



March 8, 2011

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

Re: **RIN 3038-AD18 / Core Principles and Other Requirements for Swap Execution Facilities**

Dear Mr. Stawick:

The American Benefits Council (the “*Council*”) and the Committee on Investment of Employee Benefit Assets (“*CIEBA*”) appreciate this opportunity to provide comments to the Commodity Futures Trading Commission (the “*CFTC*” or “*Commission*”) regarding the proposed rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“*Dodd-Frank*”) ¹ relating to core principles and other requirements for swap execution facilities (the “*Proposed Rule*”). ²

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 ³-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 the usage of swaps to address those risks.

IMPORTANCE OF SWAPS TO PENSION PLANS

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

¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

² Core Principles and Other Requirements for Swap Execution Facilities; Proposed Rule, 76 Fed. Reg. 1214 (proposed Jan. 7, 2011).

³ The Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (enacted September 2, 1974).

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.

SUMMARY

As further discussed below, we believe that:

- The Commission, not the swap execution facilities (“*SEFs*”), should determine whether swaps are “made available for trading” because SEFs may have pecuniary interests in making this determination, and, consistent with the Commission’s designation of clearable contracts, it is in the public interest for the Commission to make these critical decisions;
- The Commission should not determine that any swaps are “made available for trading” until the Commission has collected and analyzed one year’s worth of data so as to be able to properly identify a threshold at which a given swap should be considered liquid enough to mandatorily trade on a SEF;
- The Commission should permit pension plans to choose to send a request for quote (“*RFQ*”) to fewer than five recipients because requiring plans to send an RFQ to five participants may raise rather than lower transaction costs;
- Pension plans should be able to transact on an over-the-counter (“*OTC*”) basis if they send an RFQ and either no parties provide a responsive quote or trading with the responding party would be a non-exempt “prohibited transaction” under ERISA, and thus illegal;
- For transactions subject to the execution requirement (*i.e.*, “*Required Transactions*”), SEFs should be permitted to offer both RFQ and Order Book systems to their members, as the Proposed Rule suggests, and the reference to taking into account any resting bids or offers should be clarified to mean for information purposes only;
- Market participants should have the flexibility to determine how swaps not required to be exchange-traded are executed and affirmed;
- Transactions which are not subject to the requirement to execute on a SEF (*i.e.*, “*Permitted Transactions*”) should not be required to be entered into an electronic affirmation system or onto a SEF’s trading system;
- Market participants should be permitted to communicate with potential counterparties prior to executing a transaction for price discovery purposes because this practice will result in lower prices, and such practice should not be prohibited as “pre-arranged trading”;
- The Commission should require SEFs to establish policies and procedures reasonably designed to prevent any provision in a valid swap transaction from being invalidated or modified through the utilization of, or execution on, a SEF;

- SEFs should not be required or permitted to inspect and monitor their members' creditworthiness because it is unnecessary and intrusive;
- The several regulatory burdens imposed on SEFs under the Proposed Rule will likely erect barriers to entry for new SEFs which will cause the market to be less liquid and, accordingly, will be detrimental to pension plans;
- After one year of data collection and analysis, the Commission should be able to designate swaps as made available for trading according to a procedure similar to that established under Dodd-Frank for cleared contracts; and
- Because SEF rules could impose unreasonable fees, trading restrictions or information requirements on market participants, SEFs should be required to provide advance public notice of their rules to market participants and any objections received from market participants should be included in a SEF's submission of its rules to the Commission.

COMMENTS

I. The Commission, Not the SEFs, Should Decide Whether Swaps Are Available to Trade.

Under Dodd-Frank, all swaps that must be cleared must also be traded through a SEF or designated contract market ("*DCM*") if a 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) through the first SEF or DCM to designate the swap as available for trading, unless another SEF or DCM also lists the swap for trading. This dynamic could provide a SEF or DCM, as the single trading facility at least temporarily, with significant influence with respect to how the swap trades and the relevant costs and execution arrangements.

Because SEFs have a pecuniary incentive to require more swaps be traded on their platforms, we believe that there is a risk that a SEF could claim that a particular swap is made available for trading when in fact the swap is highly illiquid and a market participant may not be able to execute such transaction with the dealers, if any, participating in the relevant SEF's platform. A pension plan could find that it has a particular need for a swap but cannot get exposure to such swap because there is limited or no trading on the SEF which claimed that it was making such swap "available for trading". Alternatively, even if dealers willing to make a two-way market in the particular swap were available on the SEF, a plan may be in a position that none of the dealers can or will act as a counterparty to the plan for legal or credit-related reasons.⁴

The designation of "available for trading" gains particular importance in the context of Rule 37.10(c)(1), which states that if one SEF makes the swap "available for trading" designation, all other DCMs and SEFs will have to treat the same swap contract as made "available for trading". The implication of this provision is that one SEF, without any public comment and approval by the Commission, can bind the entire U.S. market to treating, for all market participants, a certain swap contract as "made available for trading". Particularly for illiquid markets, such designation may cause these markets to contract dramatically.

⁴ See Paragraph IV of this Letter for further discussion on ERISA-related issues.

Given these potential negative consequences to plans, we believe that the Commission, rather than SEFs, should determine whether a swap is made available for trading on a SEF. Although Proposed Rule 37.10 permits SEFs to determine whether “the [SEF] has made a swap available for trading”,⁵ we note that Dodd-Frank specifically states in Section 733 (amending Commodity Exchange Act (“CEA”)⁶ Section 5h(d)(1)) that the “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 the counterparties to a swap...” CEA Section 5h(d)(2) contemplates that the CFTC rules implementing CEA Section 5h(d)(1) would define which swaps would be “required” to be exchange traded and therefore made available for trading.

We respectfully request that the Commission, rather than SEFs, determine whether swaps are “made available for trading”. This determination should be made according to concrete, transparent, and objective standards including liquidity metrics as well as the range and number of available dealers so that market participants have some understanding as to when swaps will be mandatorily moved from the OTC market to a SEF. We further note that the Act’s language was intentionally broad in order to provide the Commission the flexibility necessary to address each new class or type of swap product developed in the future. Accordingly, we suggest that the CFTC actively consider new types of swaps as they are developed and seek public comment on whether, and if so when, they should be categorized as “available for trading”.

Separately, we also propose the procedure on how the Commission should make this determination. Please see below Paragraph II and Paragraph XII of this Letter.

II. The Commission Should Decide Whether a Swap Is Available to Trade Only After It Has Obtained Information From Actual Reporting of Trades.

Today, swap markets are not subject to any reporting regime. Accordingly, the true size of the swap market and other relevant basic swap market data are not known.⁷ We believe that a swap should not be deemed to be made available for trading by the Commission and required to be traded on a SEF unless there is sufficient liquidity in the trading of such swap. Otherwise, trading on a SEF of illiquid swaps will result in plans having less access to potential counterparties, thus reducing competitive pricing and increasing swap transaction prices for pension plans. In order to set a factually-based, rational formula identifying which swaps are liquid so that they can be deemed to be available for trading, the CFTC must obtain and analyze the data obtained from OTC swap reporting to SDRs.

We strongly urge the CFTC to wait until SDRs have collected one year’s worth of data on swaps and then begin to develop criteria for determining if a market for a particular swap is sufficiently liquid such that it may be deemed available for trading on a SEF. Importantly, we

⁵ See Proposed Rule, 76 Fed. Reg. at 1241 (to be codified at 17 C.F.R. 37.10(a)).

⁶ The Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*

⁷ 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. at 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. at 76159 n. 67.

believe that the CFTC should not only analyze the swap's liquidity in determining whether a swap may be deemed available for trading on a SEF, but should also analyze the characteristics of the SEFs that list the swap (e.g., number and types of participants, typical sizes of trades executed on the SEF in other types of swaps, etc.) to arrive at such a determination.

Given the episodic nature of swap transactions and liquidity, 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 formulas based on this data for determining whether a swap is available for trading, as well as what transactions for a particular swap should be considered "block trades" not subject to a requirement to be traded on a SEF. We believe that any such proposed formulas should be 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, confirmed 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.*"⁸ 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.⁹ 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 more likely be expected to move the market price materially for a contract than if the market for the contract were more liquid.) The same information that is necessary to determine what a block trade is for a particular swap market should be used by the Commission to determine whether a swap is available for trading.

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 liquid enough to be deemed available for trading as well as the corollary threshold for a "block trade" for such swap. After the Commission collects sufficient amount of information to quantifiably substantiate the designation of specific swap contracts as "made available for trading", we suggest that the Commission follow the procedure laid out in Paragraph XII of this Letter.

⁸ S5921, Congressional Record – Senate (July 15, 2010) (emphasis added).

⁹ *Id.*

III. Pension Plan Fiduciaries Should be Able to Determine If It is in the Best Interest Of a Plan to Seek Quotes From Fewer Than 5 RFQs Providers.

The Proposed Rule requires that market participants using an RFQ System offered by any SEF send RFQs to no fewer than five market participants.¹⁰ We believe that this requirement exceeds the Commission's mandate under Dodd-Frank and will unnecessarily raise costs and/or diminish availability for market participants.

Pension plan fiduciaries are subject to the highest fiduciary standards under United States law. Under these standards, many pension plan fiduciaries find that it is in the best interest of a pension plan not to shop a potential trade to a large group of potential counterparties. One of the main reasons for limiting the number of potential counterparties is to lower the pension plan's transaction costs. If potential dealer counterparties believe that their trade with the pension plan will be known by other market counterparties, they may be reasonably concerned that it may be more expensive for the dealer counterparty to hedge the trade with the pension plan, and the dealer will necessarily protect itself from increased risk of hedging by raising the price of the transaction with the plan.

For these reasons, we believe that pension plan fiduciaries should have the ability to determine whether to send RFQs to fewer than five counterparties and that the Commission should not arbitrarily prescribe the number of persons from which a plan fiduciary must seek requests for quote.

IV. In the Absence of Quotes from Qualified RFQ Providers On a SEF, Plans Should Be Able to Execute Required Transactions Over-the-Counter.

Under ERISA, transactions between pension plans and certain persons, *e.g.*, "parties in interest" and fiduciaries, may be prohibited. Without further clarification by the Commission, we are concerned that a pension plan could find itself in the situation where it has requested quotes from potential market participants on a SEF (*e.g.*, 5 RFQ provider dealers) and either: (i) none of such RFQ dealers provide a quote; or (ii) the only dealers to provide quotes are unable to execute the transactions as a result of legal restrictions under ERISA. In either case, we believe the Commission should allow pension plans to conduct the swap transaction on an over-the-counter basis.

V. SEFs Should Be Permitted To Operate As RFQ Systems and Not Be Required to Operate as Limit Order Book Systems.

We believe that the Commission correctly proposed with respect to Required Transactions to permit SEFs to offer both RFQ and Order Book systems to their members. Notwithstanding, we believe it is important that the rules do not force SEFs to operate an Order Book or any system that resembles an Order Book for Required Transactions, as an Order Book system is only well suited for liquid markets.

¹⁰ See Proposed Rule, 76 Fed. Reg. at 1241 (to be codified at 17 C.F.R. § 37.9(a)(ii)).

To that end, we note that the Proposed Rule requires that any resting bids or offers be taken into account when a market participant sends an RFQ. We respectfully request that the Commission confirm that this requirement merely ensures that requesting parties may be made aware of these bids (*i.e.*, can see them and can either respond to them or ignore them), but does not require requesting parties to accept these bids nor communicate the RFQs to parties submitting resting bids.

VI. Market Participants Should Have Flexibility to Determine How Swaps Not Required to Be Exchange-Traded Are Executed and Affirmed.

Section 733 of Dodd-Frank specifically states that “all swaps that are not required to be executed through a [SEF] ... may be executed through any other available means of interstate commerce.”¹¹ Unlike other provisions of Dodd-Frank, this section is not qualified by the phrase “except as provided by the Commission.”¹² We believe this mandates that parties to a Permitted Transaction have full discretion in choosing whether to enter into a Permitted Transaction on a SEF and, if so, which of the SEF’s execution methods would be used.

If the Commission intends to require Permitted Transactions to be entered into a SEF’s platform, we believe this would have significant consequences, including a significant increase in hedging costs, and, in any event, go beyond the Commission’s mandate. We do not believe that this is an appropriate reading of the letter or spirit of Dodd-Frank. Dodd-Frank specifically excluded swaps that are not subject to the clearing requirement from the execution requirements as well,¹³ and the Commission should therefore not independently require these swaps to be traded on a SEF.

Proposed Rule 37.9(c), however, states that Permitted Transactions may be executed by an Order Book, Request for Quote System, a Voice-Based System, or any such other system for trading as may be permitted by the Commission.¹⁴ By requiring Commission approval before any alternative execution method is permitted, we believe that the Proposed Rule contravenes Dodd-Frank. We therefore request that the Commission merely state that Permitted Transactions may be executed by any available means of interstate commerce.

VII. Transactions Which are Not Required to Be Exchange-Traded Should Not Have to Be Entered Into an Electronic Affirmation System or Onto a SEF’s Trading System.

Proposed Rule 37.205(b)(1) would require that SEFs that permit intermediation must require that all orders or requests for quotes received by phone that are executable be immediately entered into the trading system or platform.¹⁵ The proposing release states that Permitted Transactions entered into through a SEF’s Voice-Based System must be entered into “some form of electronic affirmation system” immediately upon execution.¹⁶ This statement

¹¹ CEA Section 5h(d)(2).

¹² *See, e.g.*, CEA Section 5h(f)(1)(B) (“Unless otherwise determined by the Commission. . .”).

¹³ *See* CEA Section 2(h)(8).

¹⁴ *See* Proposed Rule, 76 Fed. Reg. at 1241.

¹⁵ *Id.* at 1244 (to be codified at 17 C.F.R. § 37.205(b)(1)).

¹⁶ *Id.* at 1221.

confuses matters by seemingly mandating that *SEFs* enter Permitted Transactions into an affirmation system.

If the Commission intends to require Permitted Transactions to be entered into an affirmation system, we believe that the Proposed Rule confuses matters by overlapping its rules with other proposed rules. Specifically, under the Commission's proposed rule Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, the Commission has imposed certain affirmation and confirmation requirements on the parties to every swap.¹⁷

Entering data regarding Permitted Transactions into a SEF's trading platform could significantly raise the cost of hedging. The Proposed Rule does not specify whether SEFs must, can, or cannot display post-trade pricing or trade data for all SEF members to see. However, the Commission's proposed rule Real-Time Public Reporting of Swap Transaction Data ("**Real-Time Rule**") does permit SEFs to make swap transaction data available to its participants even *before* such data is required to be published by a real-time disseminator.¹⁸

The purpose of postponing public reporting for block trades in the Real-Time Rule is to mitigate the possibility that market prices will move against the market participants, which would significantly increase the cost of engaging in block trades. If SEFs are permitted to display transaction and pricing data to all SEF participants even before these prescribed time delays, other participants will be all the more able to trade ahead of the transactions necessary to hedge the risk associated with these block trades. We believe that this would defeat the purpose of the delays proposed in the Real-Time Rule, which we have separately argued are insufficient as it is.¹⁹ As discussed above, this would increase costs of hedging activity to the detriment of pension asset security.

Dodd-Frank does not impose any such requirement. Dodd-Frank creates certain documentation and confirmation duties for SDs and MSPs,²⁰ and requires swap data to be made publicly available in real-time.²¹ Dodd-Frank also requires SEFs to make public timely information on price, trading volume, and other trading data,²² but the Commission appears to have interpreted this only as requiring that a SEF transmit transaction data to a real-time disseminator.²³ Moreover, Dodd-Frank also requires SEFs to establish and enforce rules that will deter abuses.²⁴ We believe that requiring SEFs to display transaction data of Permitted Transactions before that data is required to be published in real-time would permit just those

¹⁷ See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81519, 81530 (to be codified at 17 C.F.R. § 23.501).

¹⁸ See Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76140, 76173 (proposed Dec. 7, 2010) (to be codified at 17 C.F.R. § 43.3(b)(2)(ii)).

¹⁹ See Letter from American Benefits Council and Committee on the Investment of Employee Benefit Assets to the CFTC (February 7, 2011).

²⁰ See CEA Section 4s(i).

²¹ See CEA Section 2(a)(13).

²² CEA Section 5h(f)(9).

²³ See Real-Time Rule, 75 Fed. Reg. at 76142 (Under the proposal, if a swap market sends the swap transaction and pricing data to a registered SDR, the swap market is responsible for ensuring that such data is sent in a timely manner for public dissemination.).

²⁴ CEA Section 5h(f)(2).

types of problems that Dodd-Frank and the CEA have sought to avoid (for example, with respect to block trades, the Proposed Rule should be reconciled with the Real-Time Rule that permits a time delay with respect to real-time dissemination of block trade execution data).

Rather than clarifying this requirement, therefore, we urge the Commission to remove any requirement that Permitted Transactions which are executed by voice or by any other off-facility method be entered into an affirmation system or into the SEF's trading platform.

VIII. Parties to Required Transactions, in Addition to Permitted Transactions, Should Be Able To Communicate Prior to Execution As Long As the Trade is Executed on a SEF.

The Proposed Rule is unclear on what limitations, if any, apply to contacting, *e.g.*, using a voice-based system, a potential counterparty prior to making a trade. On the one hand, Proposed Rule 37.9(b)(3) would permit a broker to execute against a customer's order as long as the broker shows the trade to the market for 15 seconds.²⁵ On the other hand, Proposed Rule 37.203 requires SEFs to prohibit "pre-arranged trading".²⁶

Because Proposed Rule 37.203 does not define pre-arranged trading, it could easily be understood to prohibit communication between counterparties before execution of a trade. Indeed, the proposing release states that the nature of these types of trading systems or platforms, where transactions are negotiated or consummated via a one-to-one or one to-many basis, do not provide the ability for participants to conduct multiple-to-multiple execution or trading.²⁷

We therefore believe that Proposed Rule 37.203 would seemingly prohibit much of the activity permitted by 37.9(b). For example, if a customer called a broker with a trade and the broker decided that she would take the other side of the trade, Proposed Rule 37.9(b) would permit the broker to do so as long as the broker presented the trade to the market for 15 seconds. However, Proposed Rule 37.203 could be read to prohibit transacting with the broker with whom the discussion had taken place.

We believe that the free-flow of information assists market participants in finding the most appropriate products at the best available prices. For example, parties frequently negotiate prices with dealers prior to entering into a transaction, resulting in lower prices. This is a long-standing practice applicable to DCMs, where parties can pre-negotiate certain transactions before posting those transactions on the DCM within a certain time frame, such as 5 seconds. Particularly for block trades, it is a common practice for traders to call to several dealers and pre-negotiate an off-setting trade and then enter into such trade and the offsetting trade(s); conversely, if no trader is willing to enter into off-setting trades of this size, traders may offer to enter into a trade of a smaller size and retain the risk until an offsetting trade can be made. If parties are strictly limited to a take-it-or-leave-it realm of electronically posted prices, they will be stripped of this useful price discovery tool.

²⁵ See Proposed Rule, 76 Fed. Reg. at 1241 (to be codified at 17 C.F.R. § 37.9(b)(3)).

²⁶ See *id.* at 1242.

²⁷ See *id.* at 1219.

At the same time, however, we understand the need for pre-trade transparency. We believe that both of these interests can be achieved by permitting parties to communicate before executing a trade so long as the parties comply with the requirement to execute the trade on the SEF. We note that pre-trade price discovery is permitted at times under DCM rules, and we firmly believe that it will be beneficial for trading on SEFs as well.

We therefore suggest that the Commission explicitly permit pre-execution communication between the counterparties for price discovery purposes. We believe that the Commission could achieve its goal by prohibiting transactions that are negotiated *and* consummated on a one-to-one basis, rather than transactions that are negotiated *or* consummated in this way. Alternatively, the Commission should clarify that pre-arranged trading does not include non-abusive communication between the parties prior to execution.

IX. The Commission Should Require SEFs to Establish Policies and Procedures Reasonably Designed to Prevent any Provision in a Valid Swap Transaction from Being Invalidated or Modified Through the Utilization of, or Execution on, a SEF.

We believe that there are no circumstances under which a validly executed swap should be modified or altered by a SEF other than by the express agreement of the counterparties at the time of such modification or alteration. Dodd-Frank established that the Commission must determine whether a swap contract is required to be cleared and only after that determination and the submission by a derivatives clearing organization to clear such contract, will a swap contract be required to be traded on a designated contract market or SEF. Under Dodd-Frank, the terms of a swap contract required to be cleared will never be established by a SEF nor should a SEF have the power to modify the terms of swap executed on it.

Accordingly, we believe the Commission should establish by regulation that SEFs “*establish policies and procedures reasonably designed to prevent any provision in a valid swap transaction from being invalidated or modified through the utilization of, or execution on, a SEF.*” In addition to requiring that SEFs maintain such policies and procedures, we respectfully request that the Commission clarify in its release accompanying the final rule that such policies and procedures are expected, among other things, to preclude the practice of changing swap terms agreed upon by counterparties through SEF agreements which require users to agree that changes to their swap terms by the SEF will be “deemed to have been accepted” by users if users utilize such SEF after notice of such term change. We believe that the Commission has the authority to adopt such a rule to prevent market participants from modifying swaps terms carefully negotiated by plans and other counterparties. We note that the Commission has proposed a similar rule for SDRs.²⁸

X. SEFs Should Not Be Self-Regulatory Organizations or Obligated or Permitted to Monitor Market Participants’ Financial Condition or Perform Audits of its Members.

SEFs are expected to be trading platforms, not clearinghouses, and thus will not be subject to counterparty credit risk or be required to guarantee the commitments of a market

²⁸ See Swap Data Repositories, 75 Fed. Reg. 80898, 80905 (proposed Dec. 23, 2010).

participant trading on its platform. However, the Proposed Rule treats a SEF as if it were exposed to such credit risk or guarantees by requiring SEFs to conduct an analysis into members' or participants' creditworthiness.

Proposed Rules 37.702 and 37.703 mandate that SEFs request credit arrangement documentation from their members participating in non-cleared transactions, require evidence of those members' creditworthiness, and routinely monitor each member's financial condition. Each SEF would be required to annually audit market participants.²⁹ These rules would impose heavy and costly burdens on SEFs which will naturally increase the price of executing on such a platform.

Moreover, these rules would erect significant barriers to entry because any newly-formed SEFs will be required to establish all these compliance procedures. Thus, the rules would stifle competition, leading to even higher prices. We believe that these requirements are not only unnecessary but intrusive and burdensome to SEFs and to market participants, and we believe that these requirements should be removed from the final rule.

XI. The Burdens Imposed by The Proposed Rule on SEFs Will Likely Result in Fewer SEFs and Fewer RFQ Platforms, Which Will Be Detrimental to Plans.

We believe that the proposed market participant oversight requirements place an inappropriate regulatory burden on SEFs which will result in there being fewer SEFs and fewer RFQ Platforms. For example, Proposed Rule 37.206 requires SEFs to have enforcement staff, establish disciplinary, review, and hearing panels, issue charges for violations, impose disciplinary sanctions, and establish appellate panels.³⁰ These requirements are in stark contrast to Dodd-Frank, which only mandates, in relevant part, that SEFs (i) establish and enforce rules to *deter* abuses, (ii) establish and enforce trading *procedures*, and (iii) *monitor* trading in swaps to prevent manipulation.³¹ Deterring abuses, enforcing procedures, and monitoring trades do not require SEFs to become enforcement agencies for abusive trading practices. On the contrary, we respectfully believe that this responsibility remains with the Commission, and that Dodd-Frank did nothing to change this. These requirements necessarily require heavy technological and human capital investment by SEFs and impose a significant barrier to entry for SEFs.

Given that many buy-side participants utilize RFQ systems currently, we are concerned that such requirements will result in fewer RFQ systems being available to pension plans. As noted above, pension plan fiduciaries currently effectively use RFQ systems to obtain favorable pricing for pension plans. We are concerned that the Commission will inadvertently through unnecessary and costly requirements limit the number of SEFs available to market participants. Accordingly, we request that the Commission not place burdensome enforcement and market compliance burdens on SEFs.

²⁹ See Proposed Rule 37.205(c)(1).

³⁰ See Proposed Rule, 76 Fed. Reg. at 1244-45.

³¹ See CEA Sections 5h(f)(2)-(4).

XII. Commission Designation of Swaps as “Made Available for Trading”; SEFs Should Be Required To Provide Advance Public Notice Of Their Rules To Market Participants And Any Objections Received From Market Participants Should Be Included In A SEF’s Submission Of Its Rules To The Commission.

As discussed above, we believe that the Commission, not the SEFs, should designate what swap contracts are “made available for trading”. Also, as noted above, the Commission should only be in a position to make this determination after a sufficient amount of data has been collected through the SDRs to provide enough information to qualitatively and quantitatively assess the swap markets, and, as Dodd-Frank requires in Section 733, to allow the Commission to “take into account the price and nonprice” factors, such as liquidity, frequency of trading, nature of counterparties, breadth of the market, etc. We believe that a year is a sufficient period to allow the Commission to collect this information.

After this period of data collection and analysis, the Commission should follow a process similar to that established for the approval of swaps that would be subject to the clearing requirement (*i.e.*, Commission-initiated review of swaps and a Commission determination of “made available for trading” initiated by the SEFs and other market participants).³² Below we discuss the procedures that should apply to Commission determinations upon SEF’s submission.

Similarly, but separately, we believe that the Commission should be in a position to specifically approve other rules of the SEFs that the SEFs must promulgate under Dodd-Frank and under the Proposed Rules. We note that under Dodd-Frank, a SEF is permitted to approve its own rules through the process of “self-certification”. A SEF’s rules could impose significant limitations on market participants, unreasonable fees, over-reaching information obligations on market participants and terms which could not be in the public interest. Because a swap that is subject to mandatory clearing and made available to be traded on a SEF must be traded through a SEF or a DCM, the result of such a designation could be to force a plan to choose between paying potentially unreasonable fees and being subject to onerous trading requirements imposed by a SEF or not entering into a swap that is critically needed to control the plan’s risks. Accordingly, we request the following:

A. Consideration of Plans and Public Policy

We urge the Commission to consider the consequences for plans and other market participants in its review of rule submissions by a SEF. We request that the Commission require that SEFs that make “self-certification” submissions to the Commission 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. The submission by a SEF to the Commission should also be required to describe any views expressed by SEF market participants as well as by its members.

³² See Section 723 of Dodd-Frank.

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

We request the Commission to require SEFs to provide prior notice to its members and market participants of a submission by the SEF to the Commission and establish a specific time period that must elapse between such notice and the SEF's submission to the Commission.³³ *It is critical that plans and other non-member market participants have advance notice of SEF submissions.* Because mandatory execution will have a very significant impact on every market participant, plans and other market participants should be granted the right to voice their views on a submission before it is made.

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 SEFs 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 SEFs provide advance notice of a submission to the National Futures Association (the “*NFA*”) at the same time that the SEF 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 SEF to electing market participants or the date that the notice is published on the *NFA*'s website), to (ii) the submission by the SEF to the Commission. Any less time would hinder market participants in their ability to review and respond to the submission.

C. Stay

The CFTC's recently proposed rule 40.2 provides that a SEF may list a swap if it has filed a submission with the Commission and the submission has not been stayed.³⁴ The proposed rule lists only very narrow grounds for staying such a submission. However, the CEA gives the Commission broad regulatory powers with respect to clearing and trading of swaps. First, Section 5h(d) of the CEA, as amended by Dodd-Frank, 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. . . .” Second, 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. Under Dodd-Frank, the determination that a swap is clearable also means that this swap should trade on a SEF or a DCM. Finally, the provisions of the CEA dealing with SEFs give the Commission broad regulatory authority over SEFs.³⁵ In the aggregate, the Commission has sufficient authority under Dodd-Frank to require a stay of a SEF rule's effectiveness.

We ask that the proposed rules regarding SEF requirements be amended, pursuant to these regulatory powers, so that additional consideration can be given to the interests of plans

³³ See Process for Review of Swaps for Mandatory Clearing, 75 Fed. Reg. 67277, 67279 (proposed Nov. 2, 2010), first column, first paragraph.

³⁴ See Provisions Common to Registered Entities, 75 Fed. Reg. 67282, 67293 (to be codified at 17 C.F.R. § 40.2).

³⁵ See, *e.g.*, CEA Section 5h(f)(1)(A)(ii) (“To be registered, and maintain registration, as a [SEF], the [SEF] shall comply with . . . any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).”).

and other market participants. Trading on SEFs 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 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 provide comments on the submission to the Commission.

In addition, SEFs should be required to demonstrate compliance (including in their submission) with SEF Core Principle 13 by showing 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 from using the self-certification process and/or their possible single-provider status to charge potentially unreasonable fees. It would be a counter-productive result if the upshot of the CEA were to be to permit SEFs to enrich themselves at the expense of plans and their participants.

D. Public Information

We request that the Commission confirm that it will also list all SEF 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 a SEF's members and to all other market participants, as discussed above, 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 SEF or the Commission.

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We thank the CFTC for the opportunity to comment on the proposed rules on the swap execution facility requirements.

American Benefits Council

Committee on Investment of Employee Benefit Assets

Cc:

Chairman Gary Gensler

Commissioner Michael Dunn

Commissioner Bart Chilton

Commissioner Jill Sommers

Commissioner Scott O'Malia