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Ursula C. Pfeil
*Deputy General Counsel,
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April 1, 2024

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

Re: Operational Resilience Framework for Futures Commission Merchants,
Swap Dealers, and Major Swap Participants (RIN 3038–AF23)

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 its notice of proposed rulemaking to require that futures commission merchants, swap dealers, and major swap participants establish, document, implement, and maintain an Operational Resilience Framework (“ORF”).¹ 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 goal of promoting operational resilience, including to address the risk of potential technological failures and cyberattacks. We are particularly supportive of the Commission’s efforts to take a principles-based approach that accounts for the requirements and standards set by other regulators.² We also acknowledge the Commission’s proposal (proposed “Paragraph (c)(4)”) to permit a swap dealer, such as PNC, that is part of a larger entity or holding company structure to satisfy certain aspects of its CFTC ORF obligations through participation in a consolidated program or plan, under certain conditions.

Although these are steps in the right direction, the Commission should take additional steps to tailor its ORF requirements to account for the great diversity in swap dealer

¹ Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants, 89 Fed. Reg. 4,706 (Jan. 24, 2024) (the “Proposal”), available at <https://www.cftc.gov/sites/default/files/2024/01/2023-28745a.pdf>.

² Proposal, 89 Fed. Reg. at 4,710-11.

business models and the extent of overlap with supervision by other regulators. In particular, consistent with our recent comments on the Commission’s advance notice of proposed rulemaking concerning its risk management program (“RMP”) regulations,³ the Commission should adopt an exception for prudentially-regulated swap dealers engaged in limited swap dealing activities.

I. Background on PNC’s Operational Risk Management Framework

As a prudentially regulated bank, PNC is already subject to extensive regulation in the operational resilience area by its prudential regulators and NFA, and we take our obligations to our regulators and customers in this area seriously. We have adopted an Operational Risk Management Framework, which addresses key risk domains such as technology and systems, information security, business continuity, and third-party service providers. Our parent company’s board of directors has also established a standing Technology Committee, which fulfills responsibilities with respect to technology risk, technology risk management, cybersecurity, information security, business continuity, and significant technology initiatives and programs.

II. The Proposal, including Paragraph (c)(4), Does Not Permit Adequate Reliance on Consolidated ORF Programs or Plans

In light of the pre-existing operational resilience measures described above, it is likely that PNC would rely on Paragraph (c)(4) to satisfy its CFTC ORF obligations through participation in its consolidated Operational Risk Management Framework. Under the Proposal, in order for PNC to rely on Paragraph (c)(4), that consolidated Framework would need to meet all of the requirements of the Commission’s new ORF rule. In addition, PNC’s senior officer, oversight body, or senior-level official would need to attest annually that the consolidated Framework meets all of those requirements and reflects a risk appetite and risk tolerance limits appropriate to PNC’s swap dealer.⁴

The Commission proposed Paragraph (c)(4) in recognition of “the benefits of such a consolidated approach,” which allows a firm to “address the risks holistically and to achieve economies of scale,” and to avoid “interfer[ing] with covered entities’ operational structures.”⁵ We respectfully submit, however, that the conditions and limitations to reliance on Paragraph (c)(4) would undermine achievement of these objectives, for several reasons:

- Paragraph (c)(4) would not extend to several aspects of the overall Proposal, including requirements for training, reviews and testing, incident notifications to the Commission, and incident notifications to affected

³ See Letter from Ursula C. Pfeil, dated Sept. 18, 2023 ([link](#)), in response to Risk Management Program Regulations for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 88 Fed. Reg. 45,826 (July 18, 2023) (the “RMP ANPR”).

⁴ See Proposal, 89 Fed. Reg. at 4,715-16.

⁵ *Id.* at 4,715.

counterparties. In particular, the need for ORF testing to conform directly to CFTC requirements is likely to pose significant issues, given the extent to which banks' testing programs are administered at the overall bank level and conform to prudential regulators' standards and guidance.

- Even with respect to those aspects of the Proposal covered by Paragraph (c)(4), the condition requiring the consolidated program or plan to meet all of the requirements of the Proposal would potentially force swap dealers to modify their consolidated programs to meet the Commission's requirements, thus interfering with those programs and firms' operational structures. Although the extent of such modifications might be modest at first, in light of the Commission's intent to take a principles-based approach, over time the likelihood of further interpretations by the Commission and NFA, coupled with evolution of the prudential regulators' views and expectations, presents a serious risk of regulatory conflict.
- The condition requiring the swap dealer's risk appetite and risk tolerance limits to be appropriate to the swap dealer, as opposed to the overall entity, could lead to inappropriately siloed approaches to risk management in areas where risk is managed on an integrated basis across swap versus non-swap activities and supervised by a prudential regulator, which is frequently the case in the information security and third-party risk management areas.
- It is not clear how a swap dealer's reliance on Paragraph (c)(4) would carry over to examination and supervision by the Commission and NFA. To the extent the Commission and NFA still intend to examine and supervise for compliance with all aspects of the Proposal, but to do so by examining and supervising the consolidated level ORF program or plan, then there would be even greater potential for regulatory conflict and overlap than if a swap dealer did not participate in the consolidated level ORF program or plan in the first place.

III. Recommendation to Tailor ORF Requirements

In order to address the issues described above, the Commission should adopt an exception from the ORF rule, other than the incident notification requirements in Rule 23.603(i) and (j) and emergency contact requirements of Rule 23.603(k), 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 revenue 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 revenue and less than 0.5% of the notional amount of swaps outstanding across all registered swap dealers.

This exception would be consistent with the one we proposed in our comments on the RMP ANPR. It would be appropriate for all of the reasons we recited in those comments, including consistency with: (i) the fact that the Commission does not regulate capital or margin for prudentially-regulated swap dealers, (ii) the statutory requirement for “robust and professional risk management systems,”⁶ which would be satisfied by ORFs adopted by prudentially-regulated swap dealers in accordance with those other regulators’ standards and guidance; (iii) the approach taken by the SEC in connection with risk management by security-based swap dealers, which merely requires policies and procedures reasonably designed to comply with this high-level statutory requirement;⁷ and (iv) the Commission’s decision to permit foreign swap dealers to rely on substituted compliance in connection with ORF requirements.⁸

In formulating the qualifications for this exception, we have kept in mind the Commission’s “strong regulatory interest in ensuring that operational shocks, such as cyber incidents or technological failures, having an impact on the discrete interests and operations of the covered entity are appropriately considered through the unique lens of the covered entity, which is regulated by the Commission.”⁹ In light of this interest, this exception would be limited in several respects. First, it would only apply to swap dealers, not futures commission merchants, given that the latter present several unique regulatory considerations for the Commission, including safekeeping of customer funds, which were a primary rationale for the Proposal.¹⁰ Second, it would only apply if the swap dealer entity itself is prudentially-regulated; nonbank swap dealer subsidiaries of bank holding companies would not be eligible. Finally, and perhaps most significantly, the exception would be limited to only prudentially-regulated swap dealers with *de minimis* swap activity. As we noted in our prior comments, while there may be some benefit to layering swap dealer-specific ORF requirements 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.

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⁶ CEA Section 4s; 7 U.S.C. § 6s(j)(2).

⁷ See 17 C.F.R. § 240.15Fh-3(h)(2)(iii)(I).

⁸ Proposal, 89 Fed. Reg. at 4,734.

⁹ *Id.* at 4,716.

¹⁰ See *id.* at 4,709.

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 or (202) 835-4515.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ursula C. Pfeil".

Ursula C. Pfeil