January 3, 2011

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

Re: RIN 3038-AD00 / Process for Review of Swaps for Mandatory Clearing; and
RIN 3038-AD07 / Provisions Common to Registered Entities

Dear Mr. Stawick:

The American Benefits Council (the "Council") appreciates this opportunity to provide comments to the Commodity Futures Trading Commission (the "Commission") regarding the recently released proposed rulemakings concerning the process for review of swaps for mandatory clearing and the provisions common to registered entities, both of which implement new statutory provisions enacted under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), which amends the Commodity Exchange Act (the "CEA").

The Council is a public policy organization principally representing Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

Swaps play a critical role for our members' plans. Pension plans use swaps to manage risk and to reduce the volatility of the plan funding obligations imposed on the companies maintaining the plans. If swaps were to become materially less available or become significantly more costly to pension plans, funding volatility could increase substantially. This would in turn undermine the retirement security of the millions of Americans who rely on their pensions for such security. Increased funding volatility would also force companies in the aggregate to reserve billions of additional dollars to satisfy possible funding obligations, most of which may never need to be contributed to the plan because the risks being reserved against may not materialize. Those greater reserves would have an enormous effect on the working capital that would be available to companies to create new jobs and for other business activities that promote economic growth.

The issues we raise regarding the mandatory clearing of swaps and registered entities are of great importance to our members, to the plan system generally, and to the economy. We look forward to working with you to ensure that the new rules strengthen financial regulations in a manner that enhances workers' retirement security. It is critical that the new rules not be developed in a way that undermines such security.

I. Mandatory Clearing

Many plans use swaps to hedge or mitigate risk endemic to plan liabilities and investments. The flexibility of this market allows our members to enter into swaps with terms that are tailored to the unique and important needs of plans and especially plans regulated by the Employee Retirement Income Security Act of 1974 ("ERISA").

Prior to the Act, plan fiduciaries could determine whether a cleared derivative, such as a futures contract, would provide better exposure and/or protection for a plan than an over-the-counter derivative. Once the Act takes effect, for swaps determined by the Commission to be required to be cleared, and which are accepted for clearing by a derivatives clearing organization ("DCO"), that determination is, in effect, placed in the hands of the Commission. Whereas clearinghouses and their members have an effective voice in the process because they initiate the submission of a request to accept a swap for clearing by a particular clearing organization, plans and other buy-side participants will be looking to the Commission to make the determination whether requiring a particular swap to be cleared is "in the public interest." Specifically, in reviewing the submission of a swap for clearing, the Commission will apply five factors in new CEA Section 2(h)(2)(D)(ii) and whatever other factors the Commission determines to be appropriate (under CEA Section 5c(c)(5)(C)(iii)(II)) in making that public interest determination. The Council's members maintain plans covering many millions of United States pensioners, which is a significant portion of the "public."

We certainly recognize the benefits of clearing and we recognize that the Commission has not yet issued anti-evasion guidance. However, we are concerned that if the clearing mandate and related anti-evasion net is cast too broadly, plans could be precluded from customizing their swaps to hedge their very specific risks. For example, because of the particular obligations of a plan to its beneficiaries, a plan may want to enter into an interest rate swap with a particular maturity that differs from those of other interest rate swaps which are accepted by a DCO for clearing. If the Commission were to require the clearing of all interest rate swaps, and no DCO accepted for clearing a swap with that particular maturity, we fear that the plan could be accused of illegal evasion of the clearing mandate if it enters into such a swap on a bi-lateral, uncleared basis even though this maturity term is used for bona fide business reasons. Alternatively, swap dealers could refuse to enter into customized swaps with plans because of concerns as to potential evasion issues.

Accordingly, we strongly encourage the Commission to clarify in these rule makings and other formal Commission pronouncements that it would not constitute

illegal evasion for an entity to enter into a swap that would have been subject to the statutory clearing mandate but for the fact that the swap contains a unique tailored term adopted for a bona fide business or investment reason, even if that term prevented the swap from being accepted for clearing by any DCO. It is critical that plan fiduciaries and other market participants be able to tailor their swaps to their unique needs; this should not be prevented by the incidental result that the swap is not clearable by reason of such tailoring.

We are also uncertain about all the possible costs that could apply to cleared swaps. When the Commission considers the fees and charges applied to clearing as required by new CEA Section 2(h)(2)(D)(ii)(IV) in determining whether a swap should be required to be cleared, we would urge the Commission to review any related or ancillary cost issues. If a DCO proposes a clearing system which would impose unnecessary costs, this should be taken into account and plans should not be forced to clear swaps under such system and bear such costs.

Accordingly, we believe that the Commission's determination of whether a particular swap should be mandatorily cleared should consider whether mandatory clearing will result in greater difficulty for plans in using swaps to mitigate risk or in a material increase in unnecessary costs to plans (which will reduce the pension assets of beneficiaries).

In light of these concerns, we request the following.

A. Consideration of Plans and Public Policy

In determining whether a swap should be subject to mandatory clearing, the Act permits the Commission to consider any factors which the Commission determines to be appropriate.[1] We believe that a factor that needs to be considered by the Commission is the effect of such mandatory clearing on plans. Any decision to require the clearing of specific swaps should take into account the costs for plans, including those described above, and the Commission should not require clearing of swaps even when accepted by a DCO if mandatory clearing will impose unreasonable costs on plans and other buy-side participants. We would especially urge the Commission to take into account these costs if only one DCO has applied to and will be authorized to clear a swap because the consequence of requiring clearing will be to force all market participants, including plans, to clear through that one DCO. The Commission should make every effort to minimize costs to buy-side participants, including plans, from the clearing mandate.

In addition, we believe that the determination by the Commission to require the clearing of a swap should include a specific, fact-based analysis of the costs and burdens on market participants of the clearing requirement. The submission by the

[1] Section 5c(c)(5)(C)(iii)(II) of the CEA.

DCO to clear a swap should also include a specific analysis of the costs and burdens on market participants of clearing and Section 39.5(b)(3)(viii) of the proposed rules should be amended accordingly. The Commission should also give great weight to any views on costs expressed by plans or other buy-side participants in connection with public comment on the Commission's clearing determinations.

B. Requests for Comments by DCO Customers – 90 Days Period Prior to Submission

In the release accompanying the proposed rules, the Commission invites comment on whether the regulation should prescribe the manner in which a DCO should provide prior notice to its members of a submission to the Commission and whether the Commission should require a specific time period between such notice and the submission.[2] We support the requirement that the DCO provide advance notice to its members. *In addition, it is critical that plans and other non-member market participants have the same advance notice.* Because mandatory clearing will have a very significant impact on every market participant, plans and other market participants should be granted the same right to voice their views on a submission before it is made. The submission by the DCO to the Commission should also be required to describe any views expressed by the customers as well as by the members.

There are a number of ways that the Commission could facilitate the dissemination of the notice at the same time to all market participants in order to allow such participants sufficient time to consider the submission. For example, the Commission could require DCOs to provide, at the same time notice is provided to members, notice of a submission to any market participant that elects to receive such advance notices. Or the Commission could require that the DCOs provide advance notice of a submission to the National Futures Association (the "NFA") at the same time that the DCO provides notice to its members. The Commission should further require a minimum of 90 days from (i) the date of notice to market participants (e.g., the date notices are sent by the DCO to electing market participants or the date that the notice is published on the NFA's website), to (ii) the submission by the DCO to the Commission. Any less time would hinder market participants in their ability to review and respond to the submission.

C. Groups of Swaps

The release accompanying the proposed regulation states that "[t]he proposed regulation encourages a DCO to submit swaps to the Commission … by group, category, type or class of swaps."[3] But in this context, "group", "category", "type" and "class" are not defined. We request that the Commission provide guidance on the meaning of these terms.

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[2] 75 Fed. Reg. 67279 (Nov. 2, 2010), first column, first paragraph.

[3] 75 Fed. Reg. 67279 (Nov. 2, 2010), first column, first paragraph.

While our members understand the need for efficiency, we are strongly opposed to the Commission adopting any clearing requirement that covers a group, category, type, or class of swaps unless the Commission reviews each swap within the group, category, type, or class and determines that each swap should be cleared. The Act specifies factors that must be considered by the Commission in adopting a clearing requirement and the first factor that must be considered is "significant outstanding notional exposures, trading liquidity, and adequate pricing data."[4] These factors are only meaningful for specific types of swap contracts. For example, a liquid market in certain interest rate swaps does not result in liquidity for all interest rate swaps.

II. Registered Entities

The proposed rules applicable to registered entities could also have a serious impact on plans. Under the Act, all swaps that must be cleared must also be traded through a swap execution facility ("SEF") or designated contract market ("DCM") if an SEF or DCM makes the swap "available for trading." As a result, all market participants, including plans, will be required to trade a swap (if it is subject to mandatory clearing and assuming only one SEF or DCM designates the swap as available for trading) through the first SEF or DCM to designate the swap as available for trading. This dynamic could provide the SEF or DCM, as the single trading facility at least temporarily, significant influence with respect to how the swap trades and the relevant costs and execution arrangements.

As a result, we request the following:

A. Consideration of Plans and Public Policy

Because of all the uncertainties regarding the new rules, absent effective Commission oversight, an SEF or DCM, through the self-certification process, could impose unreasonable fees in connection with mandated trading, especially where the SEF or DCM would have an effective monopoly. Because a swap that is subject to mandatory clearing and made available to be traded on a SEF or DCM must be traded through an SEF or DCM, the result of such a designation could be to force a plan to choose between paying potentially unreasonable fees or not entering into the swap that is badly needed to control the plan's risks. In considering this issue, it may be useful to distinguish between making available for trading a swap with a pre-existing market and making available for trading a completely new futures product. For a new futures product, market participants will have a choice whether to start trading the futures contract, use another form of derivative to manage its risk, like a swap, or not trade. For the swap, the existing market flow will have to move to a new SEF or DCM or cease altogether, unless there is a bona fide bespoke feature of a swap that would remove it from the clearing mandate.

[4] Section 2(h)(2)(D)(ii)(I) of the CEA.

As a result, we urge the Commission to consider the consequences for plans and other market participants in its review of submissions under the proposed rules. This is particularly important when a submission has the potential to give the SEF or DCM an effective monopoly over the provision of services that market participants, including plans, will be required to use.

We also request that the Commission require that SEFs, DCMs and DCOs that make submissions under the proposed rule provide an analysis of the effect of the submission on market participants, including the interest expressed by market participants, the costs and burdens that may be imposed on market participants, and the potential effect on highly regulated entities such as pension plans and mutual funds.

B. Stay

Section 40.2 of the proposed rules provides that an SEF or a DCM may list a swap (and a DCO may clear certain swaps) if it has filed a submission with the Commission and the submission has not been stayed. The proposed rule lists only very narrow grounds for staying such a submission. However, the Act gives the Commission additional regulatory powers with respect to the clearing and trading of swaps. Section 5h(d) of the CEA, as amended by the Act, provides that the Commission and the Securities Exchange Commission "may promulgate rules defining the universe of swaps that can be executed on a swap execution facility. These rules shall take into account the price and nonprice requirements of counterparties to a swap … ." Section 5c(c)(5)(C)(iii) of the CEA states that the Commission shall determine the eligibility of a DCO to clear a swap in connection with the listing of a swap for clearing. Finally, the provisions of the Act dealing with SEFs and DCMs give the Commission broad regulatory authority over SEFs and DCMs.

We ask that the proposed rules be amended, pursuant to these regulatory powers, so that additional consideration can be given to the interests of plans and other market participants. Trading on SEFs and DCMs will require market participants to enter into user agreements with such entities and related business and technological arrangements which are expected to involve significant human, capital and technology resources of market participants. Obviously, the review and negotiation of such agreements and the implementation of any required technology could take a significant amount of time. Accordingly, the submission by the SEFs and the DCMs should include, for public viewing, the form of user agreements and the business and technological requirements for market participants. The Commission's rule should authorize the stay of a submission until market participants have a meaningful opportunity to review such agreements and the business and technological requirements of the SEF and DCM and provide comments on the submission to the Commission.

In addition, SEFs and DCMs should be required to demonstrate compliance (including in their submission) with SEF Core Principle 13 and DCM Core Principle 21,

respectively, by showing that that they have sufficient legal, business and technology resources to accommodate the number of market participants that will be required to utilize such platforms by a certain date. Market participants should be able to comment on whether such resources are sufficient to accommodate market demand by any proposed date. This buy-side input can help the Commission avoid a large number of market participants attempting to get through a potentially small gate by a required date. Clearly, in such a situation, smaller market participants will be the losers and the disruption to the markets could be significant.

We also ask the Commission to consider how it can use its broad powers to prevent SEFs and DCMs from using the self-certification process and/or their possible single-provider status to charge potentially unreasonable fees. It would be a very sad result if the upshot of the Act were to be to permit SEFs and DCMs to enrich themselves at the expense of plans and their participants.

C. Public Information

The proposed rule provides that registered entities that wish to list new products or to accept them for clearing must post this information on their website. We ask that the Commission reconfirm that it will also list all such submissions on the Commission's website. Also, in order to make the information available for consideration to market participants, including plans, we ask that the Commission require that advance notice of all submissions related to swaps be made available to registered entities' members and to all other market participants, as discussed above with respect to DCOs, and that the submission to the CFTC may not be made until 90 days after notice is provided to market participants, also as discussed above. This would allow plans to make more informed decisions and to express their views to the member, the registered entity or the Commission.

. . .

It is critical that our members' plans continue to be able to use swaps as efficiently as possible to provide retirement security and health benefits to millions of Americans across the country. Thus, it is of vital importance that the Act not be interpreted so as to impose unnecessary new costs and burdens on plans.

We thank the Commission for the opportunity to comment on its proposed rules on mandatory clearing and registered entities. If you have any questions, please do not hesitate to call or email the undersigned (202-289-6700, ldudley@abcstaff.org).

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