposal. We would be pleased to discuss our comments with representatives of the Commission at their convenience. In addition, if there are any questions regarding this letter, please do not hesitate to contact the undersigned at [ursula.pfeil@pnc.com](mailto:ursula.pfeil@pnc.com) or (202) 835-4515.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ursula C. Pfeil", with a stylized flourish at the end.

Ursula C. Pfeil