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March 15, 2019

Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Swap Execution Facilities and Trade Execution Requirement (RIN 3038-AE25)

Dear Mr. Kirkpatrick:

The Commodity Markets Council (“CMC” or “we”) appreciates the opportunity to submit this comment letter in response to the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) notice of proposed rulemaking entitled “Swap Execution Facilities and Trade Execution Requirement” (the “SEF NPRM”).¹ We agree that with the benefit of several years of experience with trading on swap execution facilities (“SEFs”), now is an appropriate time to consider whether rule amendments are appropriate in order to more fully realize Congress’ objectives of promoting swaps trading on SEFs and promoting pre-trade price transparency in the swaps market.

CMC is a trade association that brings together exchanges and their industry counterparts. Its members include commercial end-users that utilize the futures and swaps markets for agriculture, energy, metal, and soft commodities. Its industry member firms also include regular users and members of SEFs as well as designated contract markets, such as the Chicago Board of Trade, Chicago Mercantile Exchange, ICE Futures US, Minneapolis Grain Exchange, NASDAQ Futures, and the New York Mercantile Exchange. Along with these market participants, CMC members also include regulated derivatives exchanges and price reporting agencies. As a result, CMC is well-positioned to provide a consensus view of commercial end-users on the impact of the SEF NPRM. Its comments, however, represent the collective view of CMC’s members, including end-users, intermediaries, exchanges, and benchmark providers.

I. The Commission Should Reconsider the Proposed Registration Requirement and Provide Protection Relating to SEF Rule Changes, Given the Operational Challenges and Costs that These Proposals Would Impose on Market Participants.

The rule amendments proposed in the SEF NPRM would lead to a fundamental reconstruction of the entire “SEF ecosystem,” making changes that would impact many of the ways in which market

¹ Swap Execution Facilities and Trade Execution Requirement, Proposed Rule, 83 Fed. Reg. 61946 (Nov. 30, 2018).

participants interact with, and trade on, SEFs. This reconstruction of the existing ecosystem would present tall operational challenges and impose substantial costs on all market participants, including CMC members that trade on SEFs.

a. SEF Registration

The SEF NPRM estimates that up to 60 swaps broking entities² and one single-dealer aggregator platform would have to register as SEFs as a result of the proposed SEF registration requirements.³ CMC members that desire to trade, or to keep trading, through that platform must incur new onboarding costs, including costs of adapting to use any new systems and review of the new SEF's rulebook. The compliance function of market participants must be extended to include each new SEF with which it has a relationship, and training as to the new SEF's trading functionalities and rulebooks must be provided.

b. SEF Rule Changes

Under the SEF NPRM, market participants will have to contend with new and incumbent SEFs writing and amending their rulebooks at different times and in different ways, making the tracking of these changes a significant challenge for CMC members. The Commission should require any SEF rule amendment that is undertaken as a result of a final SEF rulemaking by the Commission to provide an implementation period of at least 90 days, rather than the 10 business days permitted by Commission Regulation 40.6.⁴

II. The Commission Should Replace the “Made Available to Trade” (“MAT”) Process with a Practical Approach to Trade Execution Mandate Determinations

The MAT process is an unworkable approach to implementing the Commodity Exchange Act's trade execution mandate because SEFs have an inherent conflict of interest in issuing MAT determinations since SEFs benefit by a greater range of swaps being required to be executed on-SEF. Although CMC's members generally are excepted from trade execution mandates with respect to their swaps, we support the proposal to eliminate the current MAT process because they may not be able to utilize the end-user clearing exception for all swaps they enter into that may be subject to mandatory SEF trading.

a. Congressional Intent

CMC, however, does not support the proposed solution that any swap that is subject to a clearing mandate also would become subject to a trade execution mandate when a SEF lists the swap for trading. The proposed solution is inconsistent with Congressional intent because the Commission has read the “makes the swap available to trade” language to encompass two different meanings in the current SEF rules and the SEF NPRM – evidence to the phrase's ambiguity. When statutory text is ambiguous, an examination of legislative history is appropriate to determine Congressional intent. When reviewed, legislative history shows that Congress did not intend for the phrase to mean “lists the swap.”⁵ In fact, “[t]he mere ‘listing’ of the swap by a [SEF], in and of itself, without a minimum

² This estimate includes interdealer brokers.

³ SEF NPRM, 83 Fed. Reg. at 62046, 62053

⁴ 17 C.F.R. § 40.6.

⁵ Cong. Rec. Vol. 156, Number 105, p. S5923 (July 15, 2010) (Sen. Lincoln).

amount of liquidity to make trading possible, should not be sufficient to trigger the Trade Execution Requirement.”⁶

b. A Practical Approach to Trade Execution Mandate Determinations and Related Issues

The Commission should take a practical approach to the imposition of trade execution mandates. First, such an approach should assure workable solutions for market participants that enter into the swap in connection with their commercial operations. CMC members enter into swaps as part of complex transactions, where flexibility is required and a mandate to trade those swaps on a SEF may not be workable in the context of completing those transactions. Similarly, swaps entered into by CMC members frequently are tied to deliveries and supply chains for physical commodities, which again demands flexibility and may render SEF trading of certain swaps unworkable.

Second, a practical approach should address the operational challenges and costs that the mandate will necessarily impose on all market participants involved in the trading and processing of the swap. Each new trade execution mandate will require market participants to onboard to new SEFs and adapt their systems and compliance programs to handle swaps that may have previously been traded only on an over-the-counter basis. A revised approach should include consideration of not only whether a trade execution mandate is appropriate, but also when compliance with a mandate should be required in light of the operational burdens and monetary costs associated with compliance.

Third, the proposed amendments to the impartial access criteria in the SEF NPRM would allow SEFs to limit participation to “similarly situated market participants” if certain conditions are satisfied. As a result of this change, a trade execution mandate may require CMC members to trade a swap on a SEF to which they do not have access, or for which they may have to pay more for access.

Finally, market participants should be afforded the opportunity to be heard and provide input to the Commission to assist its determination whether a swap subject to the clearing mandate should also be subject to the trade execution mandate. For example, the Commission could issue a Request for Comment, hold a public roundtable, and/or request that one of its Advisory Committees provide input as well.

III. The Proposed Prohibition on Pre-Execution Communications Should Not Be Adopted

The sweeping ban on all pre-execution communications, as applied to swaps routinely entered into by CMC members, would be virtually impossible to administer at best, and at worst, would stymie legitimate commercial business transactions that include a swap that is subject to a trade execution mandate as part of the terms.

The proposed prohibition is simply not workable with respect to many swaps entered into by CMC members. First, read literally, the proposed prohibition would prevent CMC members, that are engaged in complex commercial business transactions,⁷ from discussing the fact that a swap would be entered into as a term of the transaction. Yet, these communications must take place, because the transactions cannot be undertaken without them. Second, from a compliance perspective, it would be incredibly difficult, if not impossible, to determine and educate trade business personnel the point at

⁶ *Id.*

⁷ *E.g.*, infrastructure and inventory financing.

which a permissible conversation about a transaction that involves a swap subject to a trade execution mandate would become a prohibited communication about the swap.

We request that the Commission not adopt the proposed prohibition on pre-execution communications; however, if the Commission determines to include such a prohibition in a final SEF rulemaking, CMC requests that the Commission provide an exception for communications relating to swaps that are terms of broader commercial transactions or, at a minimum, clearly define the types of communications that are prohibited in these circumstances.

IV. Conclusion

CMC appreciates the opportunity to comment on the SEF NPRM. If you have any questions about these comments, or we can provide further information, please do not hesitate to contact me at Kevin.Batteh@Commoditymkts.org.

Sincerely,

/s/ Kevin K. Batteh

Kevin Batteh
General Counsel
Commodity Markets Council