

January 3, 2011

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

Re: RIN 3038-AD26 - Advance Notice of Proposed Rulemaking: Antidisruptive Practices Authority Contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (75 Fed. Reg. 67301)

Dear Mr. Stawick:

The International Swaps and Derivatives Association, Inc.¹ (“**ISDA**”) and the Securities Industry and Financial Markets Association² (“**SIFMA**”, and together, the “**Associations**”) are writing in response to an advance notice of proposed rulemaking (the “**ANPR**”), issued by the Commodity Futures Trading Commission (the “**Commission**”), pursuant to which the Commission solicited comments on Section 747 (“**Section 747**”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**Dodd-Frank Act**”), which amends Section 4c(a) of the Commodity Exchange Act (the “**CEA**”) by expressly prohibiting certain trading practices deemed disruptive of fair and equitable trading on or subject to the rules of a regulated entity.

The Associations support the Congressional mandate to prohibit trading practices that are disruptive of fair and equitable trading on registered entities. At the same time, the Associations have two primary concerns with respect to Section 747 of the Dodd-Frank Act and the Commission’s rulemaking under it:

- First, we believe that the while the terms used in Section 747 and in the ANPR may have limited application in certain markets, they are not commonly understood to have a particular meaning in the swaps markets. These terms lack definition, which makes them susceptible to being interpreted to sweep in a range of completely appropriate conduct. Moreover, it is not at all clear what relevance, if any, these terms will have in the swaps markets as they develop as a result of the implementation of regulations under the Dodd-Frank Act. Imputing to the swaps market practices that may have no relevance may result in regulations that are misdirected or misapplied.
- Second, by adopting distinct rules to deal specifically with “disruptive” trading practices separately from the Commission’s current broad anti-manipulation authority under Section 9(a)(2) of the CEA and from the enhanced authority contained in Section 6(c) of the CEA (as

¹ ISDA was chartered in 1985 and has over 830 member institutions from 57 countries on six continents. Our members include most of the world’s major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the risks inherent in their core economic activities.

² SIFMA brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

amended by Section 753 of the Dodd-Frank Act), the Commission risks creating a patchwork of overlapping and inconsistent standards that are ultimately designed to prohibit the same conduct, complicating the ability of market participants to implement effective compliance programs. Similarly, by treating the Section 747 “use of swaps to defraud” provision separately from the related Section 753 material, the Commission may miss the opportunity to achieve much desired regulatory consistency and coherence.

Therefore, while we appreciate that the Commission has approached the rulemaking contemplated by Section 747 by issuing an advanced notice of proposed rulemaking rather than proposing a rule, we urge the Commission to proceed with the rulemaking only after it has assessed and defined with particularity the practices in the swaps markets (as they will develop) that it seeks to prevent and does so in a manner that accords with the Commission’s other anti-fraud and anti-manipulative authority.

A. Disruptive Practices

In enacting Section 747, Congress targeted certain practices, “violat[ing] bids or offers”, “demonstrat[ing] intentional or reckless disregard for the orderly execution of transactions during the closing period” (e.g., where traders attempt to affect a settlement price by buying or selling large volumes before the day’s end of business) and “spoofing,” as being unlawful. Congress provided related rulemaking authority.

Notwithstanding that the terms used in the statute may or may not have currency in the futures or public securities markets, we are unsure how these concepts will apply to the swaps market. At this time it is premature to formulate regulations outlawing practices of a *swaps* “registered entity” within the Commission’s jurisdiction. The parameters of what will ultimately constitute a *swaps* “registered entity” continue to evolve, and the practices that may or may not develop on such entities cannot be foreseen with any precision. As an example, the phrase “violating bids and offers” simply has no meaning in most if not all swaps markets. The pricing and trading of many swaps involves a variety of factors (e.g., size, credit risk) which, taken together, render the concept of “violating bids or offers” as inapposite. The Commission has recognized some of these aspects of the swaps markets in its proposed rule on core principles for swap execution facilities (which will be registered entities) by, for example, specifically permitting certain swaps to be executed through a request for quote system.³ To go a step further, a “swap data repository” is now a “registered entity”. Conceivably, without further clarification from the Commission, a bespoke bilateral swap reported to a swap data repository would be vulnerable to being characterized as “disruptive.”

The Associations believe that the rules governing conduct in the swaps markets should be clear to market participants, and such rules should be reasonably tailored to the swaps markets and the market participants to which they will apply. The Dodd-Frank Act reflects a recognition by Congress of the differences between futures and swaps (and between different classes of swaps), and the adoption of a regulatory regime that fails to account for the distinguishing features of swaps and swaps markets would inevitably be contrary to Congressional intent.

The Associations suggest that the Commission continue to refine its approach to disruptive practices in the futures market, taking into account of course the concerns of futures market participants. The Associations also suggest, however, that the Commission wait until swaps market facilities are defined and trading practices may be predicted before attempting to apply prohibitions developed for other

³ Notice of Proposed Rulemaking: Core Principles and Other Requirements for Swap Execution Facilities, Commodity Futures Trading Commission (RIN Number 3038-AD18).

markets. Then and only then will the Commission be able to craft the clear and definite conduct standards that the market requires to thrive, and that are lacking thus far in the ANPR.

B. Connection with Other Rulemaking

The Commission at present is conducting a rulemaking under Section 753 relating to proposed anti-fraud and anti-manipulation provisions. We see the subject matter of the ANPR as being directly related to that 17 CFR Part 180 rulemaking. We have expressed our views on the Part 180 rulemaking in our joint letter of December 28, 2010 with the Futures Industry Association (the “**Joint Letter**”). We hope the Commission understands that our general concerns voiced in the Joint Letter for gaining appropriate specificity and eliminating confusing redundancy apply equally to the rulemaking anticipated by the ANPR. (In fact, we suggest that the two rulemakings be combined.) The Associations believe that the Commission, in pursuing the subject matter of the ANPR, should be careful to provide precise definitions of unwanted conduct, requisite intent and effect, and to achieve other recognized drafting goals in defining prohibitions and violations. We underscore our view that manipulative intent is a necessary element of “manipulative” or “disruptive” conduct. See Section II.C of the Joint Letter. We also note again our thoughts with respect to new Section 4c(a)(7) of the CEA as amended, and its potential to place an unwarranted burden of disclosure or diligence on swap counterparties (as further articulated in Section II.B of the Joint Letter).

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The Associations appreciate the opportunity to provide their comments on the ANPR and look forward to working with the Commission as the rulemaking process continues. Please feel free to contact us at your convenience.

Sincerely,



Robert Pickel
Executive Vice Chairman
ISDA



Kenneth E. Bentsen, Jr.
Executive Vice President
Public Policy and Advocacy
SIFMA