February 13, 2012

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

Re: "Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade" *(RIN number 3038–AD18)*

Dear Mr. Stawick:

Chatham Financial Corp. ("Chatham") is pleased to respond to the request for comments by the U.S. Commodity Futures Trading Commission (the "Commission") regarding its Notice of Proposed Rulemaking ("NPR") pertaining to the ***"Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade"*** issued under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or "the Act").

Introduction

Chatham is a consulting company that works with over one thousand companies from virtually all business sectors that employ over-the-counter ("OTC") derivatives to manage risks they face in connection with their day-to-day businesses. Chatham assists its clients with all facets of the hedging process, from structuring and executing hedges to providing on-going valuations, reporting and accounting. Throughout the policy debate over regulation of the OTC derivatives market, Chatham has advocated for effective regulation that reduces systemic risk and increases transparency in the derivatives market, while also ensuring that the market remains an efficient venue for managing risk.

The Impact on End Users

The authors of the Dodd-Frank Act recognized that end users did not contribute to the financial crisis, and do not pose a systemic risk. Accordingly, they have repeatedly emphasized through letters and colloquies that policy makers should strive to ensure that end users are not unnecessarily burdened by new regulations. While many end users will qualify for the end user exception from the Act's mandatory clearing and trading requirements, other end users (e.g., small banks, pension funds, entities that do not fit within the narrowly crafted captive finance exemption, etc.) will not be able to avail themselves of the exception. Consequently, the clearing and trading requirements will extend to thousands of end users. If not implemented carefully, the process for making a swap "available to trade" could negatively impact end users by increasing hedging costs and administrative burdens. Increased costs and administrative burdens could arise due to the following:

- A swap subject to the clearing requirement may not have sufficient liquidity to be traded on a swap execution facility ("SEF") or designated contract market ("DCM"), and/or it may not have sufficient liquidity on each of the swap execution facilities ("SEFs") that make the swap "available to trade".

- End users will be required to expend resources to monitor the swaps deemed "available to trade" and could also be subject to the burden and costs of needing to connect to the latest SEF/DCM that is first to make a given swap "available to trade".

Additionally, even end users that are exempt from the mandatory clearing and trading requirements still may be impacted indirectly by the requirement for swaps to be executed on a SEF/DCM. As an end user executes hedges with a swap dealer, the swap dealer will often execute a subsequent swap in the market to lay off the risk associated with the end user's swap. If the swap dealer is required to transact their offsetting swap on a SEF/DCM and that swap is not sufficiently liquid to be traded on a SEF/DCM, the cost incurred as a result of transacting on an illiquid venue will be passed on to end users and hedging will become more expensive.

For these reasons, we urge the Commission to ensure the "available to trade" process minimizes the potential for unnecessary costs due to decreased liquidity and increased operational burdens.

Liquidity

Some market participants anticipate that only the most standardized and highly liquid swaps would be subject to the clearing requirement and would therefore automatically be deemed suitable for trading on a SEF/DCM. While this is one possible scenario, we believe it prudent that the Commission's approach acknowledge the possibility that other scenarios are similarly feasible. The Commission has crafted numerous rules which suggest that a *subset* of swaps subject to the clearing requirement may be subject to the trading requirement, hence the very creation of the proposal for a process to designate swaps as "available to trade". Likewise, Part 43 and Part 45 reporting requirements put forth scenarios where a swap would be subject to clearing but not traded on a SEF/DCM.

We strongly support the approach of having a separate test to ensure that a swap subject to the clearing requirement is in fact suitable for trading on a SEF/DCM. This approach acknowledges the essential need for swaps only to be designated as available for trading if those swaps are sufficiently liquid. This principle has also been emphasized by then Senate Agriculture Committee Chairman Lincoln, who noted:

> In interpreting the phrase "makes the swap available to trade," it is intended that the Commission should take a practical rather than a formal or legalistic approach. Thus, in determining whether a swap execution facility "makes the swap available to trade," the Commission should evaluate not just whether the swap execution facility permits the swap to be traded on the facility, or identifies the swap as a candidate for trading on the facility, but also whether, as a practical matter, it is in fact possible to trade the swap on the facility. The Commission could consider, for example, whether there is a minimum amount of liquidity such that the swap can actually be traded on the facility. The mere "listing" of the swap by a swap execution facility, in and of itself, without a minimum

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amount of liquidity to make trading possible, should not be sufficient to trigger the Trade Execution Requirement."[1]

To address the need for liquidity on SEFs/DCMs, the Commission proposed eight criteria intended to ensure swaps are sufficiently liquid to be traded on a SEF/DCM.[2] However since no single factor would be dispositive - and the eighth criteria is essentially anything the SEF/DCM deems relevant - the process may allow for less liquid products to be made "available to trade". Consequently, as such the proposed rule makes it feasible that the process may result in outcomes that are averse to the best interests of end users.

We urge the Commission to ensure the key liquidity factors are always satisfied before a swap is deemed "available to trade" rather just than allowing any other factor the SEF/DCM deems relevant. We believe end users would benefit by having proper checks and balances in the process that allow market participants to offer input – both qualitative and quantitative – when they believe the trading requirement should not apply due to the relative illiquidity of a product being considered for the trading requirement. This should be true during the initial process to determine if a swap should be made 'available to trade" and a similar process should be established in the event a swap becomes unsuitable to trade on a SEF/DCM after the initial determination. This would help ensure that swaps that are made "available to trade" are indeed appropriate for execution on a SEF/DCM.

Operational and Logistical Burdens

End users subject to the clearing requirement will be required to commit resources to research, sign up and connect with SEFs/DCMs. It is not yet clear that the time and cost to set up with one or more SEFs/DCMs is worth the relatively small number of swaps many end users execute per year. Furthermore, if SEF/DCMs can quickly make swaps "available to trade," we are concerned that end users may need to sign up with multiple SEFs/DCMs, or chase the latest SEF/DCM that has made a relevant swap type "available to trade." This may be particularly true if the end user has contracted with a particular SEF/DCM, and that SEF/DCM does not offer a swap that becomes required to trade on such a venue. The SEF/DCM self-certification process must be kept in check and provide end users sufficient time to comply. Such time may also allow for competing SEFs/DCMs to ensure they are able to match the product offerings of competing SEFs/DCMs, further promoting robust competition for the benefit of end users. A process that inadvertently promotes a SEF/DCM to benefit from a first mover advantage, or requires end users comply in a short timeframe, risks creating unnecessary burdens and costs for end users with no appreciable benefit.

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[1] 156 CONG. REC. S 5923 (daily ed. July 15, 2010) (statement of Senator Blanche Lincoln)

[2] Page 77732 Federal Register / Vol. 76, No. 240 The eight factors are: "(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. No single factor would be dispositive, as the DCM or SEF may consider any one factor or several factors to make a swap available to trade."

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With respect to the timing and process specified in Part 40.5 and Part 40.6[3] a swap could be required to trade on a SEF/DCM as quickly as 75 days via voluntary submission by a SEF/DCM (including the 45 day review period for the Commission[4] and the 30 day period after the swap is first made available to trade[5]) and as quickly as 40 days via the self-certification process (including the 10 day review period for the Commission[6] and the 30 day period after the swap is first made available to trade). Both scenarios would provide little time for end users to become aware, voice concerns and take steps to comply. Both the voluntary submission for approval and self-certification processes should be subject to *at least* a 90 day review by the Commission with a 30 day public comment period in all cases.

From a logistical perspective, it is worth noting that thousands of end users will be required to monitor the various websites of various SEFs, DCMs, and the Commission on a regular basis - perhaps daily or weekly - to see if a swap they may need to execute to manage risk will be subject to the "available to trade" designation. While there may be multiple approaches to notify all market participants, one approach to ease this logistical burden would be to have the process span a greater time period to facilitate broad market awareness. For example, a quarterly or annual process for end users to check which swaps are "available to trade," while still potentially burdensome, would at least align with other quarterly or annual business processes. Once a swap is deemed "available to trade" end users should then have 6 to 9 months to ensure they will be able to comply with the trading requirement. This amount of time would enable end users to research new SEFs/DCMs if needed, negotiate contracts, connect, learn how to use the system and institute processes to comply. Additionally, this time period will permit other SEFs/DCMs to make the same swap "available to trade" and prevent end users from needing to chase the latest SEF/DCM.

Even with extended periods of time, end users could be required to commit significant resources just to ensure they comply with the trading requirements. Without additional time, compliance could become unnecessarily burdensome and potentially costly for end users.

Economically Equivalent

The proposed rule states, "Upon a determination that a swap is available to trade, all other swap execution facilities and designated contract markets listing or offering for trading such swap and/or any economically equivalent swap, shall make those swaps available to trade."[7] The economic equivalency test should be sufficiently granular so that customized swaps used for hedging are not inadvertently subject to the SEF/DCM trading without sufficient liquidity just because they are similar in some respects to other swaps made available on a SEF/DCM. If the economically equivalent provisions were interpreted too broadly, it would only serve to exacerbate the concerns related to liquidity and operational burdens that we have identified

3 Pages 67294 and 67295, Federal Register/Vol. 75, No. 211

4 Page 77731, Federal Register/Vol. 76, No. 240

5 Page 77733, Federal Register/Vol. 76, No. 240

6 Page 77731, Federal Register/Vol. 76, No. 240

7 Page 77737, Federal Register/Vol. 76, No. 240

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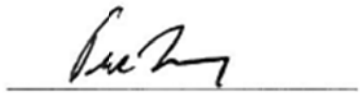
above. We urge the Commission to prevent such unnecessary burdens associated with overly broad or unclear economic equivalency test.

Conclusion

Chatham appreciates the opportunity to comment on the proposed rule implementing the process for making a swap "available to trade" because it will affect all participants in the swaps market. We look forward to working with the Commission to help implement rules that will strengthen the derivatives market without placing an undue burden on end users or the larger economy.

Sincerely,



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