From: Legal <legal@futuresindustry.org>
Sent: Monday, September 20, 2010 4:16 PM
To: rule-comments@sec.gov; dfadefinitions <dfadefinitions@CFTC.gov>
Subject: SEC File #S7-16-10 CFTC Definitions
Attach: CFTC SEC Definitions 092010.pdf

Attached please find the Futures Industry Associations comment letter regarding Proposed Rules Relating to Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act (File No. S7-16-10).

Please feel free to contact the FIA with any questions or comments.

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FIA

September 20, 2010

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

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609.

Re: Proposed Rules Relating to Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act (File No. S7–16–10)

Dear Ms. Murphy and Mr. Stawick:

The Futures Industry Association (the "FIA")[1] submits these comments in response to Release No. 34-62717 (the "Release"), in which the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC") solicited comments on certain definitions contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). FIA welcomes the opportunity to provide our comments on the definitions addressed in the Release, and in particular, with regard to issues concerning futures commission merchants ("FCMs") and their affiliates.

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[1] FIA is a principal spokesman for the commodity futures and options industry. FIA's regular membership is comprised of approximately 30 of the largest futures commission merchants ("FCMs") in the United States, the majority of which are either registered with the Securities and Exchange Commission as broker-dealers or are affiliates of broker-dealers. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than eighty percent of all customer transactions executed on United States designated contract markets.

FCMs Should not be Required to Register as Swap Dealers

FIA strongly believes that FCMs should not be required to register as swap dealers solely by virtue of providing swap clearing services to customers or acting as brokers with respect to swap transactions between customers.[2] Pursuant to Dodd-Frank, a "swap dealer" is a market participant that "actively holds itself out as a dealer in swaps", "makes a market in swaps", "regularly enters into swaps with counterparties as an ordinary course of business for its own account" or "engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps." While FCMs will perform services related to the execution of swaps, they will not, solely by virtue of these activities and acting as clearing brokers, engage in any of the activities enumerated in the swap dealer definition. Specifically, an FCM that acts as a clearing broker but neither holds itself out as a dealer nor makes a market in swaps, and does not enter into swap transactions as principal, should not be considered a dealer. As is the case with respect to futures transactions, an FCM, in its role as a clearing broker, is limited to acting as an agent on behalf of its customers.

Similarly, FCMs might from time to time act as brokers in matching two customers or counterparties seeking to execute a swap, which will then be submitted for clearing. In such instances, the FCM has no role in the transaction other than matching the parties. It does not act as a principal with respect to either party, nor does it have any obligation under the resulting transaction unless and until it is cleared. This role is outside of the statutory definition of a swap dealer and the CFTC's regulations should make it clear that registration as a swap dealer is not required. The definition of swap dealer, therefore, should make it clear that only those market participants that are actively engaged in the activities enumerated in the swap dealer definition should be required to be registered as swap dealers pursuant to any regulations promulgated by the CFTC under Dodd-Frank.

In addition, FIA does not believe that an FCM should be deemed to be a swap dealer if the FCM is required to assume customer positions as a result of a default or other extraordinary circumstances. The assumption of a defaulted customer's positions is related to and simply a function of the FCM's role as an agent and clearing broker and should not be treated as principal activity. Accordingly, FIA requests the CFTC to clarify that an FCM will not be deemed a swap dealer in such circumstances including for purposes of capital treatment as a result of assuming such positions.

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2 We also believe that the definition of the term major swap participant ("MSP") should not be construed to include FCMs, and we urge the CFTC to clarify that FCMs will not be required to register as MSPs, solely by virtue of providing clearing services and brokerage services in connection with swaps.

In addition, to ensure consistent regulation between comparable market participants, we urge the SEC to define the terms security-based swap dealer and major security-based swap participant to exclude registered broker-dealers to the extent that their swaps activities are limited to the provision of brokerage and clearing services.

Similarly, FCMs may, from time to time, be required to take on customer positions in order for the clearing systems to function. For example, some clearing organizations may utilize default management processes in connection with cleared swaps, pursuant to which non-defaulting clearing members may accept certain positions of a defaulted clearing member. An FCM accepting such positions should not be construed as a swap dealer as a result of this activity in default situations. We believe that clarity on this issue in advance of any customer default or any other extraordinary circumstances will provide legal certainty to market participants and will help to reduce the risk of market disruptions.

FCMs Should not be Required to Register as Commodity Trading Advisors

FIA is concerned that an overly broad interpretation of the definition of commodity trading advisor ("CTA") might encompass FCMs that provide advice on swap transactions in a manner that is solely incidental to their FCM business. We do not believe that this is the intended result or that it would serve any regulatory purpose. We note that the definition of a CTA in Section 1a of the Commodity Exchange Act ("CEA") explicitly excludes FCMs whose advice is solely incidental to their business. Accordingly, we encourage the CFTC to clarify in its rulemaking that this exemption applies equally to advice rendered by an FCM in connection with its brokering and clearing of swaps.

Swap Dealers Should not be Required to Register as FCMs

For many of the reasons set forth in the preceding paragraphs, those entities acting in the capacity of a swap dealer should not fall within the definition of an FCM. We urge the CFTC, in its rulemaking under Dodd-Frank, to clarify the newly expanded definition of an FCM under Section 721 in order to provide clear guidance to market participants as to the precise activities that will result in a market participant being encompassed within the definition of an FCM. We are concerned that the expanded definition of an FCM might be construed too broadly, thereby capturing a range of market participants that historically have not been, and are not appropriate to be, treated as FCMs, such as executing dealers or swap dealers acting only in dealer capacities. Accordingly, we urge the CFTC to exercise its authority to ensure that any rulemaking regarding the definition of FCMs strikes the appropriate balance between capturing market participants that are actively engaged in the activities of an FCM, such as the provision of brokerage and clearing services and the handling of margin, while excluding those market participants that should not be considered FCMs under Dodd-Frank, particularly where such participants are required to register in other capacities.

For example, swap dealers affiliated with FCMs should not be required to register as FCMs simply because they refer their swap counterparties to FCMs for the provision of clearing services. FCMs provide a wide range of services to customers, including executing and clearing transactions, accepting funds and securities deposited by customers as margin and issuing confirmations and statements. An affiliated entity that refers a counterparty for clearing services is not engaged in FCM activities merely by such referral. Under these circumstances, the affiliated entity is not "accepting" an order for a swap, and is not providing clearing services. These factors, combined with the swap dealer's own registration status, make it duplicative and unnecessary for it also to be registered as an FCM.

This additional registration will provide no additional benefits or protections to the counterparties, the market or the CFTC, and will force swap dealers to comply with a regulatory scheme not appropriate for their businesses. We urge the CFTC to clarify in the definition of an FCM that such dual registration by swap dealers will not be required unless a swap dealer itself engages in the provision of clearing services, the handling of margin for cleared swaps or other activities characteristic of an FCM.

Similarly, because the revised definition of an FCM includes any entity that "accepts" swap orders, we are also concerned that this could be read to include executing dealers, which may also be affiliated with FCMs, that are merely executing swap transactions with counterparties to be submitted for clearing through an FCM. Cleared swaps are typically executed directly between an executing dealer and its counterparty, each acting as principal, with the intention of the resulting counterparty position being submitted to the counterparty's FCM for clearing. This is an activity that is distinct from an FCM's "acceptance" of orders for execution of futures transactions. In such instances, we do not believe that swap dealers that execute transactions as principal with counterparties should be construed as "accepting" swap orders for the purpose of the definition of "FCM." We urge the CFTC to ensure that any regulations promulgated under Dodd-Frank make it clear that the definition of an FCM does not include swap dealers that enter into swap transactions, even if those transactions are then cleared by affiliated (or unaffiliated) FCMs.

The Associated Person Registration Requirement should be Clarified

We note that Dodd-Frank creates a newly defined term in the CEA for associated persons ("AP") of a swap dealer or MSP, which is defined to mean an individual engaged in the solicitation or acceptance of swaps on behalf of a swap dealer or MSP. However, in contrast to the provisions of the CEA requiring the registration of APs of FCMs, introducing brokers, CTAs and commodity pool operators, Congress chose not to amend the CEA to require registration with respect to APs of a swap dealer or an MSP, or with respect to employees of FCMs that provide services in connection with swaps. FIA believes that these individuals should not be required to be registered as APs and requests that the CFTC clarify that such registration will not be required. In addition to the absence of a statutory registration requirement, we note that, where an FCM provides brokerage and clearing services with respect to swaps, its employees involved in that business would not be encompassed within the definition of an AP, because the FCM has not been considered to be soliciting or accepting orders. Accordingly, the CFTC

should clarify in future rulemakings that there is no registration requirement for APs of FCMs, as well as APs of swap dealers or MSPs.

The Legal Distinctions between Forwards, Futures and Swaps should be Clarified

The definition of a "swap" under Section 721 of Dodd-Frank expressly excludes "any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled." We recommend that the CFTC clarify, through rulemaking or interpretation, that the intent standard in this provision will be interpreted and applied in the same manner as the "forward contract exclusion" that has been included in the CEA since 1974. In particular, the CFTC and the courts have traditionally construed the forward contract exclusion to apply to transactions that (1) are entered into between parties with the capacity to make or take delivery of the underlying commodity; (2) require settlement by physical delivery and do not provide either party with the contractual right to settle in any other manner; and (3) are generally settled by physical delivery absent an event of default or force majeure, or a subsequent agreement of the parties consistent with relevant market practice. This approach is well understood by market participants and has allowed such participants to enter into transactions with legal certainty as to the status of the transactions as forward contracts, without focusing exclusively on subjective intent. The use of the term "intend," without further clarification or interpretation, relies exclusively on the subjective intentions of the parties, which cannot definitively be ascertained and could change during the term of a transaction for entirely legitimate business purposes.

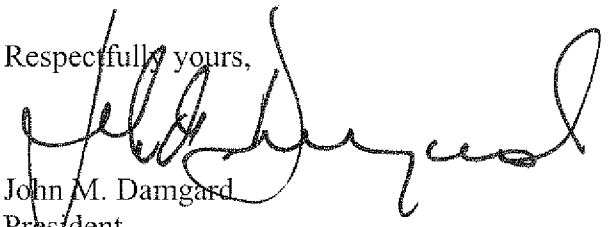
To provide legal certainty to all market participants, we urge the CFTC to interpret this intent requirement in a manner consistent with the CFTC's long-standing policy as set forth in its *Exemption for Certain Contracts Involving Energy Products*, 58 F.R. 21286 (Apr. 20, 1993) (the "*Energy Contracts Exemption*"). The *Energy Contracts Exemption* describes transactions eligible for exemption under the forward contract exclusion as those that "impose binding obligations on the parties to make and receive delivery of the underlying commodity or commodities, with no right of either party to effect cash settlement of their obligations without the consent of the other party (except pursuant to a bona fide termination right), provided, however, that the parties may enter into a subsequent bookout, book transfer, or other such contract which provides for settlement of the obligation in a manner other than by physical delivery of the commodity specified in the contract." We believe that forward contracts that satisfy these criteria, regardless of the underlying commodity, should be excluded from the definition of the term "swap," for purposes of the CEA and we urge the CFTC to clarify that the term "intend" in the exclusion from the swap definition will be construed in this manner.

We also believe that such an interpretation is consistent with the legislative intent of Congress, as noted in a letter from Senate Banking Committee Chairman Dodd and Senate Agriculture Committee Chairman Lincoln to House Financial Services Chairman Frank and House Agriculture Committee Chairman Peterson on June 30, 2010. In that letter, Senators Dodd and Lincoln stated that the definition of the forward contract exclusion "is intended to be consistent with the forward contract exclusion that is currently in the Commodity Exchange Act and the CFTC's established policy and orders on this subject, including situations where

commercial parties agree to 'book-out' their physical delivery obligations under a forward contract." We therefore recommend that the CFTC clarify that the forward contract provision of Dodd-Frank will be interpreted and applied in the same manner as the pre-Dodd-Frank forward contract exclusion.

We appreciate the opportunity to comment on the Release, and would be pleased to discuss any questions either regulator may have with respect to this letter. Any questions about this letter may be directed to Barbara Wierzynski, Executive Vice President and General Counsel.

Respectfully yours,



John M. Damgard
President
Futures Industry Association

cc: Honorable Gary Gensler, Chairman, CFTC
Honorable Michael Dunn, Commissioner, CFTC
Honorable Jill E. Sommers, Commissioner, CFTC
Honorable Bart Chilton, Commissioner, CFTC
Honorable Scott O'Malia, Commissioner, CFTC
Terry Arbit, Deputy General Counsel, Office of the General Counsel
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