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By Electronic Mail (http://comments.cftc.gov)

June 10, 2011

Mr. David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Regarding: Automatically Effective Provisions under Title VII of the Dodd-Frank Act

Application for Exemption Pursuant to Section 4(c) of the Commodity Exchange Act and Section 712(f)) Pending Effectiveness of Final Rulemaking

Dear Mr. Stawick:

The Financial Services Roundtable[1] requests, on behalf of our members, that the Commission grant a temporary exemption from compliance with any provision of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act.[2] The Dodd-Frank Act and the Commodity Exchange Act ("CEA") expressly state that the Commodity Futures Trading Commission (the "CFTC" or "Commission) has exemptive authority. Without the requested temporary exemption, the provisions of Title VII would otherwise become effective 360 days after enactment of the statute (i.e., July 16, 2011).

We strongly believe that:

(i) There should be clarity within the swaps markets as to which aspects of the law are effective and which are not, and such clarity does not currently exist,

(ii) Market participants should not be left in a legal limbo concerning the meaning of certain provisions that may become effective before the extensive regulatory interpretations of them by the Commission have

[1] The Financial Services Roundtable (the "Roundtable") represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.
[2] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1897 (July 21, 2010) ("Dodd-Frank Act").

been finalized, nor should they be subject to the risk of either enforcement action or private rights of action,

(iii) Market participants outside the United States who are unsure as to the exterritorial application of these provisions should have greater certainty as to whether their activities are subject to these new requirements to avoid disruption of global markets, and

(iv) The Commission's existing rulemaking, policy statements, exemptions and other guidance should be specifically affirmed to ensure that an effective legal framework remains in place for the swaps, futures and commodity markets during the transition to a robust and comprehensive new legal regime.

We believe that Congress has underestimated the monumental task that would be involved in adopting implementing regulations. Title VII presumed (and required) that final implementing regulations would be in place by July 16, 2011, and we appreciate the extraordinary efforts the Commission has made to bring that about. The issuance of a comprehensive set of final rulemakings to implement the requirements of Title VII, however, will not have occurred by July 16, and those rulemakings that are final by that date will not have taken effect. Under these circumstances, it is critical that the Commission use its exemptive authority, to the greatest extent possible, to exempt market participants from compliance with the provisions of Title VII that would otherwise be automatically effective on July 16, 2011. The Commission has indicated that it desires to achieve an orderly transition. We believe that the Commission must take action as soon as possible before July 16 to ensure that implementation occurs on a time frame that the Commission has determined to be appropriate and capable of being achieved without significant disruption to this multi-trillion dollar market.

We apply for an exemption for all market participants, under Section 4(c) of the Commodity Exchange Act and Section 712(f) of the Dodd-Frank Act, from all provisions of Title VII that would otherwise become effective on July 16, 2011, such exemption to expire with respect to any provision and market participant on the date the Commission's final rulemaking becomes effective with respect to that provision and participant. We believe that such a temporary exemption, with an automatic sunset provision tied to effectiveness of final rules, is strongly consistent with the public interest. Further, to the extent that the Commission does not believe it has sufficient authority to grant an exemption with respect to any provision, we ask that the Commission clearly indicate that it will not take action against any market participant that fails to comply with that provision until the Commission has provided greater clarity on how to comply. We also ask the Commission to affirm the continued effectiveness of its existing regulations, policy statements, interpretations and other guidance until such regulations, policy statements, interpretations or guidance are formally revised or repudiated by the Commission, whether as part of final Title VII rulemaking or otherwise.

Overview

The key provision establishing the effectiveness of the provisions of Title VII, Section 754, states:

> Unless otherwise provided in this title, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.

It is not clear, however, which provisions *require* a rulemaking. Although some provisions clearly require rulemaking, in many instances provisions that do not on their face require a rulemaking include defined terms that do, or may, require a rulemaking, including the foundational definition of "swap." Other provisions *permit* Commission rulemaking, but as a practical matter such rulemaking is essential to the proper functioning of the provision. Others do not require rulemaking on their face, but make certain actions illegal unless the person taking such action is registered with the Commission, and the ability to register requires rulemaking. Some provisions do not instruct the Commission to make rules, but the action to be taken is required to be in compliance with Commission rules.[3] Finally, some provisions specifically require rulemakings only for portions of a section of the statute; in those cases we have tried to determine whether that requirement should be treated as relating to the entire section, but such interpretations are inherently uncertain.

We note that the definitions of "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," "eligible contract participant," and "security-based swap agreement" all appear to require a rulemaking.[4] We appreciate that the Commission may be reluctant to decide that few or no aspects of Title VII take effect because they incorporate these terms. We have, accordingly, drafted this letter to seek relief from those provisions that include such terms but otherwise do not on their face require rulemaking. We believe, however, that the better view of Title VII is that all provisions that include any term as to which a rulemaking is required should be treated as themselves requiring a rulemaking, and thus should not become effective on July 16, 2011.

Nearly all of the relevant provisions of Title VII rely on an understanding of the term "swap." This term as defined in the statute, however, is quite broad and, as the Commission has noted in its products definition release,[5] arguably could be read to include a range of products and transactions, such as insurance products and consumer transactions, that are clearly beyond its intended scope. Although the Commission has proposed guidance on these issues, market participants do not know the extent to which they would be able to rely on such guidance if required to comply with statutory

[3] For purposes we have treated such provisions as requiring a rulemaking. If the Commission disagrees on this point, the list of provisions that become effective may be significantly longer.
[4] Dodd-Frank Act, Section 712(d).
[5] Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29818, 29820 (May 28, 2011) (the "Product Definitions Proposal").

provisions before the product definition regulations are adopted in final form. Nor do they know how to deal with situations where they believe the interpretive guidance in the proposed regulation is insufficient to cover all circumstances that it was intended to or ought to cover (as will be reflected in comment letters). And if a term, such as "eligible contract participant," has a meaning under the Commodity Exchange Act as it currently exists, it is unclear whether that meaning would continue to apply until the required rulemakings are complete. As long as there is uncertainty about what a swap is, and about the status of the parties who transact in swaps, the provisions of Title VII do no have a clear meaning, transactions executed under them may be void or voidable, and market participants may be at risk of liability for violation of provisions that they did not know how to apply. On that basis, we believe that provisions that rely on terms that require rulemaking do, indeed, also require rulemaking to as great a degree as do their component definitions.

In addition to these issues, the Commission has noted that certain of its interpretations and guidance will not have continued effect after Title VII is implemented. Market participants need to understand which of the Commission's existing rules, exemptions and interpretive guidance will remain in effect until final regulations under Title VII have been promulgated, and which will lapse even when such a lapse would lead to significant legal uncertainty. They also need to know how to read provisions for which the Commission has proposed regulations, has received feedback expressing concerns about interpretations or approaches, but has not issued final regulations.

In this letter, we set forth our preliminary analysis of many of the provisions in Title VII that will create significant legal uncertainty or market disruption if the Commission does not provide the requested exemption. We believe that the following items are among the many provisions of Title VII that *may* become effective on July 16, 2011, with significant adverse consequences for the stability of the swap markets:

- The prohibition on transactions with persons that are not eligible contract participants, unless such transactions are carried out on a designated contract market;

- Provisions requiring derivatives clearing organizations to provide open access, especially to the extent provisions relating to financial responsibility and risk management have not been clarified;

- Provisions that make it unlawful for any person to perform the functions of a swap data repository unless registered with the Commission;

- Provisions that make it unlawful to act as a swap dealer or major swap participant unless registered with the Commission;

- Provisions that make it unlawful to operate facilities to trade or process swaps unless registered as a designated contract market or swap execution facility (including the effect of these provisions on existing single dealer platforms, voice

brokerages and other entities that are important to market function pending the establishment of the SEF-based system);

- Provisions that require compliance with core principles by entities that are not yet certain of their required regulatory status or of the precise requirements of these core principles;

- Provisions that require notice of the right to segregate collateral for uncleared swaps, and that require such segregation;

- Provisions that prohibit acceptance of collateral with respect to cleared swaps by any person that is not registered as a futures commission merchant; and

- The anti-disruptive trading practices provisions to the extent that key terms included in those provisions are neither defined nor have a clear meaning in the market.

Analysis

A. *New definitions and amendments to existing definitions (Section 721)*

1. *General.*

Section 712(d)(1) of the Dodd-Frank Act says that the Commission and the SEC "shall further define the terms 'swap', 'security-based swap', 'swap dealer', 'security-based swap dealer', 'major swap participant', 'major security-based swap participant', 'eligible contract participant'', and ''security-based swap agreement.'" Section 712(d)(2), which requires that the rules be jointly adopted, indicates that these further definitions shall be adopted as the CFTC and SEC "determine are necessary and appropriate in the public interest, and for the protection of investors." In addition, Section 721(c) requires the CFTC to further define "swap," "swap dealer," "major swap participant" and "eligible contract participant" to include transactions and entities that have been structured to evade the provisions of Subtitle B of Title VII. However, as noted above, it is unclear how the failure to further define these terms affects other provisions that rely on them. In the following sections we set forth a further discussion of these terms and other definitions that will lead to significant uncertainty until the required rulemakings have been completed.

2. *"Major swap participant."*

In addition to the requirements described in Section I.A.1 above, the definition of "major swap participant" requires the Commission to define the term "substantial position." We believe "major swap participant" cannot have a clear meaning until "substantial position" is defined. We therefore believe that the best interpretation of Title VII is that no entities should be considered major swap participants, and the provisions that regulate major swap participants should not have effect, until at least 60 days after

"substantial position" is defined.[6] In addition, Section 731, makes it unlawful for any person "to act as a major swap participant" unless registered with the Commission and does not directly require rulemaking. The term "major swap participant," however, is based not on actions but on status, and so it is unclear how a market participant would "act as a major swap participant" before the term has been more fully defined.

3. *"Swap dealer."*

The definition of "swap dealer" will be critical for many market participants in determining which aspects of Title VII will apply to them and their business operations. For example, clause (49)(D) of Section 1a of the Commodity Exchange Act, as amended by Section 721 of the Dodd-Frank Act, provides that "[t]he Commission shall exempt from designation as a swap dealer an entity that engages in a *de minimis* quantity of swap dealing in connection with transactions with or on behalf of its customers." Many entities that engage in a *de minimis* quantity of swap dealing will be uncertain as to whether the swap dealer provisions of Title VII apply to them until the scope of the *de minimis* exemption has been finalized. The defined term "swap dealer" also excludes banks entering into swaps with customers in connection with loans and entities that do not enter into swaps "as part of a regular business." The Commission is not required to provide clarity as to these aspects, but has proposed to do so as part of its entity definitions release.[7] Such clarity will be essential to inform market participants as to whether they are treated as swap dealers for purposes of the Dodd-Frank Act.

As with major swap participants, Section 731 makes it unlawful for any person "to act as a swap dealer" unless registered with the Commission, and does not directly require rulemaking. Acting as a swap dealer is more principles-based than acting as a major swap participant, but its meaning is still unclear without the *de minimis* exemption and clarity around the exclusions discussed above.

4. *"Eligible contract participant."*

The term "eligible contract participant" was already defined in the Commodity Exchange Act before the enactment of the Dodd-Frank Act. As noted, however, the Commission is required to conduct further rulemaking with respect to this term. We believe the pre-enactment definition of eligible contract participant should continue in effect until such further rulemaking occurs, and we ask the Commission to confirm that interpretation.

5. *"Swap."*

As noted above, the term "swap" is included in several provisions of Title VII that

[6] We note, however, that the Commission's interim final rule relating to reporting of pre-enactment swaps creates a definition of "major swap participant" and a definition of "swap dealer" for purposes of Part 44 of the Commission's rules.

[7] Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant''; Proposed Rule, 75 Fed. Reg. 80174 (December 21, 2010).

require further rulemaking, but the definition itself, as presented in Section 721, does not specifically require rulemaking. We note that the preamble to the proposed products definition rule says, "The statutory definitions of "swap" and "security-based swap" are detailed and comprehensive, and the Commissions believe that extensive 'further definition' of the terms by rule is not necessary."[8] The Commission and the SEC have also acknowledged, however, that there are a number of aspects of the definition in Section 721 that require clarity, including its application to insurance products and certain consumer agreements. Given the uncertainty around the scope of this term, we believe the most appropriate course of action would be to treat all provisions of Title VII that depend on that definition as requiring rulemaking, or to grant the exemption we have requested. If the Commission does not take either of those approaches, we recommend that, until the final products definitions rules become effective, the term "swap" as used in provisions of Title VII that become automatically effective on July 16 should be given a meaning no more expansive than that reflected in the term "swap agreement" as used in Part 35 of the Commission's current rules.

6. *"Commodity Pool" and "Commodity Pool Operator."*

Section 721 of the Dodd-Frank Act adds to the Commodity Exchange Act a definition of "commodity pool" and revises the definition of "commodity pool operator," in each case including "swaps" as part of the definition (in addition to other changes). A commodity pool operator will be an entity that is "engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any . . . swaps." Similar language in the current definition of "commodity pool operator" has been interpreted very broadly. We believe that, to the extent that adding "swaps" to these provisions would change the regulatory status of existing entities, the Commission should provide an exemption until it provides further clarification of the definition of "swap." We also believe the Commission should clarify how these provisions affect entities currently acting as counterparties to swaps, or expecting to enter into swaps after July 16, 2011, that would not otherwise have been considered commodity pools or commodity pool operators.

7. *"Commodity Trading Advisor."*

Section 721 of the Dodd-Frank Act likewise amends the definition of "commodity trading advisor" to include entities that advise as to entry into swaps, which may change the status of a number of entities and require them to register. We believe that the Commission should exclude market participants from this definition and the provisions in which it is used, if they would only be "commodity trading advisors" because of the inclusion of swaps in the definition of this term, until the Commission has promulgated regulations clarifying the definition of "swap.

[8] Products Definition Proposal, 76 Fed. Reg. at 29821.

8. *"Futures Commission Merchant."*

The amended definition of "futures commission merchant" will include, as of July 16, 2011, any person "engaged in soliciting or in accepting orders for . . . a swap" and accepting "any money, securities, or property (or extend[ing] credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom." The inclusion of the term "swap" in the definition thus may make it necessary for swap dealers to register as FCMs even though they are not yet required to register as swap dealers, if they are accepting collateral or margin, or extending credit for cleared swaps.[9]

9. *"Introducing Broker."*

Similar to the definition of commodity pool operator and commodity trading advisor, the term "introducing broker" has been revised to include swaps. We believe that the Commission should exclude market participants from this definition and the provisions in which it is used, to the extent their status under this definition would be a result of the inclusion of swaps in the definition of this term, until the Commission has promulgated regulations clarifying the definition of "swap."

B. *Transactions with non-Eligible Contract Participants (Section 723)*

Section 2(e) of the Commodity Exchange Act, as amended by the Dodd-Frank Act, provides that "It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5." Currently, many small businesses employ the line-of-business exemption to hedge their exposures. This language, however, places the continued availability of the line-of-business exemption in doubt, which means that, as of July 16, 2011, many small businesses may be prohibited from hedging their exposures unless the Commission acts to preserve their access to hedging. We note, as well, that market participants are unsure of the meaning of the statutory language of the revised definition, and in particular, the phrase "assets invested on a discretionary basis" in Section 721 of the Dodd-Frank Act. Without greater clarity, market participants who would satisfy the definition of "eligible contract participant" may be unable to do so to the extent other participants are uncertain of their status. Finally, we believe there may be a conflict between these provisions and those of the prudential banking regulators with respect to foreign currency transactions that must be reconciled with implementation of these provisions. We believe Commission action is essential with respect to protecting the availability of swaps to both eligible contract participants and to others who have previously been permitted to hedge their exposures.

[9] See also Futures Industry Association, Petition for Exemption Pursuant to Section 4(c) of the Commodity Exchange Act, June 1, 2011 (the "FIA Petition"). One further question for the Commission is whether a bank that receives in connection with a loan security that also secures the obligations under its swap positions would be required to register as an FCM, or whether such security can be treated as accepted solely in connection with its banking business.

C. *Mandatory clearing (Section 723)*

Section 2(h)(1)(A) of the Commodity Exchange Act, as amended by the Dodd-Frank Act, makes it unlawful to enter into a swap that is not submitted for clearing "if the swap is required to be cleared." Because the designation of swaps as being subject to mandatory clearing is within the discretion of the Commission, and no such swaps have been so designated (or will be, in advance of the promulgation of final rules), we believe that the mandatory clearing requirement in Section 2(h)(1)(A) will not become effective on July 16, 2011 and no specific exemption is necessary. Given the significance of this provision to the entire Title VII regulatory structure, we ask the Commission to confirm.

D. *Open access for derivatives clearing organizations (Section 723)*

Section 2(h)(1)(B) of the Commodity Exchange Act, as amended by the Dodd-Frank Act, provides that derivatives clearing organizations, whether registered or exempt from registration, must have rules that treat as economically equivalent all swaps submitted to them with the same terms and conditions, and must provide for nondiscriminatory clearing of swaps executed bilaterally or by an unaffiliated DCM or SEF. Although the parameters of such open access are a subject of proposed rulemaking and have significant impacts on the risk management of the DCOs, as well as requiring technology interfaces that may not exist, this provision does not appear to directly require rulemaking and thus may become automatically effective on July 16, 2011. Rather than risk having one of the core classes of infrastructure entities for the new regime to implement Title VII fall out of compliance, the Commission should quickly move to exempt DCOs from this requirement pending the finalization of its rules.

E. *Reporting and clearing transition rules (Section 723)*[10]

Legacy swaps are generally grandfathered and do not have to be cleared if they were entered into before the enactment of Title VII or before the application of the clearing requirement,[11] but only if they are reported in accordance with Section 2(h)(5). Swaps entered into before enactment must be reported within 180 days after July 16, 2011 to obtain the exemption from clearing. The Commission's Interim Final Rule with respect to such reporting[12] does not extend this deadline if no swap data repository has been registered by such date. Accordingly, the Commission should be mindful of the need to provide exemptive relief or to have a reporting mechanism in place sufficiently ahead of that deadline to permit all necessary reporting.

F. *Clearing and choice of DCO at election of counterparty (Section 723)*

Although it would be possible to read Section 2(h)(7)(E) as becoming effective on July 16, 2011, given its strong relationship to the rest of Section 2(h)(7), which is tied to

[10] Note that the provisions of Section 729 somewhat overlap these, but were effective upon enactment, subject to Commission rulemaking.
[11] Commodity Exchange Act, Section 2(h)(6).
[12] Interim Final Rule for Reporting Pre-Enactment Swap Transactions, 75 Fed. Reg. 63080 (October 14, 2010).

the effectiveness of the clearing requirements, we believe the better reading is that none of Section 2(h)(7) takes effect until the Commission begins designating swaps as subject to mandatory clearing. We ask the Commission to confirm this interpretation.

G. *Trade execution on SEFs and DCMs (Section 723)*

Section 2(h)(8) of the Commodity Exchange Act, as amended by the Dodd-Frank Act, requires swaps to be executed on a SEF or DCM if they are subject to a clearing requirement and available to trade on a SEF or DCM. Because the clearing requirement requires rulemaking by the Commission, the trade execution requirement cannot take effect until such rulemaking occurs. We thus believe this provision cannot take effect on July 16, 2011 absent Commission rulemaking. Again, given the importance of this provision to the overall Title VII regulatory structure, we ask the Commission to confirm.

H. *Registration as FCMs required in connection with cleared swaps (Section 724)*

Section 4d(f) of the Commodity Exchange Act, as added by the Dodd-Frank Act, provides that:

> It shall be unlawful for any person to accept any money, securities, or property (or to extend any credit in lieu of money, securities, or property) from, for, or on behalf of a swaps customer to margin, guarantee, or secure a swap cleared by or through a derivatives clearing organization (including money, securities, or property accruing to the customer as the result of such a swap), unless the person shall have registered under this Act with the Commission as a futures commission merchant, and the registration shall not have expired nor been suspended nor revoked.

This provision does not directly require rulemaking, and the registration requirements for a futures commission merchant are already provided for in CEA and are not subject to further mandatory rulemaking by the Commission. We believe that the Commission needs to clarify the relationship between registration as an FCM and registration as a swap dealer. Thus, here as well, any entities currently acting in this capacity that are not so registered should be exempted until final regulations are adopted and become effective.[13]

I. *Segregation and investment of collateral for cleared swaps (Section 724)*

Section 724 of Dodd-Frank amends Section 4d(f) of the CEA to include rules requiring a futures commission merchant to segregate and not commingle *cleared* swap customer funds. These rules do not appear to require direct rulemaking, and thus, to the extent that they would create compliance difficulties for FCMs (including those that may only have had to register as a result of Title VII), we believe temporary exemptive relief is essential.

J. *Segregation of collateral for uncleared swaps (Section 724)*

[13] We note that we support the petition for relief set forth in the FIA Letter with respect to this point.

Section 724 of Dodd-Frank, which amends Section 4s of the CEA to include rules requiring an SD or MSP to notify counterparties to *uncleared* swaps at the beginning of a swap transaction of the right to have the counterparties' margin (other than variation margin) segregated, and to then segregate such collateral, does not appear to require direct Commission rulemaking. However, it is very unlikely that affected parties would be able to comply with these requirements as of July 16, 2011, given the significant changes to trade documentation and custodial arrangements that would have to be made on a portfolio-wide basis. Some of the challenges involved would relate to training, notification requirements (which as written in Section 724 of Dodd-Frank, are per transaction), systems changes, and opening new accounts across a limited number of independent custodians. It is thus extremely important that the Commission provide exemptive relief from these provisions to facilitate an orderly transition.

K. *Derivatives clearing organizations (Section 725)*

i. *Chief compliance officers*

The requirement for a DCO to have a chief compliance officer who "ensures compliance with the Act" does not appear to directly require rulemaking. However, the requirement that the CCO prepare and file an annual report, including certifying compliance, does require regulatory rulemaking and thus should not be automatically effective.

ii. *Core principles*

The requirement to be in compliance with the revised core principles articulated in Section 725 does not directly require rulemaking; however, in the absence of Commission rules, Section 5b(c)(A)(ii) of the Commodity Exchange Act, which allows DCOs to use "reasonable discretion in establishing the manner by which the derivatives clearing organization complies with each core principle described in this paragraph," appears to provide the standard for compliance. Many of the core principles are already included in the current Commodity Exchange Act or merely expand existing requirements. However, a few noteworthy changes do not appear to directly require rulemaking, and thus are potentially effective on July 16, 2011. We believe the Commission should provide exemptive relief with respect to all such aspects of the core principles, including:

- Section 5b(c)(B)(ii)—minimum financial standards (but not clause (i));
- Section 5b(c)(C)—standards and procedures for participant and product eligibility, including open access;
- Section 5b(c)(D)—risk management procedures, including daily measurements of credit exposures, limitations on risk of loss from defaults, and collection of margin "sufficient to cover potential exposures in normal market conditions";

- Section 5b(c)(E)—settlement procedures;

- Section 5b(c)(F)—treatment of funds, including permissible investments ("instruments with minimal credit, market, and liquidity risks");

- Section 5b(c)(L)—public information

- Section 5b(c)(O), (P), (Q) and (R)—various corporate governance, conflict of interest policies, and legal certainty provisions, some of which already exist in somewhat different forms elsewhere in the statute or regulations.

L. *Swap data repositories (Section 728)*

Section 728 of Dodd-Frank adds a new Section 21 to the Commodity Exchange Act addressing swap data repositories. Clause (a)(1)(A) makes it "unlawful for any person, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a swap data repository." Those functions are described in the definition of "swap data repository," which uses the word "swap." However, neither clause (a)(1)(A) of Section 728 nor the definition of swap data repository directly requires rulemaking. To ensure the continuing functioning of entities that are currently fulfilling the functions of a swap data repository, the Commission will have to afford such entities the opportunity to register as such by July 16, 2011, specifically exempt or grandfather them, or clarify that the relevant provisions do not become effective until "swap" is defined.

The core principles relating to antitrust, governance concerns and conflicts of interest for SDRs permit, but do not directly require, rulemaking. In the absence of rules or an exemption, compliance with these core principles would be left to the SDR's reasonable discretion. We believe the better course would be for the Commission to provide exemptive relief with respect to compliance with these core principles until final rules become effective.

M. *Swap dealers and major swap participants (Section 731)*

i. *Prohibition on actions by unregistered entities*

As discussed in connection with the definitions, Section 731 of Dodd-Frank adds a new Section 4s(a) to the Commodity Exchange Act that makes it unlawful for any person to act as a swap dealer or a major swap participant unless registered with the Commission. In addition to the extremely important issues relating to defining these entities, there is still no way for such entities to register with the Commission. The prohibition, however, does not appear to directly require rulemaking. Accordingly, there is a strong need for the Commission to clarify whether this provision will become automatically effective and to provide exemptive relief for all market participants who may be affected by it if it does. If the Commission does not provide exemptive and

concludes that these provisions will become effective on July 16, 2011, it is essential that the Commission create before July 16, 2011 a mechanism for such entities to register. If Section 731 is allowed to become effective without such a mechanism, the United States over-the-counter derivatives market may no longer exist as of July 18, 2011.

ii. *Associated persons subject to statutory disqualification*

The provisions prohibiting swap dealers and major swap participants from allowing associated persons who are subject to statutory disqualification to handle swap transactions do not appear to directly require rulemaking. We ask that the Commission provide exemptive relief with respect to these provisions until the status of market participants as swap dealers or major swap participants has been determined.

iii. *Rulemaking relating to swap dealers and major swap participants*

Section 4s(d)(1) of the Commodity Exchange Act, as added by Section 731 of the Dodd-Frank, requires the Commission to make rules with respect to entities registered as swap dealers or major swap participants. Each of Section 4s(e) (the capital and margin provisions), Section 4s(f) (the reporting and recordkeeping requirements), Section 4s(g) (the daily trade records requirements), Section 4s(h) (the business conduct rules), Section 4s(i) (documentation standards) and Section 4s(j) (duties) includes a specific subclause that requires Commission rulemaking. In addition, the requirement for an annual compliance report requires a Commission rulemaking. In general, therefore, we believe that the key prudential and other requirements that will apply to swap dealers and major swap participants, other than the requirement for a chief compliance officer, require rulemaking and will not take effect on July 16, 2011. Given the importance of this determination, we ask the Commission to confirm.

N. *Swap execution facilities (Section 733)*

i. *Prohibition on actions by unregistered entities*

Section 5h of the Commodity Exchange Act, added by Section 733 of the Dodd-Frank Act, states in clause (a) that "[n]o person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or as a designated contract market under this section." We understand that many existing facilities may not meet the conditions for registration as SEFs, but even those that will likely qualify will not be able to continue in operations until they are permitted to register. The Commission should preserve the existing trading structure as much as possible until the new infrastructure is in place, including by permitting single-dealer platforms, voice brokerage systems and others to continue operations until the SEF-based system becomes operational. This provision does not appear to directly require rulemaking and therefore we believe the exemption we have requested is critical to a smooth transition.

ii. *Compliance with core principles*

The requirement to be in compliance with the revised core principles articulated

in Section 733 as a whole does not directly require rulemaking by the Commission, but certain provisions, such as those relating to compliance with position limits and those relating to reporting, would require such rulemaking, and other provisions would permit Commission rulemaking. In the absence of Commission rules, SEFs may use "reasonable discretion in establishing the manner by which the swap execution facility complies" with the core principles. However, we believe the better course would be for the Commission to provide exemptive relief with respect to compliance with these core principles until final rules become effective.

O. *Derivatives transaction execution facilities and exempt boards of trade (Section 734)*

Section 734 contains a provision that allows entities operating as derivatives transaction execution facilities and exempt boards of trade to petition the Commission to continue to so operate for one year following the effective date of the provision. The Commission should ensure that all such petitions are approved before July 16, 2011.

P. *Designated contract markets (Section 735)*

The amendments to the provisions of the Commodity Exchange Act relating to designated contract markets do not appear to generally require direct rulemaking. In the absence of new rulemaking, DCMs would seem to continue to be subject to the Commission's existing regulations. Compliance with new provisions appears to be subject to the DCM's reasonable discretion until final rules are promulgated. We believe it would be more efficient, and preferable for market stability, to apply the updated requirements set forth under Section 735 to DCMs only after the Commission has finalized its rulemaking process and we ask the Commission to affirm that approach.

Q. *Anti-disruptive practices authority (Section 747)*

Section 747 of the Dodd-Frank Act adds a new Section 4c(a)(5) to the Commodity Exchange Act, which provides that

> [it]shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that—
>
> (A) violates bids or offers;
>
> (B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or
>
> (C) is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution).

Market participants have expressed concern as to the interpretation of Section 747, including with respect to the meaning of "spoofing," and the Commission has proposed

rules interpreting this section. We believe the Commission should ensure that this provision does not take effect without sufficient guidance for market participants to be comfortable that established, non-abusive behavior is not captured by this provision.

R. *Exemptive authority*

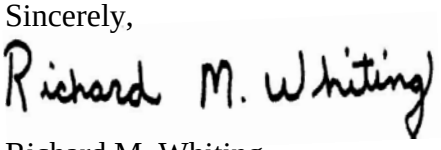
As we have noted, we believe that the Commission may appropriately interpret the requirement to further define the key terms used in Article VII as causing each provision using such terms to require rulemaking. Such an interpretation would lead to very few of these provisions becoming automatically effective. We believe that determination would be the correct result given the issues concerning interpretation of these provisions and the inability to bring existing businesses into timely compliance without further guidance. In addition, Section 712(f)) of the Dodd-Frank Act grants the Commission broad authority to "exempt persons, agreements, contracts, or transactions from provisions of this Act, under the terms contained in this Act," as part of the transition process. Section 4(c) of the Commodity Exchange Act also provides broad authority to the Commission to provide exemptions. Many of the other provisions of the Dodd-Frank Act and the Commodity Exchange Act also provide specific authority to the Commission to provide exemptions.

We recognize that Section 721(d) of the Dodd-Frank, which amends Section 4(c), is not particularly clear. We nonetheless believe that the various provisions referenced in the preceding paragraph provide the Commission with sufficient authority to take such actions necessary to ensure an orderly transition. We ask that the Commission apply this authority generously to avoid the disorderly transition that would occur if the statutory provisions were to take effect prior to the adoption of the final regulations that are an essential part of the implementation of Title VII.

Conclusion

We respectfully request the Commission to address the areas of specific concern that the Roundtable has described above by providing exemptions and interpretive guidance as discussed above. If you have any questions about our request, or any of the issues raised in this letter, please do not hesitate to call me or Brad Ipema, the Roundtable's Senior Regulatory Counsel, at (202) 589-2424.

Sincerely,



Richard M. Whiting
Executive Director and General Counsel
Financial Services Roundtable

Cc:

Chairman Gary Gensler
Commissioner Michael Dunn

Commissioner Jill E. Sommers
Commissioner Bart Chilton
Commissioner Scott D. O'Malia