

November 17, 2025

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

**Re: Revisions to Business Conduct and Swap Documentation Requirements for Swap Dealers and Major Swap Participants (RIN 3038-AF38)**

Dear Mr. Kirkpatrick:

We appreciate the opportunity to comment on the Commodity Futures Trading Commission's (the "Commission") proposed amendments to the business conduct and documentation requirements for swap dealers (the "Proposal").<sup>1</sup> We commend the Commission for undertaking this rulemaking to codify prior staff no-action relief related to the regulatory requirements applicable to intended-to-be-cleared ("ITBC") swaps. Doing so promotes legal certainty by ensuring longstanding Commission guidance is reflected in its rules.

While we support the Proposal, the Commission should ensure that all ITBC swaps executed on a SEF, DCM or Exempt SEF that are subject to these updated business conduct requirements and fail to clear are deemed void *ab initio*, consistent with the Commission's longstanding positions.<sup>2</sup> This provides a consistent standard for all on-venue transactions that are intended to be cleared, and prevents any attempt to reintroduce bilateral breakage agreements.<sup>3</sup>

**I. Support for Tailored EBC Requirements for ITBC Swaps**

We support the Commission's efforts to right-size the external business conduct ("EBC") requirements and swap documentation standards applicable to the trading of ITBC swaps. ITBC swaps are intended to be cleared contemporaneously with execution and therefore do not involve the same risks or counterparty credit exposures as bilateral swaps. For cleared swaps, the derivatives clearing organization ("DCO") becomes the counterparty to each original executing party, and there is no ongoing relationship between the original executing parties. Requiring swap dealers to adhere to the panoply of EBC requirements and relationship documentation standards with respect to ITBC swaps is not necessary to achieve regulatory objectives and, in fact, hinders

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<sup>1</sup> Revisions to Business Conduct and Swap Documentation Requirements for Swap Dealers and Major Swap Participants, 90 Fed. Reg. 47136 (Sept. 30, 2025) available at <https://www.cftc.gov/sites/default/files/2025/09/2025-18924a.pdf>.

<sup>2</sup> See *Staff Guidance on Swaps Straight-Through Processing*, Commodity Futures Trading Commission (Sept. 26, 2013); CFTC Letter No. 23-01 (Feb. 1, 2023).

<sup>3</sup> A "breakage agreement" is an agreement between counterparties pursuant to which parties agree in advance that if the swap does not clear then either the swap will be considered a bilateral swap between the parties, or one party will owe a "breakage" payment to the other party to compensate such party for costs or damages incurred due to the failure to clear. Breakage agreements can be used to discriminate among market participants and interfere with impartial access requirements.

the efficient execution and processing of such transactions.

For more than a decade the Commission has tailored its EBC requirements applicable to ITBC swaps through staff no-action positions. The Commission's Market Participant Division first provided no-action relief for certain EBC and documentation requirements in 2013,<sup>4</sup> and issued amended relief in 2023.<sup>5</sup> We support the Commission right-sizing its EBC requirements through formal rulemaking, which will promote legal certainty and ensure that longstanding guidance is reflected in the Commission's rules.

## II. On-Venue ITBC Swaps that are Rejected from Clearing Should be Void *Ab Initio*

Under the Proposal, a swap must meet eight conditions to qualify as an "ITBC Swap." In contrast to the Commission's longstanding position, however, the Proposal fails to ensure that all on-venue transactions that cannot be successfully cleared are deemed void *ab initio*. Instead, the Proposal appears to suggest that on-venue ITBC swaps can either be deemed void *ab initio* based on the rules of the trading facility or subject to the terms of a bilateral agreement between counterparties. As currently drafted, the Proposal would increase market complexity and uncertainty for on-venue ITBC swaps, including by potentially re-introducing the need for bilateral trading documentation.

In particular, proposed condition 8 suggests that there could be situations where a SEF or DCM does not have rules deeming rejected trades void *ab initio*.<sup>6</sup> The condition is plainly inconsistent with the Commission's straight-through-processing guidance, which requires SEFs and DCMs to have rules deeming swaps rejected from clearing as void, and should be amended accordingly.<sup>7</sup> Additionally, with respect to Exempt SEFs, the Commission should ensure that foreign swap trading facilities comply with core straight-through-processing requirements, including the requirement that trades rejected from clearing are deemed void, as part of the Commission's determination that the foreign facility is subject to "comparable, comprehensive supervision and regulation" in its home country.<sup>8</sup> Failing to ensure that all on-venue ITBC swaps that fail to clear are deemed void could re-introduce the need for bilateral trading documentation and raises the possibility of unintended bilateral counterparty credit exposures, both of which are antithetical to the SEF and DCM framework.

Prior to the Commission's straight-through processing ("STP") standards, there was a lack of market consistency regarding the execution-to-clearing workflow for OTC derivatives that were intended to be cleared. This lack of consistency unnecessarily complicated the trading of cleared swaps, which should be more accessible to market participants since central clearing eliminates

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<sup>4</sup> Commission Staff Letter 13-70.

<sup>5</sup> Commission Staff Letter 23-01.

<sup>6</sup> Specifically, condition 8 states that: "if the swap is executed on or pursuant to the rules of a DCM, SEF, or Exempt SEF and the rules of the DCM, SEF, or Exempt SEF do not provide for a swap rejected from clearing to be deemed void *ab initio*..." (emphasis added).

<sup>7</sup> See *Staff Guidance on Swaps Straight-Through Processing*, Commodity Futures Trading Commission (Sept. 26, 2013).

<sup>8</sup> See CEA Section 5h(g).

bilateral counterparty credit risk and the need for complex bilateral trading and credit support documentation between each pair of potential trading counterparties.

The U.S. ITBC swaps market demonstrates how well markets can function when participants operate without the friction of bilateral trading documentation. By eliminating the need for bespoke agreements such as breakage agreements when trading on a facility, firms can trade with any counterparty as long as the transaction is cleared through a DCO, significantly expanding access to liquidity and price competition. New entrants can participate on equal footing, execution can occur more efficiently, and the benefits of central clearing—reduced counterparty risk and deeper liquidity—are fully realized. In order to maintain these benefits, the Commission must ensure that on-venue ITBC swaps that fail to clear are deemed void *ab initio*.

### III. Conclusion

We commend the Commission for undertaking this rulemaking to codify prior staff no-action relief related to swap documentation and the treatment of ITBC swaps and support the Commission's continued efforts to promote legal and regulatory certainty. However, the Proposal should maintain the Commission's clear, consistent, and longstanding standard that ITBC swaps executed on a SEF, DCM, or Exempt SEF that are rejected for clearing are deemed void *ab initio*. This is necessary to preserve the meaningful improvements to market functioning that we have witnessed over the past decade, and to ensure that the Proposal does not lead to the re-introduction of bilateral trading documentation or bilateral counterparty credit exposures for cleared swaps.

We thank the Commission for considering our comments.

Please feel free to call the undersigned with any questions regarding these comments.

Respectfully,

/s/ Stephen John Berger

Managing Director

Global Head of Government & Regulatory Policy