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Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street NW
Washington, DC 20581

Submitted via CFTC Comment Portal

**Re: Requirements for Designated Contract Markets and Swap Execution Facilities
Regarding Governance and the Mitigation of Conflicts of Interest Impacting
Market Regulation Functions
RIN number 3038-AF29, 89 FR 19646**

Dear Mr. Kirkpatrick:

Bloomberg SEF LLC¹ appreciates the opportunity to provide the Commodity Futures Trading Commission (the “Commission”) with our comments regarding the Commission’s proposal to amend and establish new governance and fitness requirements as well as related conflict of interest standards (the “Proposal”).²

We appreciate the Commission’s effort to update and enhance the Commission’s rules in this space to ensure that they are appropriately tailored for swap execution facilities (“SEFs”) and designated contract markets (“DCMs”) to allow them to adequately discharge their market regulation functions and effectively manage and mitigate conflicts of interest. While we are generally supportive of the Commission’s Proposal, we provide comments below regarding the proposed nominating committee requirements.³

Overview

Under the current regulatory framework, neither SEFs nor DCMs are required to have a nominating committee to identify or manage the process for nominating potential members to the

¹ Bloomberg SEF LLC is a wholly owned subsidiary of Bloomberg L.P. operating a swap execution facility (“BSEF”) that is registered with, and regulated, by the CFTC. BSEF provides its participants with access to liquidity across credit, interest rate and foreign exchange swaps.

² Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interests Impacting Market Regulation Functions, CFTC, 89 Fed. Reg. 19646 (March 19, 2024), available at <https://www.cftc.gov/sites/default/files/2024/03/2024-04938a.pdf>.

³ Proposed Rule §37.1205.

board of directors.⁴ Although a formal nominating committee has not been a requirement under the Commission's rules to date, SEFs and DCMs have adequately discharged their governance responsibilities through the existing framework for over a decade with great success.

Summary of the Proposal's Nominating Committee Requirements

Under the Proposal, a SEF would be required to form a board-level nominating committee. The nominating committee would be required to be comprised of at least 51% public directors and must be chaired by a public director.⁵

The nominating committee's responsibilities would be twofold: (1) to identify a diverse pool of individuals qualified to serve on the board of directors, and (2) administer a process for the nomination of individuals to the board of directors.⁶ The nominating committee would be charged with taking the first steps in identifying the pool of future members of the board of directors.

Comments on the Nominating Committee Requirements

In justifying the proposed nominating committee requirements, the Commission notes that "many SEFs and DCMs do not currently have formal policies or procedures for identifying potential members of the board of directors," and instead rely "on the personal networks of members of their boards of directors or executives."⁷ The Commission observes that a "lack of policies or procedures" in this process "may result in delays in the appointment process."⁸ In addition, the Commission believes that an independent perspective on the SEF or DCM board of directors is necessary to mitigate conflicts of interest.⁹

Bloomberg supports the Commission's efforts to address and mitigate conflicts of interest. We believe that a SEF or a DCM board should have a process for identifying potential new members of the board of directors. We also believe that formal procedures would help to address the Commission's central concerns – that a lack of policies or procedures may result in delays in the appointment process and would help to identify candidates with independent perspectives.

However, we also believe the rules in this space must be appropriately designed and applied. The Proposal's imposition of certain prescriptive governance requirements, such as the requirement to maintain a board-level nomination committee comprised of at least 51% public directors, may not be appropriate for certain SEFs. In particular, SEFs that are either closely-held or not owned by its members are not subject to the same risks and conflicts of interest to which a publicly-traded or member-owned SEF may be subject. In addition, we believe the stated benefits of an independent nominating committee do not outweigh the burdens associated with requiring a

⁴ Proposal at 19669.

⁵ Proposed Rule §37.1205(d).

⁶ Proposed Rule §37.1205(a).

⁷ Proposal at 19669.

⁸ Id.

⁹ Id.

closely-held company to identify and source board members through a majority independent committee.

The need for the nominating committee, and in particular an independent nominating committee, is diminished in light of the other proposed governance requirements and attendant mechanisms that will assure a sufficiently independent board. For example, the Proposal would still require that the board of directors of a SEF be composed of at least thirty-five percent public directors.¹⁰ The Commission notes that this 35% percent public director requirement aims to mitigate conflicts of interest through the representation of independent perspectives.¹¹ The Commission also notes that this threshold will “balance the need to ensure proper representation of impartial views with the need for market expertise.”¹² These board-level governance requirements, which are designed to mitigate conflicts of interest and encourage a diversity of interests on the board, address the same risks that are intended to be addressed by the nominating committee. Accordingly, the benefits of an additional independent nominating committee would be redundant and diminished, and the Proposal should allow for a more flexible approach to achieve the Commission’s overall goals.

In addition, the requirement to have a nominating committee comprised of at least 51% public directors may be particularly burdensome on smaller SEFs. Most smaller SEFs and DCMs do not have a particularly large board of directors. While each board, as constituted, is designed to adequately fulfill the oversight and governance responsibilities required by the registered entity under the Commission’s rules, boards are not typically comprised of many more than two or three public directors, which number typically represents a significant percentage of the overall board. But the overall board is generally limited in size, yet appropriately constituted relative to the size of the overall business. As a result of the Commission’s new requirements, the public directors would need to serve on the board, serve on the nominating committee and serve as the exclusive directors on the regulatory oversight committee, and would in general be responsible for identifying future board members and overseeing all aspects of the regulatory oversight program. While this approach may assure that independence of those particular board members is present throughout all aspects of the SEF or DCM governance program – at times to the exclusion of all other board members, this arrangement would also result in the concentration of power in the hands of a few individuals and would also potentially lead to the very outcome that the Commission was attempting to avoid through its public director requirements – that a board includes representation of independent and diverse perspectives.

The Commission’s Approach Diverges From The SEC’s Approach

The Proposal’s nominating committee requirements should also be re-examined in light of the Securities and Exchange Commission’s (“SEC”) recently finalized rules governing the registration and regulation of security-based swap execution facilities under Regulation SE.¹³

¹⁰ Proposed Rule §37.1204(a)(1).

¹¹ Proposal at 19669.

¹² Proposal at 19667.

¹³ *Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities*, SEC, 88 Fed Reg. 87156 (Dec. 15, 2023), available at

The SEC, under Rule 834, chose to follow the Commission's current approach in establishing standards for governance and conflicts of interest.¹⁴ As finalized, the SEC's rule would require an SBSEF to prohibit members from owning 20% or more of the voting securities of an SBSEF and from exercising disproportionate influence in disciplinary proceedings. This approach, which allows for greater flexibility in governance, follows the Commission's current governance standards under Commission Regulation §1.64. While we appreciate the Commission's current efforts, we believe an overly prescriptive approach to the nomination committee, in particular, is unwarranted and would result in a divergent approach to governance that is significantly more burdensome than the SEC's model for security-based swap execution facilities and the Commission's current approach.

Conclusion

For the reasons set forth above, we believe the Commission should re-examine the Proposal's requirement that each SEF establish a board-level nominating committee comprised of a majority of public directors. We appreciate your willingness to consider our comments on this Proposal and would be pleased to discuss any questions that you may have with respect to this letter. Thank you.

Very truly yours,



Derek Kleinbauer
President
Bloomberg SEF LLC