CME Group

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February 13, 2012

VIA ON-LINE SUBMISSION

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

Re: Process for Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade (RIN number 3038-AD18); (Federal Register Vol. 76, No. 240, Page 77728)

Dear Mr. Stawick:

CME Group Inc. ("CME Group" or "CME")[1], on behalf of its four designated contract markets, appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") Notice of Proposed Rulemaking ("Release") that was published in the Federal Register on December 14, 2012. In the Release, the Commission seeks comment on proposed rules and guidance on the process and substance surrounding a designated contract market ("DCM") or swap execution facility ("SEF") making a swap "available to trade," (the "MAT determination").

[1] CME Group is the world's largest and most diverse derivatives marketplace. CME Group includes four separate Exchanges, including Chicago Mercantile Exchange Inc. ("CME"), the Board of Trade of the City of Chicago, Inc. ("CBOT"), the New York Mercantile Exchange, Inc. ("NYMEX") and the Commodity Exchange, Inc. ("COMEX") (collectively, the "CME Group Exchanges"). The CME Group Exchanges offer the widest range of benchmark products available across all major asset classes, including futures and options based on interest rates, equity indexes, foreign exchange, energy, metals, agricultural commodities, and alternative investment products. CME includes CME Clearing, one of the largest central counterparty clearing services in the world, which provides clearing and settlement services for exchange-traded contracts, as well as for over-the-counter derivatives transactions through CME ClearPort®.

As a pioneer in the globalization of the futures markets, CME has helped to expand the customer base for futures products. CME Globex, for example, is available to users around the world for more than 23 hours a day, five days a week. To satisfy the increasing demands of the international marketplace, customers can access the CME Globex platform in more than 150 countries and foreign territories around the world. Telecommunications hubs in Singapore, London, Amsterdam, Dublin, Milan, Paris, Seoul, São Paulo, Kuala Lumpur and Mexico reduce our customers' connectivity costs, increase accessibility, and deliver faster, more efficient trading. Additionally, CME has established international offices in London, Singapore, Tokyo, Hong Kong, São Paolo and Calgary. CME believes that its significant global expertise and experience will provide the Commission with a unique and valuable perspective on the matters discussed herein.

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I. Detailed Comments

The Commission states in the Release that it is proposing regulations "to establish a process for a DCM or SEF to make a swap 'available to trade' under Section 2(h)(8) of the CEA." (Release at 77730.) This process is wholly independent from the process established by the Commission to determine which swaps will be subject to the clearing mandate. Moreover, unlike the clearing mandate determination which will be made by the Commission, in the Release the Commission proposes that SEFs and DCMs make the MAT determination as part of their routine rule filings, giving them the option to choose to self-certify or seek prior approval by the Commission. Significantly, with respect to swaps that are deemed subject to the clearing mandate by the Commission, the Release proposes that the entire marketplace for a particular swap and its economic equivalents (not defined by the Commission in the Release) will be bound by the MAT determination of a single SEF or DCM in that once such a determination is made, all market participants will be forced to trade such products on a SEF or DCM. The Release also seeks comment on the substantive factors which should be considered as part of the MAT determination. CME Group's comments on the Release are as follows.

A. The Commission's Request for Comment on this Matter is Premature.

While it may ultimately be necessary for the Commission to adopt a rulemaking to address a MAT determination, we believe that the Commission's Release is premature for several reasons.

First, the MAT determination only has relevance in that if a swap is subject to the clearing mandate and MAT, then it must be traded on a SEF or DCM. In other words, in the absence of a clearing mandate, a MAT determination for a particular swap has no import. As a matter of common sense, having a substantive understanding as to how the Commission is going to implement the clearing mandate in the different swaps markets is critical to: understanding the MAT proposal, assessing the collective impact of these two determinations on the market and providing informed and detailed public comment on the Release.

Per the Commodity Exchange Act (CEA), in determining whether a swap should be subject to the clearing mandate, the Commission must consider the following:

(I) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data;
(II) The availability of rule framework, capacity, operation expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;
(III) The effect on the mitigation of systemic risk, taking into account the size of the market for such contracts and the resources of the derivatives clearing organization available to the clear the contract;
(IV) The effect on competition, including appropriate fees and charges applied to clearing; and
(V) The existence of reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds and property.

CEA §2(h)(2)(D). If the Commission compares the factors listed above to the factors the Commission proposes in the Release to be considered as part of the MAT determination, as well as the discussion

from the Roundtable held on January 31, 2012 to discuss the Release (the "Roundtable"), it appears that there is substantial overlap between the relevant factors necessary to making both the clearing MAT determination. Specifically, in the Release, the Commission proposes that the following factors be considered as part of the MAT determination: (1) whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions on SEFs, DCMs, or of bilateral transactions; (3) the trading volume of SEFs, DCMs, or of bilateral transactions; (4) the number and types of market participants; (5) the bid/ask spread; (6) the usual number of resting firm or indicative bids and offers; (7) whether a SEF's trading system or platform or a DCM's trading facility will support trading in the swap; and (8) any other factor that the SEF or DCM may consider relevant. (Release at 77732.) Indeed, factors (1) – (6) are a subset of, or can be used as a proxy for, trading liquidity and adequate pricing data. Accordingly, it makes no sense to move forward with finalizing the rules proposed in the Release prior to the Commission's issuance of final determinations regarding which swaps will be subject to the clearing mandate.

Second, another rulemaking not yet finalized that is critical for assessing the proposed rules in the Release and providing informed comment is the SEF Rulemaking.[2] As we previously commented, the need to address the MAT determination is necessitated by the Commission's erroneous reading of the CEA in its proposed SEF Rulemaking dated January 7, 2011 (the "SEF Release"). Specifically, Section 2(h)(8)(B) provides that a swap subject to the clearing mandate must be executed on or subject to the rules of a DCM or SEF. There is an exception to this trade execution requirement if no DCM or SEF "makes the swap available to trade." *See* § 2(h)(8)(B). By its unambiguous terms, the CEA (as amended by the Dodd-Frank Act (DFA)) does not contemplate a separate determination by the Commission as to which swaps are "made available to trade. *Compare §*2(h)(8)(B) *with §*2(h)(1)-(3). Rather, the phrase "made available to trade" clearly contemplates a SEF or DCM listing a product for trading; we do not see a legal basis for the Commission to read this statutory language any differently.

In the SEF Release, the Commission specifically sought comment on the "trade execution requirement" in its SEF rulemaking. Many commenters, including CME Group, expressed concern that if "made available to trade" meant "listed," then the market could experience a situation where a SEF, as defined by the Commission, lists a product that is unsuitable for trading on a Commission-defined SEF, which would result in impaired trading of the product and increased costs for any end user that is exempt from the mandatory clearing/trading requirement. This potential for this problem to arise is created by the Commission's impermissibly narrow reading of the statutory provisions related to SEFs, and in particular, what types of trading platforms may qualify as a SEF. Moreover, the Commission's artificial construct of "required transactions" and "permitted transactions" in the SEF rulemaking is not supported by DFA and requires the Commission to contort different provisions of the statute in an unnatural manner to arrive at some semblance of a legal justification for these categories. In turn, this reading puts the Commission in the legally unsound position of making a determination of "made available to trade" when DFA does not grant the Commission that authority. If the Commission reads the statute as written to allow voice brokers to qualify as SEFs, then the concerns outlined in the comment letters submitted in response to the SEF Release regarding the "trade execution requirement" would be alleviated – categories such as "required transactions" and "permissible transactions" would not need to exist and no markets would be forced to

[2] 17 CFR Part 37, RIN Number 3038-AD18, Federal Register Vol. 76, No. 5, Page 1214.

trade on the screen. Thus, there would be no regulatory or other market concerns with "made available to trade" meaning "listed," as was clearly Congress' intent.

For these reasons, the Commission should extend the comment period on the Release until such time as the market has clarity on how the clearing mandate will be implemented in the various swaps markets and until we have final SEF rules specifying what types of trading platforms will qualify for SEF status. Indeed, it may be the case that the MAT determination could be done away with and the Commission could re-focus its efforts on assessing how to best promote pre-trade price transparency in swaps markets without forcing contracts determined to be MAT onto a screen.

B. If the Commission Proceeds with Closing the Comment Period and Finalizing the Rules in the Release Without Clarity Surrounding the Clearing Mandate and SEF Rules Discussed Above, Then the MAT Determination Must be Made by the Commission, Not DCMs and SEFs.

If, however, the Commission continues to move forward with finalizing this rulemaking in the absence of final rulemakings on the critical issues noted above, and based on the collective set of relevant proposed rules, then we absolutely agree that the Commission must establish a process and substantive requirements for making the determination as to whether a swap is MAT within the meaning of the CEA. As evidenced by our comments above, we, like many other commenters, fundamentally disagree with the Commission on the issue of who should make that determination. Specifically, we believe that the Commission – not any SEF or DCM – should make the determination as to whether a particular swap is required to be traded on a DCM or SEF. Having this determination made by the Commission will eliminate the motivation that might exist for a SEF to determine that it has made a swap available to trade and force the market to trade such swap on a SEF before it is appropriate in order to attempt to gain a first mover advantage. We do, however, support the Commission's requiring SEFs or DCMs to make available to the Commission data that will allow the Commission to make this determination if the Commission does not have that data otherwise available to it.

Moreover, as previously noted, in the Release the Commission proposes that the following factors be considered as part of the MAT determination: (1) whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions on SEFs, DCMs, or of bilateral transactions; (3) the trading volume of SEFs, DCMs, or of bilateral transactions; (4) the number and types of market participants; (5) the bid/ask spread; (6) the usual number of resting firm or indicative bids and offers; (7) whether a SEF's trading system or platform or a DCM's trading facility will support trading in the swap; and (8) any other factor that the SEF or DCM may consider relevant. (Release at 77732) Because factors (1) – (6) are a subset of, or can be used as a proxy for, trading liquidity and adequate pricing data, the Commission will be provided with most, if not all, of this information by derivatives clearing organizations ("DCOs") when they make a submission to voluntarily clear a swap pursuant to the final rules governing the submission process for swaps subject to the clearing mandate (the "Swaps Clearing Rulemaking"). Therefore, it would be a waste of Commission and industry resources to require a separate MAT filing, particularly since the MAT determination has no import unless a clearing mandate is in place for that swap. Thus, we suggest that a logical and efficient use of Commission and industry resources is for the Commission to implement the following process: (i) review the swaps clearing submission and make a clearing mandate

determination, (ii) assess whether such product is listed for trading by a SEF or DCM, (iii) if it is, request any additional information from the relevant DCM(s) and/or SEF(s) to make the MAT determination and (iv) make the MAT determination.

If, for some reason, the Commission chooses not to fold in the MAT determination with the clearing mandate determination as described above, CME Group submits that the final rules governing the process for determining whether a swap is MAT should mirror the rules adopted in the Swaps Clearing Rulemaking. Specifically, that rulemaking sets forth the procedural and substantive requirements that govern a DCO submission to voluntarily clear a swap in the first instance, which in turn allows the Commission to make the substantive determination as to whether those swaps should be subject to the clearing mandate. That is, a DCO must submit a Part 40 rule filing in order to list a swap for clearing and that filing must contain certain data that will allow the Commission to decide whether the entire marketplace will be required to clear that swap with a DCO. The implications for the marketplace from both a cost and market structure perspective are just as significant when a product is required to be executed on a DCM or SEF as when it is required to be cleared. As such, we can think of no reason why the process for making those determinations should differ.

C. The Commission's Treatment of "Economically Equivalent Swap" in the Release Also is Premature.

In the Release, the Commission proposes to define "economically equivalent swap" as a "swap that a SEF or DCM determines to be economically equivalent with another swap after consideration of each swap's material pricing terms." (Release at 77732.) We believe that the Commission's Release is premature with respect to this issue as well. In particular, the Commission did not address this issue in the Swaps Clearing Rulemaking. In that release, the Commission states that questions of this sort "relate[] to the clearing of swaps in general, rather than the process for review of swaps for mandatory clearing" (see 76 Fed. Reg. at 44470.), suggesting that it will conduct a future rulemaking to answer this question. Given the Commission's failure to address this issue in the Swaps Clearing Rulemaking, the inclusion of the issue in this Release makes no sense. Specifically, once a determination has been made that a particular swap is MAT, if that swap has been mandated for clearing then market participants must execute that swap on a DCM or SEF. Should the trade execution requirement apply to an economically equivalent swap, the Commission would have needed to define "economically equivalent swap" for purposes of the Swaps Clearing Rulemaking and would have to make such an assessment in conjunction with each swap it mandates for clearing. Because the Commission did not do this, it makes no sense to define the term in the first instance in the Release – and, in so doing, give SEFs and DCMs de facto authority to define the term and make such an assessment when there is no relevance to such an assessment in the absence of a Commission determination in the context of the clearing mandate.[3]

[3] This problem is illustrated by the following example.

- Assume that Swap 1 is cleared by a DCO and is subject to the clearing mandate. Swap 1 also is made available to trade by a SEF.
- Another product, Swap 1EE is developed that is economically equivalent to Swap 1 and is traded on a different SEF.

D. We Agree With the Proposed Factors Required to be Considered as Part of the MAT Determination.

In the Release the Commission proposes that the following factors be considered as part of the MAT determination: (1) whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions on SEFs, DCMs, or of bilateral transactions; (3) the trading volume of SEFs, DCMs, or of bilateral transactions; (4) the number and types of market participants; (5) the bid/ask spread; (6) the usual number of resting firm or indicative bids and offers; (7) whether a SEF's trading system or platform or a DCM's trading facility will support trading in the swap; and (8) any other factor that the SEF or DCM may consider relevant. (Release at 77732.) As previously noted, we believe that factors (1) – (6) are merely a proxy for assessing trading liquidity and adequate pricing data, which we believe are the most important factors the Commission must consider when assessing whether a swap should be subject to the clearing mandate.

We agree with the Commission that a MAT determination by the Commission should consider factors (1)-(7). Additionally, regarding other factors that the SEF or DCM should consider in making the MAT determination, we believe that the Commission should also consider open interest.

Further, in considering whether a swap is MAT, the Commission must balance its interest in promoting pre-trade price transparency against the increased costs that could arise through pre-trade transparency in the context of swaps trading, particularly trading large size in illiquid products. In some cases, the need to protect the functioning of the markets outweighs the concern for pre-trade transparency. If quotes are made public before a trade can occur in a less liquid swap, third parties may be tipped off to the upcoming trade, resulting in an unlevel playing field. Allowing the market access to this information encourages front-running and an increased bid/ask spread which will result in increased costs to the end-user client rather than decreased costs. In illiquid markets and markets where there are few market participants, information about the positions and trading strategies of counterparties to a trade can be conveyed to the market, and in some instances, may be used to infer the identity of at least one of the counterparties to the trade. In these markets, if market participants do not retain the ability to execute trades without, in effect, announcing their positions or trading strategy prior to making such trades, they will refrain from trading these instruments or trade in markets outside the Commission's jurisdictional reach.

E. Miscellaneous Issues.

With respect to compliance, we believe that a MAT determination by the Commission should be followed by a compliance period of at least 90 days, with an ability to appeal to the Commission for an extension.

- The CFTC's clearing rules would not make Swap 1EE automatically subject to the clearing mandate, so the exchange-trading mandate (which only applies to swaps subject to the clearing mandate) also would not apply to Swap 1EE.
- Therefore, Swap 1EE could not be "made available for trading" for purpose of the exchange-trading mandate, despite the CFTC's proposed rule.

As we noted at the Roundtable, exchanges like CME Group commonly maintain Service Level Agreements ("SLAs") with firms and vendors specifying minimum time requirements for the implementation of new products, changes to existing products or delisting of products. We have recently conducted a survey of firms and vendors with regards to these SLAs and have concluded that a minimum of 30 days is necessary for vanilla products launches from the time at which we serve notice to all affected parties with the new product details. Given the operational complexities that market participants will potentially face in dealing with several different products at once subject to a MAT determination, across several different execution venues, and appreciating that some of the products will not be vanilla, we believe that 30 days is not appropriate and could have unintended adverse consequence for the industry.

Moreover, we agree with the Commission that an annual review of MAT determinations is appropriate, but for the reasons stated above this review, like the initial MAT review, should be conducted by the Commission, not SEFs and DCMs. Additionally, rather than require SEFs and DCMs to make supplemental filings to enable this annual review, we believe that the necessary information will be more readily available to the Commission from SDRs and that it would minimize costs to the industry and the Commission to obtain such information from SDRs.[4] Finally, to further minimize cost to the industry and ease administrative burdens for market participants and the Commission, we recommend that the annual review of all MAT determinations should be made within 30 days of December 31 every year. If, however, a filing is made after June 30 on any given year, the annual review should take place within 30 days of the following calendar year. This means the first annual review for many products will occur more than a year after the initial MAT filing.

With respect to notice to the public regarding MAT determinations, we recommend that the Commission publish on a central page on its website as well as in the Federal Register for a period of at least 30 days, all products which it is currently assessing for MAT status. We can think of no reason not to ensure that all exchanges and market participants receive adequate notice of such a determination and are given sufficient time to prepare for compliance should such a decision impact their daily business operations.

[4] To the extent that in any particular instance the Commission needs additional information from a SEF or DCM, it can simply ask that the relevant SEF(s)/DCM(s) provide it to the Commission.

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CME Group thanks the Commission for the opportunity to comment on this matter. We would be happy to discuss any of these issues with Commission staff. If you have any comments or questions, please feel free to contact me at (312) 930-8275 or via email at Craig.Donohue@cmegroup.com, or Christal Lint, Director, Associate General Counsel, at (312) 930-4527 or Christal.Lint@cmegroup.com.

Sincerely,

Craig S. Donohue

cc: Chairman Gary Gensler
Commissioner Bart Chilton
Commissioner Jill Sommers
Commissioner Scott O'Malia
Commissioner Mark Wetjen