THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

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

February 13, 2012

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

Regarding: Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade

RIN 3038–AD18

Dear Mr. Stawick:

The Financial Services Roundtable (the "Roundtable")[1] appreciates the opportunity to submit comments to the Commodity Futures Trading Commission (the "Commission") with respect to its proposed rulemaking, RIN 3038-AD18, Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade (the "Proposing Release").[2] We believe it is important to have a clear process for such designations that accomplishes the Commission's goals of implementing the trade execution requirement but does not leave the market vulnerable to the self-interest of select participants.

We have commented on a large number of Commission proposals relating to the implementation of Title VII of the Dodd-Frank Act,[3] including the Commission's

[1] The Financial Services 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, $1.2 trillion in revenue, and 2.3 million jobs.
[2] 76 Fed. Reg. 77728 (December 14, 2011).
[3] A full list of the comment letter submitted by The Roundtable to the Commission can be accessed at http://www.fsround.org/fsr/policy_issues/regulatory/cftc.asp

previous proposals relating to swap execution facilities.[4] We appreciate the opportunity to offer further perspective on these important matters.

The designation of a swap as "made available to trade" has crucial significance in establishing when swaps become subject to the trade execution requirements of Title VII. In particular, if a swap is subject to the mandatory clearing requirement and has been made available to trade on a Swap Execution Facility ("SEF") or a Designated Contract Market ("DCM"), it must be traded on such a facility unless an exemption applies. Market participants that cannot rely on an exemption will have to trade on a SEF or DCM or forgo the transaction.

As noted by many of the participants in the Commission's roundtable on January 30, 2012, premature application of the trade execution requirement to a swap has the potential to compromise rather than advance the goals of Title VII. If a facility determines that it has made a swap available to trade, but the platform it offers is not conducive to such trading, for any of a number of reasons that we discuss in this letter, the swap may become *unavailable* to many market participants. Given the potential negative consequences to the market, we believe the determination of whether a swap has been made available to trade is too significant to be left in the hands of private market participants who have no obligation to act in the best interest of the market as a whole. The Commission's proposal provides insufficient oversight of this critical aspect of Title VII implementation.

We have the following serious concerns about the proposed process and the following specific suggestions about alternative approaches:

1. **SEFs and DCMs have a strong economic incentive to determine that a swap has been made available to trade, even where such determination may adversely affect other participants in the market.**

If a SEF or a DCM determines a swap that is subject to the clearing mandate has been made available to trade, and thus is subject to the trade execution requirement, the SEF or DCM receives a number of important advantages. It may receive first-mover advantages, enhancing its competitive position in the market, and if no other markets respond by also making the swap available to trade, it may acquire monopoly power, which would not only give it control of the market but also allow it to control pricing. Conversely, if other SEFs or DCMs respond by also making the swap available to trade they may fragment liquidity in a market that already has insufficient liquidity. Either of these outcomes may cause entities to rely on exemptions from the trade execution requirement, even when they otherwise might have been inclined to trade on a SEF or a DCM. In other words, by facilitating anti-competitive behavior in the early stages of the development of this market, the Commission may impede the establishment of centralized trading markets, notwithstanding the statutory mandate, and may limit the

[4] *See* Letter from The Financial Services Roundtable to David A. Stawick, CFTC Secretary, *Core Principles and Other Requirements for Swap Execution Facilities*, March 8, 2011. *Available at* http://www.fsround.org/fsr/policy_issues/regulatory/pdfs/pdfs11/RoundtableCFTCSEFletter--FinalDraft.pdf.

ability of market participants to transact in swaps on reasonable terms and with enhanced transparency.

2. The Commission's list of factors that a SEF or DCM may consider in making the determination, allows a SEF or DCM the unfettered opportunity to make the determination even in the absence of critical market components necessary for public execution of a swap.

The Commission's proposal provides a list of factors that a SEF or DCM must consider in determining whether it has made a swap available to trade, including the availability of ready and willing buyers and sellers; the frequency, size and volume of transactions across all markets; and the SEF or DCM's platform's ability to support trading in the swap. The Commission, however, does not propose to require more than "consideration" of these factors. What conclusions must a SEF or DCM reach, after such consideration, to determine that the swap has been made available to trade? The lack of objective standards leaves the decision wholly with the SEF or DCM, and allows it to make a determination that serves no market participant other than itself. The standards are not even bolstered by a subjective standard, for instance that the SEF or DCM, upon consideration of such factors, must determine that mandatory trading of the swap will not cause significant market disruption, reduce liquidity in the swap or have other adverse effects. A SEF or DCM may also certify a swap as available for trade without determining that the SEF or DCM has or reasonably expects to develop sufficient liquidity in that swap to support such trading or that the SEF or DCM possesses sufficient resources to connect to market participants who will now be required to publicly execute the swap.

3. Determinations that a swap is "economically equivalent" to a swap made available to trade should be subject to a review process comparable to the original "made available to trade" determination.

As noted during the Commission's roundtable, it is unclear how a determination would be made that a swap is "economically equivalent" to another swap. Even the choice of clearing agency, which affects margin determinations and risk, may make two ostensibly equivalent swaps trade differently. We believe that, unless the facilities have coordinated with each other to agree on a uniform set of terms, an economic equivalency determination for a swap traded on different facilities is essentially a new determination that a swap has been made available to trade. In such a circumstance, it should be subject to certain procedural protections, including the opportunity for public comment, as the determination with respect to the original swap.

4. An annual review of determinations that a swap has been made available to trade is insufficient, especially in the early years of the implementation.

We believe that, especially during the critical early phases of implementation of the trade execution requirement, it is essential that the Commission frequently review and analyze the impact of that requirement on the availability and cost of affected swaps. We thus believe that such reviews should occur no less frequently than quarterly. Moreover,

we believe that the Commission should be prepared to suspend such a determination on an emergency basis if, as a practical matter, the swap is not "available" to trade, whether as a result of operational issues or for other reasons.

5. Final rules should ensure that market participants are or can be rapidly connected to the applicable SEF or DCM at a reasonable cost.

As we have noted, SEFs and DCMs will have a strong incentive to determine that they have made swaps available to trade in order to drive transactions onto their markets. But the Commission's proposal does not require them to be able to demonstrate that they have or can quickly establish connectivity with market participants, leaving open the possibility that the new exchange-based approach may, contrary to the Commission's and Congress's intent, have the perverse effect of concentrating swaps transactions in a small number of market participants that are connected to the SEF. We also note that such a situation could occur even where a SEF has appropriate policies and procedures in place for broad market access, but technological constraints do not allow sufficiently rapid onboarding of new participants to avoid these consequences.

Our members believe that 30 days will be insufficient for the market to develop adequate connectivity to a new market participant if a swap has been made available to trade. They suggest at least 180 days to avoid market disruption or the exclusion of participants from the market. Moreover, we believe that a SEF should be required to demonstrate that it has, or has the ability to establish within the applicable time period, connectivity with all active market participants in a particular swap, without undue expense or burden to such participants, before it can state that it has made the swap available to trade.

6. Our strong preference would be to have the Commission make the determination that a swap was made available to trade; however, the Commission could take a number of alternative approaches, independently or in tandem, to improve oversight of the designation process. Although we have included at the end of this list several suggestions that would apply if the Commission follows through with its proposal to leave the determination with the DCM or SEF, we believe strongly that this is the wrong approach.

a. Require at least a 30-day comment period, at the end of which the Commission would have to do a formal review if it received substantive comments indicating opposition to the determination.

The determination has significant legal consequences that may materially adversely affect the ability of market participants to transact in swaps. Accordingly, we believe that determinations that a swap has been made available to trade should not be made without the opportunity for meaningful public comment.

b. Establish an agreed list of swaps that are currently listed and actively trading on existing platforms and for which there is sufficient liquidity to support a trade execution requirement, and stipulate that the products included in the list be the only swaps designated as "made available to trade" for at least one year after the effective date of the clearing mandate.

During the Commission's Roundtable, a representative of Tradeweb suggested that during the first year of implementation of the trade execution requirement, the Commission establish a single, stable list of swaps that have been made available to trade. We agree with the merits of this suggestion.

The changes to the swaps markets that are being brought about by Title VII and the Commission's regulations affect every aspect of a large, global marketplace that plays an important role in the U.S. economy. Each of these changes—the clearing mandate, the trade execution requirement, new regulatory status for market participants, reporting requirements, business conduct standards, margin, trade documentation requirements, and so on—in itself arguably would have involved a significant devotion of time and resources from market participants to implement. The confluence of them is extraordinarily challenging. Moreover, the Commission is not only changing the rules for transacting swaps but is changing the infrastructure related to those transactions by creating newly regulated entities in the form of SEFs and Swap Data Repositoriess ("SDRs") and making significant changes to the way Derivative Clearing Organizations ('DCOs") conduct their business. We are considering how SEFs will decide when a swap is made available to trade, making trading of that swap on a SEF or DCM mandatory, but we do not yet know how a SEF will be required to operate in terms of its core principles and functionality; no registered SEF exists, and not a single trade has been transacted on a Title VII-compliant SEF.

Rather than trying to force a large swath of the market onto new, untested infrastructure while continuing to have constant changes to the rules as to what must be traded on that infrastructure, we suggest that the Commission "start small." The Commission should take care to make sure that the trade execution system works, that the necessary connectivity can be established among these new classes of infrastructure entities, and that the market has the opportunity to test the system without having to deal with the uncertainties generated by an evolving list of swaps to which the trade execution requirement applies. The regulatory mandate supporting the restructuring of the swap market, through the trade execution requirement, must not be imposed on a system in which the technology is not reliable, connectivity is limited and trades cannot be conducted in a way that makes economic sense. Nothing is gained by establishing open, transparent markets that then fail because of a faulty infrastructure. The Tradeweb solution is consistent with a more careful approach that may be essential to the long-term

success of these new facilities, and we believe the Commission should give it serious consideration.[5]

c. Delegate to a board with broad market participation, or the National Futures Association, the ability to make a determination that a swap has been made available to trade, upon application of a SEF or DCM;

Our members believe that establishing a review board to make the "made available to trade" determination would create important cross-checks on the ability of SEFs and DCMs to make decisions that would have market-wide implications. The SEC contemplated a similar board in its proposal on security-based SEFs, and we believe that such an approach has numerous advantages over the current proposal.[6] We appreciate that the establishment, composition and selection of such a board may present logistical complications, but it is our view that a board could be established that included appropriate representation from the buy-side, sell-side, DCOs, SEFs, DCMs and others that would result in a more thoughtful, balanced approach to these issues.

In the event that the establishment of such a board is determined not to be feasible, a second alternative would be to place the authority for the determinations with the NFA. Our members believe a board comprised of market participants would have greater insight into real world consequences, and so would prefer that approach if the determination were delegated to a separate entity. However, they believe that the NFA would make fundamentally better and less biased decisions than the SEFs or DCMs themselves.[7]

d. Establish objective standards of liquidity or market acceptance that must be met before a swap can be made available to trade, such standards to be determined by the Commission after considering the data provided to it under new reporting requirements;

A tremendous amount of information about how, where, how often, and between whom swaps trade is about to become available to the Commission. As SEFs register, that information will be further supplemented with data as to how market participants are using SEFs to conduct trades. Our members are in agreement that having objective standards that will assist in the determination of whether a swap can be effectively traded on an exchange is essential to the proper determination of whether a swap has been made available to trade. Accordingly, we believe there would be significant merit in deferring the determination that any swap has been made available to trade until the Commission has had the opportunity to view SEFs in operation and establish objective criteria.

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[5] We note, as well, that an approach that defers the commencement of the trade execution requirement for at least a year after the first SEFs are registered, operational and fully compliant—in other words, confirming that the market works before mandating its use—would also be consistent with a more cautious approach.

[6] Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. 10948 , 10968 (February 11, 2011) (discussing swap review committees).

[7] A third alternative would be to place the responsibility for these determinations with the NFA, with the NFA appointing a broad-based advisory committee to assist it with such determinations.

e. Require the SEF or DCM to demonstrate that it has broad market participation and connectivity;

As we discuss in Paragraph 5 above, we believe that broad market participation and connectivity are key to the successful implementation of the trade execution requirement. Any approach to determine that a swap has been made available to trade must consider these issues. Indeed, we believe a swap has *not* been made available to trade on a particular SEF or DCM if active participants in the markets would not be able to trade the swap on that SEF due to connectivity or operational issues. Any standard established by the Commission must evaluate the availability of the swap in light of these matters.[8]

f. Require a senior officer of the SEF or DCM to certify as to its reasonable belief, under penalty of law, that treating a swap as made available to trade will not materially disrupt the ability of market participants to trade in that swap or impose unreasonable costs on such participants;

Regulators, including the Commission, have long espoused the view that certifications inspire greater diligence and a more thorough analysis by key decision-makers with respect to regulatory and reporting matters. In the absence of objective criteria to guide the determination that a swap should be treated as made available to trade, and thus subject to the trade execution requirement, a certification from a senior officer of the SEF or DCM that the SEF or DCM has fully evaluated the market impacts of the determination and does not believe they will be materially adverse may lead to a more thoughtful approach to these matters. We believe that, in the absence of a Commission evaluation or a determination by a board or entity unaffiliated with the SEF or DCM, such a certification may help protect the market from premature application of the trading mandate to swaps for which the necessary supporting infrastructure is not yet available.

g. Require demonstration of market support for the made available to trade determination, for instance by requiring a SEF or DCM to demonstrate that at least 2 other SEFs and DCMs (that are not affiliated with the SEF or DCM making the demonstration or each other) agree that the swap should be considered made available to trade.

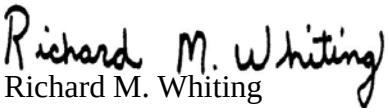
One way that the Commission can avoid giving any SEF or DCM the first mover advantage with respect to a swap is by requiring that multiple unaffiliated SEFs or DCMs jointly determine that they have made the swap available to trade. Although such an approach does not address some of the connectivity issues we have discussed elsewhere in the letter, it may mitigate them by affording market participants the opportunity to choose the facility on which they want to trade and minimizing the potential bottleneck of

[8] We note, too, that the Commission has broad anti-evasion authority that it could use if it believed market participants were intentionally refusing to connect to SEFs to undermine this determination.

all active traders of a swap trying to connect concurrently to a single facility. Although we recognize that such an approach may lead to more fragmentation of the trading market for the swap, we believe the advantage of ensuring meaningful competition among SEFs and DCMs may outweigh the risks of that fragmentation.

We appreciate the opportunity to comment on these proposals. If you have any questions about this letter, or any of the issues raised by our comments, please do not hesitate to call me or Robert Hatch at Robert@fsround.org or (202) 289-4322.

Sincerely,



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