June 3, 2011

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

Re: Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act;

RIN 3038-AD19 – Swap Data Recordkeeping and Reporting Requirements

Dear Mr. Stawick:

The Committee on the Investment of Employee Benefit Assets ("CIEBA") appreciates this opportunity to provide further comments to the Commodity Futures Trading Commission (the "CFTC" or "Commission") regarding the CFTC's proposed rulemaking entitled "Swap Data Recordkeeping and Reporting Requirements" (the "Proposed Rules") under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the Commodity Exchange Act ("CEA").

CIEBA represents more than 100 of the country's largest pension funds. Its members manage more than $1 trillion of defined benefit and defined contribution plan assets on behalf of 15 million plan participants and beneficiaries. CIEBA members are the senior corporate financial officers who manage and administer corporate retirement plan assets governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). CIEBA's recent annual survey of members showed an increased emphasis on managing and reducing plan risks and a corresponding increase in usage of swaps to address those risks.

Swaps play a critical role for our members' plans. Many plans regulated by ERISA use swaps to hedge or mitigate the risks endemic to plan liabilities and investments. These plans conduct swap transactions through fiduciaries that are subject to stringent regulation under ERISA such as a duty to act solely in the interests of the

plan's participants. Consistent with ERISA, we are sure the Commission will want to avoid any possibility that the recordkeeping or reporting requirements of swaps, directly or indirectly, would adversely affect an ERISA fiduciary's ability to obtain the best possible swap terms for plan participants.

If swap trading becomes materially less available to plans, millions of Americans' retirement security would be detrimentally affected. Moreover, funding volatility could increase substantially, undermining participants' retirement security and forcing companies in the aggregate to needlessly reserve billions of additional dollars to satisfy possible funding obligations. Those greater reserves would vastly diminish working capital that would otherwise be available to companies to create new jobs and for other business activities that promote economic growth.

DEVELOPMENTS & INTERACTION OF THE COMMISSION'S PROPOSALS

Since February 7 when CIEBA last filed comments on the Proposed Rules ("Prior Comment Letter"), industry developments have occurred that concern ERISA plans. These developments heighten the prospect of negative consequences to ERISA plans if the Commission's proposals are implemented as proposed.

On March 31, the "G14" Dealers and a few others (collectively, the "Signatories") submitted a letter ("Commitment Letter") to the Federal Reserve Bank of New York ("NY Fed") that makes "industry" commitments regarding the processing of derivatives trades. Confusingly, these commitments were made to the NY Fed at the same time as the CFTC had proposed regulations governing much of the subject matter of the Commitment Letter.

On May 11, ISDA announced that it selected a single swap data repository ("SDR") for interest rate swaps ("IRS").[1]

SUMMARY OF FURTHER COMMENTS

Unless the CFTC clarifies that the commitments in the Commitment Letter initiated by the NY Fed several years ago may not be imposed by swap dealers on entities not regulated by the NY Fed, such commitments will likely be used to bind and regulate the entire universe of swap counterparties that trade with these swap dealers, to the detriment of buy-side participants. Notwithstanding the Commitment Letter, a plan should have the right to determine, when entering into a swap with an SD or MSP, whether an uncleared swap will be confirmed electronically or manually. *See* Prior Comment Letter at 14-15.

[1] http://www2.isda.org/news/isda-announces-interest-rate-derivatives-trade-repository-selection

If the plan chooses an electronic confirmation, the plan should have the right to select which electronic confirmation platform will be used. *See* Further Comment Letter at 4-5; *See* Prior Comment Letter at 12-13.

The CFTC should require that electronic confirmation and matching service providers must register as swap data repositories and expressly prohibit SDRs or other service providers from changing the terms of a validly executed swap. *See* Prior Comment Letter at 13-14. The CFTC should permit plans and other non-SD/MSP counterparties to designate the SDR to which the swaps they enter into with SD/MSP counterparties are reported. *See* Prior Comment Letter at 12-13. Lastly, plans should only be required to retain final executed trade confirmations for five years after the final termination of a particular swap.

SUMMARY OF PRIOR COMMENT LETTER

We remain concerned about, and resubmit all prior comments on, this Proposed Rule by reference to our Prior Comment Letter. The following summarizes those comments in our Prior Comment Letter which are not discussed further below, a summary of which is provided below.

- A plan should never be the reporting counterparty for swaps it enters into with a SD or MSP counterparty. P. 10-11.
- All terms of a swap with economic consequences should be agreed upon prior to, or at the time of, execution of that swap. P. 11.
- The definition of confirmation is appropriately broad and includes the master agreement. P. 11.
- The terms of the master agreement must govern to the extent specified in the terms of the master agreement. P. 12.
- Master agreements should be reported to a separate library at the SDR. P. 12.
- The Commission should adopt an unique counterparty identifier system that is flexible enough for non-pro-rata pension trusts to identify the relevant sub-component pool on whose behalf a trade is done (*e.g.*, by issuing UCIs for particular legal entities and permitting such entities to identify individual sub-components with hyphenated numerical identifiers for every non-legal entity on whose behalf such entity trades). Separate Letter filed by CIEBA on Proposed Rules.

FURTHER COMMENTS

The CFTC Should Establish by Regulation That Counterparties to SDs/MSPs Have the Right:

1) ***To Determine Whether or Not to Confirm Their Uncleared Swaps Electronically; and***

2) ***If they Choose to Confirm Electronically, to Choose Which Electronic Confirmation Platform Will Be Used.***

It is essential that plans have the right to decide when entering into a swap with a SD or MSP whether the primary economic terms for that swap should be verified electronically or non-electronically and whether an uncleared swap is confirmed electronically or manually. *See* Prior Comment Letter at 14-15. We support the CFTC's proposals which contemplate that confirmations may be processed manually. *See* Proposed Rules 45.1(b), 23.200(k), 23.500(c), and 43.2(g), each providing that "[a] confirmation must be in writing *(whether electronic or otherwise)*."[2] We also support the CFTC's proposals which contemplate that parties to certain swaps may verify primary economic terms of those swaps manually. *See* Proposed Rules 45.3(a)(1)(i)(C), 45.3(a)(1)(ii)(B), 45.3(a)(2)(i)(C), and 45.3(a)(2)(ii)(B) (each requiring that certain primary economic terms data for certain swaps be reported no later than "24 hours after execution of the swap *if neither execution nor verification of primary economic terms occurs electronically*").[3]

The Commitment Letter commits to processing on electronic platforms 75% of electronically eligible confirmation events for interest rate swaps entered into with non-G14 Members. Commitment Letter at 11. The swap dealer Signatories commit to match all but 5% of electronically eligible confirmations on an electronic platform within 4 days of execution. Commitment Letter at 10. To deliver on these commitments, the majority of swaps, including swaps entered into between the Signatories and their swap counterparties (who are not Signatories), would need to be processed and matched electronically. This commitment effectively negates the ability of market participants to elect to confirm and verify a swap's terms manually.[4] **To ensure that ERISA plans may choose whether an uncleared swap will be confirmed manually or electronically, we request that the Commission adopt a rule that grants non SD/MSP counterparties to SDs/MSPs this explicit right to choose. The CFTC should also adopt a rule which**

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[2] Similarly, Proposed Rules 45.3(a)(1)(ii)(C) and (iv) would require that confirmation data for certain swaps be reported no later than "24 hours after confirmation of the swap *if confirmation was done manually rather than electronically*."

[3] *See also* Proposed Rule 45.3(a)(1)(iii), 45.3(a)(2)(iii), and 45.3(a)(2)(iv) (each requiring that certain primary economic terms data for certain swaps be reported no later than "24 hours after execution of the swap *if verification of primary economic terms does not occur electronically*").

[4] Signatories claim that because they submitted a letter to regulators containing commitments that such commitments are "regulatory" obligations of the swap dealers which they must comply with in order to trade with ERISA plan counterparties and that their ERISA plan counterparties must accept terms and/or processes resulting from such commitments even if the plan fiduciary believes it is not in the best interest of the plan.

grants non SD/MSP counterparties to SDs/MSPs with the explicit right to choose a particular confirmation platform for any swap for which a non SD/MSP counterparty chooses to confirm electronically.

Unless the CFTC clarifies that commitments in the Commitment Letter may not be imposed by swap dealers on entities not regulated by the NY Fed, such commitments will likely be used to bind and regulate the entire universe of swap counterparties that trade with these swap dealers, to the detriment of buy-side participants.

CIEBA, along with the American Benefits Council, wrote a letter to the NY Fed expressing the concern that the Commitment Letter will be used to bind the buy-side. The NY Fed responded to CIEBA's letter and stated that the commitments made in the Commitment Letter are not binding on non-signatories; and we greatly appreciate the NY Fed's response and position on this issue. We continue to be concerned however, that swap dealers can claim that their obligations are "regulatory" obligations restricting their ability to trade with any counterparty which does not adhere to such commitment.

Although CIEBA sought to get clarification from the NY Fed on this particular issue, the NY Fed's letter to CIEBA did not address the important issue as to whether dealers will be viewed "in violation" of a "regulatory" obligation or subject to negative regulatory consequences if they transact swaps with non-signatory counterparties without adhering to the obligations set forth in the Commitment Letter. Without sufficient clarification, the requirements of the Commitment Letter may be used to bind and regulate the entire universe of swap counterparties that trade with these swap dealers, to the detriment of buy-side market participants. Congress did not intend this nor would such private "regulation" be consistent with U.S. law (e.g., the Administrative Procedures Act).

Congress correctly granted exclusive jurisdiction for swap regulations to the CFTC, which has the power to consider the interest of all market participants (and granted jurisdiction for security-based swap regulations to the SEC). We urge the CFTC to protect market users against swap dealers' claims that such "commitments" are regulatory obligations of the swap dealers that market users must accept. The CFTC's reference to the Commitment Letter process in its release for the proposed rule raises the question of how the CFTC views the commitments of swap dealers in the Commitment Letter and whether the CFTC intends to permit dealers to claim that these commitments are "regulatory" obligations. Accordingly, we believe that market users would greatly benefit from a clarifying statement by the CFTC in its preamble to the final rules.

Electronic Confirmation and Matching Service Providers Should be Registered As SDRs and Such Service Providers Must Not Be Permitted to Change the Terms of a Validly Executed Swap Confirmed or Verified on Their Platforms.

The Commitment Letter's commitment to electronic confirmation and verification is especially disconcerting given that currently there is only one electronic confirmation platform and it is strongly influenced, if not controlled, by dealers. To use this platform,

a market participant must agree to the terms in the platform's user agreement and operating procedures. These operating procedures provide that the terms of a swap which a market participant and its counterparty negotiate and agree upon may be overridden by the terms set forth in the platform's user agreement and operating procedures. The platform further reserves the right to change the terms in its operating procedures at any time. Importantly, this platform has in the recent past changed its operating procedures at the request of a dealer led trade group to change the terms of trades confirmed on such platform.

A requirement that market participants confirm their swaps through this platform would effectively mandate that participants consent to any swap terms that the platform unilaterally includes within its user agreement and operating procedures, even when these terms conflict with the terms of validly executed swaps. The CFTC has raised similar concerns that SDRs should not be in a position to alter, amend or invalidate valid swaps; the CFTC has proposed Rule 49.10(c) to prevent the terms of validly executed swaps from being invalidated or modified by the confirmation or recording process of SDRs.

Electronic confirmation or matching service providers fall within the statutory definition of an SDR and thus must register, and be regulated, as SDRs. *See Prior Comment Letter at 13-14.* **We ask that the Commission confirm in its final rulemaking that electronic confirmation or matching service providers must register as SDRs. Alternatively, we request that the CFTC extend the application of Proposed Rule 49.10(c) to prohibit an SDR from using an electronic confirmation or matching service provider which may modify or invalidate swap terms reported to it.**

The Commission Should Establish By Regulation that Non-SD/MSP counterparties to SDs/MSPs Have the Right to Choose the SDR to Which They Will Report Their Trades.

Under Dodd-Frank, Congress charges the CFTC with the obligation to register any swap data repository ("SDR") applicant who meets the CFTC's criteria. *See* Dodd-Frank Section 728, adding new CEA Section 21. We support the CFTC's Proposed Rule 45.7(b), which preserves the ability of an end user to choose the SDR to which all terms of a particular swap would be reported. *See* Prior Comment Letter at 12-13. The presence of multiple SDRs for a particular asset class and competition between SDRs will promote innovation, from which the marketplace will benefit.

The Commitment Letter calls for a single SDR per asset class and the Signatories commit to providing implementation plans for the SDR for each asset class. Commitment Letter at 21-23. Similarly, ISDA recently announced it has partnered with a single SDR for interest rate swaps ("IRS") and will work with that SDR to promote the development of this IRS SDR.

Absent an explicit right of plans to select the SDR, we expect these developments will hurt plans and other buy-side swap participants not involved in the ISDA selection process. Plans' SD counterparties are likely to select the ISDA-endorsed SDR and this

SDR will likely make operational and other determinations that serve the financial interests of swap dealers active in ISDA to the detriment of plan and other buy-side interests. It is essential that plans be able to choose reporting services best suited to, and most cost effective for, plans (or at the very least, those that do not have a conflict of interest with respect to the plans). Accordingly, we ask that the CFTC adopt the following rule to supplement Proposed Rule 45.7(b):

> **"Where a non-SD/MSP counterparty is not the reporting counterparty pursuant to Section 45.5 and the counterparty to the non-SD/MSP is a swap dealer or a major swap participant, the non-SD/MSP counterparty shall select a single SDR to which the reporting counterparty shall report all required primary economic terms data."**

Non-SD/MSP counterparties to SDs/MSPs Should Only Be Required to Keep the Final Executed Trade Confirmations (which includes the Final Executed Swap Agreements) For Five Years Following the Final Termination of the Particular Swap.

Proposed Rule 45.2(b) would require an ERISA plan that enters into swaps to "keep full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty, including all required swap creation data and all required swap continuation data ***that they are required to report*** pursuant to this Part 45, and including all records demonstrating that they are entitled, with respect to any swap, to the end user exception pursuant to Section 2(h)(7)."

The CFTC correctly recognizes the "policy choice made by Congress in Dodd-Frank to place lesser burdens on non-SD/MSP counterparties to swaps, where this can be done without damage to the fundamental systemic risk mitigation, transparency, standardization, and market integrity purposes of the legislation." Proposed Rules at 76,579. Consistent with this policy choice, we ask that the CFTC confirm our understanding that Proposed Rule 45.2(b) is not intended to impose unnecessary requirements on non-SD/MSP counterparties. Specifically, we ask that the CFTC confirm that the records, pertinent data, and memoranda an end user must keep relating to its swap under Proposed Rule 45.2(b) (i) would be far less extensive than the records, pertinent data, and memoranda that a SD or MSP must keep regarding all of its swaps activities and all activities relating to its business as a SD or MSP under Proposed Rules 45.2(a) and 23.201, and (ii) is not intended to include any of the items enumerated in Proposed Rule 23.201 that are not listed in Proposed Rule 45.2(b) (*e.g.*, journals, ledgers, risk disclosure documents, internal and external audit, risk management, compliance, and consultant reports). **We believe the non-SD/MSP counterparty should only be required to retain the final executed trade Confirmation with respect to swap entered into with *any* SDs or MSPs which, by the proposed definition of Confirmation in 45.1(b), includes the final executed swap agreements and memorializes "all terms of a swap" (including all required swap creation data and all required swap continuation data as required by Proposed Rule 45.2(b)).**

We appreciate the opportunity to comment in response to the CFTC's request for comments concerning the appropriate length of the required post-termination retention period for swap recordkeeping. Proposed Rules at 76,579, note 34. We support the Commission's proposed requirement in Proposed Rule 45.2(c) that records be kept for at least five years after the final termination of the swap. This is consistent with CFTC Rule 1.31(a)(1) (books and records requirement applicable to futures and options contracts) and plans' recordkeeping requirements under ERISA. Extending this retention period to ten years after the final termination of the swap, however, would go beyond that required by CFTC Rule 1.31(a)(1) and by ERISA and would impose unnecessary burdens on ERISA plans. Proposed Rules at 76,580. **Accordingly, we urge the CFTC to adopt Proposed Rule 45.2(c), as proposed.**

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We thank the CFTC for the opportunity to comment on the proposed rules on the swap data recordkeeping and reporting requirements.

Committee on the Investment of Employee Benefit Assets