WMBA AMERICAS
WHOLESALE MARKETS BROKERS' ASSOCIATION

February 13, 2012

Mr. David Stawick
Secretary
U.S. Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Process for a Designated Contract Market of Swap Execution Facility to Make a Swap Available To Trade (RIN 3038-AD18)

Dear Mr. Stawick:

The Wholesale Markets Brokers' Association Americas ("WMBAA")[1] appreciates the opportunity to address the Commodity Futures Trading Commission's ("CFTC's") proposed regulations ("Proposed Rule") that establish a process for a designated contract market ("DCM") or swap execution facility ("SEF") to make a swap "available to trade" as set forth in new Section 2(h)(8) of the Commodity Exchange Act ("CEA") pursuant to Section 723 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

Introduction

The WMBAA believes that the regime contemplated by the Proposed Rule is unnecessary and imposes a redundant layer of calculation and analysis on the Commission. The stated public policy goals of the Proposed Rule can be more easily achieved with reliance on the analysis done in connection with the CFTC's process for review of swaps for mandatory clearing,[2] and, for that reason, should be relied upon to make "available to trade" determinations. Further, as noted in its letter to the Commission dated March 8, 2011,[3] the WMBAA believes that the statutory language in the CEA relied upon to authorize the Proposed Rule should be interpreted more literally and the mandatory trade execution requirement should apply to all swaps subject to the clearing requirement of Section 2(h)(1) of the CEA, unless no SEF makes the swap available to trade.

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[1] The Wholesale Markets Brokers' Association Americas is an independent industry body representing the largest inter-dealer brokers ("IDBs") operating in the North American wholesale markets across a broad range of financial products. The WMBAA and its member firms have developed a set of *Principles for Enhancing the Safety and Soundness of the Wholesale, Over-The-Counter Markets*. Using these principles as a guide, the Association seeks to work with Congress, regulators and key public policymakers on future regulation and oversight of over-the-counter ("OTC") markets and their participants. By working with regulators to make OTC markets more efficient, robust and transparent, the WMBAA sees a major opportunity to assist in the monitoring and consequent reduction of systemic risk in the country's capital markets. For more information, please see www.wmbaa.com.

[2] Process for Review of Swaps for Mandatory Clearing, 76 Fed. Reg. 44464 (Jul. 26, 2011).

[3] *See* letter from Stephen Merkel, Shawn Bernardo, Christopher Ferreri, J. Christopher Giancarlo, and Julian Harding, WMBAA, to CFTC, dated March 8, 2011, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=31296.

If the CFTC seeks to achieve increased swaps clearing through central clearinghouses and swaps execution through regulated marketplaces, one of the hallmark aspirations of the Dodd-Frank Act,[4] the Commission should encourage the making "available to trade" of as many swaps as possible. The WMBAA supports efforts to increase the number of swaps cleared through central counterparties. Tying the "made available to trade" determination to the analysis performed for mandatory clearing would increase the number of swaps traded through regulated intermediaries, fostering increased liquidity, and make a greater number of swaps clearable with minimal increased regulatory burden. Only with the availability of these products for DCM and SEF customers will liquidity flourish, increasing the likelihood that the swap will meet the statutory criteria set forth by Congress for it to become subject to the mandatory clearing requirement. Limiting whether a regulated marketplace may execute a swap will only restrict the number of products that become liquid enough for mandatory central clearing.

While the determination as a trading protocol falls under the Commission's Part 40 rules,[5] the WMBAA believes that the more appropriate method of submitting available trade determinations is to rely on a self-certification process, consistent and in connection with the Part 40 rules. The WMBAA encourages the CFTC to proceed cautiously with this new proposed regime. As the Commission has recognized, the implementation of a "made available to trade" execution provision for multiple execution venue will pose challenges for regulators and market participants alike.[6] For that reason, the WMBAA believes that the mandatory trade execution requirement should be effective 30 days after the CFTC makes a determination that a swap is subject to the mandatory clearing requirement. This period of time should be sufficient for market participants to be aware of the determination and for DCMs and SEFs to comply with any regulatory or technological changes needed to provide execution services for these products.

Wholesale brokers exist to create liquidity in the OTC markets that do not readily form or sustain continuous markets and where a competitive trading platform will produce better terms than if the parties to the trade executed the trade themselves. The ability to create liquidity will ultimately determine whether a swap is "available for trading." Currently, wholesale brokers, unlike futures exchanges, do not seek prior approval from a regulator prior to making a swap available for customer trading. Rather, it is a dynamic process where buyers of risk and sellers of risk are actively sought by wholesale brokers to generate competitive price discovery and liquidity.

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[4] *See* CEA Section 5h(e) ("The goal of this section is to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market." [emphasis added]).

[5] *See* Provisions Common to Registered Entities, 76 FR 44776 (Jul.27, 2011).

[6] *See* Customer Clearing Documentation and Timing of Acceptance for Clearing, 76 Fed. Reg. 45730, at 45732 (Aug. 1, 2011) ("The Commission recognizes that while immediate acceptance for clearing upon execution currently occurs in some futures markets, it might not be feasible for all cleared markets at this time. For example, where the same cleared product is traded on multiple execution venues, a DCO needs to be able to aggregate the risk of trades coming in to ensure that a clearing member or customer has not exceeded its credit limits.").

As Mr. Michael Cosgrove indicated during the recent staff public roundtable,[7] it is important that the Commission recognize that the principles of appropriate block trade thresholds and methods of trade execution are intimately tied to the issue of whether a swap is "available to trade." The more flexible the trade execution regime adopted by the CFTC in its Part 39 rules, the greater likelihood for deeply liquid markets and, accordingly, an increase in the number of swaps which can be mandatorily cleared and executed. The WMBAA encourages the CFTC to consider a flexible approach to the SEF definition, permitting registration for trading systems or platforms that meet the statutory requirements set forth in the Dodd-Frank Act. A wide range of permitted methods of trade execution, clearly permitted by the CEA's use of the phrase "any means of interstate commerce," will foster increased liquidity and allow for more swaps to be traded on regulated marketplaces. As the number of SEF-executed swaps grows, so will the scope of products with sufficient characteristics to require central clearing. As a result, a greater number of swaps will be made "available to trade."

<u>Lack of Legislative Authority; Duplicative Nature of Proposed Rule</u>

The CEA sets forth clear and concise criteria for the Commission's review in determining whether a swap must be cleared. Unlike the enumerated analysis required to be completed by the CFTC in making a clearing determination pursuant to Section 2(h) of the CEA, there is no statutory corollary in the CEA to establish the "made available to trade" framework. The CEA does not set forth a required analysis or the criteria to be considered in performing such analysis, nor does it establish that the burden for trading should rest on SEFs or DCMs to convince the CFTC a swap should be traded on a registered marketplace.

Given the duplicity of the analysis resulting from a DCM or SEF's petition to the CFTC under the Proposed Rule, the WMBAA believes a more efficient use of resources would be to permit a DCM or SEF to self-certify that it makes a swap "available to trade." In reality, any swap with sufficient "outstanding notional exposures, trading liquidity, and adequate pricing data," such that it is subject to the mandatory clearing requirement, will also meet the criteria in the Proposed Rule for the swap to be made "available to trade." For that reason, and to ensure precision surrounding the scope of swaps that may be made "available to trade," the WMBAA urges the CFTC to add clarifying language that indicates the Proposed Rule only applies to those swaps already deemed mandatorily clearable by the CFTC and subject to the mandatory clearing provisions of the CEA and implementing rules.

The standardized swaps which the Commission will subject to mandatory clearing present a situation analogous to the listed options marketplace. The listed options world has 12 exchanges which can list and trade identical options which are all issued by the Options Clearing Corporation. The same thing will be occurring in the standardized swap world where multiple SEFs will list as available to trade and trade identical swap contracts which will be cleared by one or more derivatives clearing organizations ("DCOs"). The WMBAA believes that requiring SEFs to provide all the information and data for standardized swaps which have been identified as being mandatory clearable would be duplicative and provide minimal value to the Commission, particularly because

[7] CFTC Staff Public Roundtable to Discuss the "Available to Trade" Provision for Swap Execution Facilities and Designated Contract Markets, January 30, 2012.

the Commission will already have the data through DCO submissions and its regulatory access to SEF and swap data repository data (SDR).

To this end, the WMBAA encourages the CFTC to streamline the Part 40 review process to the greatest extent possible and to rely on this review in making its "available to trade" determination. It is likely that multiple DCMs or SEFs will make a swap "available to trade" if sufficient liquidity was found to impose a clearing requirement.

Finally, the WMBAA has concerns with the annual review process and the process by which a swap ceases to be made available to trade. With respect to the former, the WMBAA believes that the annual requirement is arbitrary, time consuming, and will not provide any sufficient regulatory value to the Commission. Rather, the Commission should require renewal of a self-certification on an annual process, but without the regulatory burden of collecting and submitting the data contemplated in the Proposed Rule. The CFTC could also consider receiving the necessary data directly from the SDR. With respect to the latter, the WMBAA believes a more efficient approach would be to rely upon the Commission's determination to mandate a swap's clearing through a DCO. So long as the Commission deems a swap subject to the mandatory clearing requirement, the swap should be considered available to trade on a DCM or SEF. At the moment when the Commission reverses its position with respect to clearing for a swap, the trade execution requirement should similarly no longer apply.

Factors Considered Under the Proposed Rule

The CFTC proposes that a SEF or DCM consider the following factors to make a swap available to trade: (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 on 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; or (8) any other factor that the SEF or DCM may consider relevant. The CFTC notes that no single factor is dispositive, but rather a SEF or DCM may consider one or several factors.

The factors to be used in making a mandatory trade execution determination are significantly similar to those enumerated in the CEA for determining whether a swap must be cleared.[8] Imposing two duplicative rules on DCOs, SEFs, and DCMs is unnecessarily burdensome. Further, at a time when regulatory resources are at a premium, this rule would impose an additional burden on the CFTC that could be more easily addressed through SEF self-certification.

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[8] *See* CEA Section 2(h)(2)(D) ((I) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data; (II) The availability of rule framework, capacity, operational 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 contract and the resources of the derivatives clearing organization available to 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 1 or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property.).

Regulatory Burden Imposed on SEFs to Comply with Proposed Rule

Finally, the WMBAA believes that the CFTC's projected aggregate burden in terms of hours is lower than the actual demands the Proposed Rule will impose on DCMs and SEFs. Particularly for the implementation of a new regime, the Proposed Rule fails to consider the wide array of resources that will be required to contribute to a DCM or SEF's made available to trade submission, including internal sophisticated information technology professionals, experienced operations support staff, legal and compliance staff, and management involvement. In addition to the initial costs of implementing this new procedure, the ongoing obligations, including the annual review and assessment, will exceed the projected costs and burdens projected in the Proposed Rule. As previously stated, these excessive costs and burdens are the product of a duplicative rule that can be more effective if implemented in connection with the mandatory clearing analysis.

The CFTC should consider the regulatory burden imposed on DCMs and SEFs resulting from the requirement that each regulated marketplace make a swap available to trade if another DCM or SEF lists or offers for trading such swap and/or any economically equivalent swap. Accepting the CFTC's projection of 50 registered entities filing rule submissions and annual reports, the monitoring of each DCM and SEF for newly petitioned swaps to be made available to trade will require ongoing surveillance for each DCM and SEF, a cost not clearly contemplated by the Proposed Rule.

Conclusion

The WMBAA thanks the Commissions for the opportunity to comment on the Proposed Rule.
We look forward to continuing our conversations with the Commissioners and staff as the new regulatory framework is developed and implemented in a way that fosters competition and liquidity for market participants.

Please contact the undersigned with any questions you may have on our comments.

Sincerely,

Chris Ferreri

Christopher Ferreri
Chairman