



May 6, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **File Number S7-8-11 / Clearing Agency Standards for Operation and Governance**

Dear Ms. Murphy:

The American Benefits Council (the “*Council*”) appreciates this opportunity to provide comments to the Securities and Exchange Commission (the “*SEC*” or “*Commission*”) on its proposed rule regarding clearing agency standards for operation and governance published on March 16, 2011 (the “*SEC Proposal*”) ¹ under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“*Dodd-Frank*”). 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.

IMPORTANCE OF SECURITY-BASED SWAPS TO PENSION PLANS

Pension plans use swaps regulated by the Commodity Futures Trading Commission (“*CFTC*”) and security-based swaps (“*SB swaps*” and, together with CFTC-regulated swaps, “*Swaps*”) to manage risk and to reduce the volatility of the plan funding obligations imposed on the companies maintaining the plans. If Swaps are materially less workable or available, funding volatility could increase. 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 additional amounts to satisfy possible funding obligations, most of which may never need to be contributed to the plan because the risks being reserved against may never materialize. Those greater reserves would have a significant effect on the working capital that would be available to companies to create new jobs and for other business activities that promote economic growth.

¹ Clearing Agency Standards for Operation and Governance, 76 Fed. Reg. 14472 (published March 16, 2011).

² The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

The Council supports the SEC's proposal to define clearing agencies broadly to include, among other entities, any person who provides facilities for the comparison of data regarding the terms of settlement as well as persons providing trade matching services.³ We believe that these entities should be regulated because their policies, rules, and actions could have a significant impact on Swap transactions. In particular, we are concerned that these entities could be in a position to modify or invalidate otherwise valid Swaps through the matching process.

Therefore, as further discussed below, we believe that:

- The SEC should modify the SEC Proposal to require clearing agencies, including those providing trade matching services, to implement policies and procedures that prevent those entities from modifying or invalidating the terms of any otherwise valid SB swaps; and
- In order to maximize efficiency and in order to ensure that the SEC and CFTC comply with President Obama's recent Executive Order regarding harmonization of the U.S. regulatory system, the SEC should work with the CFTC to ensure that entities providing matching services for CFTC-regulated swaps are also required to register with the CFTC and implement similar policies regarding modification of swap terms.

I. The SEC Should Require Clearing Agencies to Establish Policies and Procedures Reasonably Designed to Prevent any Provision in a Valid SB Swap Transaction from Being Invalidated or Modified Through the Utilization of Trade Matching Platforms or Clearing Services.

We believe that there are no circumstances under which a validly executed SB swap should be modified or altered by a clearing agency, whether it be a trade matching clearing agency or a central counterparty clearing agency ("CCPs"), other than by the express agreement of the counterparties at the time of such modification or alteration.

Trade processing and CCP services are both important aspects of the trade process because they promote financial stability, one of the stated goals of Dodd-Frank.⁴ Trade matching is the process whereby "an intermediary compares each market participant's trade data regarding the terms of settlement of securities transactions, in order to reduce the number of settlements of securities transactions, or to allocate securities settlement responsibilities."⁵ Thus, trade matching providers compare one party's data against the other party's data in order to ensure that both sets match. CCPs, on the other hand, will interpose themselves between parties to a transaction and act "as the buyer to every seller and the seller to every buyer."⁶ Therefore, both types of entities will function as an intermediary and will manage the terms of SB swap transactions to varying degrees. As a result, without rules to the contrary, clearing agencies may be in a position to modify the terms of SB swap transactions through the matching or novation process. We believe that this would increase market uncertainty, thus undermining the financial stability gained through the matching or clearing process.

³ See SEC Proposal, 76 Fed. Reg. at 14495.

⁴ See Dodd-Frank, 124 Stat. at 1376.

⁵ SEC Proposal, 76 Fed. Reg. at 14495.

⁶ SEC Proposal, 76 Fed. Reg. at 14537 (to be codified at 17 C.F.R. § 240.17Ad-22(a)).

Accordingly, we believe the SEC should establish by regulation that clearing agencies “*establish policies and procedures reasonably designed to prevent any provision in a valid security-based swap transaction from being invalidated or modified through the utilization of a clearing agency.*” In addition to requiring that clearing agencies maintain such policies and procedures, we respectfully request that the SEC clarify in its release accompanying the final rule that such policies and procedures are expected, among other things, to preclude the practice of changing SB swap terms agreed upon by counterparties through clearing agency rules which require users to agree that changes to their SB swap terms by the clearing agency will be “deemed to have been accepted” by users if users utilize such clearing agency after notice of such term change. We note that the SEC has proposed a similar rule for security-based swap data repositories.⁷

II. The SEC Should Work With the CFTC to Ensure that Trade Matching Services Are Regulated Under Both Regulatory Regimes.

The CFTC has not proposed to require trade matching entities to register with the CFTC. As explained above, we agree with the SEC that trade matching entities should be regulated, and we believe that the SEC should work with the CFTC to ensure that the Commissions’ regulations in this area are in harmony.⁸

If trade matching providers are regulated by the SEC but not the CFTC, the rules, processes, and procedures applicable to trade matching may begin to diverge for SEC- and CFTC-regulated swaps, causing market inefficiencies. For example, if the SEC prohibits trade matching providers from modifying or invalidating otherwise valid SB swaps, entities providing matching services for CFTC-regulated swaps will still be able to implement rules permitting them to modify or change the terms of swaps. As a result, trading entities engaging in Swaps that wish to use trade matching services may need to develop two different systems if they are unwilling to accept rules permitting trade matching providers to alter the terms of a transaction. Some trading entities, for example, may decide to use trade matching services only for SB swaps while other trading entities may decide not to use these services at all. The same will be true for any number of rules that will be applicable to trade matching providers under the SEC’s rules but not under the CFTC’s rules.⁹

⁷ See Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. 77306, 77331 (published Dec. 10, 2010) (Section e: “Controls to Prevent Invalidation”).

⁸ See SEC Proposal, 76 Fed. Reg. at 14500, stating: “Title VII requires that the SEC consult and coordinate to the extent possible with the CFTC for the purpose of assuring regulatory consistency and comparability, to the extent possible, and states that in adopting rules, the CFTC and SEC shall treat functionally or economically similar products or entities in a similar manner.” *Id.* Clearly, treatment of “matching services” is very different as adopted by the SEC and the CFTC, although economically and functionally these matching services regulated by the SEC and the CFTC are identical.

⁹ For example, the SEC has proposed to require clearing agencies to protect the confidentiality of trading information. See SEC Proposal, 76 Fed. Reg. at 14539 (to be codified at 17 C.F.R. § 240.17Ad-23). This requirement would not apply to unregulated matching of CFTC-regulated swaps.

Such an outcome would contravene the recent Executive Order.¹⁰ Section 3 of that Order notes that “[s]ome sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping,” and therefore requires that, “[i]n developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote . . . coordination, simplification, and harmonization.”¹¹ The SEC’s and CFTC’s regulations will clearly be inconsistent if trade matching of Swaps is regulated under the SEC but not under the CFTC.

We therefore believe that the SEC should urge the CFTC to regulate providers of trade matching services. The CFTC could regulate these entities, for example, as derivatives clearing organizations,¹² swap execution facilities,¹³ or designated contract markets.¹⁴

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We thank the SEC for the opportunity to comment on its proposed rules regarding the clearing agency standards for operation and governance.

American Benefits Council

cc:

Chairman Mary L. Schapiro, SEC
Commissioner Luis A. Aguilar, SEC
Commissioner Kathleen L. Casey, SEC
Commissioner Troy A. Paredes, SEC
Commissioner Elisse B. Walter, SEC

Chairman Gary Gensler, CFTC
Commissioner Bart Chilton, CFTC
Commissioner Michael Dunn, CFTC
Commissioner Scott D. O’Malia, CFTC
Commissioner Jill E. Sommers, CFTC

¹⁰ See Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (published January 21, 2011).

¹¹ *Id.* at 3822.

¹² See Commodity Exchange Act (“CEA”) Sec. 1a(15)(A)(ii) (“The term ‘derivatives clearing organization’ means a[n] . . . entity, facility, system, or organization that, with respect to an agreement, contract, or transaction—arranges or provides, on a multilateral basis, for the settlement . . . of obligations); SEC Proposal, 76 Fed. Reg. at 14495 n.103 (“A vendor that provides a matching service . . . will issue the affirmed confirmation that will be used in settling the transaction.”) (quoting Exchange Act Release No. 39829 (April 6, 1998), 63 Fed. Reg. 17943 (April 13, 1998) (File No. S7-10-98)).

¹³ See Dodd-Frank § 733, 124 Stat. at 1712 (adding CEA Sec. 5h(a)(1) (“No person may operate a facility for the trading *or processing* of swaps unless the facility is registered as a swap execution facility or as a designated contract market under this section.”)).

¹⁴ See *id.*