



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-AD20 – Swap Data Repositories

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 Repositories” (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 reporting of swaps to swap data repositories (“SDRs”),

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 22 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 (which Congress did not grant jurisdiction to regulate swaps) at the same time as the CFTC (the regulator which did have jurisdiction) had proposed regulations governing much of the subject matter of the Commitment Letter.

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

SUMMARY OF FURTHER COMMENTS

The Commission should state explicitly that it will register *any* qualified applicant as an SDR. The CFTC should require that electronic confirmation and matching service providers must register as SDRs. *See* Prior Comment Letter at 2-3. Plans support proposed rule 49.10(c) (which requires a registered SDR to "establish policies and procedures reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the confirmation or recording process of the swap data repository"). This rule should apply to any third parties that an SDR may use in fulfilling the SDR's duties. *See* Prior Comment Letter at 3-4. Finally, 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.

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

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, a summary of which is provided below.

- Multiple SDRs should be allowed to accept the data for any particular kind of swap for reporting. P. 7.
- A SDR should provide open access to all market participants. Any third service providers used by the SDR should also be required to provide open access to all market participants. P. 4-5.
- Both counterparties to a swap should be able to access data reported to a SDR on that swap. P. 5-7.

FURTHER COMMENTS

The Commission should confirm its intent to register any qualified applicants as SDRs. The CFTC 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 charged 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. The CFTC correctly contemplated multiple SDRs would exist for a particular asset class in Proposed Rule 45.7(b) (preserving the ability of an end user to choose the SDR to which all terms of a particular swap would be reported). *See* CIEBA's February 7 letter to the CFTC on the Swap Data Recordkeeping and Reporting Requirements at p. 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.

We request that the CFTC provide in the preamble to its final rules an explicit statement that the Commission will register *any* qualified applicant as an SDR. Absent such an explicit statement, we believe that potential competitors to the ISDA-endorsed SDR would be less likely to pursue registration as a SDR if there is any doubt whether the CFTC intends to register any qualified applicant, as Congress intended. A lack of competition between SDRs and a lack of options when selecting an SDR for a particular asset class will hurt plans and other buy-side swaps participants not involved in the ISDA selection process.

We have also commented in response to the Commission's proposed Swap Data Recordkeeping and Reporting Requirements that it will be essential that the CFTC provide plans with an explicit right to select the SDR. Without this explicit right, plans' SD counterparties are likely to insist upon using the ISDA-endorsed SDR and this SDR will likely make operational and other determinations 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.

Any centralized recordkeeping facility for swaps, including any electronic swap confirmation or matching service provider, must register, and be regulated, as a SDR.

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.

We have commented in response to the Commission's proposed Swap Data Recordkeeping and Reporting Requirements that it is even more essential in light of the Commitment Letter that the CFTC adopt a rule providing plans with the explicit right to choose, when entering into a swap with an SD or MSP, whether the primary economic terms for that swap should be verified electronically or non-electronically and whether an uncleared swap should be confirmed electronically or manually. We have also requested that the CFTC adopt a rule which 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. We also asked the CFTC to provide a clarifying statement that the commitments made by swap dealers in the Commitment Letters are not "regulatory" obligations and cannot be imposed on the swap dealers' counterparties. *See* CIEBA's June 3 letter to the CFTC on the Swap Data Recordkeeping and Reporting Requirements at 5.

While the CFTC's affirmative response to our asks in the June 3 letter on the Swap Data Recordkeeping and Reporting Requirements will help to protect plans, it is also essential to the protection of plans that electronic confirmation and matching service providers be regulated as SDRs. As noted in our prior letter, 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 2-3.* This layer of protection would better enable plans to elect that their swap terms be verified and confirmed electronically as discussed in the following section.

Electronic Confirmation or Matching Service Providers Should Be Prohibited by CFTC Regulation from Changing 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 correctly raised similar concerns that SDRs should not be in a position to alter, amend or invalidate valid swaps; the CFTC rightly 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. So long as the CFTC requires electronic confirmation or matching service providers to register as SDRs, Proposed Rule 49.10(c) would appropriately prevent electronic confirmation or matching service providers from invalidating or modifying the terms of validly executed swaps. However, in the alternative, **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.**

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We thank the CFTC for the opportunity to comment on the proposed rules on the swap data repository requirements.

Committee on the Investment of Employee Benefit Assets