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June 3, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
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: FR Doc. 2011–10884
Core Principles and Other Requirements for Swap Execution Facilities – RIN 3038-AD18
General Regulations and Derivatives Clearing Organizations – RIN 3038–AC98

Dear Mr. Stawick:

MarkitSERV[1] is pleased to have the opportunity to submit the following comments to the Commodity Futures Trading Commission (the "***CFTC***" or the "***Commission***") regarding harmonization of CFTC and Securities and Exchange Commission ("***SEC***") rules related to clearing organizations and certain post-trade services proposed pursuant to certain requirements included in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "***DFA***").[2]

Introduction

MarkitSERV views its role in the global derivatives markets as an independent facilitator, making it easier for derivatives market participants to interact with each other. To achieve this goal, MarkitSERV provides trade processing, confirmation, matching and reconciliation services for swaps and security-based swaps across regions and asset classes, as well as universal middleware connectivity for downstream processing such as clearing and reporting. With over 2,000 firms currently using the MarkitSERV platform, including over 21,000 buy-side fund entities, its legal, operational, and technological infrastructure plays an important role in supporting the swap markets in the United States and globally.

As a service and infrastructure provider to the domestic and international swaps markets, MarkitSERV supports the objectives of the DFA, and the Commission's objectives of increasing transparency and efficiency in these markets and of reducing both systemic and counterparty risk.

Executive Summary

MarkitSERV provides these comments to the Commission primarily in response to a rule proposed by the SEC. In its rule on Clearing Agency Standards for Operation and Governance (the "***SEC Rule***"),[3] the SEC has proposed to require certain providers of post-trade services, including certain providers of confirmation services, to register with the SEC as Clearing Agencies. The CFTC, on the other hand, has made no similar proposal. We believe that regulating these entities in the SEC-regulated market but not in the CFTC-regulated market

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

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

[3] Clearing Agency Standards for Operation and Governance, 76 Fed. Reg. 14472 (published March 16, 2011).

would have detrimental market effects, would create unnecessarily inconsistent regulations and would result in regulatory gaps in the regulations mandated by the DFA. An important market function, such as providing confirmation services, should be subject to a robust, uniform and pervasive regulatory regime in the U.S. to ensure the safety, resiliency, and efficiency of the U.S. derivatives markets. We therefore believe that the Commission should also regulate facilities that perform the confirmation and processing of swaps (collectively "***Independent Verification Services***" or "***IVS***"). The Commission can carry out such regulation either by establishing a new kind of regulated and registered IVS entity or by recognizing and regulating IVSs as a sub-category of swap execution facilities ("***SEFs***"), derivatives clearing organizations ("***DCOs***"), or swap data repositories ("***SDRs***").

If the SEC or the CFTC decide to require IVSs to register, these entities should only be subject to regulations that are relevant to the types of activities they engage in and the types of risks they potentially pose. Because IVSs do not perform clearing and trading and execution services, consistently with the SEC proposal, regulated categories of IVSs should neither qualify for the fulfillment of clearing nor trading and execution services. Also, *all* IVSs that provide competing services, regardless of whether they employ "matching" or "affirmation" techniques or whether their activity results in a legally binding contract or not, should be required to register. Any difference in regulation between the various providers would create a significant restraint on competition and should therefore be avoided. We have already provided our written comments to the SEC on this matter.[4]

Comments

1. Introduction and Background on the SEC Rule

We define Independent Verification Service providers as "entities that act independently from and on behalf of both counterparties of a swap to facilitate the agreement of a verified record of the complete transaction details that is used for subsequent processing."

IVSs include providers of several types of post-trade processing services, including providers of affirmations, confirmations, and matching services. There are certain distinctions between these services, and different definitions have been assigned to each of these services over time,[5] but in general, they all enable counterparties to reach an agreement on the complete set of transaction details. Moreover, all of these services can be accomplished through several combinations of interactions between counterparties alone or counterparties and intermediaries.

Under currently proposed rules, certain IVSs will be highly regulated by the SEC but will not be regulated at all by the CFTC. The SEC Rule states that the SEC "preliminarily believes that entities providing . . . trade 'matching services' with respect to security-based swaps would meet the definition of a Clearing Agency."[6] The SEC Rule defines the term "matching service" as the "process whereby an intermediary compares each market participant's trade data regarding the terms and settlement of securities transactions, in order to reduce the number of settlements of securities transactions, or to allocate securities settlement responsibilities."[7] Pursuant to a DFA requirement, then, the SEC Rule would require all trade matching providers to register with

[4] *See* MarkitSERV Letter to the SEC (April 29, 2011) (regarding the Clearing Agency Standards for Operation and Governance rule).

[5] *Compare* Confirmation and Affirmation of Securities Trades; Matching (Exchange Act Release No. 39829), 63 Fed. Reg. 17943, 17943 (April 13, 1998) (File No. S7–10–98) (explaining the process of confirmation and affirmation as "the transmission of messages among broker-dealers, institutional investors, and custodian banks," with confirmation being the first step and affirmation being the second step), *with* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81519, 81530 (published Dec. 28, 2010) (explaining the process of acknowledgment and confirmation as being between swap counterparties, and defining "confirmation" as the second step in the process, which consummates legally binding documentation).

[6] SEC Release: Clearing Agency Standards for Operation and Governance, 76 Fed. Reg. 14472, 14495 (published March 16, 2011).

[7] *Id.* at 14495.

the SEC.[8] Additionally, the SEC Rule would require all Clearing Agencies, including providers of trade matching services, to comply with a large number of regulations that are directed toward traditional Clearing Agencies, or CCPs.[9]

The SEC bases its decision to regulate trade matching service providers on a pre-DFA provision of the Securities Exchange Act of 1934 (the "***Exchange Act***") which defines Clearing Agencies broadly to include, in addition to providers of CCP services, also entities that operate "facilities for the *comparison of data* regarding the terms of settlement of transactions."[10] Based on this provision of the Exchange Act, the SEC stated in an earlier release (the "***Matching Release***") that it "is of the view that matching constitutes a Clearing Agency function within the meaning of the Clearing Agency definition under Section 3(a)(23) of the Exchange Act."[11] The Matching Release, of course, pertained to matching services for debt and equity securities, and not security-based swaps ("***SB swaps***").

While we question the applicability of the Exchange Act's definition of Clearing Agency to providers of confirmation and affirmation services like MarkitSERV, or IVSs in general,[12] we appreciate the SEC's statutory duty to regulate entities that provide facilities for the comparison of data. Further, we are supportive of the desire to ensure that there are no regulatory gaps, and that every significant element of the market infrastructure is appropriately regulated. However, we strongly believe that, if any providers of independent verification services are to be regulated by the SEC, the CFTC should ensure that providers of similar services are treated similarly in the CFTC-regulated market. Below we describe how we believe these regulations can be practically implemented to satisfy all statutory requirements while at the same time maximizing market efficiency.

2. The CFTC Should Also Require IVSs to Register in Order to Harmonize its Rules with the SEC's Rules

The SEC's requirement for providers of confirmation services to register as Clearing Agencies finds no parallel in the Commission's regulations. We acknowledge that the CEA differs from the Exchange Act in that the CEA does not seem to include a reference to the comparison of data in the definition of a "derivatives clearing organization" ("***DCO***").[13] However, we believe that the Commission has wide latitude under the DFA and the

[8] *See* DFA § 763(b) (adding subparagraph (g) to Section 17A of the Exchange Act) ("It shall be unlawful for a clearing agency, unless registered with the Commission . . . to perform the functions of a clearing agency. . . .").

[9] *See* Clearing Agency Standards for Operation and Governance, 76 Fed. Reg. at 14474-75.

[10] Exchange Act § 3(a)(23)(A) (emphasis added). Note that the statutory language makes no distinction between matching and affirmation services, nor does it reference any degree of legal certainty that must result from this "comparison of data" in order for an entity to fall into the definition of a Clearing Agency.

[11] Confirmation and Affirmation of Securities Trades; Matching (Exchange Act Release No. 39829), 63 Fed. Reg. 17943, 17943 (April 13, 1998) (File No. S7–10–98).

[12] The definition of "Clearing Agency" was added to the Exchange Act in 1975 by the Securities Acts Amendments of 1975, and, even at that time, included "any person . . . who provides facilities for comparison of data respecting the terms of settlement of securities transactions." *See* Pub, L. 94-29, 89 Stat. 97. We believe that the "comparison of data" intended to be captured under the 1975 amendment was different than the high-speed, computer-based verification services which the SEC proposes to include as Clearing Agencies. *See also* Matching Release, 63 Fed. Reg. at 17946 ("When the 1975 Amendments were enacted, the processing of institutional trades was carried out directly between the broker-dealer and the institution with little or no automation. The SROs' rules requiring the use of electronic confirmation and affirmation of institutional trades were adopted in response to the increased complexity of institutional trades and the need to automate the process.").

[13] *See* CEA §1(a)(15) ("(A) IN GENERAL.—The term "derivatives clearing organization" means a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization that, with respect to an agreement, contract, or transaction (1) enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties; (2) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the derivatives clearing organization; or (3) otherwise provides clearing services or arrangements that mutualize or transfer among participants in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the participants. (B) EXCLUSIONS.—The term "derivatives clearing organization" does not include an entity, facility, system, or organization solely because it arranges or

CEA to regulate IVSs and to require IVSs, which include providers of trade matching services, to register with the Commission. Under that authority, the Commission could require IVSs to register as a special sub-category of either an SDR, a SEF, or a DCO, notwithstanding the absence of clear reference to IVSs or their functions in the definition of an SDR, a SEF, or a DCO. Moreover, we believe that the Commission must do so in order to avoid detrimental market effects and unnecessarily inconsistent regulations. Any rules implemented to effect this "catch all" registration category should take into account specific characteristics of services provided and functions performed by IVSs as well as the likely ways in which the markets may develop in the future.

i. The Commission should require IVSs to register for practical reasons

We urge the Commission to harmonize its rules with the SEC because regulating post-trade service providers heavily in the SEC-regulated market but not in the CFTC-regulated market will likely create an unlevel playing field between competing providers of these services in the two markets. As a result, the differing regulations could unintentionally discourage the provision of these services for SB swaps compared to swaps. We are concerned that IVSs will be drawn to the unregulated market not only because of the lower cost of participation but because of the freedom associated with being an unregulated entity. As a result, competition for matching and verification services in the SEC-regulated market may be greatly damaged.

Moreover, there is no logical reason for a large disparity in treatment of these entities because the performance of these services in the SEC- and CFTC-regulated markets will be nearly identical. As a result, regulating these services under the SEC but not under the CFTC would be a stark rejection of the recent Executive Order regarding Improving Regulation and Regulatory Review. In that order, the President stated that "[s]ome sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping," and therefore requires that, "[i]n developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote . . . coordination, simplification, and harmonization."[14] Regulating IVSs under the SEC but not under the CFTC is just the kind of inconsistent regulatory requirements proscribed by this Order, so we strongly urge the Commission and the SEC to harmonize their rules.

ii. The Commission has the authority to require IVSs to register

We believe that the Commission has the authority to require IVS to register in several different ways. First, the Commission could require IVS to register as a new type of regulated entity (*i.e.*, "IVS") or could create a special sub-category for SDRs, SEFs, or DCOs under the general jurisdiction which the DFA provides over swaps. DFA Section 722 amends CEA Section 2(a)(1) to provide the Commission with jurisdiction over "transactions *involving* swaps. . . ."[15] This language does not limit the Commission's jurisdiction to actual swap transactions, but broadly permits the Commission to regulate transactions related to swaps as well. Confirmations, affirmations, and matching services are all processing activities related to swaps, so we believe that the Commission can regulate those activities through a regulated entity – such as an IVS.

Second, the Commission could require IVSs to register as a special sub-category of SDRs under the Commission's statutory authority over SDRs. DFA Section 728, adding CEA Section 21(c)(2), requires SDRs to "confirm with both counterparties to the swap the accuracy of the data that was submitted."[16] IVSs provide

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provides for—**(i)** settlement, netting, or novation of obligations resulting from agreements, contracts, or transactions, on a bilateral basis and without a central counterparty; **(ii)** settlement or netting of cash payments through an interbank payment system; or **(iii)** settlement, netting, or novation of obligations resulting from a sale of a commodity in a transaction in the spot market for the commodity.").

[14] Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, 3822 (published January 21, 2011).

[15] *See* DFA § 722 (amending CEA Section 2(a)(1)(A)) (emphasis added).

[16] DFA § 728 (adding CEA Section 21(c)(2)).

exactly this type of service by acting as an intermediary that allows the parties to confirm the accuracy of transaction data. Therefore, we believe that the activities of IVSs could fall within the purview of the DFA's definition of an SDR. Moreover, we note that nothing in the definition of an SDR requires SDRs to disseminate information; instead, the DFA only limits SDRs to entities that collect and maintain information or records for centralized recordkeeping.[17] As a registered sub-category of an SDR, an IVS should be subject to only rules of the SDR that are applicable to the IVS-specific functionalities.

Finally, the Commission could require IVSs to register as a sub-category of SEFs because IVSs provide trade processing. DFA Section 733, adding CEA Section 5h(a), requires all entities that provide trade processing facilities to register as SEFs.[18] We believe that the term "processing" is broad enough to capture the activities of all IVSs, and that the Commission can therefore require IVSs to register as a sub-category of SEFs that do not perform multiple-to-multiple "execution and trading" functions for the purposes of the clearing requirement. The Commission could implement this registration requirement without materially revising its rulemakings regarding SEFs by issuing a separate rulemaking specifically applicable to IVSs, similar to the SEC's Matching Release.[19]

For the avoidance of doubt, we are not suggesting that IVSs should be able to perform the reporting or dissemination functions of SDRs, the regulatory-mandated clearing functions of DCOs, or the trading and execution functions of SEFs. Nor are we suggesting that market participants should be able to meet any such obligations merely by using an IVS. Instead, we believe that the Commission can require IVSs performing the limited role of providing independent verification services to register as a special regulated subset of SDRs, DCOs, or SEFs to allow the Commission to supervise these markets.

Importantly, if the Commission were to require IVSs to register as SEFs or DCOs, we note that new CEA Sections 5h(g) and 5b(h) permit the CFTC to exempt SEFs and DCOs from registration if those entities are subject to comparable, comprehensive supervision and regulation by the SEC.[20] Likewise, new Exchange Act Section 17A(k) permits the SEC to exempt Clearing Agencies from registration if those entities are subject to similar regulation by the CFTC.[21] We believe that, in order to maximize incentives for market participants to provide post-trade services, the Commission and the SEC should adopt rules permitting IVSs to satisfy the registration requirements of both Commissions by registering with one (provided that both Commissions will retain their applicable jurisdiction over a registered entity).

3. Regulation of IVSs Should Be Custom-Tailored to Their Functionalities as a Sub-Category of SEFs, SDRs, or DCOs

Assuming that the Commission agrees that IVSs should be required to register and should be subject to regulation, we believe that the regulations applicable to IVSs should be limited in scope and custom-tailored to their specific functionalities in order to be relevant to the activities that they perform.

Although some functionalities of IVSs are similar to those performed by SEFs, SDRs, DCOs and Clearing Agencies, other IVSs' integral functionalities are fundamentally different and therefore warrant a different regulatory structure. In particular, we believe that IVSs should not be subject to the governance, access, and conflict of interest regulations that will apply to SEFs, SDRs, DCOs, and CCPs, because these regulations are

[17] *See* DFA § 721 (adding CEA Section 1(a)(48)) ("The term 'swap data repository' means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.").

[18] DFA § 733 (adding CEA Section 5h(a)(1)).

[19] *See* Matching Release, 63 Fed. Feg. 17943.

[20] *See* DFA § 733 (adding CEA Section 5h(g)); DFA § 725(b) (adding CEA Section 5b(h)); DFA § 763 (adding Exchange Act Section 17A(k)).

[21] *See* DFA § 763 (adding Exchange Act Section 17A(k)).

all designed to curb potential problems that are inapplicable to IVSs (*i.e.*, multiple-to-multiple execution and trading, as well as clearing). For example, issues related to conflicts of interest in general have little relevance to IVSs. "Participation" in the services of IVSs is driven by industry commitment for product, processing, and legal standardization, and the goals of these entities are to mitigate risk and attain the highest standards of operational efficiency. The implementation of electronic confirmation of swaps, for example, is based on an industry collaborative process that is open to all market participants. We therefore believe that no conflicts of interest will arise relative to participation in these entities that would require the type of scrutiny that will be applied to SEFs, SDRs, DCOs, and CCPs.

Indeed, the SEC has recognized the differences between IVSs and CCPs several times:

- In the Matching Release itself, for example, where the SEC initially proposed to regulate trade matching providers, the SEC stated that it "is of the view that an entity that limits its Clearing Agency functions to providing matching services need not be subject to the full panoply of Clearing Agency regulation."[22]
- One year later, the SEC exempted Thompson Financial Technology Services, Inc., a provider of electronic confirmation and central matching services, from the Clearing Agency registration requirements because, "while TFTS's matching service could have a significant impact on the national clearance and settlement system, all of the concerns raised by an entity that performs a wider range of Clearing Agency functions are not raised in TFTS's situation" (the "***Thompson Order***").[23]
- Finally, the SEC exempted Omgeo, another provider of electronic confirmation and central matching services, from registration requirements for similar reasons. In its exemptive order (the "***Omgeo Order***"), the SEC stated that "[t]he exemptive order and the conditions and limitations contained in it are consistent with the Commission's statement in the Matching Release that an entity that limits its Clearing Agency functions to providing matching services does not have to be subject to the full range of Clearing Agency regulation."[24]

Note that both Thompson Financial and Omgeo provided electronic confirmations in addition to central matching, and that the SEC specifically exempted them from any registration requirements stemming from their electronic confirmation activities.[25] In the case of Thompson Financial and Omgeo, the SEC required those companies to comply with certain limited requirements, discussed further below, as a condition for their exemptions.

We believe that, similar to Thompson Financial and Omgeo, IVSs should be subject to limited regulations because many of the concerns raised in relation to SEF, SDR, DCO, or Clearing Agency are not present for IVSs. In particular, we believe that the CFTC and SEC should require IVSs to comply with the same requirements as those that were imposed on Omgeo. In its exemptive order for Omgeo, the SEC required Omgeo to provide the SEC with, among other things, the following:

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[22] Matching Release, 63 Fed. Reg. at 17947.

[23] Self-Regulatory Organizations; Thomson Financial Technology Services, Inc.; Order Approving Application for Exemption From Registration as a Clearing Agency (Exchange Act Release No. 34–41377), 64 Fed. Reg. 25948, 25949 (May 13, 1999).

[24] *See* Global Joint Venture Matching Services—US, LLC; Order Granting Exemption From Registration as a Clearing Agency (Exchange Act Release No.34-44188), 66 Fed. Reg. 20494, 20498 (April 23, 2001).

[25] *See* Thompson Order, 64 Fed. Reg. at 25948 ("This order grants TFTS an exemption from registration as a clearing agency to offer an electronic trade confirmation (ETC) service and a central matching service subject to the conditions and limitations described below."); Omgeo Order, 66 Fed. Reg. at 20495 ("This order grants [Omgeo] an exemption from registration as a clearing agency subject to certain conditions and limitations described below in order that GJVMS may offer an electronic trade confirmation ("***ETC***") service and a Central Matching Service.").

- An audit report (before beginning operations);
- Annual reports and any associated field work prepared by competent, independent audit personnel generated in accordance with the annual risk assessments of the areas set forth in the SEC's Automation Review Policies ("***ARPs***");
- Reports of all significant system outages;
- Twenty days' notice of any material changes to its services; and
- Periodic reports regarding the affirmation rates for institutional transactions

Additionally, Omgeo was required to provide the SEC with access to its facilities, was prohibited from providing additional Clearing Agency functions, and was required to establish connectivity with other providers of trade matching services.[26]

We believe that these are significant regulations and are appropriately tailored to address the types of activities that IVSs engage in. We therefore urge the CFTC to work with the SEC to establish consistent regulations which regulate IVSs in line with the established Omgeo standard.

4. All Competing Providers of IVS Should Be Required to Register in Order to Avoid Creating a Significant Restraint on Competition

The SEC Rule proposes to require only providers of matching services to register with the SEC and also states that "preliminary comparisons, such as those provided by certain affirmation and novation service providers that are followed by independent comparisons that result in the issuance of legally binding matched terms would generally not fall within the definition of a Clearing Agency."[27] We believe that regulating IVSs differently depending on whether they provide matching or affirmation services, or whether their activity results in legally binding terms or not, as the SEC proposes, would create a significant restraint on trade. We therefore urge the Commission to work with the SEC to ensure that all competing IVSs are regulated similarly.

As a preliminary matter, we note that the statutory language in the Exchange Act defining a Clearing Agency does not seem to support the SEC's position. The only material difference between the proposed unregulated services and those described by the SEC as "matching services," which would be regulated, are that "matching" services as defined in the SEC Rule result in the issuance of binding matched terms, while "affirmation" services do not.[28] However, the Exchange Act does not distinguish between entities whose services result in legally binding matched terms and those that do not.[29] Thus, if the SEC is obliged to regulate *any* entities that provide facilities for comparison of data, it is obligated to regulate *all* entities providing the same. As noted by the SEC, these "affirmation" entities provide "preliminary comparisons," thus falling within the Exchange Act's definition. The SEC itself acknowledged this in the Thompson Order and the Omgeo Order by exempting both organizations from registration requirements stemming not only from their central matching services, but also their electronic confirmation services.[30]

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[26] *See* Omgeo Order, 66 Fed. Reg. at 20498-99 (April 23, 2001).

[27] *See* SEC Rule, 76 Fed. Reg. at 14495.

[28] *Compare* SEC Rule, 76 Fed. Reg. at 14495 (an entity that "performs an independent comparison of that information which results in the issuance of binding matched terms to the transaction is providing matching services"), *with id.* ("preliminary comparisons . . . that are followed by independent comparisons that result in the issuance of legally binding matched terms, would generally not fall within the definition of clearing agency.").

[29] *See* Exchange Act Section 3(a)(23).

[30] *See* Thompson Order, 64 Fed. Reg. at 25948 ("This order grants TFTS an exemption from registration as a clearing agency to offer an electronic trade confirmation (ETC) service and a central matching service subject to the conditions and limitations described below."); Omgeo Order, 66 Fed. Reg. at 20495 ("This order grants [Omgeo] an exemption from registration as a clearing agency subject to certain conditions and limitations described below in order that [Omgeo] may offer an electronic trade confirmation ("ETC") service and a Central Matching Service.").

Practically speaking, though, we believe that exempting entities that do not issue binding confirmations is counter-productive for the following reasons:

- First, such requirement risks encouraging the provision of services that do not provide legal certainty while discouraging the provision of those that do, which seems at odds with congressional intent to reduce risk in the swaps markets. It would also put in doubt whether market participants will be supplied with the means that allow them to acknowledge and verify their swap transactions in a timely and secure fashion as required by the Commission in other rules.[31]
- Second, IVSs, regardless of whether their activity only constitutes a preliminary comparison or results in the issuance of a legally binding contract, occupy a crucial position in the routing of the majority of swaps. Such entities generate a verified, definitive record of the transaction that is used for subsequent processing and typically establish, maintain and provide connectivity between the various execution venues, counterparties, DCOs, and SDRs to communicate transaction data to these entities. Given that all IVSs act as conduits of swap transaction data to other registered entities, their proper functioning is of crucial importance to secure timely central clearing of swaps as well as their accurate regulatory and real-time reporting.
- Third, such approach would result in an unnecessary restraint on competition because IVSs that issue a legally binding contract directly compete with IVSs that only perform preliminary comparisons. A registration requirement that favors one group of services over the other should be avoided.

Additionally, there is no distinction between these services that would justify regulating matching but not affirmation. Trade affirmation and matching are nothing but two alternative techniques that are employed to lead to the same result; namely, enabling counterparties to reach an agreement on the complete set of transaction details in an efficient and timely manner.[32]

Although the SEC does not explain its rationale for treating matching and affirmation services differently in the SEC Rule, we believe that the answer may lie in the Matching Release. In that release, the SEC explained that "matching combines certain steps in the confirmation and affirmation process" by "eliminat[ing] a separate affirmation step that would allow the detection of errors that could delay settlement or cause the trade to fail."[33]

However, we do not believe that this alone can equitably justify such a disparity in treatment. First, the SEC's statement in the Matching Release cannot be considered to be a universal distinction between matching and affirmation, because affirmation systems exist whereby an intermediary proposes the transaction terms to both

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[31] *See* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81531 (to be codified at 17 C.F.R. § 23.501).

[32] Trade affirmation is the process whereby one party alleges the details of a SB swap transaction to its counterparty and those details are affirmed by the counterparty if correct. Matching is the process whereby both counterparties to the SB swap transaction allege the transaction details to each other, which are then compared. Central trade matching is done through an electronic matching service which matches the terms in a centralized fashion. Notably, affirmation can be accomplished through use of an intermediary, just like matching. Matching and affirmation are each widely used by a variety of market participant types. Quarterly metrics show that 99% of the relevant credit derivative transactions were electronically confirmed, mostly using a central matching method. In equity derivatives, 40% of the transactions were electronically confirmed using a mixture of central matching, affirmation and affirmation with local matching. 80% of the relevant interest rate derivative transactions were electronically confirmed, largely using affirmation or affirmation with local matching. Available at http://www.markit.com/en/products/research-and-reports/metrics/metrics.page. Thus, while affirmation currently prevails in some asset classes, matching dominates in others, and a variety of techniques are used in the remainder. In general, parties implement the matching service by submitting transactions as they have already been captured in their trade booking systems, with the resolution of potential mismatches being dealt with by their back office. In contrast, counterparties will often use the affirmation service to route transactions to their trade capture systems, with submission of the transactions to the service often being performed by the execution venue (for example by an inter-dealer broker). Here, the resolution of trade discrepancies represents a front office task. As such, large volume users of affirmation services with efficient integration generally see a faster time to submission and verification of swap transactions than equivalent users of matching services.

[33] Matching Release, 63 Fed. Reg. at 17946.

parties, who then affirm them with each other. In these affirmation systems, there is only one check on the accuracy of the details, just like in a matching system. Second, we fail to see how this distinction reduces the importance, from a risk-management perspective, of affirmation providers. We believe that all IVSs occupy an important position in the swaps marketplace because they provide a verified, definitive record of the transaction and act as conduits for this information. Therefore, we believe that all IVSs should be regulated equally.

Because of the statutory language which captures all entities that provide independent comparisons of data and because of the similarities between matching and affirmation services, we believe that the SEC's approach would impose a significant and, importantly, undue burden on competition in the market for IVS services by providing entities that only use affirmation techniques with a competitive advantage. As a consequence, independent verification services for those swaps for which matching is currently the main technique to confirm transactions, such as Credit Default Swaps, could become more costly or, in the extreme, even unavailable. This seems at odds with congressional intent and the public interest.

Therefore, if the Commission decides to regulate providers of independent verification services, it needs to apply those regulations to all "entities that act independently from and on behalf of both counterparties of a swap to facilitate the agreement of a verified record of the complete transaction details that is used for subsequent processing," and should ensure that the SEC does the same.

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MarkitSERV appreciates the opportunity to comment on the Proposed Rule, and would be happy to elaborate or further discuss any of the points addressed above.

In the event you may have any questions, please do not hesitate to contact the undersigned or Gina Ghent at gina.ghent@markitserv.com.

Sincerely,

Jeff Gooch
Chief Executive Officer
MarkitSERV

Cc: **CFTC Commissioners**
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