WMBA
AMERICAS
WHOLESALE MARKETS BROKERS' ASSOCIATION

March 8, 2011

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

Re: Core Principles and Other Requirements for Swap Execution Facilities (RIN 3038–AD18)

Dear Mr. Stawick:

The Wholesale Market Brokers' Association, Americas ("WMBAA" or "Association")[1] appreciates the opportunity to provide comments to the Commodity Futures Trading Commission ("CFTC" or "Commission") on the proposed rules related to core principles and other requirements for swap execution facilities ("Proposed Rules")[2] under the Commodity Exchange Act ("CEA").[3] The WMBAA appreciates the hard work of the Commissioners and the CFTC staff in implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[4]

The WMBAA is supportive of a regulatory regime for over-the-counter ("OTC") swaps markets that improves regulatory transparency, promotes competition, and fosters market participant access to a vibrant, affordable source of liquidity. The WMBAA supports transparency in OTC swaps markets for all market participants. WMBAA members' trade execution platforms provide their participants with the most current market information with the express purpose of price discovery and the matching of buyers and sellers, using knowledgeable brokers and sophisticated electronic trading and matching systems to create greater trading liquidity.

The principle reforms at the heart of Title VII of the Dodd-Frank Act, mandatory clearing and trade execution of certain swaps and the reporting of all swaps to swap data repositories, will bring much needed transparency and stability to OTC swap markets. In light of these goals, the WMBAA encourages the Commission to consider the following comments as it considers rules designed to protect the integrity and efficiency of OTC swaps markets.

These comments reflect the joint position of the Association's five member firms and are supported by each of the WMBAA's individual members. The WMBAA believes that the views expressed herein are informed by the greatest expertise available to regulators about the unique challenges of

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[1] The WMBAA is an independent industry body representing the largest inter-dealer brokers ("IDB") operating in the North American wholesale markets across a broad range of financial products. The WMBAA and its member firms have developed a set of *Principles for Enhancing the Safety and Soundness of the Wholesale, Over-The-Counter Markets.* Using these *Principles* as a guide, the WMBAA seeks to work with Congress, regulators and key public policymakers on future regulation and oversight of OTC markets and their participants. By working with regulators to make OTC markets more efficient, robust and transparent, the WMBAA sees a major opportunity to assist in the monitoring and consequent reduction of systemic risk in the country's capital markets.

[2] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. 1,214 (January 7, 2011).

[3] 7 U.S.C. 1 et seq.

[4] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

garnering liquidity and executing transactions in today's swaps marketplaces. The WMBAA looks forward to providing thoughtful and constructive commentary about the functioning of effective markets for swaps products that are vital to U.S. financial markets and economic recovery.

I. Executive Summary

The WMBAA members have long acted as intermediaries in connection with the execution of swaps in the OTC market and are responsible for the execution of more than 90% of inter-dealer intermediated swaps transactions in the world. While a regulated OTC market is new to the swap markets, the WMBAA members are already subject to oversight by financial regulators across the globe for services offered in a range of other products and markets. The WMBAA members are regulated by the CFTC, the Securities and Exchange Commission ("SEC"), the National Futures Association ("NFA"), and Financial Industry Regulatory Authority ("FINRA") in the U.S., by the Financial Services Authority in the UK, and other regulatory agencies around the world. The WMBAA members have acted as OTC swap execution platforms for decades and, as a result, understand what is necessary to support and promote a regulated, competitive and liquid swaps market. Although a swap execution facility ("SEF") might be a new concept originating in the Dodd-Frank Act, the effective role of existing intermediaries in the OTC swaps marketplace is not.

The following points briefly summarize the WMBAA's comments and suggestions aimed at assisting the Commission in complying with the requirements of the Dodd-Frank Act. Each point is discussed in greater detail within the context of the Proposed Rules:

- First, as Congress recognized and mandated by law, to promote a competitive and liquid swaps market, the Proposed Rules cannot overly restrict acceptable modes of execution.[5] To the contrary, by using the phrase "through any means of interstate commerce," Congress established a broad framework that permits multiple modes of swap execution, so long as the proposed mode of execution is capable of satisfying the statutory requirements. The WMBAA believes that any interpretation of the CEA definition of a SEF must be broad, and any trading system or platform that meets the statutory requirements should be recognized and registered as a SEF.

- Further, the Dodd-Frank Act does not restrict the scope of swaps a SEF can make available for trading. SEFs that meet the statutory requirements should be allowed to make available for trading and execution all clearable swaps subject to the mandatory trade execution requirement. Broader liquid markets for a wider array of transactions will ultimately increase the number of transactions that can and should be deemed "clearable," one of the basic tenets of the Dodd-Frank Act. The WMBAA believes that the SEC's proposed approach, which reviews a potential SEF's application for registration based upon its ability to meet the requirements of the legislation and regulations, is a more appropriate method of fashioning a regulatory regime that reflects the multiple modes of trade execution relied upon in competitive OTC markets and should be considered by the Commission in drafting final rules.[6]

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[5] *See* CEA Section 5h(d).

[6] *See* Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. 10,948, 11,054 (February 28, 2011) ("The Commission shall grant the registration of a security-based swap execution facility if the Commission finds that the requirements of the Act and the rules and regulations thereunder with respect to the applicant are satisfied. The Commission shall deny the registration of a security-based swap execution facility if it does not make such finding.").

- The regulatory framework for the swaps market must take into consideration the significant differences between the trading of futures on an existing futures exchange and the trading of swaps on SEF platforms. While it may be appropriate to look to the futures model as instructive in certain instances, overreliance on that model will not achieve Congress' goal. Congress explicitly incorporated a SEF alternative to the exchange-trading model, understanding that competitive execution platforms provide a valuable market function. Final rules governing SEFs should reflect Congressional intent and promote the growth of existing competitive, vibrant markets without impeding liquidity formation. The WMBAA agrees with Commissioner Sommers that Congress clearly intended "a broad model for executing swaps on SEFs."[7] The WMBAA shares her concern that a "far too restrictive" interpretation of Section 5(h) of the CEA will "limit competition by shutting out applicants."[8]

- Many of the requirements set forth in the Proposed Rules, particularly those implementing certain core principles, are not explicitly required by Section 5(h) of the CEA and lack legislative authority for their enactment. In some cases, as discussed in the following comments, the Proposed Rules appear more appropriate for a futures exchange model and, in the context of OTC markets, are impossible to perform or do not further the intended goal. Examples of the use of futures markets regulations in the Proposed Rule include vague references to "members" of SEFs and the "listing" of products. Moreover, general terms such as "customers," "traders," and "brokers," if not properly identified, might result in unclear regulatory direction and difficulty in compliance. It is important that the Commission recognize that SEFs, unlike vertically-siloed, monopolistic futures exchanges, are solely execution platforms. The imposition of requirements related to post-execution duties (or any duties unrelated to trade execution) will often be impossible for the SEF to perform due to its narrow market function. The WMBAA suggests that the CFTC adopt a less prescriptive and more principles-based regime that provides SEFs with reasonable discretion to develop and implement appropriate rules to carry out these obligations.

- As noted in previous remarks to the Commission,[9] the implementation of this new regulatory regime is only part of the equation. From the perspective of intermediaries who broker transactions of significant size between financial institutions, it is critical that the block trade threshold levels and the reporting regimes related to those transactions are established in a

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[7] Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. at 1,259 ("As I have pointed out in my public speaking engagements over the past few months, the term 'trading facility' is defined in the Commodity Exchange Act (Act), but the terms 'trading system' and 'platform' are not. By introducing these new, undefined terms into the Act, and by specifying that SEFs should facilitate the trading of swaps through any means of interstate commerce, I believe Congress intended a broad model for executing swaps on SEFs, both cleared, uncleared, liquid or bespoke. The goals identified by Dodd-Frank for registering SEFs are 'to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market.' In my view, the best way to achieve these twin goals is to adopt a model that provides the maximum amount of flexibility as to the method of trading.").

[8] *Id.*

[9] *See*, *e.g.*, letter from J. Christopher Giancarlo, Chairman, WMBAA, to Commission and SEC, dated July 29, 2010; *see also* letter from Julian Harding, Chairman, WMBAA, to Commission and SEC, dated November 19, 2010; letter from Julian Harding, Chairman, WMBAA, to Commission and SEC, dated November 30, 2010; letter from Stephen Merkel, Chairman, WMBAA, to Commission, dated February 7, 2011.

> manner that does not impede liquidity formation. A failure to effectively implement block trading thresholds will frustrate companies' ability to hedge commercial risk. Participants rely on swaps to appropriately plan for the future and any significant changes to market structure might ultimately inhibit economic growth and competitiveness. The rules governing the core principles and other requirements for SEFs, in conjunction with the real-time public reporting of swap transaction data, must collectively work to ensure these markets retain their vibrancy in the future.

Concurrent with these comments, the WMBAA requests the Commission and its staff review a separate letter which the Association also filed today related specifically to Core Principle 15 – Designation of Chief Compliance Officer, namely Proposed Rules Sections 37.1500 and 37.1501 ("CCO Provisions"). In that letter, the WMBAA explains in detail why it believes the CCO Provisions are impractical and unworkable and distort the proper role of a Chief Compliance Officer. The WMBAA believes that the CCO Provisions mandate a compliance structure which has the potential to negate and undermine the accountability of corporate management, by blurring the respective roles of the Chief Compliance Officer and the Chief Executive Officer, suggesting that management does not have the primary responsibility for a SEF's compliance. The letter suggests that the Commission should revise the CCO Provisions to permit SEFs to structure their compliance programs in accordance with established regulatory models, where management and the board of directors are responsible and accountable for compliance, with the Chief Compliance Officer's role constituting the recommendation, establishment and administration of procedures to assist in fulfilling compliance responsibilities.

II. Discussion of Permitted Execution Methods – Section 37.9

As defined in the CEA, the term "swap execution facility" means a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—(A) facilitates the execution of swaps between persons; and (B) is not a designated contract market.[10]

At the outset, it is important to recognize that Congress, during the legislative process, rejected the use of the term "trading facility," as defined in the CEA, and instead opted for a broad definition that allows a wide array of trading systems or platforms to meet the criteria. It is clear that Congress did not intend a central limit order book model, but instead preferred to retain the competitive nature of OTC swaps markets. The WMBAA believes that the "expansive language" used to define a SEF should be interpreted in a similar fashion.[11]

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[10] CEA Section 1a(50).

[11] Statement of Commissioner Bart Chilton, *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission13_121610-transcri.pdf. ("Congress intended for their systems in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system. That expansive language -- that is expansive language and we need to ensure that we capture what Congress intended.").

The WMBAA encourages the CFTC to reconsider its narrowly-tailored approach that attempts to classify potential SEFs as either an "order book,"[12] "request for quote,"[13] or "one-to-one voice."[14] Instead, the Commission should base the determination of whether a SEF's registration should be approved on whether the trading system or platform can meet the requirements set forth in the CEA.

The WMBAA believes that, so long as an applicant SEF has the bona fide ability to allow multiple market participants to execute or trade swaps by accepting bids and offers made by multiple participants, through any means of interstate commerce, then the trading system or platform should be permitted to operate under the Commission's rules in accordance with the CEA. There does not appear to be any benefit to swap markets or their participants by promulgating explicit means or methods which can be used to fulfill the functionality requirement. As a baseline, the WMBAA believes that if a SEF meets the "multiple to multiple" requirement and the other statutory definitions from the CEA, then the SEF's registration should be approved. It is worth noting that the SEC, which relies upon substantially similar legislative authority, along with its experience regulating OTC markets, has taken a different approach to permissibility of trade execution in its proposed rules.[15] The WMBAA encourages the CFTC to review and consider the SEC's proposal with respect to these provisions, as they more accurately reflect the mechanics of a competitive, intermediated OTC market.

The WMBAA is also concerned that the three proposed classes of trade execution are inconsistent with both the language and intent of the Dodd-Frank Act as they severely restrict the availability of the multiple modes of trade execution of clearable transactions on a SEF. In earlier drafts of the legislation, there were attempts to limit trade execution through the definition of a SEF to exchange-trading or to trades which could be electronically executed. Such an approach was continuously rejected in favor of the flexibility of allowing trade execution through any means of interstate commerce. Therefore, it is unclear what legislative authority exists for the Commission to implement the approach set forth in the Proposed Rules, which excludes certain methods of execution and permits others without consideration of whether it meets the definition of a SEF.

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[12] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. at 1,240. ("(A) An electronic trading facility, as that term is defined in section 1a(16) of the Act; (B) A trading facility, as that term is defined in section 1a(51) of the Act; (C) A trading system or platform in which all market participants in the trading system or platform can enter multiple bids and offers, observe bids and offers entered by other market participants, and choose to transact on such bids and offers; or (D) Any such other trading system or platform as may be determined by the Commission.").

[13] *See id.* ("(A) A trading system or platform in which a market participant must transmit a request for a quote to buy or sell a specific instrument to no less than five market participants in the trading system or platform, to which all such market participants may respond. Any bids or offers resting on the trading system or platform pertaining to the same instrument must be taken into account and communicated to the requester along with the responsive quotes; or (B) A trading system or platform in which multiple market participants can both: (1) View real-time electronic streaming quotes, both firm and indicative, from multiple potential counterparties on a centralized electronic screen; and (2) Have the option to complete a transaction by: (i) Accepting a firm streaming quote, or (ii) Transmitting a request for quote to no less than five market participants, based upon an indicative streaming quote, taking into account any resting bids or offers that have been communicated to the requester along with any responsive quotes; or (C) Any such other trading system or platform as may be determined by the Commission.").

[14] *See id.* ("a trading system or platform in which a market participant executes or trades a Permitted Transaction using a telephonic line or other voice-based service.").

[15] *See* Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. at 11,054.

As stated above, under the CEA, Congress permits SEFs to utilize "any means of interstate commerce" to transact swaps that must be traded on SEFs.[16] Congress recognized that restricting methods of execution of swaps instruments could do substantial harm to the orderly operation of U.S. swaps markets overall, particularly for those trades that do not enjoy natural continuous liquidity, to the detriment of all market participants who need to access the market to manage risk. Furthermore, regulations designed to restrict or promote any one component or other of the hybrid means of swaps execution utilized by wholesale brokers and SEFs also appear to be inconsistent with the statute's definition of a SEF.

For similar reasons, the WMBAA believes that "hybrid brokerage," which integrates voice with electronic brokerage systems, should be clearly recognized as an acceptable mode of trade execution. The combination of traditional "voice" brokers with sophisticated electronic trading and matching systems is necessary to provide liquidity in markets for less commoditized products where liquidity is not continuous. Failure to unambiguously include such systems is not only inconsistent with the statute but will severely limit liquidity production for a wide array of transactions.

It is important that all trading systems and platforms, regardless of their operational characteristics, be evaluated by the same criteria. It is imperative that each entity seeking designation as a SEF be able to satisfy the "multiple to multiple" requirement of the definition and, at the same time, be permitted to execute transactions "through any means of interstate commerce."

With respect to the request for quote system, the Commission has proposed that requests for quotes be requested of at least five possible respondents. The WMBAA does not believe that there is any justification or legislative authority for a requirement of five possible respondents. Rather, the threshold analysis should consider whether the system meets the "multiple to multiple" requirement set forth in the SEF definition. The WMBAA believes that the CFTC has arbitrarily established a baseline of five respondents and fails to see why five is more appropriate than two or ten respondents. The WMBAA finds it inconsistent that the CFTC's Proposed Rules permit, under the CEA, a multiple to one request for quote SEF, while at the same time (without clear explanation), impose arbitrary limits on the various multiple to multiple execution platforms using the various means of interstate commerce currently utilized by interdealer brokers.

Required Transactions; Permitted Transactions

The Proposed Rule classifies trades as "Required Transactions"[17] and "Permitted Transactions."[18]

The WMBAA believes such a distinction between the types of transactions is ill suited to the transactional requirements of functioning swaps markets and is neither required nor authorized

[16] CEA Section 1a(50).

[17] Required Transactions are those trades subject to the execution requirements under the CEA and are made available for trading pursuant to Proposed Rule Section 37.10, and are not block trades. Required Transactions may be executed on an order book or a request for quote system.

[18] Permitted Transactions are either (a) block trades; (b) are not swaps subject to the CEA's clearing and execution requirements; or (c) are illiquid or bespoke swaps. 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.

under the CEA. Such artificial and arbitrary designations of swap transactions will likely result in perverse consequences to OTC swaps markets. Further, the CEA does not expressly authorize the Commission to restrict Required Transactions to only those traded on order books or request for quote systems. The statute was clear that SEF trading can be "by *any* means of interstate commerce." While certain requirements should be mandated during trade execution (*i.e.*, audit trail, trade processing, and reporting), limitations on methodologies used in trade execution should be considered carefully and weighed against potential implications on liquidity formation. A rules regime that is overly prescriptive will reduce the ability for SEFs to match buyers and sellers and restrict trading liquidity

The 15 Second Rule

The Proposed Rule includes a provision that, for Required Transactions, SEFs must require that traders with the ability to execute against a customer's order or execute two customers against each other be subject to a 15 second timing delay between the entry of those two orders, such that one side of the potential transaction is disclosed and made available to other market participants before the second side of the potential transaction (whether for the trader's own account or for a second customer) is submitted for execution.[19]

There does not appear to be any authority for this required trade delay in the CEA. This concept, which seems to have originated in the futures exchange markets, uses terminology that seems misplaced in the context of a competitive market with multiples SEFs. For example, the WMBAA is unsure who the Commission intends to include within the term "trader" or "customer" in this part of the Proposed Rule. It is not clear whether a "trader" refers to a counterparty, a broker or another entity. Neither is it clear who a "customer" can refer to within the Dodd-Frank paradigm. If a "customer" is an end-user counterparty, then it is exempt from mandated SEF execution; alternatively, if the "customer" is a swap dealer or major swap participant, then the "customer" is disallowed from trading bilaterally and presenting a pre-arranged trade to the SEF. The SEC, in its proposed rules, consistently refers to a SEF's "participants."[20] The WMBAA believes this approach better reflects the inter-dealer wholesale market characteristics of OTC markets. Proposed rules that refer to "customers" or "traders" should be re-examined to more accurately reflect the participants and functions of the intermediated executions platforms to be regulated.

Even if the associated trading context could exist in the future, a 15 second delay for these transactions will create uncertainty and risk in the market and interferes with the operation of the OTC markets. While it is the WMBAA's understanding that this delay is intended by the Commission to ensure sufficient pre-trade transparency, under the CEA, transparency must be balanced against the liquidity needs of the market. Once a trade is completed when there is agreement between the parties on price and terms, any delay exposing the parties to that trade to

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[19] WMBAA Board member J. Christopher Giancarlo recently discussed this provision in greater detail before the House Financial Services Committee. *See* Testimony before the House Committee on Financial Services on Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act, February 15, 2011, *available at* http://financialservices.house.gov/media/pdf/021511giancarlo.pdf, page 11.

[20] Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. at 11,054 ("The term participant when used with respect to a security-based swap execution facility means a person that is permitted to directly effect transactions on the security-based swap execution facility.").

further market risk will have to be reflected in the pricing of the transaction, to the detriment of all market participants. Lastly, the impact of this delay will be most profoundly felt if the large block exemption is not appropriately formulated. As noted in its comment letter, the WMBAA urges the Commission to consider the potential impact to liquidity caused by the Commission's proposal for block trade threshold calculations in its proposed rule.[21]

Permitted Execution Methods

The WMBAA does not believe that the Commission's proposal appropriately implements the statutory directive that a SEF provide multiple participants with the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system. It is important that the Commission fashion final rules that recognize that SEFs are intended to serve as an alternative to the designated contract market ("DCM")/futures exchange model, and are not designed to replace or complement the DCM/futures exchange model. The WMBAA suggests that the Commission consider the SEC's rules for the regulation of exchanges and alternative trading systems ("Reg ATS").[22]

The CEA requires that swaps subject to the clearing requirement be executed on a SEF or a DCM.[23] The distinction between the two entities is important, as Congress intentionally chose to create the new SEF framework and, at the time, rejected an approach that would have required that all standardized derivatives be traded as futures on an exchange. The establishment of the new categories of SEFs, different from the characteristics and obligations of exchanges, indicates that Congress recognized the need for a more flexible, yet transparent and regulated means of intermediated execution.

In the questions posed in the preamble to the Proposed Rules, the CFTC posits that the multiple participant to multiple participant requirement (in conjunction with the impartial access requirement) requires that the facility provide the ability for any market participant to make any bid or offer transparent to the entire market if the market participant chooses to do so. While the WMBAA supports transparency in OTC swaps markets for all market participants, the WMBAA respectfully disagrees with this analysis. There is no requirement in the CEA, as amended by the Dodd-Frank Act, which explicitly provides such direction. The legislation does not require making bids or offers transparent to an entire market, but rather to multiple market participants in the facility or system. The language approved by Congress, and signed by the President, does not need to be interpreted or construed beyond the clear words in the CEA, and any variation from the plain text may unintentionally result in burdensome or confusing regulation.

Similarly, no legislative requirement exists to impose arbitrary and academic mechanisms that might impede market liquidity in the hope of adding more pre-trade price transparency. While WMBAA members operate in furtherance of that goal by naturally and consistently disseminating trade bids

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[21] *See* letter from Stephen Merkel, WMBAA, to Commission, dated February 7, 2011, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27613&SearchText=merkel.

[22] *See* 17 CFR 242.300 et seq; *see also* Securities Exchange Act Release No. 40,760, (December 8, 1998), 63 Fed. Reg. at 70,844.

[23] *See* CEA Section 2(h)(8).

and offers to the widest practical range of customers, they do so because the IDB business model relies upon commission revenue from completed transactions.

The WMBAA strongly cautions against reliance on the "rule of construction" in the CEA, which provides that the goal Section 5(h) of the CEA is to promote trading of swaps on SEFs and to promote pre-trade price transparency. A rule of construction should not override the plain language of the CEA, which provides for SEFs to establish their own execution methods. Nor does the goal to "promote" these objectives mean that they should override all other considerations required by the plain language requirements in the legislation, including the explicit requirement to not harm market liquidity. The WMBAA does not believe Congress intended the Commission to pursue this rule of construction in a way that would result in mandating exchange-like order books and barring existing and functioning execution methods for swaps that, by their terms, satisfy the CEA's SEF definition. The WMBAA supports greater pre-trade price transparency in the OTC swaps market to achieve reduced execution costs for end-users. Moreover, as a policy matter, the WMBAA believes that the CEA already accomplishes this objective with new requirements for post-trade reporting and dissemination, impartial access, and fair pricing and best execution obligations for swap dealers will reduce execution costs for investors.

Instead of mandating artificially restrictive methods of trade execution, the Commission should promote a competitive SEF marketplace. These trading systems or platforms will compete to offer superior technological capabilities and more immediate dissemination of market information to a broad spectrum of market participants, all of which ultimately improves the functioning of the market. If the Commission seeks to require specific means of pre-trade price transparency or to mandate a certain market structure, the WMBAA believes such regulation would require additional legislative action.

SEF Trading Protocols Should be Limited to SEFs

Just as SEFs should not be forced to adopt DCM-style execution procedures, DCMs should not be permitted to employ SEF procedures on their platforms. By creating the SEF as a trading venue that is separate and distinct from the DCM, Congress expressed its intent for these two trading venues to operate differently. Otherwise, Congress could have merely required that all swaps be traded on DCMs.

Maintaining the distinction between SEFs and DCMs is appropriate since the two trading venues have different functions and serve different trading communities. Trading on SEFs is limited to institutional traders who qualify as eligible contract participants. DCMs, in contrast, serve the general retail public as well as institutional traders.

Under the CEA, swaps may be traded on DCMs as well as on SEFs. Moreover, as the Commission noted in its proposed rules on the core principles and other requirements for DCMs, the price discovery function of a DCM is important and a contract will not be permitted to trade on a DCM if a sufficient volume of transactions are not executed on the DCM's central order book.[24] In addition, any trading on a DCM, including the trading of swaps, will be governed by the core

[24] *See* Core Principles and Other Requirements for Designated Contract Markets, 75 Fed. Reg. 80,572 (Dec. 22, 2010).

principles for DCMs, which differ from those for SEFs. The Commission's final rules should reinforce the differences between SEFs and DCMs, so that each can best perform its designed function for their respective trading communities.

III. Importance of Harmonization between Commissions and Foreign Jurisdictions

Several differences exist between the SEC's Registration and Regulation of Security-Based Swap Execution Facilities,[25] and the CFTC's Proposed Rules. While the WMBAA does not strongly support one Commission's proposed approach in its entirety over the other, it is important that the final regulatory frameworks are harmonized between the two agencies. A failure to achieve harmonization will lead to regulatory arbitrage and unreasonably burden market participants with redundant compliance requirements. While the WMBAA is generally supportive of the objectives of the Proposed Rule, as discussed in detail below, there are certain approaches set forth in the SEC's release that better reflect the characteristics of OTC derivatives markets and, as such, would be more appropriate for SEFs, which are, by definition OTC trade execution facilities. These provisions include the approach taken with respect to permitted execution methods, impartial access that must be provided by SEFs, and compliance with core principles in a flexible manner that best recognizes the unique characteristics of competitive OTC swaps markets.

Based upon its review of the Proposed Rules, the WMBAA suggests that the Commission consider the release of further revised Proposed Rules incorporating comments received for additional review and comment by market participants. This exercise would ensure that the SEC and CFTC have the opportunity to review each of their proposals and integrate appropriate provisions from the proposed rules and comments in order to arrive at more appropriate regulations. Further, the WMBAA encourages the CFTC and SEC to work together to attempt to harmonize their regulatory regimes to greatest extent possible. While some of the rules will differ as a result of the particular products subject to each agency's jurisdiction, inconsistent rules will only make the implementation for SEFs overly burdensome, both in terms of time and resources.

The WMBAA also reminds the Commission that "mixed swaps" will exist under the new regulatory regime. Without a clear understanding of the definition of these products (because definitions have not yet been released), and the extent to which the CFTC and SEC will have overlapping jurisdiction, inconsistent rules could exacerbate the difficulty of regulating these particular products. The WMBAA believes that harmonization of the joint regulation of mixed swaps is extremely important to ensure that liquidity remains present for these particular products.

U.S. regulations also need to be in harmony with regulations of foreign jurisdictions to avoid driving trading liquidity away from U.S. markets towards markets offering greater flexibility in modes of trade execution. In particular, European regulators have not yet agreed upon their preferred approach related to trade execution methodology. In a world of competing regulatory regimes, business naturally flows to the market place that has the best regulations – not necessarily the most lenient, but certainly the ones that have the optimal balance of liquidity, execution flexibility and participant protections. In a swaps market that excludes retail participants, the WMBAA questions

[25] *See* Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. at 10,948.

what useful protections are afforded to swaps dealers and major swaps participants by regulations that would limit the methods by which they may execute their orders.

IV. Discussion of Proposed Rules

General Principles for Consideration

As wholesale brokers involved in the formation and execution of OTC derivatives transactions, ensuring that OTC derivatives markets continue to provide liquidity to and be a source for risk mitigation for end-users is vital to the WMBAA. The variety of transactions in the derivatives markets demand the breadth and flexibility of an OTC market to ensure competitive price discovery and liquidity. The Dodd-Frank Act does not eliminate the OTC derivatives market. Rather, it provides trade reporting of all transactions and clearing and intermediation for many trades in order to provide market participants a more competitive pricing environment and regulators greater information for oversight and systemic risk management.

To that end, it is necessary that the Proposed Rules, which are the first attempt to codify a new definition of a long-established market entity (*i.e.*, swaps intermediaries), appropriately take into consideration the unique characteristics of OTC markets. The Commission must recognize that OTC derivatives markets are different than financial markets that have significant retail participation.[26] While the relationship between exchange-traded and OTC markets generally has been complimentary, as each market typically provides unique services to different trading constituencies for products with distinctive characteristics and liquidity needs, the nature of trading liquidity in the exchange-traded and OTC markets is often materially different. Liquidity is the degree to which a financial instrument is easy to buy or sell quickly with minimal price disturbance. The liquidity of a market for a particular financial product or instrument depends on several factors, including the parameters of the particular instrument, such as tenor and duration, the number of market participants and facilitators of liquidity, the degree of standardization of instrument terms, and the volume of trading activity.

Highly liquid markets exist for both commoditized, exchange-traded products and the more standardized OTC instruments, such as the market for U.S. Treasury securities, equities, and certain commodity derivatives. Exchange-traded markets provide a trading venue for commoditized instruments that are based on standard characteristics and single key measures or parameters. Exchange-traded markets rely on relatively active order submission by buyers and sellers and generally high transaction flow. These markets allow a broad base of trading customers meeting relatively modest margin requirements to transact standardized contracts in a relatively liquid market. As a result of the high number of market participants and the relatively small number of standardized instruments traded, liquidity in exchange-traded markets is relatively continuous in character.

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[26] *See, e.g.*, Comments from Yuhno Song, Merrill Lynch, ("I think one of the distinctions we have is a market that may be more smaller in retail based versus a market that is with far small number of participant and that's institutional based.") Public Roundtable to Discuss Swap Data, Swap Data Repositories, and Real Time Reporting, September 14, 2010 at 332-333, *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative18sub091410.pdf.

In comparison, many swaps markets feature a broader array of less-commoditized products and larger-sized orders that are traded by fewer counterparties, all of which are institutional. Trading in these markets is characterized by variable or non-continuous liquidity. Such liquidity can be episodic, with liquidity peaks and troughs that can be seasonal (*i.e.*, certain energy products) or more volatile and tied to external market and economic conditions (*i.e.,* many credit and interest rate products).

As a result of the episodic nature of liquidity in certain swaps markets combined with the presence of fewer participants, the WMBAA believes that the CFTC and SEC need to carefully structure a clearing, execution, and reporting regime for block trades that is not a "one size fits all" approach, but rather takes into account the unique challenges of fostering liquidity in the broad range of swaps markets. Such a regime must permit the execution of larger transactions without imposing unnecessary regulatory burdens or materially reducing market liquidity.

Timing; Implementation of Final Rules

With respect to the effective date and transition period, the WMBAA notes that while final regulations may become effective 60 days after publication in the Federal Register, the Commission is proposing that the effective date for the proposed regulations be 90 days after publication of the final regulations in the Federal Register. The Commission believes that the effective date would be appropriate to allow potential SEFs and market participants time to adapt to the new regulatory regime for the trading of swaps in an efficient and orderly manner. In addition, the Commission believes that this would give any entities then operating a marketplace for the execution or trading of swaps adequate time to submit a SEF application and meet the conditions to receive relief under the grandfather provisions.

The WMBAA is concerned that the timeline for implementation of the final rules is as important, if not more important than, the substance of the regulations. The WMBAA members recognize and support the fundamental changes to OTC swaps markets resulting from the passage of the Dodd-Frank Act and will commit the necessary resources to diligently meet the new requirements. However, the Commission must recognize that these changes are significant and will result in considerable changes to the operations and complex infrastructure of existing trading systems and platforms.

The WMBAA is concerned that the proposed 90 day implementation period following the issuance of final rules does not provide sufficient time for compliance. Providing market participants with an insufficient time frame for compliance could harm the efficient functioning of the markets if existing entities can no longer operate until they have built the requisite platforms to comply with every measure in final rules.

The vast number of changes required to existing trading systems or platforms to register as a SEF will impose a substantial burden in the short term. Upon implementation of the Dodd-Frank Act and final rules, wholesale brokers that register as SEFs will be required to undertaken activities that include, but are not limited to, (i) developing extensive rulebooks; (ii) meeting new substantive and reporting-related financial requirements; (iii) implementing sophisticated trading, surveillance, monitoring and recordkeeping processes and technology; (iv) creating extensive self-regulatory capabilities and entering into arrangements with their customers setting forth the terms of this new

arrangement; (v) potentially restructuring the governance structure of their companies, including identifying and recruiting independent board members and establishing required governance committees; (vi) potentially altering the mix of their existing customer base and adding new customers; (vii) implementing appropriate contractual and technological arrangements with clearing houses and swap data repositories; (viii) hiring staff and creating a compliance program structured to meet the Commission's specifications; and (ix) educating staff on the requirements relating to trade execution, clearable vs. non-clearable trades, blocks vs. non-blocks, bespoke and illiquid trades, end-users vs. non-end-users, and margin requirements.

As this list indicates, these undertakings are monumental. This burden is exacerbated when considering that the users of intermediary services will themselves be going through dramatic change, responding to new clearing, margin and capital requirements, new business conduct standards, and changes to the means by which they are able to interact with their end customers.

For these reasons, the WMBAA would respectfully suggest that the implementation period be extended beyond 90 days to ensure that these rules are instituted in an orderly manner. The WMBAA would suggest the Commission consider the implementation of other regulatory regimes with lesser burdens than the Dodd-Frank Act, such as the introductions of TRACE reporting for corporate bonds and Regulations SHO and NMS in the equity markets. The imposition of these new regimes was far less drastic of a change to the markets, and required participants to expend far fewer resources. Nevertheless, they were implemented with longer time frames than the Proposed Rules.

Phasing

After recent discussions with the Commission and staff, the WMBAA would like to offer brief comments on the "phasing" of implementation of the SEF rules. The mandatory trade execution requirement will become effective at the time that swaps are deemed "clearable" by the Commission. As such, it is necessary that SEFs be registered with the CFTC and available to execute transactions at the time that trades begin to be cleared under the CEA. As previously noted, the WMBAA estimates that its members currently account for over 90% of inter-dealer intermediated swaps transactions taking place around the world today. If the SEF registration process is not effectively handled by the time various swaps are deemed clearable, there could be serious disruptions in the U.S. swaps markets with adverse consequences for broader financial markets.

Furthermore, requiring absolute compliance with final rules within a short time frame is particularly troublesome for likely future SEFs, as such a result may provide DCMs with an unfair advantage in attracting trading volume simply due to their ability to quickly meet the CEA's requirements. This result would be inconsistent with Congressional intent to create competing swap marketplaces and to promote the trading of swaps on SEFs.

It is imperative that the implementation timeline for final rules does not disrupt swaps markets or disadvantage SEF applicants. Accepting the premise that the mandatory trade execution requirement cannot be enforced until there are identified "clearable" swaps and that swaps are "made available for trading," the Commission needs to ensure that a functioning and competitive marketplace of registered SEFs exists at the time the first trade is cleared and made available for

trading. Congress distinguished between DCMs and SEFs, intending for competitive trade execution to be made available on both platforms. Congress also recognized the importance of SEFs as distinct from DCMs, noting that a goal of the Dodd-Frank Act is to promote the trading of swaps on SEFs.[27] The phasing in of final rules for both DCMs and SEFs should be done concurrently to ensure that this competitive landscape remains in place under the new regulatory regime.

V. Proposed Rules – General Provisions

Section 37.3 – Registration

The Proposed Rule sets forth a requirement for registration, including the filing of an electronic application including information sufficient to demonstrate compliance with the core principles. The Proposed Rule also allows temporary grandfather relief from the registration requirement, allowing the applicant SEF to continue operating during the pendency of the application process.[28]

First, the WMBAA encourages the CFTC and the SEC to adopt one common application form for the registration process. While regulatory review of the application by the two agencies is appropriate, reducing the regulatory burden on applicant SEFs to one common form would allow for a smoother, timelier transition to the new regulatory regime. Because the two forms are consistent in many respects, the WMBAA believes the differences between the two proposed applications could be easily reconciled to increase regulatory harmonization and increase efficiency.

In addition, the WMBAA is concerned that it will be incredibly difficult, if not impossible, to satisfy the requirements of Section 37.3(a) at the time temporary grandfather relief is sought, thereby making the temporary relief provided by this section illusory. While the temporary grandfather relief allows the Commission to grant interim authority for a SEF to operate, the relief is less significant for the applicant SEF that must be in compliance with the final rules at the time of application. For that reason, the WMBAA suggests that the temporary grandfather relief will provide a more efficient transition if applicants are afforded temporary grandfather relief at the time of application if the trading system or platform is functioning prior to implementation of the final rules and certifies it is actively taking steps to meet the final rules' requirements within a finite period of time. Final registration should remain dependent upon a SEF illustrating its ability to comply with the final rules.

Otherwise, imposition of final rules on potential SEFs as a prerequisite for temporary grandfather relief will have a potentially adverse impact on existing trade execution platforms, given that some time will be needed for these entities to meet the Proposed Rules' requirements. It is, therefore, critical that a competitive SEF marketplace exist prior to the clearing of the first swap under the new regulations. As noted, if the SEF registration process is not effectively implemented for WMBAA member firms responsible for over 90% of inter-dealer intermediated swaps transactions by the time various swaps are deemed clearable, there could be serious negative impact to the U.S. swaps markets. Moreover, during any such disruption, certain DCMs may seek to exploit an unfair

[27] *See* CEA Section 5h(e).

[28] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. at 1,238.

competitive advantage that will enable them to capture a significant amount of the initial volume in swaps to the detriment of other entrants to the market, simply because they control the clearing function. Any implementation of registration requirements should protect the inherently competitive nature of these markets.

The failure of the Commission to provide registration, even on a temporary basis for existing trading systems or platforms, may alter the swaps markets and unfairly induce market participants to trade on already-registered and operating futures exchanges, albeit ones that have limited experience in OTC swaps execution (*i.e.*, DCMs). The WMBAA strongly encourages the Commission to provide prompt provisional registration to existing trade execution intermediaries that intend to register as a SEF and express intent to meet the regulatory requirements within a predetermined time period. To require clearing of swaps through derivatives clearing organizations without the existence of the corresponding competitive trade execution venues risks consistent implementation of the Dodd-Frank Act and could have a disruptive impact on market activity and liquidity formation, to the detriment of market participants.

Section 37.4 – Procedures for Listing Products and Implementing Rules

Section 37.4, among other things, includes a provision that SEFs should label a swap in its rules as "listed for trading." Wholesale brokers for OTC derivatives do not "list" swaps, but rather act as an intermediary for any interested buyers or sellers for a particular product. Unlike futures exchanges, OTC markets enjoy no execution monopoly over the products traded by the WMBAA members' participants. When a market participant wants to engage in a trade, it is the role of the SEF, through multiple modes of execution, to find buyers for sellers and sellers for buyers. This is true whether the transaction is highly liquid and commoditized or more episodic in its trade frequency.

The WMBAA would suggest that provisions indicating that a SEF "lists" products, or the use of other futures exchange terminology, be revised to better reflect the characteristics of OTC derivative markets. Such an approach should also be consistent with Congressional intent, which clearly sought to implement an alternative to exchange trading that offered flexibility and practically reflects the market characteristics.[29]

In addition, Section 37.4(b) requires the rules of a SEF to self-certify that any rule or rule amendment complies with the CEA, including the terms or conditions of swaps listed for trading on the facility. Wholesale brokers, unlike future exchanges, do not currently seek approval from the CFTC (or SEC) before making a product available for trading. In addition, the scope of the universe of swaps to be executed on a SEF will be dependent upon the Commission's designation of a swap as clearable, which will provide a baseline list of those swaps a SEF makes available for

[29] 208 Cong. Rec. S5923 (daily ed. July 15, 2010) (statement of Sen. Lincoln) ("In interpreting the phrase 'makes the swap available to trade,' it is intended that the CFTC should take a practical rather than a formal or legalistic approach. Thus, in determining whether a swap execution facility 'makes the swap available to trade,' the CFTC should evaluate not just whether the swap execution facility permits the swap to be traded on the facility, or identifies the swap as a candidate for trading on the facility, but also whether, as a practical matter, it is in fact possible to trade the swap on the facility. The CFTC could consider, for example, whether there is a minimum amount of liquidity such that the swap can actually be traded on the facility.").

trading. The Commission could clarify in final rules whether this requirement is intended to apply on a swap-by-swap basis or whether this is intended to take place at a more general asset class level.

The WMBAA believes that, in order for SEFs to provide market participants with access to fully liquid swaps markets and to provide market participants with a full range of products to meet demand, Commission approval for the products made available for trading should not be required. Further, consistent with the Commission's principles-based approach to regulation, the Proposed Rules should allow a SEF to self-certify its compliance with this requirement (and other requirements) based on the rule framework it employs. The Commission should consider the ability for SEFs to self-certify within a framework that reflects the needed flexibility for OTC swaps markets. A flexible self-certification process will encourage SEFs to trade additional products, increasing the transaction volume and making products more likely to be deemed clearable. Self-certification could either be done on a product-by-product basis or more broadly based upon predetermined asset classes. This approach would reduce the Commission's regulatory burden without compromising regulatory oversight of OTC markets by the Commission.

Section 37.6 – Enforceability

Section 37.6(b) of the Proposed Rules requires a transaction entered into on or pursuant to the rules of a registered SEF include written documentation that memorializes all of the terms of the transaction and legally supersedes any previous agreement. The confirmation of all terms of the transaction shall take place at the same time as execution.

The WMBAA believes that this requirement is not authorized by the CEA and would impose an impractical duty on registered SEFs to possess information that they may not have or may not have the authority to request from their participants. As intermediaries that match buyers and sellers, SEFs will not act as a party to transactions, do not maintain positions, hold collateral, or handle counterparties' assets. As a neutral service party, SEFs lack privity of contract to enforce the terms of an agreement between two parties.

Additionally, the Proposed Rule does not set out a SEF's responsibilities if a counterparty provides incomplete or incorrect information. As an alternative, in the credit default swap market, the Depository Trust & Clearing Corporation maintains a "gold record" for electronically confirmed swaps. That "gold record" is the legal, binding documentation that memorializes the terms of the transaction and legally supersedes any other recording of the transaction. Given the arrangement already relied upon by market participants, the WMBAA would suggest that the final rule reflect that registered swap data repositories ("SDRs") maintain this information or, in the alternative, to allow SEFs to access the SDR's documentation of swaps executed on its trading system or platform. The WMBAA is supportive of allowing SEFs to record the economic terms of a contract and provide the valuable service of real-time reporting of executed swap data to an SDR, but cannot endorse any requirement that imposes a post-trade obligation on a trade execution system or platform that lacks the authority to carry out such a function.

The WMBAA would also request clarification from the Commission as to what is meant by "at the same time as execution" and additional direction as to when that moment occurs.

Section 37.7 – Prohibited Use of Data Collected for Regulatory Purposes

Section 37.7 prevents a SEF from using for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations. This provision is intended to protect market participants' information provided to a SEF for regulatory purposes from its use to advance the commercial interests of the SEF.[30]

The CEA, as amended by the Dodd-Frank Act, does not impose this requirement. Any information provided to a SEF by a market participant is done in the course of providing commercial services, generally with the intent of a participant to either hedge risk or enter into a speculative position. The SEF's obligation is to disseminate pricing and economic information to market participants as quickly as possible to locate a counterparty for consummation of the trade. The WMBAA membership, as intermediaries in markets consisting of eligible contract participants, is unclear what information may be obtained that the Commission consider proprietary or personal. The WMBAA would request that the Commission clarify in its final rules what constitutes "proprietary data or personal information" in order to ensure that SEFs have clarity on what information is covered by this provision. This information should, at a minimum, be limited to the type of information obtained by the SEF other than in the ordinary course of its trade execution services and related to the performance of market surveillance activities.

Section 37.10 – Swaps Made Available for Trading

Section 37.10 requires a SEF to conduct an annual review of whether the SEF has made a swap available for trading.

While the Dodd-Frank Act is clear that a SEF may make available for trading any swap and facilitate trade processing of any swap,[31] the WMBAA would request that this provision be revised to better reflect the characteristics of OTC derivatives markets and less the futures exchange model that "lists" products for trading. As previously noted, wholesale brokers exist to create liquidity in the OTC markets for trades that are not commoditized enough to be traded on an exchange and where a competitive trading platform will produce better terms than if the parties to the trade executed the trade themselves. The ability to create liquidity will ultimately determine whether a swap is "available for trading." This is not a "listing" process as occurs on an exchange. Rather, it is a dynamic process where buyers of risk and sellers of risk are actively sought by wholesale brokers to generate competitive price discovery and liquidity.

Further, the factors enumerated in Section 37.10(b) seem to be more appropriate for reviewing the swaps a SEF has historically executed and less indicative of whether a SEF makes certain swaps "available for trading." Given the unique liquidity characteristics of OTC swap markets, it is quite possible that a SEF makes a certain swap available for trading, but facilitates a low frequency of

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[30] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. at 1,218, fn. 34 ("Proposed § 37.7 is intended to protect market participants' information provided to a SEF for regulatory purposes from its use to advance the commercial interests of the SEF.").

[31] *See* CEA Section 5h(b).

trading. For that reason, a SEF may identify many swaps as available for trading that have sporadic (or minimal) activity based on the enumerated criteria.

Section 37.10(c)(1) mandates that if at least one SEF has made the same or an economically equivalent swap available for trading, all SEFs are required to treat the swap as made available for trading. The WMBAA would request additional clarification on this requirement; primarily, what information will be made available to other SEFs.

Finally, similar to the approach suggested for Proposed Rule Section 37.4, allowing a SEF to self-certify whether it has made a swap available for trading would reduce the regulatory burden on the Commission without removing the ongoing obligation for a SEF to accurately report to the Commission the swaps available for trading.

VI. Proposed Rules – Core Principles

Section 37.200 – Compliance with Rules

Proposed Rule Section 37.200 requires, in part, that a SEF establish and enforce compliance with its rules, including the terms and conditions of the swaps traded or processed on or through the SEF.

The WMBAA remains concerned that this provision, which was directed by the Dodd-Frank Act,[32] requires a SEF to undertake an obligation it cannot ultimately satisfy. First, it is important to remember that a SEF is only a trade execution facility. Its ability to impose any post-execution duties on counterparties to a trade is very limited. Further, the competitive nature of SEFs is different than exchanges, where the trading of a specific listed instrument occurs wholly on a single exchange. The competitive SEF environment requires recognition that a SEF can only be held responsible for what happens in its own platform and not for what happens on a competitor's platform.

Furthermore, because the SEF will not be a party to the swap and will never possesses the consideration exchanged by the two parties to the swap, it will not have access to or knowledge of the complete transaction. This is particularly true where two counterparties have agreed to and maintain an underlying trading arrangement and rely on the SEF to negotiate the key pricing fields before turning the trade to the derivatives clearing organization and/or swap data repository for recordation of the other information. While the WMBAA members believe it is appropriate to require a SEF to ensure participant compliance with the SEF's rules, a mandate to require compliance with the terms of swaps traded or processed on or through the SEF would be extremely difficult to enforce.

[32] *See* CEA Section 5h(f)(2) ("A swap execution facility shall (A) establish and enforce compliance with any rule of the swap execution facility, including (i) the terms and conditions of the swaps traded or processed on or through the swap execution facility.").

Section 37.202 – Access Requirements

Proposed Rule Section 37.202 requires that a SEF provide eligible contract participants and any independent software vendors ("ISV") with impartial access to its market(s) and market services (including any indicative quote screens or any similar pricing data displays).

The WMBAA is concerned that the Proposed Rule expands the impartial access provision beyond market participants. There is no legal authority in the CEA to provide impartial access to ISVs. In fact, the SEC's proposed rules related to impartial access are expressly limited to market participants (*i.e.*, security-based swap dealer, major security-based swap participant, broker, or eligible contract participant).[33] ISVs are not "market participants" and are not granted "impartial access" under the CEA. The CFTC's expansion of the impartial access provisions is without legislative basis and could have troubling consequences for trade execution platforms. Particularly, as SEFs are competitive execution platforms, a requirement to provide impartial access to market information to ISVs who lack the intent to enter into swaps on a trading system or platform will reduce the ability for market participants to benefit from the competitive landscape that provides counterparties with the best possible pricing.

Further, given the lack of a definition of what constitutes an ISV and the significant technological investments made by wholesale brokers to provide premiere customer service, the ISV access requirement leaves open the possibility that SEFs could qualify as ISVs in order to seek access to competitors' trading systems or platforms. This possibility would defeat the existing structure of competitive sources of liquidity, to the detriment of market participants.

Because the CEA only requires SEFs provide impartial access to market participants, the WMBAA would request clarification in the final rules that the impartial access for ISVs should be simply that: to be impartial. That is, if a SEF makes data available to any ISV, it should do so in a manner that is impartial to other similar ISVs. Such impartiality may be reflected in a policy that the SEF will only contract with such ISVs that have contractual relationships with the particular SEF's market participants. In that case, the ISV should remain subject to compliance with the SEFs market participant rules. The Commission should make clear that a SEF may legitimately impose appropriate and uniform limitations on an ISV, including, but not limited to, compliance with the SEF's rules, the core principles, and oversight or supervision by the SEF in the same manner as a market participant. Finally, a SEF may appropriately require an ISV accessing the SEF's information to face restrictions on how it can use the information it receives, both for its own trade execution or commercialization of the information without the SEF's prior consent.

With respect to whether a SEF can assert jurisdiction over any person or entity executing swaps on the SEF, either for its own account or on behalf of another, the Commission must recognize that SEFs are competing, and not monopolistic, trading venues. The only jurisdiction a SEF will have over a market participant is with respect to the particular SEF's rules. As previously discussed, the SEF's ultimate sanction would be to ban a market participant from the trading system or platform. This punishment has little utility if the market participant can continue to execute swaps on other SEFs.

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[33] *See* Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. at 11,059.

Also, the trades subject to the mandatory clearing and trade execution requirements of the CEA will be primarily between swap dealers and major swap participants. For these counterparties, it is unlikely that the trades will be executed on behalf of another's account, making those provisions of the Proposed Rules implementing the core principles less applicable than in an exchange market.

Section 37.203 – Rule Enforcement Program

Proposed Rule Section 37.203 requires the establishment and enforcement of rules to deter abuses. The provision lists specific prohibited abusive trading practices, which include "front-running, wash trading, pre-arranged trading, fraudulent trading, money passes and any other trading practices that a swap execution facility deems to be abusive."[34]

The WMBAA supports the use of investigatory reports prepared by compliance staff as a prelude to formal disciplinary proceedings. SEFs should rely upon this valuable practice to the same degree as compliance staff at DCMs.

The WMBAA suggests, consistent with other comments related to the Proposed Rules, that these abusive trading practices are more frequent in futures exchange markets, and less likely to take place on potential SEFs. The identified practices are more common in markets with retail participants, which OTC swaps markets do not have. To that end, the WMBAA recommends that the final rules better reflect potential abusive trading practices more common to OTC markets, including but not limited to, intradesk and intracompany trading, order flashing (if done regularly), a failure to honor firm prices (with exceptions at the discretion of the SEF), attempting to change the general conditions of the swap after price has been agreed to, and monitoring of potential abuses at those points in the day when options are settled against swaps levels.

Further, the rule enforcement provisions should clearly limit a SEF's responsibility to abusive trading practices taking place on its trading systems or platforms. Given the limited scope of one SEF's knowledge, it would be impractical to impose a duty upon a SEF to monitor its market participants' activities on other SEFs. Such an approach is not dissimilar to the CFTC's recognition that oversight of competing exchanges requires access to proprietary information and can only be performed by the Commission.[35] The WMBAA encourages the Commission to consider the issues

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[34] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. at 1,242.

35 *See* CFTC Market Surveillance Program–Inter-Exchange and Cross-Border Surveillance. ("[Inter-exchange and cross border surveillance of competing, related contracts] requires access to multiple streams of proprietary information from competing exchanges, and as such, can only be performed by the Commission or other national regulators. The Commission can and does receive trading data from multiple exchanges and foreign regulators whenever there is a sufficient relationship between competing contracts that trading violations in one could lead to abuses in the other. Staff analyzes such data to detect possible inter-exchange violations, and the Commission occupies a unique space in the regulatory arena that cannot be filled by foreign and domestic exchanges offering related competing products." [Emphasis added]); *see also* CFTC Market Surveillance Program–Trade Practice Surveillance Program. ("The Commission's trade practice surveillance program plays a critical role in inter-exchange surveillance, since only the Commission can consolidate data from multiple exchanges and foreign regulators to create a seamless, fully-surveilled marketplace."), *available at* http://www.cftc.gov/IndustryOversight/MarketSurveillance/CFTCMarketSurveillanceProgram/tradepracticesurveillance.html.

related to inter-exchange surveillance and recognize that an analogous situation exists with SEF trading surveillance.

As competitive trade execution platforms vying for customers' trading activity, the WMBAA strongly suggests that a common regulatory organization ("CRO") be relied upon to implement and oversee SEF trading activity for abusive trading practices. The Association presented its thoughts on a CRO in a letter to the Commission on November 30, 2010.[36] Ensuring a single, consistent standard is applied across multiple SEFs will ensure that there is not a "race to the bottom" for rule enforcement programs and will also prevent market participants from selectively choosing which SEF to use based upon the laxity of its rules regime. The WMBAA believes that an industry-wide standards body would best ensure the integrity of the swaps market and protect market participants from abusive trading practices.

Proposed Rule Section 37.203(c) requires that a SEF establish and maintain sufficient compliance department resources and staff. It is unclear from the Proposed Rule whether compliance department resources and staff may be shared with affiliates or between multiple SEFs. In particular, it is difficult to evaluate how the Commission would consider shared resources between affiliates or SEFs or how outsourced resources might be considered in meeting the compliance resources and staff requirements. Further, the Commission does not indicate whether a SEF's contractual relationship with a third party service provider engaged to assist in complying with the core principles, as set forth in Proposed Rule Section 37.204(a), will allow the SEF to consider the third party service provider's resources and staff when determining the adequacy of its resources for rule enforcement purposes.

Proposed Rule Section 37.203(d) requires that a SEF maintain an automated trade surveillance system capable of detecting and investigating potential trade practice violations. This automated system must have the capability to, among other things, compute trade gains, losses, and futures-equivalent positions for its market participants. Such a requirement will be entirely impossible for one SEF to complete without knowledge of a participant's entire trading activity, including that activity which takes place on or through other SEFs. Requirements such as this, which are not mandated by the CEA, reflect a function that can be performed on a single-silo futures exchange, but cannot be done in a competitive market landscape as intended by Congress for SEFs.

Finally, Proposed Rule Section 37.203(e) requires that a SEF conduct real-time market monitoring of all trading activity on its electronic trading platforms. The WMBAA respectfully suggests that the Commission clarify in its final rules that the real-time obligation does not include the automated trade surveillance obligations set forth in Proposed Rule Section 37.203(d).

Section 37.204 – Regulatory Services Provided by a Third Party

Proposed Rule Section 37.204 permits a SEF to contract with a registered futures association or another registered entity ("regulatory service provider") for the provision of services to assist in complying with the core principles. The SEF must ensure that its regulatory service provider has the

[36] *See* letter from Julian Harding, WMBAA, to Commission, dated November, 30 2010, *available at* http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_13_SEFRules/index.htm.

capacity and resources necessary to provide timely and effective regulatory services and remains responsible for the compliance with the SEF's obligations.

As noted in a letter to the Commission on November 30, 2010,[37] the WMBAA supports the establishment of a CRO[38] that will facilitate compliance with the core principles by each of its members, as well as for any other SEF that agrees to follow its rules.[39] The CRO would not itself have any direct regulatory responsibilities, but it would, by way of contractual obligations, assist its members by addressing compliance issues that are common to all SEFs, including: (i) model provisions related to investigations, enforcement authority, trade monitoring, and obtaining information; (ii) entering into regulatory services agreements with existing self-regulatory organizations ("SROs") pursuant to which the CRO will have the capacity to detect, investigate, and enforce those rules for its members, such as manipulative trading, position limit violations, or other rules violations; (iii) ensuring that SEFs obtain information from other SEFs as necessary to comply with core principles; and (iv) reviewing associated persons of each SEF to ensure that they are not statutorily disqualified to be associated with a SEF.

The WMBAA believes that such an arrangement offers many benefits. First, a CRO provides a platform that ensures certain key rules for SEFs are written fairly and establish a uniform standard of conduct, streamlining the Commission's evaluation of each SEF's registration application. Relying upon a CRO's model rules would also simplify the Commission's SEF oversight burdens, as the Commission would need to familiarize itself with only one set of rules, as opposed to varying approaches for each trading platform or facility. Finally, in order to conduct effective surveillance of fungible swap products trading on multiple SEFs, a neutral intermediary will be needed in order to ensure the sharing of important information among SEFs and regulatory service providers.

Section 37.205 – Audit Trail

Proposed Rule Section 37.205 requires that a SEF establish procedures to capture and retain information that may be used in establishing whether rule violations have occurred. In addition, each SEF must capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses.

The WMBAA fully supports the Commission's proposal to capture a complete audit trail for executed transactions on a SEF. To that end, WMBAA members currently have the ability to capture and retain all audit trail information on all firm bids and offers and all executable customer orders, including the terms of each order. In promulgating final rules related to audit trail requirements, the WMBAA recommends that the Commission set forth a common data format for

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[37] *See* letter from Julian Harding, WMBAA, to Commission, dated November, 30 2010, available at http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_13_SEFRules/index.htm.

[38] Distinguished from an SRO to avoid confusion with the legal and regulatory implications of an SRO.

[39] The NFA recently provided the Commission with comments about possible ways in which it could act as a utility with respect to swap transactions, including assisting SEFs to comply with certain core principles, including requirements to perform basic self-regulatory functions regarding its trading platform. *See* Possible Role for NFA as a Utility for Swap Transactions, *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission13_083110-nfa.pdf.

audit trail information to ensure consistency between multiple SEFs for ease of use by the Commission in investigating customer and market abuses.

The Proposed Rule also requires that records be retained for "customer orders (whether filled, unfilled or cancelled, each of which shall be retained or electronically captured)."[40] The WMBAA supports the retention of audit trail information for all firm bids and offers under the Proposed Rules. However, the WMBAA believes that to impose this data retention requirement on SEFs for indications of interest would extend beyond the legislative authority[41] granted the Commission and would be more expansive than the audit trail requirements currently in place in other financial markets regulated by various financial regulators. The imposition of record retention requirements for indications of interest would also result in an unnecessary burden and significant data storage costs. Such prohibitive storage costs would greatly outweigh any regulatory oversight value, since indications of interest do not establish the actual market supply and demand at any given moment. Actual supply and demand is only indicated by bids and offers that can be executed. Therefore, retaining information related to executable interests is the appropriate record to maintain to indicate trends in pricing or other activity.

Finally, given that trade execution can take place "through any means of interstate commerce," it is important that the audit trail permits the retention of relevant information through various modes, as determined by the mode of communication, so long as the audit trail is accurate and complete. This is particularly important to SEFs that operate electronic and voice platforms, along with hybrid platforms that incorporate aspects of the two. A flexible audit trail regime will ensure that regulators have all of the necessary information to recreate transactions.

Section 37.206 – Disciplinary Procedures and Sanctions

Proposed Rule Section 37.206(n) discusses the imposition of a SEF's disciplinary sanctions upon its market participants for violations.

As a general matter, the WMBAA believes that the final rules implementing this provision should permit greater flexibility for SEFs than currently contemplated. It is important for the Commission to recognize that, unlike DCMs, SEFs are not required to have specific disciplinary procedure rules. Instead, SEFs should enjoy latitude and discretion to establish and implement enforcement programs that best reflect each trading system or platform's unique characteristics.

In order to ensure consistency in sanctions imposed for rules violations, the WMBAA recommends that the Commission adopt in its final rules a requirement that a disciplinary sanction imposed by a SEF must be published and made publicly available for market participants. Further, the final rules should codify a requirement that any limitation of a market participant's access to a SEF imposed in response to a rules violation should be recognized and enforced consistently among all SEFs. Without consistent recognition and enforcement of disciplinary procedures and sanctions, the

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[40] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. at 1,243.

[41] *See* CEA Section 5h(a)(10)(i) ("A swap execution facility shall maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of 5 years.").

Commission will inadvertently reduce a SEF's incentive to sanction its market participants. The final rules should incorporate this concern in order to prevent market participants from gaming the system and maintaining its access to markets after violations.

The WMBAA supports the imposition of a streamlined disciplinary process that features, for example, a robust staff summary fine program rather than formal disciplinary hearings. This approach will minimize the bureaucratic demands on SEFs and minimize the burden on compliance department resources and staff, without jeopardizing the disciplinary procedures or the enforcement of the disciplinary sanctions.

The WMBAA is supportive of the proposal that Commission regulations provide detailed guidelines on the appropriate size of any financial penalties levied by SEFs for violative conduct. As competitors in a market with multiple SEFs, the ability to rely upon an industry standard, similar to FINRA Sanctions Guidelines for penalties,[42] would prevent regulatory arbitrage and ensure consistent disciplinary actions taken by registered SEFs. Commission guidelines would also simplify the disciplinary procedure for SEFs and allow the trading systems or facilities to rely upon enforcement by a third party.

Section 37.207 – Swaps Subject to Mandatory Clearing

Proposed Rule Section 37.207 requires a SEF's rules to provide that when a swap dealer or major swap participant enters into or facilitates a swap transaction that is subject to the mandatory clearing requirement of Section 2(h) of the Act, the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under CEA Section 2(h)(8). The WMBAA does not believe there is any basis in the CEA to impose such a burden on the SEF for verification. The WMBAA believes it may be more appropriate to impose a certification process upon a swap dealer or major swap participant that is consistent with the Commission's proposed rule for counterparties relying upon an elective exception to mandatory clearing of swaps available for swap counterparties meeting certain conditions under Section 2(h)(7) of the CEA.[43]

Section 37.300 – Swaps Not Readily Susceptible to Manipulation; Section 37.301 – General Requirement

Proposed Rule Section 37.300 limits a SEF to only permit trading in swaps that are not readily susceptible to manipulation. Proposed Rule Section 37.301 requires a SEF to either request prior approval for new swap contracts or self-certify new product submissions to demonstrate compliance with Proposed Rule Section 37.300. Furthermore, the SEF must provide evidence that the swap complies with Core Principle 3 (Swaps Not Readily Susceptible to Manipulation) by providing the applicable information as set forth in appendix C to part 38 – demonstration of compliance that a contract is not readily susceptible to manipulation.

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[42] *See* FINRA–Sanction Guidelines, *available at* http://www.finra.org/Industry/Enforcement/SanctionGuidelines.

[43] *See* CEA Section 2(h)(7); *see also* End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747 (December 23, 2010).

As previously discussed, SEFs are intended to serve as competitive trading systems or platforms that seek to match buyers and sellers. The WMBAA members will comply with any Commission designation of certain swaps as readily susceptible to manipulation and restrict trading in those swaps, but unlike futures exchanges, the IDB universe of financial products available for trading is much larger. There is no obligation in the CEA for SEFs to "list" products and, because of the wide array of products traded by market participants on these systems and platforms, it would impose an impossible burden on SEFs to seek, and the Commission to approve, regulatory approval each time a new product is traded.

Section 37.401 – General Requirement

Proposed Rule Section 37.401 requires a SEF to collect and evaluate data on individual traders' market activity on an ongoing basis. The Proposed Rule also requires the SEF to monitor and evaluate general market data and have the capacity to conduct real-time monitoring of trading and comprehensive and accurate trade reconstruction.

The WMBAA requests that the Commission clarify what it means by "individual traders" and "market activity" in paragraph (a). For the first term, the WMBAA questions whether the Commission is referring to (i) an individual employee of a SEF; (ii) an individual employee of a participant in a SEF; (iii) an institutional participant in a SEF; or (iv) a customer of an institutional participant in a SEF. For the second term, the WMBAA requests greater clarification on what is intended by the Commission.

Further, the WMBAA seeks additional information regarding what constitutes the "general market data" that must be monitored and evaluated pursuant to paragraph (b). Finally, the WMBAA requests additional detail with respect to the requirement of real-time monitoring of trading. It is unclear whether this monitoring duty (i) is limited to detecting abnormal price movements, unusual trading volumes, impairments to market liquidity, and position-limit violations; (ii) includes trading activity within a SEF or across multiple SEFs; or (iii) requires real time monitoring of underlying instruments.

Section 37.403 – Additional Requirements for Cash-settled Swaps

Proposed Rule Section 37.403 requires, for cash-settled swaps, that a SEF monitor (i) the availability and pricing of the commodity making up the index to which the swap will be settled; and (ii) the continued appropriateness of the methodology for deriving the index. For any SEF that computes its own indices, it must promptly amend any methodologies that result, or are likely to result, in manipulation, price distortions, or market disruptions, or impose new methodologies to resolve the threat of disruptions or distortions.

This requirement is likely to be impossible for SEF compliance. In the present swaps marketplace, intermediaries do not necessarily execute transactions in the underlying instruments or commodities that serve as reference information for the respective swaps. As such, a SEF will most likely lack access to the necessary reference information underlying an index to appropriately monitor the availability, pricing, and methodology for the index. This burden is more appropriately borne by those setting the index or a third party with necessary access to the information and the capabilities to analyze the data. Alternatively, this requirement might be carried out by a third party service

provider who is able to collect information related to SEF trading activity and the underlying commodities making up an index in order to meet the monitoring requirements of the Proposed Rules.

Section 37.404 – Ability to Obtain Information

Proposed Rule Section 37.404 requires that a SEF must have rules that require traders in its swaps to keep records of their trading, including records of their activity in the underlying commodity and related derivatives markets, and make such records available, upon request, to the SEF and the Commission. In addition, a SEF with customers trading through intermediaries must either use a comprehensive large-trader reporting system ("LTRS") or be able to demonstrate that it can obtain position data from other sources in order to conduct an effective surveillance program.

The WMBAA does not believe that the CEA provides sufficient authority for this requirement. The legislation is clear as to the SEF's core principles, but does not provide the basis for such a prescriptive rule. Further, the WMBAA believes this provision may be more appropriate under Core Principle 5 – Ability to Obtain Information.

The WMBAA seeks additional detail on this requirement in the final rules. For example, the WMBAA would appreciate specific direction from the Commission enumerating the duration that records must be retained and the format for record retention that would satisfy the Proposed Rules. The WMBAA also seeks additional information on the LTRS, including the scope of the data and detail on how the data will be maintained. Finally, consistent with other comments in this letter, the WMBAA asks the Commission to carefully consider its use of the phrases "traders" and "customers" and either define them or use more accurate terms that are in line with the current competitive OTC trade execution marketplace.

Section 37.502 – Collection of Information

Proposed Rule Section 37.502 requires that a SEF have rules allowing for collection of information on a routine basis, collection of non-routine data from its participants, as well as the SEF's examination of books and records kept by the traders on its facility.

With respect to the Commission's proposal that a SEF collect information from its participants, the WMBAA notes that, aside from participants who contractually agree to provide information, SEFs do not possess the legal authority to obtain such information. The burden for reporting counterparty information sought by the Commission should be imposed upon counterparties who register with the Commission as swap dealers or major swap participants. As an alternative, the WMBAA respectfully suggests that the Commission require SEFs and their participants to enter into third party service provider agreements for the collection of the required information. Such an arrangement would be cost-effective and promote efficiency in the collection of required information. The Commission should consider the efficiency and practicality involved in various approaches to collecting information, recognizing that the SEF is not the ideal vehicle for such responsibility given its limited function and minimal ability to force market participants into action in a competitive marketplace of similarly situated trading systems or platforms.

Section 37.504 – Information-sharing Agreements

Proposed Rule Section 37.504 requires a SEF to share information with other regulatory organizations, data repositories, and reporting services as required by the Commission or as otherwise necessary and appropriate to fulfill its self-regulatory and reporting responsibilities. To meet this requirement, appropriate information-sharing agreements may be established or the Commission, in conjunction with the SEF, may determine to carry out such information sharing itself.

As currently drafted, this provision could be interpreted to require SEFs to share information with competitor SEFs, unless the information is disseminated by a neutral third party pursuant to a services agreement. The WMBAA requests that this requirement be revised in the final rule to ensure that the competitive nature of the industry is not unintentionally interrupted. Further, the WMBAA requests clarification on the alternative information sharing approach. Specifically, the WMBAA requests additional information related to circumstances in which the Commission would determine to carry out the information sharing itself, as opposed to a SEF entering into information-sharing agreements with the relevant entity.

Section 37.600 – Position Limits or Accountability

Proposed Rule Section 37.600(a) requires a SEF that is a trading facility to adopt, for each of the contracts of the facility, as necessary and appropriate, position limitations or position accountability for speculators.

The enforcement of position limits by individual SEFs is virtually impossible. First, SEFs are singular execution facilities, neither regulators nor SROs, nor clearinghouses, who hold or control customer positions, nor SDRs, who possess the requisite market information to monitor position limits. SEFs do not have the legal or commercial control over positions held by their participants. As with other parts of the Proposed Rules, the concept of intermediaries having control over counterparty positions, while common to the futures market, is ill adapted to the existing swaps marketplace. This responsibility may be one best carried out by a CRO, which will have the capability to ensure coordinated oversight of the trading activity on multiple SEFs and the ability to implement disciplinary action if needed.

Moreover, each SEF will lack knowledge of a market participant's activity on other venues, and that will preclude the SEF from being able to calculate a true position of one market participant. While it may appear to a SEF that the market participant violates a position limit on one SEF, the same participant may have a counter position in another SEF or may have liquidated that position on another SEF, resulting in the market participant's compliance with the aggregate position limit. Unfortunately, each SEF involved in these transactions will not know what the other SEFs are doing. They will not be able to piece together the entire series of transactions to know whether a position limit has been met or exceeded.

The WMBAA believes that the adoption of position limits by the Commission is one of many areas in which a third party regulatory service provider can more appropriately carry out some of the functions of a SEF. It will be equally difficult for a SEF to mandate that a market participant

liquidate a position, as it does not hold customer positions, is not a party to the trade, and lacks authority to require such an action.

The WMBAA seeks confirmation that the requirement to maintain position limits applies solely to SEFs that are "trading facilities" as defined by the CEA. Further, this language seems to be consistent with the requirements appendix C to part 38, related to the regulation of DCMs, which contains certain parts that may not be consistent with the operation of SEFs.

Section 37.800 – Emergency Authority

Proposed Rule Section 37.800 requires a SEF, in consultation or cooperation with the Commission, as necessary and appropriate, to adopt rules to provide for the exercise of emergency authority. Such emergency authority includes the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.

Similar to the comments related to Proposed Rule Section 37.600, with respect to the Proposed Rule's requirement that a SEF adopt rules providing for the authority to liquidate or transfer open positions in the event of an emergency, the WMBAA notes that a SEF would not have custody of a swap and, therefore, may not posses the ability to liquidate or transfer. The SEF similarly lacks any authority for post-execution activity. Therefore, WMBAA respectfully requests clarification from the Commission on the meaning of this provision of the Proposed Rule. As previously noted, rules that do not reflect a fundamental reality, such as the fact that SEFs do not maintain counterparty positions, will be impossible to fulfill and enforce despite the best efforts and good faith of both regulated and regulating parties.

Section 37.1401 – System Safeguard Requirements

Proposed Rule Section 37.1401(d) requires a SEF to maintain a business continuity-disaster recovery ("BC–DR") planning and resources plan and BC-DR resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a SEF following any disruption of its operations. Such responsibilities and obligations include, without limitation, order processing and trade matching; transmission of matched orders to a designated clearing organization for clearing, where appropriate; price reporting; market surveillance; and maintenance of a comprehensive audit trail. The Proposed Rule also indicates that SEFs determined by the Commission to be critical financial markets are subject to more stringent requirements in this regard, as set forth in Section 40.9 of the Commission's regulations. It is unclear what criteria will be used by the Commission to determine whether a SEF is a "critical financial market." Further, there is no indication of the evaluation or notification process for the SEF once designated.

The Commission should recognize, in connecting this requirement with the permitted execution methods provisions of Section 37.9, that the hybrid platforms incorporating electronic and voice elements of trade execution are best positioned to protect against a crisis caused by electronic trading platforms. The human element involved in brokering trades can prevent a "run" on trading triggered by electronic trading platforms, and only a knowledgeable broker will be able to identify and correct irregularities before a state of crisis.

VII. Conclusion

The WMBAA thanks the Commission for the opportunity to comment on the Proposed Rule. Please feel free to contact the undersigned with any questions you may have on our comments.

Sincerely,

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