

February 7, 2011

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

Re: (1) Swap Data Repositories; and (2) Real-Time Public Reporting of Swap Transaction Data

Dear Mr. Stawick:

MarkitSERV¹ is pleased to submit the following comments to the Commodity Futures Trading Commission (“**CFTC**” or the “**Commission**”) on the following proposed rulemakings to implement certain requirements included in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**DFA**”):² (1) Proposed Rule on Swap Data Repositories (the “**SDR Regulation**”);³ and (2) Proposed Rule on Real-Time Public Reporting of Swap Transaction Data (the “**Real-Time Regulation**”)⁴ (collectively, the “**Proposed Rules**”).

1. Introduction.

MarkitSERV provides trade processing, confirmation, matching, and reconciliation services for swaps and security-based swaps (“**SBS**”) across many regions, swap instruments, swap markets and asset classes. As a service and infrastructure provider to the global swaps markets, MarkitSERV supports the Commission’s objectives of increasing transparency and efficiency in the OTC derivatives markets and of reducing both systemic and counterparty risk.

In our comments below, MarkitSERV wishes to: (a) highlight some significant market consequences and impact of implementing the Proposed Rules as currently drafted; (b) identify potential deficiencies in the Proposed Rules; and (c) propose solutions and recommendations on ways to more effectively implement the Congressional intent in the Proposed Rules.

2. Executive Summary.

As further explained below, MarkitSERV believes that: (i) SDRs and their affiliates should be permitted to offer a range of Ancillary Services (as defined below) in addition to their core services of data acceptance and data storage; (ii) the Commission should allow for various acceptable fee models for SDRs, including the broadly established “sell-side pays” approach as one of them; (iii) SDRs should not be restricted in how the SDRs price their non-core, optional Ancillary Services that can be provided by unregulated Third-Party Service Providers;

¹ MarkitSERV, jointly owned by The Depository Trust & Clearing Corporation (DTCC) and Markit, provides a single gateway for OTC derivatives trade processing. By integrating electronic allocation, trade confirmation and portfolio reconciliation, MarkitSERV provides an end-to-end solution for post-trade transaction management of OTC derivatives in multiple asset classes. MarkitSERV also connects dealers and buy-side institutions to trade execution venues, central clearing counterparties and trade repositories. In 2010, more than 19 million OTC derivatives transaction sides were processed using MarkitSERV. Please see www.markitserv.com for additional information.

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

³ Swap Data Repositories [FR Doc. 2010-31133], 75 Fed. Reg. 80898 (proposed Dec. 23, 2010).

⁴ Real-Time Public Reporting of Swap Transaction Data [FR Doc. 2010-29994], 75 Fed. Reg. 76140 (proposed Dec. 7, 2010).

(iv) commercial use of participants' data should be governed by agreements executed between participants and the SDRs; (v) SDRs should be required to accept all formats and types of data from participants provided that SDRs are able to recoup their additional reasonable costs in processing the non-standard data; (vi) SDRs should be deemed to have fulfilled their statutory duty to confirm the accuracy of the swap data if the submitted transaction is legally confirmed by the counterparties; (vii) SDRs should be able to set minimum standards for accessing SDRs; (viii) only registered SDRs, or their affiliates, should be allowed to serve as real-time trade reporting disseminators; (ix) life-cycle events should be reported to the same SDR that received original swap transaction data (both for regulatory reporting purposes and for real-time reporting purposes as well); (x) SDRs must be able to accept all swap instruments in a given swap asset class; (xi) the CFTC and the SEC should harmonize their rules on what parties should be required to report swap transactions; (xii) SDRs should have greater flexibility in determining on a going forward basis what swap data fields should be reported to the Commission and in real time to the public; and (xiii) implementation of real-time reporting rules should be phased in over time in coordination between the CFTC and the SEC.

3. Description of the Existing SDR Model.

Even though the concept of a swap data repository (“**SDR**”) – as a “registered entity” – was first articulated in the DFA in 2010,⁵ several entities that already perform some or all of the SDR functions have existed in the U.S. and other markets for a number of years. Based on the most recent commitments from the G14 dealers to the New York Federal Reserve, the OTC derivatives industry supported the establishment of trade repositories in the asset classes of credit derivatives, equity derivatives, and interest rate derivatives.⁶ Importantly, the NYFED Commitment Letter was promulgated and signed by the G14 group before the DFA passed either the House or the Senate in 2010 and before the DFA became law. Indeed, the letter referenced herein, and the five prior joint industry commitment letters thereto, all laid out goals and were successful in establishing and meeting targets related to the implementation of a robust and resilient framework for OTC derivatives risk management and market structure.

For example, in November 2006, the DTCC created the Trade Information Warehouse (“**TIW**”), a trade repository for credit derivatives, and, in a phased-in and industry-supported approach, launched the Equity Derivatives Reporting Repository (“**EDRR**”) with MarkitSERV in August 2010. MarkitSERV (a joint venture between Markit and DTCC) provides a gateway for the credit and equity trade repositories able to provide the entire set of trade details as confirmed by the counterparties to the transaction. Confirmation of economic and legal terms, submitted and ultimately verified by parties to the transaction on a timely basis, is crucially important to ensure legal certainty, particularly in the event of financial crisis and economic duress, and accuracy for the creation and continuation of effective regulatory monitoring.

⁵ See DFA § 728, 124 Stat. at 1697.

⁶ See the letter with certain commitments from the 14 buy-side and sell-side derivatives institutions addressed to the President of the Federal Bank of New York on March 1, 2010 (the “**NYFED Commitment Letter**”), signed by AllianceBernstein; Bank of America-Merrill Lynch; Barclays Capital; BlackRock, Inc.; BlueMountain Capital Management LLC; BNP Paribas; Citadel Investment Group, L.L.C.; Citi; Credit Suisse; Deutsche Bank AG; D.E. Shaw & Co., L.P.; DW Investment Management LP; Goldman Sachs & Co.; Goldman Sachs Asset Management, L.P.; HSBC Group; International Swaps and Derivatives Association, Inc.; J.P.Morgan; Managed Funds Association; Morgan Stanley; Pacific Investment Management Company, LLC; The Royal Bank of Scotland Group; Asset Management Group of the Securities Industry and Financial Markets Association; Société Générale; UBS AG; Wachovia Bank, N.A.; and Wellington Management Company, LLP (the “**G14**”). Commitments spelled out in the NYFED Commitment Letter include: (i) greater use of global derivatives repositories; (ii) promotion of clearable contracts and centralized clearing generally; (iii) promotion of processing and legal contract standardization; (iv) promotion of bilateral margining and collateral arrangements; (v) promotion and greater use of straight-through trade processing, electronification, trade date matching, affirmation and processing of trades. http://www.newyorkfed.org/newsevents/news/markets/2010/100301_letter.pdf

The existence of a swap data repository is not new and, although it continues to rapidly evolve, there is an established operational model applicable to these entities. Below we discuss how the mandate in the DFA to establish the SDRs⁷ and the CFTC's rules thereunder will impact the existing model.

4. Proposed SDR Regulation.

On December 23, 2010, the CFTC published the proposed rule on Swap Data Repositories (SDRs).⁸ MarkitSERV respectfully submits the following comments for the CFTC to consider before publishing its final rule.

a. **SDRs Should Have the Flexibility To Perform Broader Functions Than Those Mandated in the SDR Regulation**

As mandated by the DFA, an enormous amount of swaps data will be reported to the Commission, to SDRs and ultimately to the public.⁹ Ensuring the accuracy and quality of such data will be critical for the Commission's achievement of the regulatory goals of transparency, standardization and systemic risk mitigation.¹⁰ Also, as envisioned by the DFA,¹¹ SDRs will play a pivotal role in ensuring the accuracy of swaps data both for public consumption and regulatory reporting purposes.

MarkitSERV believes that one of the critical components in ensuring the accuracy of swaps data is the degree to which such data is utilized by industry participants in other processes. The existence of a number of feedback loops and distribution channels through which data will flow will enable participants to identify, test and correct inaccuracies and errors. Allowing SDRs to offer an array of services that are ancillary ("**Ancillary Services**") to those narrowly outlined in the SDR Regulation (*i.e.*, acceptance of data,¹² confirmation of data,¹³ recordkeeping,¹⁴ and, if requested by the Commission, analyzing data¹⁵) will promote greater efficiencies and greater accuracy of data.¹⁶

These Ancillary Services may include: asset servicing, confirmation, verification and affirmation facilities, collateral management, settlement, trade compression and netting services, valuation, pricing and reconciliation functionalities, position limits management, dispute resolution, counterparty identity verification and others. MarkitSERV believes that SDRs should be encouraged to perform these Ancillary Services, including through the delegation or sub-contracting of the performance of these Ancillary Services to specialized entities that may be either regulated or not ("**Third-Party Service Providers**").

⁷ See DFA, §§ 727 & 728, 124 Stat. at 1697 (adding CEA Sections 2(a)(13)(G) & 21, respectively); also, the DFA amends the Securities Exchange Act ("**Exchange Act**") to provide for a similar regulatory framework with respect to reporting to SBS SDRs of swap data that is regulated by the Securities and Exchange Commission (the "**SEC**").

⁸ 75 Fed. Reg. 80898.

⁹ See 156 Cong. Rec. S5902-1, S5921 (daily ed. July 15, 2010) (statement of Sen. Blanche Lincoln) (explaining that, while there were some questions as to the capacity of the swaps market infrastructure to absorb and hold swaps data, "the conference report requires 100% of all swaps transactions to be reported. It was universally agreed that regulators should have access to all swaps data in real time.").

¹⁰ See SDR Regulation, 75 Fed. Reg. at 80898.

¹¹ See DFA § 728, 124 Stat. at 1698 (adding CEA Section 21(b)(2)).

¹² See SDR Regulation, 75 Fed. Reg. at 80929 (to be codified at 17 C.F.R. § 49.10).

¹³ See *id.* (to be codified at 17 C.F.R. § 49.11).

¹⁴ See *id.* (to be codified at 17 C.F.R. § 49.12).

¹⁵ See *id.* (to be codified at 17 C.F.R. § 49.13).

¹⁶ See *id.* at 80912 ("Should the Commission impose any additional duties on SDRs? For example, should SDRs be required to provide downstream processing services or ancillary services (e.g., managing lifecycle events and asset servicing)?").

We note that, as identified by the Commission, such delegation to affiliates may potentially raise conflict of interest issues.¹⁷ For example, a SDR could encourage market participants to use the Ancillary Services of its affiliates in order to gain access to the SDR's services. We believe that the SDR Regulation should be amended to explicitly prohibit this kind of tying of core SDR services and the Ancillary Services. Market participants' decisions to use or not to use a given SDR or its affiliates' Ancillary Services should rest entirely with the market participant. These decisions should not be tied to any other service provided by a regulated entity or its affiliate (e.g., by a clearing agency or a derivatives clearing organization ("**DCO**"), a swap execution facility ("**SEF**"), a designated contract market ("**DCM**") or a SDR and any related Third-Party Service Provider). The SEC's proposed rule regarding SBS SDRs could serve as a useful model for such prohibition.¹⁸

MarkitSERV also believes that SDRs should be able to delegate Ancillary Services to Third Party Service Providers *only if* the Ancillary Services are not the core SDR services that would otherwise subject the Third-Party Service Providers to the SDR registration requirements (e.g., the real-time reporting services or creation and codification of certain data fields as standard fields, counterparty, transaction or product ids).

b. The CFTC Should Endorse the Established SDR Fee Model

The SDR Regulation seeks to permit fair, open and equal access to SDR services by, among other things, requiring that fees charged by SDRs be "equitable and established in a uniform and non-discriminatory manner. . . . Swap data repositories shall not offer preferential pricing arrangements to any market participant on any basis. . . ." ¹⁹ MarkitSERV has a vested interest in ensuring that SDRs are fair and open so that as many market participants use SDRs as possible. We therefore support the proposed rule in principle, but believe that if implemented as currently drafted, it may have some unintended consequences in the market.

The Commission must clarify the meaning of "non-discriminatory" fees and "preferential pricing arrangements" because the fee structure that has historically been used by SDRs could be seen as "preferential" if not fully understood. Currently, trade repositories commonly require only sell-side (i.e., dealer side) participants to pay for the costs of participating. Thus, buy-side participants are not charged any fees.²⁰ MarkitSERV believes that the use of such model was a key factor in the rapid emergence of trade repositories in the global swaps markets across various asset classes. We also believe that this model is a useful way to ensure "fair, open access" because buy-side participants are often the smaller entity, and cannot afford the SDR fees. Further, this fee model is sustainable in covering the costs that are incurred by the SDRs in providing services for various classes of participants. We are concerned that, without clarification, the rule could cause the costs for buy-side market participants to increase and thereby discourage the buy-side class of participants from using SDRs.

MarkitSERV recommends that the Commission explicitly permit SDRs to utilize the established "sell-side-pays" commercial model. Alternatively, the SDR Regulation could clarify that a fee structure would not be discriminatory if it establishes different fee structures for different classes of participants – the sell-side and buy-side, for example – so long as the pricing model is not discriminatory within those classes. This would

¹⁷ See *id.* at 80918-19.

¹⁸ See Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. 77306, 77320 (proposed Dec. 10, 2010) ("Although an SDR should be allowed to bundle its services, including any ancillary services, this proposed rule would require the SDR to also provide market participants with the option of using its services separately. For instance, if an SDR or its affiliate provide an ancillary matching and confirmation service, then the SDR would be prohibited from requiring a market participant to use and pay for that matching and confirmation service as a condition of using the SDR's data collection service.").

¹⁹ See SDR Regulation, 75 Fed. Reg. at 80937-38 (to be codified at 17 C.F.R. § 49.27(b)).

²⁰ *Id.* at 80921 (asking "In what instances would an SDR differentiate among its users with respect to fees, dues, other charges, discounts, and rebates?").

reflect the different cost of each class' usage of the SDR, and we believe that this would comply with the DFA's non-discriminatory requirement. Another alternative may be to require or permit only the reporting party to pay the SDR fees. Under the Commission's reporting rules,²¹ this condition would presumably largely capture swap dealers ("**SDs**") and major swap participants ("**MSPs**").

We believe that, as applied to the current SDR commercial landscape, the SDR Regulation would have the unintended consequence of significantly increasing the costs for buy-side participants if SDRs are required to charge SDs, MSPs, FBOTs, and end-users that same fee. We acknowledge that different fee models may evolve over time, but there should be an opportunity for existing market fee structures to remain in place if that is most conducive to broad market adoption.

As a separate but related matter, we note that the Commission's proposal to regulate the prices for Ancillary Services²² may also prove detrimental to the market. Because these services are non-core, optional and may be provided independently by unregistered Third-Party Service Providers in competition with regulated SDRs, if these Ancillary Services are offered by SDRs, they should also be priced commercially and consistently with market practices.

c. The Use of Participant Data by SDRs Should be Limited

The SDR Regulation prohibits the commercial use of any data, other than data subject to the real-time reporting requirements, submitted to the SDR unless the SDR receives express written consent from the counterparties to the swap.²³ We agree that this data should only be used as permitted by the relevant market participants in agreements between them and the SDR in order to ensure the optimal incentives for parties to support and encourage robust and accurate reporting, and the development of valuable commercial products.

Furthermore, we agree with the Proposed Section 49.10(c) of the SDR Regulation, which requires every SDR 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."²⁴ The Commission goes on to state that "the Commission is concerned that a validly executed swap may, through contractual provisions or other practices of an SDR, be improperly invalidated."²⁵ Even though certain minimum data standards should apply to swap transaction data that can be submitted (and accepted) by the SDR, such standards should be able to accommodate a wide variety of customized, bespoke or non-standard transactions submitted per asset class and for various swap instruments; provided, however, that SDRs should be permitted to charge reasonable fees and recoup any additional costs that they may incur for accepting and processing any highly non-standard, albeit eligible, transactions submitted to the SDR for reporting by participants.²⁶

²¹ See Real-Time Regulation, 75 Fed. Reg. at 76145-46.

²² See SDR Regulation, 75 Fed. Reg. at 80921 ("an equitable fee would be a uniform and non-discriminatory set of fees for both "core" regulatory services ... as well as any "ancillary" or "supplemental" services such as life-cycle analysis, confirmation, compression, dispute resolution, and mark-to-market valuation.").

²³ See *id.* at 80911.

²⁴ See *id.* at 80930.

²⁵ See *id.* at 80905.

²⁶ Note that in a companion release from the SEC, the SEC recognizes that SBS SDR must remain commercially viable and recoup their reasonable costs on a non-discriminatory basis. "... The Commission is also aware that the regulatory framework for SDRs being developed by the Commission must take into account the commercial viability of SDRs, because realizing the benefits of SDRs requires that entities seek to engage in the business of being an SDR." See Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. at 77308.

d. SDRs Should Ensure and Encourage Reporting of Bilaterally-Verified Data to SDRs and to the Public

We believe that the use of confirmed swaps data should be the preferred approach for all reporting in order to help promote accuracy and consistency in reporting. The DFA²⁷ and, consistently with the DFA provisions, the SDR Regulation require SDRs to confirm the accuracy of submitted data with both counterparties. The SDR Regulation goes further and requires the SDRs to confirm the accuracy of this data by communicating with these counterparties.²⁸ We note that a separate CFTC regulation requires the counterparties to acknowledge and confirm the accuracy of the data through “legally binding documentation memorializ[ing] the agreement ... to all of the terms of a swap transaction”²⁹ (*i.e.*, legally *confirm* the transaction).

Once the counterparties have complied with the confirmation requirement and submitted the legally confirmed trade to the SDR, the SDR should be deemed to have fulfilled its duty to confirm with both counterparties the accuracy of the data submitted, and should use this verified information for regulatory reporting purposes.

e. Access to SDRs

MarkitSERV supports the open access requirement for SDRs. However, the SDR Regulation should permit SDRs to specify the methods and channels that participants need to use to connect to them, which will most commonly be provided in the form of the Application Programming Interfaces (APIs) and through setting of certain minimum standards.

SDRs should also be permitted to outsource the function of providing connectivity to Third-Party Service Providers so long as the services from such Third-Party Service Provider are not required as a condition to gaining access to the SDR.

5. Real-Time Reporting of Swap Transaction Data.

Many of the issues discussed above in connection with the SDR Regulation are also related to the Real-Time Regulation.³⁰ MarkitSERV would like to provide the following comments to the Commission for consideration in promulgating the final Real-Time Regulation.

a. Data Must Be Consolidated in Order to Improve Transparency in the Market

MarkitSERV believes that, in order to most effectively increase transparency in the swaps markets, it will be important for the real-time swaps data to be available on a consolidated basis.³¹ While the failure to achieve consolidated public reporting would affect all market participants, it could especially disadvantage the large number of less frequent and smaller users, as well as the general public; they would simply not be able to obtain an accurate view of activity in the swaps market given the cost associated with and the complexity of accessing multiple data sources. The statutory goals of increasing transparency in the swaps market would therefore not be achieved.

²⁷ Section 728 of the DFA, adding CEA Section 21(c)(2), requires: “(c) Duties, - A swap data repository shall - ... (2) confirm with both counterparties to the swap the accuracy of the data that was submitted;...”

²⁸ See SDR Regulation, 75 Fed. Reg. at 80930.

²⁹ See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81519, 81530-31 (proposed Dec. 28, 2010).

³⁰ See Real-Time Regulation, 75 Fed. Reg. 76140 (proposed Dec. 7, 2010).

³¹ See *id.* at 76149 (“The Commission recognizes the benefits of consolidating the public dissemination of swap transaction and pricing data in real-time.”).

Consolidation of swaps data from multiple sources will increase both the cost and complexity of the transparency regime. Any unnecessary fragmentation should therefore be avoided at the outset. To achieve this goal we suggest the following:

- i. **Only Registered SDRs or their Qualified Affiliates Subject to Supervision by SDRs Should be Authorized to Serve as Real-Time Trade Report Disseminators.** To avoid unnecessary fragmentation of data, the use of Third-Party Services Providers, such as third-party information disseminators that are not SDRs, should not be allowed. MarkitSERV is concerned with the CFTC's proposal to allow DCMs and SEFs to task unregistered Third-Party Services Providers with the real-time dissemination of swaps that were executed on their platforms.³² MarkitSERV believes that little regulatory or market benefit would arise from using unregistered third-party real-time disseminators for such real-time reporting. Further, this may result in unnecessary fragmentation of swaps data that cannot easily be reversed.

Additionally, we believe that unforeseen complications could arise by permitting Third-Party Service Providers to act as real-time disseminators. One source of complications will be that, as the Commission acknowledges, it would not have power to regulate Third Party Service Providers.³³ For example, the Commission may be unable to require these disseminators to abide by operating hour requirements, pricing requirements, and perhaps even requirements related to required data fields. We therefore support the SEC's proposed rules of allowing real-time dissemination only via registered SBS SDRs or via their qualified affiliates or other Third Party Service Providers to whom SBS SDRs have delegated their duties with respect to real-time data dissemination.³⁴

- ii. **Life Cycle Events Relating to a Swap Should be Reported to the Same SDR.** The Real-Time Regulation requires all lifecycle events to be reported,³⁵ but does not regulate which SDR should disseminate such information. Another CFTC regulation, however, is clear that all events related to a single swap should be reported to the same SDR.³⁶ The Real-Time Regulation should expressly reiterate that a single SDR must receive, store, and report where appropriate all relevant information related to a given swap transaction throughout its lifecycle. MarkitSERV believes that such approach will both prevent fragmentation and ensure that corrections to previously reported data can be easily identified by the public.
- iii. **SDRs Must be Able to Accept all Swaps in Each Asset Class.** Without specific requirements related to the range of products that can be reported to them, SDRs may be tempted to limit their operating costs by only accepting the more standardized categories of swaps which also tend to trade in high volumes. The Real-Time Regulation agrees with this reasoning by requiring SDRs that accept swap data from one asset class to accept swap data for all swaps in that asset class.³⁷ MarkitSERV

³² See *id.* 76144 (defining Real-Time Disseminator as including third-party service providers); *id.* at 76142 (requiring swap markets to disseminate data "either through a registered SDR or a third-party service provider.").

³³ See *id.* at 76147 ("The Commission's proposal distinguishes between a registered SDR and a third-party service provider because the Commission would have oversight authority over a registered SDR, but not over a third-party service provider.").

³⁴ See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75208, 75227 ("[T]he Commission preliminarily believes that the best approach would be to require registered SDRs to disseminate SBS transaction information, and to require other market participants to report such information to a registered SDR in real time, so that the registered SDR can in turn provide transaction reports to the public in real time.") ["Regulation SBSR"].

³⁵ See Real-Time Regulation, 75 Fed. Reg. at 76144.

³⁶ See Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574, 76604 (proposed Dec. 8, 2010) ("Thereafter, all data reported for the swap, and all corrections of errors and omissions in previously reported data for the swap, by any registered entity or counterparty, shall be reported to the same SDR.").

³⁷ See Real-Time Regulation, 75 Fed. Reg. at 76173 (to be codified at 17 C.F.R. § 43.3(c)(2)).

therefore requests that the CFTC maintain this rule as it is currently drafted as a means of ensuring broad coverage while guarding against fragmentation that could result from inadequate SDR functionality.

We expect that some level of data fragmentation will be unavoidable. In order to help minimize the amount of data fragmentation, the Commission should consider appointment of a single SDR per asset class to consolidate all reportable data. The Commission expressed an interest in establishing a single designated SDR as the industry consolidator, but indicated that it might not be able to do so because neither the CEA nor the DFA grant the Commission explicit authority to designate a SDR as such.³⁸ There is not, however, any statutory prohibition against appointing a consolidator and because Section 728 gives the Commission broad authority to “adopt rules governing [SDRs],” the Commission appears to have authority to appoint a consolidator.³⁹

b. The CFTC and SEC Should Harmonize Rules Regarding Parties Responsible for Reporting Trades

The CFTC and SEC have taken somewhat different approaches in deciding which party is responsible for reporting data elements of a swap transaction. The Commission allocates responsibility for reporting specific data sets to different parties depending on the characteristics of execution or clearing,⁴⁰ while the SEC requires one of the counterparties to a transaction to be responsible for reporting but permits that participant to delegate its responsibility to Third-Party Service Providers.⁴¹

We believe that the most efficient approach to implementing reporting obligations will be to clearly assign reporting responsibility to one counterparty while providing this counterparty with the flexibility of choosing how to satisfy its obligation in the most timely and efficient manner, including potential delegation to Third-Party Service Providers such as a SEF or a DCO. We therefore agree with the SEC’s approach because it is more flexible and would allow participants to establish procedures based on their individual business needs, and expect it to be ultimately more effective at meeting the regulatory objectives of establishing such obligations in a timely fashion.

Finally, the Commission has requested comments regarding the appropriate reporting obligations when a non-U.S. SD or MSP transacts with a U.S.-based end-user.⁴² In light of the end-user resources and the operational and technical challenges for reporting, MarkitSERV believes that the most efficient approach will often be for the U.S. counterparty to delegate the task of reporting to the non-U.S. SD/MSP, assuming that this party is willing to perform such function. We therefore recommend that the Commission explicitly allow such delegation.

³⁸ See *id.* at 76149.

³⁹ See DFA § 728, 124 Stat. at 1701 (adding CEA Section 21(h)).

⁴⁰ See Real-Time Regulation, 75 Fed. Reg. at 76172 (to be codified at 17 C.F.R. § 43.3(a)(3)) (setting forth rules to determine which party is responsible for reporting based on whether either party is a swap dealer or major swap participant).

⁴¹ See Regulation SBSR, 75 Fed. Reg. at 75211 (explaining Proposed Rule 901(a), which explains which party is the reporting party, and then stating “Rule 901(a) would not prevent a reporting party to a SBS from entering into an agreement with a third party to report the transaction on behalf of the reporting party.”).

⁴² See Real-Time Regulation, 75 Fed. Reg. at 76146 (“In off-facility swap transactions where a non-U.S. swap dealer or non-U.S. MSP transacts with a U.S.-based end-user, which party to the swap should have the obligation to report to a real-time disseminator?”).

c. SDRs Should Determine Reportable Fields

Under the DFA, the CFTC must determine which data fields should be reported both to SDRs and to the public.⁴³ In this regard, the Commission opted to create prescriptive lists of information that counterparties must report and SDRs must disseminate.⁴⁴

As an expert in the data collection and processing industry, MarkitSERV believes that SDRs, in dialogue with market participants and the Commission, will be in the best position to determine which fields could and should be reported to them as well as to the public. We do not believe that the alternative, *i.e.*, a prescriptive approach where the Commission provides market participants and SDRs with a detailed list of reportable fields for each category of swap, is practical. Swaps transactions are complex products that can require a large number of data fields in order to be electronically confirmed.⁴⁵ They are also highly customizable, and because new swaps products and electronic processing of existing products emerge on a continuous basis, for example, variations of total return equity and dividend swaps, as well as an envisioned accumulator equity derivative products.

Thus, a prescriptive system may become outdated with every new product launch or change in market practice. The result may be a regulatory scheme that is continuously lagging behind the market. We therefore believe that the Commission should follow the SEC's proposal, which provides SBS SDRs with the authority to define the relevant fields on the basis of general guidelines as set by the SEC (or CFTC in this case). While we acknowledge that uniformity will be important in order to avoid the experience of the European equity markets, where following the introduction of MiFID,⁴⁶ a significant amount of data fragmentation occurred in the equities markets, we also believe that real-time reporting must be flexible enough to quickly track market trends. We believe that this would be inherently impossible if the reporting regime is strictly defined by a regulatory body.⁴⁷

Furthermore, any real-time reporting regime will be meaningfully transparent only if the users of the data can distinguish between: (i) reported transactions that they could have also entered into (the so-called "addressable flow," "actionable" or "indicative" trades); and (ii) other transactions that, while reportable, do not represent the "addressable flow," "actionable" or even "indicative" trades (*i.e.*, meaning that a third party cannot enter into such trade), but nevertheless constitute real transactions such as trade compressions, option exercises, or delta hedges. Similar to the established conventions in the bond or equity markets, so-called "condition flags" might therefore need to be established in the swaps markets, which will require significant technical expertise and understanding of market conventions.

⁴³ See DFA, § 728, 124 Stat. at 1698 (adding CEA Section 21(b)(1)(B) ("the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.")).

⁴⁴ See Real-Time Regulation, 75 Fed. Reg. at 76176-82 app. A.

⁴⁵ The confirmation of a new "standard" Credit Default Swap, for example, would contain 35-50 fields, depending on structure. Confirmation of all Credit Default products and life cycle events combined will require a total of 160 fields.

⁴⁶ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC; see also Directive 2008/10/EC, of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission.

⁴⁷ Of note, the Commission permits SDRs to request information from counterparties in addition to the information prescribed by the Commission, see Real-Time Regulation, 75 Fed. Reg. at 76150, but does not permit that information to be included in the real-time report. That information will thus be ineffective at simultaneously tracking market innovations while increasing transparency.

6. Other Issues.

a. Implementation Should be Phased In Over Time

The implementation of real-time reporting across all swaps markets will pose a significant challenge to the industry, but the Commission expects registered entities to be in compliance by January 2012.⁴⁸ We believe that a phased-in approach would be appropriate in order to reduce execution risk and avoid loss of confidence in this vitally important regulatory structure. The Commission could phase-in these requirements by initially requiring real-time reporting only for the highest priority and most standardized products. This would realize important transparency objectives but would also provide sufficient time to develop the most effective regulatory mechanisms for the remaining, more complex products.

In addition, MarkitSERV believes that, given the international nature of the swaps market, it would be most appropriate to aim for an implementation timing that is broadly consistent with the G20 commitments and the proposed European implementation. Such approach would improve the chances of consistent adoption across regions and minimize opportunities for regulatory arbitrage between the different jurisdictions.

Summary Conclusions

For the reasons explained above, we welcome the adoption of the SDR Regulation and the Real-Time Regulation and appreciate the opportunity to provide our comments on these two regulations.

We thank the Commission for considering our comments. In the event you may have any questions, please do not hesitate to contact the undersigned or Gina Ghent at gina.ghent@markitserv.com.

Sincerely,



Jeff Gooch
Chief Executive Officer
MarkitSERV

⁴⁸ See Real-Time Regulation, 75 Fed. Reg. at 76143.