February 7, 2011

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

Re: **RIN 3038–AD19** -- Swap Data Recordkeeping and Reporting Requirements;

RIN 3038–AD08 -- Real-Time Reporting of Swap Transaction Data;

RIN 3038–AC96 -- Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants

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 reporting and recordkeeping requirements 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.

SWAP COSTS COULD SKYROCKET UNDER THESE CFTC PROPOSALS

We have concerns about the CFTC's sequencing of the proposed real time reporting rules in relation to the collection of swap market information. We believe that the CFTC should first obtain market information via reporting of trades to swap data repositories (SDRs) and then propose rules based on this data, such as real-time reporting, which necessarily would better serve the CFTC's intended purpose.

We support the goal of price transparency for swaps through reporting. Congress intended to enhance transparency to ensure that plans (and other market participants) receive fair prices on swaps. If implemented appropriately, we believe transparency would decrease the cost of swaps over time. However, we are concerned that portions of the CFTC's proposal will, as discussed further below, have an effect that is directly contrary to Congress' intent, *i*.e, the proposal would greatly and unnecessarily increase direct and indirect costs on plans.

After considerable thought and analysis, plans believe that the real-time public reporting required by the CFTC's proposed rules would dramatically increase the cost of a wide range of swaps that are commonly used today possibly by as much as 100% in some cases. This is an alarming development; if the proposed rules are finalized in their current form, the effect on plans would be devastating.

The CFTC recognizes that its proposed reporting and recordkeeping requirements could impose "significant compliance costs" on swap counterparties (such as plans) that are neither swap dealers (SDs) nor major swap participants (MSPs). 75 Fed. Reg. 76597. The degree of that increase in cost is, however, of great concern, triggering a need to revisit the rules.

IMPORTANCE OF SWAPS TO PLANS

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 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.

In addition, if significantly increased costs make swaps materially less available to pension plans, millions of Americans' retirement security would be detrimentally affected. Moreover, funding volatility could increase substantially, undermining participants' retirement security and forcing companies in the aggregate to needlessly

reserve billions of additional dollars to satisfy possible funding obligations. Those greater reserves would vastly diminish working capital that would otherwise be available to companies to create new jobs and for other business activities that promote economic growth.

SUMMARY

Today, swap markets are not subject to any reporting regime. Accordingly, the size of the swap market and other relevant basic swap market data (including liquidity) are not known. In order to adopt factually-based, rational real-time public reporting rules, the CFTC must first obtain and analyze this information (which will be required to be reported to swap data repositories). Any real time reporting rule that is not based on this data will, in our view, fail to promote the ultimate goal of transparency *i.e.*, increasing the efficiency of hedging and decreasing the bid/ask spread.

The minimum block size must be based on actual available data and include all swaps which would likely be expected to move the market price for the relevant contract in a material way. We ask that the CFTC:

- Postpone developing a formula for defining block trades until SDRs have collected one year's worth of data on swaps;
- Propose a formula for defining block trades based on this data, subject to public comment;
- Require the SDRs (and swap markets, as relevant) to use this formula (once adopted by the CFTC) to set the appropriate minimum block size and begin real-time public reporting of block trades and non-block trades at that time.
- Define the relevant swap markets and contracts with sufficient granularity to appropriately reflect different types of swap transactions.

The time delays prior to public dissemination of data for swaps of <u>all</u> sizes must be sufficient to allow market participants to offset risk associated with these swaps. We ask that the CFTC:

- With respect to non-block trades, we ask that the CFTC provide for the real-time public reporting of volume in the form of broad ranges, and for the precise volume to be reported after an appropriate time delay to allow the plan's counterparty opportunity to enter into offsetting trades to reduce its exposure. Otherwise, market participants could use the data made public in a manner that would increase the cost of hedging for the plan's counterparty who will pass this cost on to the plan.

Qualified investment advisers who are not CTAs should be able to aggregate block trade orders for different trading accounts. We ask that the CFTC:

- Confirm this by revising proposed rule 43.5(m) such that the words "including any" from the second sentence are deleted and replaced with the word "an."

As mandated by Congress, a plan should never be the reporting counterparty for swaps it enters into with a SD or MSP counterparty. We ask that the CFTC:

- Adopt rules 45.5(a)-(c) as proposed.

- Withdraw proposed rules 45.5(d)-(f) (allowing foreign SDs and MSPs to evade their statutory reporting obligations and force this burden onto plans in violation of Dodd-Frank).

- Adopt a rule that would allow a plan's fiduciary to conclude that the plan has no reporting obligation where the plan's counterparty represents that it is registered as a SD or MSP.

All terms of a swap with economic consequences should be decided prior to, or at the time of, execution of that swap. We ask that the CFTC:

- Adopt a rule requiring that prior to, or at the time of, execution, swap parties agree on all terms which could have economic consequences.

The definition of confirmation (and swap confirmation) is appropriately broad. We ask that the CFTC:

- Adopt rules 23.200(k), 43.2(g), and 45.1(b) as proposed.

Master agreements should be reported once to a separate library at the SDR, with amendments reported to the same SDR.

Multiple SDRs should be allowed to accept swaps in any particular swap asset class for reporting and a plan should select the SDR to which the plan's swap will be reported. We ask that the CFTC:

- Extend the right in proposed rule 45.7(b) to choose which SDR will receive a plan's swaps for reporting to apply for all swaps into which a plan enters.

Any centralized recordkeeping facility for swaps must register, and be regulated, as an SDR.

A plan should have the right to decide whether a confirmation for an uncleared swap with a SD or MSP is done electronically or manually. We ask that the CFTC:

- Revise Part 45 so that:
    - the party to an uncleared swap that is not a SD or MSP has the right to determine whether the confirmation will occur electronically or manually; and
    - an electronic confirmation service provider—to the degree such provider is not regulated as an SDR—must have policies and procedures to prevent valid swap provisions from being invalidated or modified through the electronic confirmation service provider's user agreements or confirmation or recording process (at the time the swap is confirmed or anytime thereafter during the lifecycle of the swap).

A plan should have the right to decide, for swaps with a SD or MSP, whether the swap's primary economic terms should be verified electronically or non-electronically. We ask that the CFTC:

- Revise rule 45.3 to provide that:
    - a person that is not a SD or MSP will not be required to verify electronically primary economic terms data if that person lacks the resources to do so;
    - the 24-hour period during which primary economic terms data will be verified non-electronically only includes time on business days; and,
    - the SD for uncleared swaps with a non-SD counterparty shall provide a draft confirmation to the counterparty within 4-hours of execution where primary economic terms are verified non-electronically.

The identity and positions of a plan with respect to swaps must be kept confidential. We ask that the CFTC provide:

- More guidance as to what SDRs should and should not publicly disseminate;
- Concrete guidelines on what should and should not be reported to the SDR; and
- Clarification on how proposed rules 43.4(e)(1) and (2) will be enforced.

Plans need the ability to comment before the Commission updates specific terms. We ask that the CFTC:

- Provide the public with an opportunity to review and comment on the tables of minimum primary economic data terms before the Commission finalizes them.

Real-Time Reporting Summary

As discussed further below, we believe that the real-time reporting of swaps could result in dramatically higher prices for swaps unless the rules are carefully crafted to take into account individual swap market characteristics such as liquidity and volume. Without this data, any real time reporting rule will, in our view, fail to promote the ultimate goal of transparency, *i.e.*, increasing the efficiency of hedging and decreasing the bid/ask spread.

Accordingly, as discussed further below, we urge the CFTC to:

- Collect data on individual swap market characteristics such as liquidity and volume for a year.

- Propose a regulatory structure for real-time reporting of trades, subject to public comment.

- Implement the regulatory structure based on the information gleaned from the year's worth of data and public comment.

<u>The minimum block size should be based on actual market data and include all swaps large enough to move the market price of the particular swap contract in a material way.</u>

Dodd-Frank requires the CFTC "to provide by rule for the public availability of swap transaction and pricing data" for cleared and uncleared swaps through real-time public reporting.[1] Dodd-Frank defines real-time public reporting as the reporting of "data relating to a swap transaction, including price and volume, as soon as

[1] Dodd-Frank Section 727, adding new CEA Section 2(a)(13)(C), requiring real-time public reporting for "swaps that are subject to the mandatory clearing requirement . . . (including those swaps that are excepted from [the clearing mandate under new CEA Section 2(h)(7)]);" "swaps that are not subject to the mandatory clearing requirement . ., but are cleared;" "swaps that are not cleared . . . and which are reported to a [SDR] or the Commission . . . in a manner that does not disclose the business transactions and market positions of any person;" and "swaps that are determined to be required to be cleared under [new CEA Section 2(h)(2)], but are not cleared."

technologically practicable after the time at which the swap transaction has been executed."[2]

Dodd-Frank's real-time public reporting provision (as noted by the CFTC in the preamble to the Real-Time Proposal) "does not provide an explicit method or timeframe in which the swap transaction and pricing data must be reported to the public in real-time."[3] Rather, Congress authorizes the CFTC to prescribe this rule with the purpose (or goal) of making "swap transaction and pricing data available to the public ***in such form*** and ***at such times*** as the Commission determines appropriate to enhance price discovery."[4]

Congress requires that the CFTC's rule providing for the "public availability of transaction and pricing data for swaps" contain provisions with respect to cleared swaps:

- "to ensure such information does not identify the participants;"
- "to specify the criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts;"
- "to specify the appropriate time delay for reporting large notional swap transactions (block trades) to the public;" and
- "that take into account whether the public disclosure will materially reduce liquidity."[5]

Today, swap markets are not subject to any reporting regime. Accordingly, the size of the swap market and other relevant basic swap market data are not known.[6] In order to set a factually-based, rational formula identifying which swaps are block trades (or large notional swaps, collectively "block trades"), the CFTC must obtain and analyze this information.

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[2] Dodd-Frank Section 727, adding new CEA Section 2(a)(13)(A).

[3] Section 727, adding new CEA 2(a)(13); 75 Fed. Reg. 76145.

[4] Section 727, adding new CEA 2(a)(13)(B); 75 Fed. Reg. 76141 and 76145.

[5] Dodd-Frank Section 727, adding new CEA Section 2(a)(13)(E).

[6] While SDRs will have "a more complete set of swap data and therefore the calculations will be based off a more complete set of swap data" in the future, neither the SDRs nor the Commission itself has sufficient data now. 75 Fed. Reg. 76161. The Commission even notes in the preamble to the real-time reporting release that the CFTC expects that "as post-trade transparency is implemented . . ., new data will come to light that will inform the discussion and could cause subsequent revisions of the proposed rules." 75 Fed. Reg. 76159, fn 67.

We strongly urge the CFTC to wait until SDRs have collected one year's worth of data on swaps and then begin to develop a formula for defining block trades based on that data. Given the episodic nature of swaps, any less time would not provide a sufficient sampling of the market. Once SDRs have collected one year's worth of data on swaps, the CFTC should analyze the data and propose a formula defining block trades based on this data, subject to public comment.

This approach is consistent with Congressional intent. In a colloquy, Senator Blanche Lincoln, Chairwoman of the Senate Agriculture Committee and a key author of Dodd-Frank, confirms that block trades are "transactions involving a very large number of shares or dollar amount of a particular security or commodity and which ***transactions could move the market price for the security or contract***." S5921, Congressional Record – Senate (July 15, 2010) (emphasis added). Congress expects the CFTC, in establishing what constitutes a block trade for swaps, to "distinguish between different types of swaps based on the commodity involved, size of the market, term of the contract and liquidity in that contract and related contracts." *Id.* In other words, for each type of swap, Congress intends that any swap large enough that it would likely be expected to move the market price for the relevant contract in a material way be included as a block trade.

As alluded to by Senator Lincoln, in order to set a formula to define block trades, it is necessary to first have available data that will inform the CFTC as to the transaction involved, the size of the relevant market, the terms of the particular contract, and the liquidity in that contract and related contracts. (For example, a smaller notional amount of a swap in a less liquid contract would likely be expected to move the market price materially for a contract than if the market for the contract were more liquid.)

Without actual available data regarding the size of the relevant market, the terms of the particular contract, and the liquidity in that contract and related contracts, the CFTC cannot identify the threshold at which any given swap should be considered a block trade. The proposed distribution and multiple tests would certainly exclude swaps that would likely be expected to move the market price for the relevant contract in a material way.[7] Any such exclusion would violate Congressional intent and hurt plans.

To hedge particular liabilities of plans, fiduciaries utilize customized swaps. Where these liabilities are substantial, fiduciaries anticipate entering into customized

[7] The Commission's example in the preamble of the real-time reporting rule shows that the proposed multiple test is too restrictive. In a market with 500 trades over a one-month period, each with a notional value between $50 Million and $60 Million, the multiple test would set the appropriate minimum block size at $275 Million. 75 Fed. Reg. 76162-76163. A swap much greater than $60 Million (the threshold under the proposed distribution test), but substantially less than $275 Million could well be large enough that it would likely move the market price in a material way.

large notional swaps on behalf of plans. A longer delay would be required for a customized large notional swap than would be required for a block trade or a standardized large notional swap. This is because a customized large notional swap is less liquid than a standardized swap and it would take longer to offset a swap that is less liquid.

Real-time public reporting of swaps that are not block trades should enhance price discovery in a manner that increases the efficiency of hedges.

In determining in what form and at what times dissemination is appropriate to enhance price discovery for swaps that are determined not to be block trades, the CFTC should consider liquidity.[8] We support the goal of price discovery. We also recognize that price transparency is not a goal for its own sake, but rather a means to an end. The ultimate goal is to increase the efficiency of hedging by reducing the bid/ask spread. Implementing real-time public reporting in a way that increases the spread would frustrate the ultimate goal of price transparency.

Because there are so many variations of swaps relative to futures contracts, (e.g., maturity dates, underlying reference rates, payment frequencies, and termination dates), the swaps market is (and will remain) much less liquid than the futures markets.[9] It will take longer to enter into offsetting positions to work off exposure in swaps than it would in futures. It will also take longer to enter into offsetting positions to work off exposure in less liquid swap contracts than it would in more liquid swap contracts.

For plans' swaps (of any size), it is essential that a plan's swap dealer counterparty have the opportunity to enter into another swap to offset that dealer's market risk from the swap before data on the original swap is publicly disseminated. Otherwise, the dealer's cost in entering into the offsetting transaction could increase significantly and the dealer would pass this cost (or anticipated increased cost) on to plans. As a result, these very useful risk mitigation instruments will become significantly more costly to utilize to the detriment of pension asset security.

We are extremely concerned about the public dissemination of volume information prior to a plan's counterparty being able to enter into hedging transactions related to their transaction with the plan. Proposed rules 43.4(b) and (i) would require public dissemination of volume information along with the transaction report

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[8] Dodd-Frank Section 727 (adding new CEA Section 2(a)(13)(E)(iv)) explicitly mandates that the CFTC take into account liquidity for all cleared swaps. For uncleared swaps, the CFTC is authorized to consider liquidity in its determination of what is appropriate to enhance price discovery. *See* Dodd-Frank Section 727 (adding new CEA Section 2(a)(13)(B).

[9] *See* 75 Fed. Reg. 76162 for recognition that the market for swaps is less liquid than the market for futures.

for swaps that are not block trades. The proposal provides that when the notional or principal amount is disseminated, it shall be rounded:

- to the nearest 100,000 if the notional or principal amount is less than 1 million;
- to the nearest million if the notional or principal amount is between 1 million and 50 million;
- to the nearest 5 million if the notional or principal amount is between 50 million and 100 million;
- to the nearest 10 million if the notional or principal amount is between 100 and 250 million
- to "250 million+" if the notional or principal amount is greater than 250 million. *See* Proposed Rule 43.4(i).

We are concerned that the proposed methodology would enable market participants to discern with considerable certainty the size of a plan's swap transactions with notional amounts of less than $250 million and would enable market participants to utilize such knowledge in a manner which increase the costs of hedging for the plan's dealer counterparty. Those increased hedging costs are expected to be passed on to plans and increase, rather than decrease, swap prices for plans and potentially make trading in many swaps prohibitively expensive for plans.

We are also concerned that the Commission's rounding convention does not appropriately take into account the liquidity, type and tenor of swaps. For instance, an interest rate swap with a 2 year duration may be highly liquid and thus the threshold of $250 million as the highest rounding threshold might be appropriate. However, an interest rate swap with a 35 year duration may be off-market and illiquid, and typical trades may be significantly less than $250 million, and as such, a much lower rounding threshold would be appropriate. We are concerned that the current rounding proposal, by not taking into consideration the type, tenor and liquidity of particular swaps, unfairly disadvantages those participants, such as plans, who tend to be natural hedgers in the marketplace with specific portfolio needs.

We ask that the Commission adopt a rule (in lieu of proposed rule 43.4(i)) which will require that the volume of those swaps which are not block trades be disseminated in the form of ranges. The ranges selected by the CFTC should be based on data collected during the one-year period described above and should be broad enough to prevent driving up the spread in the relevant market. After a reasonable period of time (in which a dealer can work off its exposure), the precise volume should be reported. This would enhance price discovery by providing information in a timely way without increasing the spread and driving up the cost of swaps.

Qualified investment advisers who are not commodity trading advisors should be able to aggregate block trade orders for different trading accounts.

In the preamble to the proposal, the CFTC explains that proposed rule 43.5(m) would prohibit persons from aggregating orders for different trading accounts in order to satisfy the minimum block trade size requirement, "except if done on a DCM by a commodity trading advisor acting in an asset manager capacity ***or*** an investment advis[e]r who has $25 million in total assets under management." 75 Fed. Reg. 76167 (emphasis added).[10] This proposal would allow a registered investment adviser who is not registered as a commodity trading advisor ("CTA"), but who has at least $25 million in total assets under management and would satisfy the criteria of Rule 4.7(a)(2)(v) to aggregate orders for different trading accounts for block trade purposes.

We support this approach which is consistent with the CFTC's treatment of advisers to plans, such as CFTC rules 4.6(a)(2) and 4.14(a)(8), which under certain circumstances exclude and exempt, respectively, advisers to plans from CFTC registration as a CTA. The ERISA fiduciary requirements that apply to plan advisers provide an additional layer of protection to ensure that plan positions are being aggregated in a manner that is prudent and in the best interest of plan participants.

In order to eliminate any possible confusion that investment advisers who have at least $25 million in total assets under management and would satisfy the criteria of Rule 4.7(a)(2)(v) may aggregate for block trade purposes as the CFTC describes in the preamble, we ask that the CFTC omit from the second sentence of proposed rule 43.5(m) the words "including any" and replace these words with the word "an." As revised, proposed rule 43.5(m) would read:

> (m) *Aggregation*. Except as otherwise stated in this paragraph, the aggregation of orders for different accounts in order to satisfy the minimum block trade size requirement is prohibited. Aggregation is permissible if done by a commodity trading advisor acting in an asset managerial capacity and registered pursuant to Section 4n of the Act, or a principal thereof, ***an*** investment adviser who satisfies the criteria of §4.7(a)(2)(v) of this chapter, or a foreign person performing a similar role or function and subject as such to foreign regulation, if such commodity trading advisor, investment adviser or foreign person has more than $25,000,000 in total assets under management.

As mandated by Congress, a plan should never be the reporting counterparty for swaps it enters into with a SD or MSP counterparty.

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). For cleared swaps,

[10] This same inconsistency exists in the explanation of and in the text of proposed rule 38.503(e). *See* 75 Fed. Reg. 80591, 80617 (Dec 22. 2010).

Dodd-Frank is silent on which counterparty would be the reporting counterparty.

The CFTC proposes one set of rules to determine which party would be responsible for fulfilling all counterparty reporting obligations for both cleared and uncleared swaps. Proposed rules 45.5(a)-(c) would designate as the reporting counterparty the same counterparty for all swaps that Dodd-Frank will mandate for uncleared swaps. We encourage the Commission to adopt rules 45.5(a)-(c) as proposed. Consistent with Dodd-Frank, we request that the CFTC adopt a rule that would allow a plan to conclude that it has no reporting obligation under rule 45.5 where the plan's fiduciary has received a written representation from its SD or MSP counterparty that it is registered as an SD or MSP.

In stark contrast, proposed rules 45.5(d)-(f) would clash with Dodd-Frank Section 729 (adding new CEA 4r(a)(3)) by altering the reporting requirements depending on whether the parties to the trade are U.S or non-U.S. persons. In the preamble to this proposal, the CFTC states that "this approach [of deviating from Dodd-Frank for a swap with any counterparties that are not U.S. persons] is necessary in order to ensure compliance with reporting requirements in such situations." 75 Fed. Reg. 76593.

We respectfully disagree. Any non-U.S. person that is a SD or MSP and who enters into a swap with an ERISA plan (or any other U.S. person) must be registered with the CFTC as a SD or MSP. Dodd-Frank Section 731, adding new CEA 4s(a). As illustrated by that dealer's registration as an SD with the CFTC, the CFTC has jurisdiction over such SD (or MSP). If the CFTC has jurisdiction over an SD or MSP, such SD or MSP has the reporting obligation under Dodd-Frank for trades with any non-SD or MSP counterparty.

Accordingly, we ask that the CFTC withdraw proposed rules 45.5(d), (e), and (f).

All terms of a swap with economic consequences should be decided prior to, or at the time of, execution of that swap.

One impediment that plans experience in confirming swaps expeditiously today is the attempt by SDs to introduce additional legal terms (some of which have economic consequences) or representations to a swap which were not agreed to by the plan before or at the time of execution. We fear that SDs could use the proposed deadlines to report data to an SDR as a source of pressure to extract terms from plans to which plans did not, and do not want to, agree. Plans should not be faced with the difficult choice of canceling the trade or agreeing to undesirable terms and representations in order to avoid violating the reporting requirements. To protect plans against this pressure and to expedite the confirmation process for uncleared swaps, we ask that the CFTC adopt a rule requiring that the parties to a swap agree upon all terms which could have economic consequences prior to, or at the time of, execution.

As a corollary, the swap reporting process to SDRs should allow for a swap trade which was "affirmed" and reported on certain trade terms but not all to be "DKd" by a counterparty (as may be done currently) if an SD or MSP introduces a term which was not agreed to prior to, or at the time of, execution.

The definition of confirmation (and swap confirmation) is appropriately broad.

Dodd-Frank includes as part of a swap "a master agreement that provides for an agreement, contract, or transaction that is a swap [ ], together with each supplement to any master agreement." Dodd-Frank Section 721(a)(21), adding new CEA 1a(47)(C). Proposed rules 23.200(k), 43.2(g), and 45.1(b) would define the term "confirmation" (referred to as a "swap confirmation" in proposed rule 23.200(k)) as "the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap." We commend the Commission for its broad definition of confirmation which is consistent with Dodd-Frank's definition of swap and would include as part of the terms of a swap the master agreement itself. Dodd-Frank Section 721(a)(21), adding new CEA 1a(47).

This approach codifies existing industry practice under which the master agreement and confirmation are parts of the same agreement documenting the terms of a swap. As stated in the introduction of the ISDA master agreement form, a master agreement includes several documents exchanged between the parties, including a form ISDA master agreement and a Schedule modifying the terms in that form, a form ISDA credit support annex and a document referred to as Paragraph 13 modifying the terms in that form, and a confirmation. Many confirmations reaffirm this by stating that the confirmation "supplements, forms a part of, and is subject to" the master agreement between the parties and that the master agreement, together with the Confirmation, collectively constitutes the "Agreement" between the parties.

The terms of the Agreement must govern to the extent specified in the terms of the Agreement.

The definitions of confirmation also would require that a confirmation "legally supersede any previous agreement (electronically or otherwise)." Proposed rules 23.200(k), 43.2(g), and 45.1(b) (referred to as a "swap confirmation" in proposed rule 23.200(k)). We request that the Commission confirm that this proposed requirement does not mean that a confirmation supersedes terms in the package of documentation that make up the 'Agreement' unless the parties themselves so agree. This is important because some fiduciaries of plans ensure that the terms of a swap are the best terms available from the perspective and interests of the plan participants by having the lead fiduciary centralize the negotiation of the terms of the Schedule and Paragraph 13.

Where a lead fiduciary negotiates ISDA documentation on a centralized, relationship basis, there sometimes will be a provision that the ISDA's terms legally

supersede the confirmation's terms unless the fiduciary entering the plan into the swap represents that the terms in the confirmation which are inconsistent with the Schedule or Paragraph 13 are more beneficial to the plan than the terms in the Schedule or Paragraph 13. Lead fiduciaries are able to do this because the master agreement is the ***same agreement*** (not a ***previous agreement***) as the rest of the confirmation. The confirmation portion of the Agreement only legally supersedes the master agreement portion of the Agreement if so provided contractually by the parties. The Commission's recognition of this contractual reality in proposed rules 23.200(k), 43.2(g), and 45.1(b) will preserve one means through which fiduciaries have protected plans in negotiating swaps. To find otherwise would interfere with plans' contractual terms.

Master agreements should be reported to a separate library at the SDR.

We appreciate the opportunity to comment on whether, and if so, how, a separate library system should be established by the SDR for master agreements. 75 Fed. Reg. 76586. We support the reporting of the master agreement to a separate master agreement library of an SDR the first time that SDR accepts a swap for reporting under that ISDA. The reports for a particular swap could reference this master agreement as contemplated by the CFTC in Appendix One of proposed rule 45. By reporting the master agreement only once, the burden of reporting would be minimized as would the potential for confusion that could be caused by duplicative reporting of the same master agreement. Given that all amendments to the master agreement are included as part of the terms of the swap, the reporting counterparty should be required to provide any amendments to the master agreement to any SDR to which that ISDA has previously been reported and under which a swap still triggers reporting obligations within a practicable time after the amendment is fully executed.

Plans should select the SDR to which all terms of the plan's swap will be reported.

We commend the CFTC for providing a swap counterparty that is not a SD or MSP and is the reporting counterparty with the choice of the SDR to which it would report a swap in proposed rule 45.7(b). For swaps which could be accepted by multiple SDRs, we request that the CFTC extend the election of the SDR to the swap counterparty that is not a SD or MSP upon entering into a swap with a SD or MSP counterparty. This would be consistent with the policy choice of Congress to place lesser burdens on swap counterparties that are not SDs or MSPs where doing so will not damage the fundamental systemic risk mitigation, transparency, standardization, and market integrity purposes of the legislation. *See* Dodd-Frank Section 723(a)(3), adding new CEA Section 2(h)(7)(E) (allowing the counterparty that is not a SD or MSP to select the derivatives clearing organization at which a swap it enters into with a SD or MSP will be cleared); *see also* 75 Fed. Reg. 76579. In addition, this may also address potential conflict of interest concerns where the SD or MSP has an ownership or governance interest in a particular SDR and attempts to steer reported trades to such SDR.

We support the CFTC's proposal that all data reported on a particular swap should be reported to the same SDR to which the initial report is made for that swap. With this requirement in place, the existence of multiple SDRs to which the initial report for a swap could be sent would not hinder transparency.

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. Otherwise, the CFTC's proposal could be viewed as advocating for particular "commercial winners" and/or effective monopolies.

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 unfavorable provisions with respect to fees, indemnifications, and notifications if other SDRs are available.

Any centralized recordkeeping facility for swaps, including any electronic swap confirmation service provider, must register, and be regulated as an SDR.

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

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

Electronic confirmation or matching service providers "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." *See* Section 721(a)(21), adding new CEA 1a(48). This means that these providers must register, and be regulated, as SDRs.

Furthermore, Congress left no doubt that the confirmation process is a statutory duty of any SDR. Dodd-Frank mandates that each SDR "shall confirm with both counterparties to the swap the accuracy of the data that was submitted." Section 728, adding new CEA 21(c)(2).

We ask that the Commission confirm that electronic confirmation or matching service providers must register as SDRs.

A plan should have the right to decide whether a confirmation for an uncleared swap with a SD or MSP is electronic or manual.

Proposed rule 45.1(b) provides that "[a] confirmation must be in writing (***whether electronic or otherwise***)." Proposed rules 45.3(a)(1)(ii)(C) and (iv) would require that confirmation data for certain swaps be reported no later than "24 hours after confirmation of the swap ***if confirmation was done manually rather than electronically***." We applaud the Commission for recognizing in these rules the need for some swap counterparties that are not SDs or MSPs to use manual confirmations and for preserving the ability of these persons to use swaps by accommodating the use of manual confirmations.

At this time, there is only one electronic confirmation service provider in the United States. Unless plans have the right to determine whether their trades are confirmed electronically or manually, many SDs and MSPs will insist on this service provider who, in many instances, will directly or indirectly be affiliated with or controlled by the SD counterparty. If SDs and MSPs are permitted to insist on "electronic confirmations," such a requirement raises serious issues regarding effective monopolization. Accordingly, we request that the Commission establish by rule that a party to an uncleared swap that is not a SD or MSP has the right to determine whether the confirmation for that swap will occur electronically or manually if its swap counterparty is an SD or MSP.

Plans support proposed rule 49.10(c) which requires a registered swap data repository 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."*

Plans believe that terms of a valid swap should never be changed as a result of confirming or reporting the trade. Plan fiduciaries are charged with acting in the "best interests" of a plan's beneficiaries and, accordingly, only such fiduciaries, with the agreement of their counterparties, should authorize a change in a plan's swap terms. The Council and CIEBA support proposed rule 49.10(c) and believe that as it is written it would prevent swap confirmation and data repository platforms from requiring that plan fiduciaries agree, as a condition to using any such platform to confirm or report trades, that any change to a plan's swap trades by such platform will be "deemed" to

have been accepted by the fiduciary if it uses such platform after notice of such change. Because plan fiduciaries will be required by CFTC regulation to confirm and report their plan clients' trades and will either legally or practically have to use such platforms, such fiduciaries will be unable to protect their clients from swap terms, imposed by these platforms, which the plan fiduciary did not initiate or desire. Accordingly, we believe that proposed rule 49.10(c) is in the public interest and will protect plans and their fiduciaries from these practices as a result of confirming and reporting trades.

To the degree that an electronic confirmation service provider will not be regulated as an SDR, we respectfully request that the Commission establish a rule, parallel to proposed rule 49.10(c),[11] that requires any electronic confirmation service provider to "establish policies and procedures reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the provider's user agreements or confirmation or recording process of the" electronic confirmation service provider.

A plan should have the right to decide, when entering into a swap with a SD or MSP, whether the primary economic terms for that swap should be verified electronically or non-electronically.

While only one party to a swap will be the reporting counterparty, Dodd-Frank requires that a SDR "confirm with both counterparties to the swap the accuracy of the data that was submitted." Dodd-Frank Section 728; adding new CEA 21(c)(2).

For an exchange-traded swap, proposed rules 45.3(a)(1)(i)(C) and 45.3(a)(1)(ii)(B) would require that the reporting counterparty report to the SDR any primary economic terms data for a swap which the SEF or DCM has not already reported to that SDR no later than:

- "15 minutes after execution of the swap if both execution and verification of primary economic terms occurs electronically;
- 30 minutes after execution of the swap if execution does not occur electronically, but verification of primary economic terms occurs electronically; or
- 24 hours after execution of the swap if neither execution nor verification of primary economic terms occurs electronically."[12]

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[11] Proposed rule 49.10(c), which we support and for which we will submit a separate comment letter, provides that: "A registered swap data repository shall 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."

[12] Proposed rule 45.3(a)(1)(ii)(B) only applies to uncleared swaps traded on a SEF (not a DCM).

For a non-exchange traded swap, proposed rules 45.3(a)(1)(iii)(A) and 45.3(a)(1)(iv) would require that the reporting counterparty report to the SDR all primary economic terms data of that swap no later than:

- "30 minutes after execution of the swap if verification of primary economic terms occurs electronically; or
- 24 hours after execution of a swap if verification of primary economic terms does not occur electronically."

Proposed rule 45.1(dd) would define verification as "the matching by the counterparties to a swap of each of the primary economic terms of a swap, at or shortly after the time the swap is executed." Proposed rules 43.2(j) and (k) would define "executed" as the completion of an agreement by the parties to the terms of a swap that legally binds the parties to such swap terms under applicable law.

We commend the Commission for recognizing that some swap counterparties that are neither SDs nor MSPs lack the capability to verify a swap's primary economic terms electronically. To ensure that these swap counterparties can continue to enter into swaps, we request that the Commission establish by rule that a person that is not a SD or MSP will not be required to verify electronically a swap's primary economic terms if they lack the resources to do so.

We believe that the CFTC should clarify rule 45.3 to specify that the 24-hour period does not include time on a day that is not a business day, such as a national or state holiday or a national or state period of emergency. The SD customarily prepares the confirmation for any uncleared swap it enters into with a non-SD counterparty. For any uncleared swap a SD enters into with a non-SD counterparty where the primary economic terms will be verified non-electronically, we request that the Commission adopt a rule requiring the SD to provide a draft confirmation to that counterparty within 4 hours of execution. This rule would ensure that the counterparty has sufficient time to review the confirmation, correct any mistakes with the SD, and verify the primary economic terms promptly and within the requisite timeline under proposed rule 45.3.

<u>The identify and positions of a plan with respect to swaps must be kept confidential.</u>

The CEA requires the CFTC to keep confidential information and data that would disclose the transactions and positions of any person and names of customers in accordance with Section 8 of the CEA. We support the intent behind the Commission's corresponding proposed rule 43.4(e)(1) which would prohibit a SDR from disseminating publicly swap transaction and pricing data in a manner that "discloses or otherwise facilitates the identification of a party to a swap." However, we are concerned that the SDR may not have sufficient knowledge to identify all information

in its possession that, if disseminated publicly, could disclose the identity of a swap counterparty. For example, certain plans negotiate particular contractual provisions that are peculiar to those plans (such as specific cross-default threshold amounts). Accordingly, we ask the CFTC to provide the SDR with more guidance as to what should and what should not be publicly disseminated. We also request that the CFTC clarify how proposed rule 43.4(e)(1) would be enforced.

We are concerned about the responsibility being placed on the reporting counterparty and swap market in proposed rule 43.4(e)(2) to ensure that the description of the underlying asset(s) and tenor of the swap is "general enough to provide anonymity, but specific enough to provide for a meaningful understanding of the economic characteristics of the swap." To help reporting counterparties and swap markets succeed in this balancing act, we request that the CFTC adopt concrete guidelines directing these entities what should and what should not be reported to the SDR. We also request that the CFTC clarify how proposed rule 43.4(e)(2) will be enforced.

We support the restriction in proposed rule 43.4(c) that the SDR shall not disseminate publicly in real-time on a transactional or aggregate basis any additional swap information that the SDR requested to ensure that the swap transaction and pricing data match.

<u>Plans need the ability to comment before the Commission updates specific terms.</u>

We are concerned about the structure through which the CFTC intends to publish the final reporting rules. The CFTC notes in the preamble to the swap data reporting release that the CFTC intends to publish tables showing the minimum primary economic data terms that must be reported to the SDR in a separate Federal Register release from the final rule so that the CFTC may update these tables in response to swap market developments without issuing new regulations. 75 Fed. Reg. 76580, fn. 40. Consistent with basic Administrative Procedure Act principles, the public should receive notice of all proposed changes and a meaningful opportunity to comment on any proposed changes to the terms that the CFTC proposes should be reported.

. . .

We thank the CFTC for the opportunity to comment on the proposed rules on the reporting and recordkeeping requirements. If you have any questions, please do not hesitate to call Lynn Dudley (202-289-6700, the Council) or James Harshaw (212-418-6162, CIEBA).

American Benefits Council Committee on the Investment of Employee Benefit Assets