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- **17 CFR Part 49**
- **RIN Number 3038-AD20**
- **Swap Data Repositories**

Dear Mr. Stawick.

Thank you for giving us the opportunity to comment on your notice of proposed rulemaking: Swap Data Repositories.

You are proposing rules to implement new statutory provisions introduced by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Section 728 of Dodd-Frank amends the Commodity Exchange Act (CEA) by adding new Section 21, which establishes the registration requirements, statutory duties, core principles and certain compliance obligations for registered swap data repositories (SDRs) and also directs the CFTC to adopt rules governing persons that are registered, as such, under this Section.

I would first comment that the proposed rules should ideally be as close as possible to the reporting rules proposed by the Securities and Exchange Commission for security-based swap data repositories.¹ I would suggest that there is little administrative or economic rationale for proposing very different rules, and rule differences lead to duplication of reporting regimes at the lowest level of the reporting entities, which is counterproductive, confusing and wasteful. I would therefore recommend that the CFTC and the SEC should work more closely together to propose one set of robust rules regarding swap data repositories. This will reduce cost and complexity, and is in itself a strong signal to the markets that regulators are seen to be working more closely together, rather than within their individual silos.

¹ SEC proposed rule, File no. S7-35-10: Security-Based Swap Data Repository Registration, Duties, and Core Principles, RIN 3235-AK79, November 2010.

I generally support the proposed rules. I agree that establishing SDRs will enhance transparency and promote standardization in the swaps market. I am less convinced that SDRs themselves will reduce systemic risk, but rather they should provide the meaningful input for reports or other data sets that could be used by prudential regulators in monitoring risk and the build up of systemic risk in the swaps market. Such reports and data sets must be standardized and use a common terminology in order to optimise this role. This is not adequately discussed in the NPRM or elsewhere. I would therefore recommend that further attention should be given to determining the data and reporting requirements that would facilitate such meaningful prudential oversight of risk and systemic risk issues. This should also tie in with the purpose of such monitoring. What will prudential regulators do with this information? How much risk is excessive? What is an acceptable level of systemic risk? What are the trigger levels, and what are the potential regulatory levers that could mitigate excessive risk and reduce systemic risk? Without such an integrated framework we are creating data systems and monitoring mechanisms for the sake of doing so. I would hope to see some positive developments here in the future, as accurate and relevant data capture and monitoring is but a first step on the road towards a globally integrated risk management framework.

Recordkeeping requirements

Proposed § 49.12 establishes the recordkeeping requirements for SDRs. I would recommend that swap data records should be required to be kept indefinitely rather than the general “termination plus five years” proposed here.² Any original documents should be scanned. There is no technological or practical reason for limiting the retention period, and it would be useful to keep this information for future analytical purposes.³ I would also strongly recommend that records required under § 49.22(g) in the context of the chief compliance officer, and under § 49.24(j) in the context of system safeguards should be required to be kept indefinitely.

Duties to monitor, screen and analyze swap data

Proposed § 49.13 requires an SDR to “monitor, screen, and analyze all swap data in its possession in such a manner as the Commission may require”. The commentary also states that: “SDRs will function not only as warehouses for all swap transaction data, but also as potential sources of regulatory information for the Commission and other appropriate regulators”.⁴ I support these broad proposals and objectives. However, § 49.13(b) is quite demanding, and requires an SDR to maintain “sufficient information technology, staff, and other resources to fulfill the requirements in this § 49.13 in a manner prescribed by the Commission”. I could envisage circumstances that would require an SDR to have available very skilled swap or business experts in order to carry out detailed analyses, and possibly

² See proposed rule § 49.12(b) “A registered swap data repository shall maintain swap data (including all historical positions) throughout the existence of the swap and for five years following final termination of the swap”. “Indefinitely” should also include archival storage.

³ These comments are similar to my comment letter on your notice of proposed rulemaking: Information Management Requirements for Derivatives Clearing Organizations, RIN 3038-AC98, CFTC, December 2010.

⁴ See NPRM, 75 FR 80907.

flag problems to management and the CFTC. I would suggest that you should provide more clarity concerning potential requirements here, in order to reasonably manage expectations regarding information technology and other resourcing requirements.

Conflicts of interest

I have commented on this in some detail before.⁵ I believe that mitigating conflicts of interest is critical to promoting transparency and market integrity. I strongly recommend that a mixture of governance requirements and control, ownership and voting limits would optimally address conflicts of interest issues in this arena. Concerning the board membership requirements and ownership and voting limits, there should be a level playing field between at least SDRs and Derivatives Clearing Organizations here. As a minimum I would recommend that you propose a clearer required "Independent Perspective"⁶ by requiring a registered SDR to have independent public directors on (i) its board of directors and (ii) any committee that has the authority to (A) act on behalf of the board of directors or (B) amend or constrain the action of the board of directors.

Chief compliance officer

Proposed § 49.22 concerns the chief compliance officer (CCO) role. I fully support the intent of the proposed regulations here. The CCO role is the single most important compliance role in an SDR and it is critical that its job description, the rules and the SDR's structures and procedures, act to secure and maintain the CCO's independence. For example the CCO should have a single compliance role and no other competing role or responsibility that could create conflicts of interest or threaten its independence, and therefore I would suggest that you should promulgate rules that restrict the CCO from serving as the General Counsel or other attorney within the legal department of the SDR. Furthermore the remuneration of the CCO must be specifically designed in such a way that avoids potential conflicts of interest with its compliance role.

Given the pressures that bear on the CCO with regard to managing conflicts of interest and maintaining independence, I would strongly recommend one specific change to the proposed rules. I would recommend that you amend the wording under § 49.22(c) such that the authority and sole responsibility to appoint or remove the CCO, or to materially change its duties and responsibilities, only vests with the independent public directors or "Independent Perspective" and not the full board. This would help to ensure the independence of the CCO within the SDR, and would possibly mitigate the need for you to promulgate additional measures that could be required to adequately protect CCOs from undue influence or coercion in the performance of their duties.⁷

⁵ Please see my comment letter on your notice of proposed rulemaking: Requirements for Derivatives Clearing Organisations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, RIN 3038-AD01, CFTC, October 2010.

⁶ Defined under § 49.2(a)(15). There is an incorrect reference to § 49.2(a)(14) under the proposed rule § 49.20(b)(2)(v).

⁷ These comments are similar to my comment letter on your notice of proposed rulemaking: General Regulations and Derivatives Clearing Organizations, RIN 3038-AC98, CFTC, December 2010.

Financial resources

Proposed § 49.25 establishes financial resources requirements for SDRs. I support the requirement that an SDR must maintain financial resources exceeding the total amount that would cover its operating costs for a 1-year rolling period. I would also recommend that an SDR should calculate and regularly publish its Solvency Ratio, which is:

Solvency Ratio = [Available Financial Resources / Financial Resources Requirements].

The CFTC should be immediately notified when the Solvency Ratio falls below 105%.

Access and fees

Proposed § 49.27 requires fair, open and equal access to an SDR. § 49.27(b) further requires an SDR to levy charges in an equitable and non-discriminatory manner. I strongly support these requirements. The only reason for charging different charge / fee structures would relate to differing costs of providing access or service to particular categories. Anything else would be discrimination⁸ by definition. I also agree with the commentary that: "Any preferential pricing such as volume discounts or reductions would not be generally viewed as equitable".⁹ Such volume discounts and reductions tend to discriminate in favour of large players, and a small number of large players dominate the swaps market anyway.

I would additionally suggest re: § 49.27(b)(2) that full disclosure should be required here, including all explicit and implicit charges and fees. This would formalise the market practice and ensure that informed decisions were being made.

Summary

I generally support the proposed rules, which will establish sufficient business conduct and compliance standards for swap data repositories. I have recommended some changes, the most important of which concern conflicts of interest and the role of the chief compliance officer. I believe that strengthening these areas will help you to meet your objectives of enhancing transparency and promoting standardization in the swaps market.

Yours sincerely

Chris Barnard

⁸ E.g. hidden and unfair cross-subsidy or other anticompetitive measure.

⁹ See NPRM, 75 FR 80921.