



February 22, 2011

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

Re: **RIN 3038-AD20** -- Swap Data Repositories

Dear Mr. Stawick:

The American Benefits Council (the "Council") and the Committee on the Investment of Employee Benefit Assets ("CIEBA") appreciate this opportunity to provide comments to the Commodity Futures Trading Commission (the "CFTC" or "Commission") regarding regulation of swap data repositories under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the Commodity Exchange Act ("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.

CIEBA represents more than 100 of the country's largest pension funds. Its members manage more than \$1 trillion of defined benefit and defined contribution plan assets, on behalf of 15 million plan participants and beneficiaries. CIEBA members are the senior corporate financial officers who manage and administer ERISA-governed corporate retirement plan assets. CIEBA's recent annual survey of members showed an increased emphasis on managing and reducing plan risks, and a corresponding increase in usage of swaps to address those risks.

Swaps play a critical role for our members' plans. Many plans regulated by the Employee Retirement Income Security Act of 1974 ("ERISA") use swaps to hedge or mitigate the risks endemic to plan liabilities and investments. These plans conduct swap transactions through fiduciaries that are subject to stringent regulation under ERISA. When entering into a swap, ERISA requires a fiduciary to negotiate the best terms available solely from the perspective and in the interests of the plan's participants. Consistent with ERISA, we are sure the Commission will want to avoid any possibility that the reporting of swaps, directly or

indirectly, would adversely affect an ERISA fiduciary's ability to obtain the best possible swap terms for plan participants.

Any Centralized Recordkeeping Facility For Swaps Should Be A Registered Swap Data Repository.

Dodd-Frank defines a swap data repository (SDR) as:

"any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps."¹

Dodd Frank will require that all uncleared swaps be reported to an SDR unless no SDR will accept the swap for reporting (in which case that swap must be reported directly to the CFTC).² Dodd-Frank will require that, for real-time public reporting purposes, all cleared and uncleared swaps be reported to an SDR.³

In an acknowledgment of the important role that SDRs will play and the need for SDRs to be regulated, Congress promulgated basic regulations of SDRs and provided the CFTC with discretion to ensure that the Commission's regulation of SDRs is comprehensive. Specifically, Dodd-Frank will require an SDR to register with the CFTC and comply with various requirements, standards, and core principles as well as any additional requirements or duties which may be adopted by the CFTC.⁴

We are concerned that proposed rule 49.11 would treat certain persons "such as confirmation or matching service providers" as "third party service providers" rather than SDRs. Confirmation and matching service providers collect terms and conditions of swaps. They verify, typically with both counterparties to a swap, the terms of a swap. And while these service providers may turn the information they collect on swaps over to another SDR, these service providers themselves also keep the information in their own centralized recordkeeping facilities. In other words, confirmation or matching service providers are persons who "collect[] and maintain[] information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps."⁵ Dodd-Frank did not exclude persons from the SDR definition merely because they provide information about swaps to another SDR. Instead, Congress mandated that a person fulfilling this collection and maintenance role is an SDR and

¹ Section 721(a)(21), adding new CEA 1a(48).

² Section 729, adding new CEA 4r(a)(1).

³ Section 727, adding new CEA 2(a)(13)(G).

⁴ Section 728, adding new CEA 21(a)(3) and 21(f)(4).

⁵ Section 721(a)(21).

must register and be regulated as an SDR. It is essential that the CFTC thoroughly regulate as SDRs confirmation and matching service providers (even those that report to other SDRs) to ensure that records of swaps reported to any SDR are kept accurately and confidentially and not altered substantively.

Congress left no doubt that the confirmation process is a statutory duty of any SDR. Specifically, Dodd Frank mandates that each SDR "shall confirm with both counterparties to the swap the accuracy of the data that was submitted."⁶ In discussing this requirement in the preamble, the CFTC states that "[c]onfirmation is unnecessary when the reporting obligation is borne by . . . a confirmation or matching service provider to whom the swap counterparty has delegated its reporting obligation."⁷

We respectfully disagree. While it is the obligation of the reporting counterparty to a swap to report that swap to an SDR, it is the duty of the SDR to confirm the accuracy of the data submitted with both counterparties to the swap. If an SDR elects to fulfill its statutory duty by delegating this duty to a third party confirmation or matching service, that service would be acting as an SDR and therefore would be required to register and be regulated as an SDR. To find otherwise would violate Section 728 (adding new CEA 21(a)(1)(A)).

A Swap Data Repository Should Not Alter The Terms Of Any Swap Reported To It.

Proposed rule 49.10(c) would require each SDR to "establish policies and procedures reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the confirmation or recording process of the swap data repository." In the preamble explaining this proposal, the CFTC expresses concern that "a validly executed swap may, through contractual provisions or other practices of an SDR, be improperly invalidated." We appreciate the CFTC's sensitivity to this concern—which plans share—and we agree with the Commission that "SDRs should not be in a position to alter, amend, or invalidate otherwise valid swaps of counterparties through the reporting process." 75 Fed. Reg. at 80905.

We appreciate the opportunity to respond to the CFTC's request for comment in response to two questions in particular. The CFTC asks:

- whether there are any circumstances under which a validly executed swap should be modified or altered other than by the express agreement of the counterparties; and
- whether an SDR should be able to alter or modify an existing swap based on a contractual arrangement with the reporting counterparty to the swap. 75 Fed. Reg. at 80905.

⁶ Section 728, adding new CEA 21(c)(2)

⁷ Fed. Reg. at 80905.

We feel strongly that there are no circumstances under which a validly executed swap should be modified or altered other than by the express agreement of the counterparties at the time of such change.

Before a fiduciary of an ERISA plan enters into a swap on behalf of the plan, the fiduciary must determine that the terms of the swap are the best terms available from the perspective of the plan. A fiduciary's delegation of this determination to a neutral third party (such as an SDR) would either violate the fiduciary's duties to the plan under ERISA or make the SDR a fiduciary to the plan, a result that no SDR would want. Allowing an SDR (including any electronic confirmation service provider or electronic trade affirmation service provider) to change the negotiated terms of a swap without the consent of the plan's fiduciary would eviscerate the most basic protections provided by ERISA.

It follows then that no SDR should be able to alter or modify an existing swap by requiring any party to a reported swap to sign a SDR user agreement which authorizes the SDR to "deem" the user to have consented to changes to its swap terms by the SDR if the user utilizes the SDR system after notice of such change. Given that use of the SDR will be required as a matter of legal or practical necessity, counterparties will not be able to object to such changed terms by refusing to use the system. We believe the Commission is properly using its authority to protect the public interest by adopting proposed rule 49.10(c) which would serve to prevent these abusive practices.

We respectfully ask the Commission to make clear in its adopting release that such rule would prohibit confirmation or reporting platforms from requiring users of such platforms (i) to only have certain terms in their confirmed or reported swaps or (ii) to agree that changes to their swap terms by the confirmation or reporting platform will be "deemed to have been accepted" by users if users utilize such platforms after notice of such term change. To the degree that the CFTC permits an SDR to use third parties in fulfilling the SDR's duties, we also ask that (a) the CFTC extend rule 49.10(c) to apply also to any such third party, and (ii) the CFTC clarify that the SDR would be responsible for such third party's compliance with proposed rule 49.10.

A Swap Data Repository Should Provide Open Access To All Market Participants.

Dodd-Frank codifies through the SDR definition the role of an SDR which is to *collect and maintain* information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.⁸

Proposed rule 49.10(b) would require an SDR that accepts swap data for a particular asset class to "accept data from all swaps of that asset class" that are reported to that SDR. The CFTC proposed this rule "to minimize the number of swaps that are not accepted by any SDR."

Proposed rule 49.27(a) would require that an SDR "provide its services to market participants, including [plan counterparties] . . . on [a] fair, open and equal basis. For this

⁸ Section 721(a)(21), adding new CEA 1a(48).

purpose, an SDR shall not provide access to its services on a discriminatory basis but is required to provide its services to all market participants for swaps it accepts in an asset class." The CFTC explains in the preamble that this proposed rule would require SDRs to "have the necessary operational capacity to provide services to market participants that would seek access for the reporting of swap transactions consistent with Section 21 of the [Commodity Exchange Act]." We ask that the Commission also clarify in its adopting release that the SDR must not require, as a condition to reporting a swap transaction or providing information to an SDR, that a counterparty be exposed to more liability (via a user agreement or otherwise) than it would have otherwise been exposed to had its transaction not been reported to the SDR.

We support fair, open, and equal access and agree with the Commission that each SDR must have the "necessary operational capacity" to provide to all market participants its services of collecting and maintaining the terms and records of any swap that is reported to it within an asset class for which it accepts swap data. An SDR receiving the terms and records of a swap for reporting must accurately and reliably collect and maintain all of that swap's terms and records which are reported to it. If an SDR could limit the type of terms or available elections for particular terms that could be reported to it (whether because of operational capacity issues, through its user agreements, or otherwise), this limitation could strip plans of protections and other beneficial terms that the plan fiduciary and the swap counterparty to an uncleared swap had agreed upon.

We encourage the Commission to adopt rules 49.10(b) and 49.27(a) as proposed. We also ask that the CFTC extend rule 49.27(a) to apply also to any third party service providers an SDR may use to facilitate the reporting of swap terms by any counterparty to the swap to that SDR in accordance with proposed rule 49.17(e) (which permits SDRs to use conditionally certain third parties).

Both Counterparties To A Swap Should Be Able To Access Data Reported To An SDR On That Swap.

For an uncleared swap, Dodd-Frank mandates which counterparty (the "reporting counterparty") must report the swap to an SDR.⁹

- For any uncleared swap in which only one counterparty is a SD or MSP, the SD or MSP will be the reporting counterparty;
- For any uncleared swap in which one counterparty is a SD and the other counterparty is a MSP, the SD will be the reporting counterparty; and
- For any other uncleared swap, the counterparties must select a counterparty to be the reporting counterparty.

In other words, Dodd-Frank requires that an SD or MSP report any uncleared swap it enters into with a plan counterparty (who should never be an SD or MSP).

⁹ Dodd-Frank Section 729, adding new CEA 4r(a)(3).

The CFTC proposal includes rule 49.17 which states that "this Section provides a process by which the Commission, other domestic regulators and foreign regulators may obtain access to the swaps data held and maintained by [SDRs]." We are concerned that two portions of this proposed rule could be misread as extending beyond this purpose in a manner that could hurt plans.

Proposed rule 49.17(f) provides that "[a]ccess of swap data maintained by the [SDR] to market participants is generally prohibited," with one exception. "Data and information maintained by the [SDR] may be accessed by market participants if the specific data was originally submitted by such party." We are concerned that this exception would allow the reporting counterparty—but not the plan counterparty—to access the data being kept on that swap into which these two parties have entered. Congress intended to promote transparency and improve recordkeeping practices under Dodd-Frank. Consistent with that Congressional intent, the Commission should exercise its discretion under Dodd-Frank to require that both counterparties to a swap be able to access data maintained by an SDR for that swap.

Accordingly, we ask that the CFTC revise proposed rule 49.17(f)(2) to read:

"(2) Exception. Data and information related to a particular swap that is maintained by the [SDR] may be accessed by either counterparty to that particular swap."

Similarly, proposed rule 49.17(g) provides that while an SDR and its affiliates generally may not use data maintained by the SDR for commercial or business purposes, "market participants who submit the data maintained by the [SDR] may permit the commercial or business use of that data by express written consent." Given that plans will be required to report to SDRs, we are concerned that SDR user agreements will contain "non-negotiable" terms that require plans to "consent" to the commercial and business use by the SDR and its affiliates of the plans' confidential information which is provided to the SDR. This is very troublesome and we ask that the Commission include in its rules a prohibition on such practice. We also fear that this rule could be interpreted to mean that the "market participant who submits the data" is the reporting counterparty instead of both counterparties to the swap. This would allow the reporting counterparty—without the consent of the plan counterparty—to grant an SDR and an SDR's affiliates the right to use highly confidential swap terms reported to the SDR for that SDR's or SDR affiliates' own commercial or business use.

Congress intended to strengthen and protect plans use of swaps under Dodd-Frank, even to the point of calling plans "Special Entities" with special protections. Allowing a SD or MSP counterparty of a plan to authorize an SDR's or an SDR affiliate's commercial or business use of the highly confidential terms of the swap entered into by that SD or MSP and the plan would surely hurt plans. Consistent with that Congressional intent, the Commission should exercise its discretion under Dodd-Frank to require that ***both parties*** to a swap—including the plan counterparty—provide express written consent before an SDR or its affiliates may use information reported on that swap to the SDR for commercial or business use.

Accordingly, we request that the CFTC revise proposed rule 49.17(g)(2) to read:

*"(2) **Exception.** A registered swap data repository may use, for commercial or business purposes, data maintained by that registered swap data repository for a particular swap only by express written consent of both counterparties to that swap and a registered swap data repository may not directly or indirectly require as a condition to reporting or confirming a particular swap that a counterparty provide such express consent ."*

Multiple SDRs Should Be Allowed To Accept The Data For Any Particular Swap For Reporting.

In response to the CFTC's request for comments on whether a single SDR should be designated as the exclusive SDR for reports for a specific asset class, we strongly believe that multiple SDRs should be permitted to accept reports of swaps for any specific swap asset class. Competition between SDRs would serve the public interest and would likely encourage an SDR to charge lower fees and operate in an efficient, user-friendly manner.

To gain access to report or to verify the terms of a swap on an SDR, a person would likely have to execute a user agreement with the SDR that it will abide by the SDR's operating procedures. If a fiduciary is concerned about the impact that an SDR's operating procedures could have on a plan's swaps in a particular asset class, the ability of the fiduciary to consider and elect a different SDR to receive those swaps could preserve the ability of a plan to enter into those swaps. An SDR's user agreement also is less likely to have unfair, one-sided provisions with respect to fees, indemnifications, and notifications if other SDRs are available.

. . .

We thank the CFTC for the opportunity to comment on the proposed rules to regulate swap data repositories.

American Benefits Council

Committee on Investment of Employee Benefit Assets