Futures Industry Association
Institute of International Bankers
International Swaps and Derivatives Association
Investment Company Institute
Securities Industry and Financial Markets Association
U.S. Chamber of Commerce

Commodity Exchange Act Sections
1a(11), 1a(12), 1a(22), 1a(23),
1a(28), 1a(31), 1a(33), 1a(47),
1a(49), 2(e), 4d(a), 4d(f), 4d(g), 4m,
4s(a), 4s(h)(4), 4s(k), 4s(l), 5h,
12(h), 21 and 22(a)

June 10, 2011

Chairman Gary Gensler
Commissioner Michael Dunn
Commissioner Jill E. Sommers
Commissioner Bart Chilton
Commissioner Scott D. O'Malia

Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street N.W.
Washington, DC 20581

Re: Request for Clarification and Relief Under Sections 754 and 739 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; Petition for Exemption Pursuant to Section 4(c) of the Commodity Exchange Act

Chairman Gensler, Commissioners Dunn, Sommers, Chilton and O'Malia:

The undersigned trade associations, on behalf of their members and similarly situated participants in the swap markets, urgently request that the Commodity Futures Trading Commission (the "CFTC" or "Commission") take steps to ensure an orderly implementation of amendments made to the Commodity Exchange Act (the "CEA") by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and minimize the potential for market disruption, uncertainty and undesirable litigation. Preliminarily, the undersigned wish to acknowledge and express their appreciation to the Commission and its staff for the extraordinary efforts that have been undertaken to date in order to achieve an orderly implementation of Dodd-Frank.

The undersigned specifically request that the Commission give effect to Congress' intent, as manifested in Sections 712(e) and 754 of Dodd-Frank, and utilize the full

extent of Commission exemptive authority, to ensure a coordinated implementation of both those provisions that are implemented directly through Commission rulemaking and those statutory provisions that depend upon (or "require") related Commission rulemaking. We further request clarification of, and exemptive relief regarding, the treatment of swap transactions under the provisions of the CEA applicable to futures contracts.

We urge the Commission to take prompt action in order to avoid unprecedented confusion, potential market disruption and an environment that would not be conducive to the respect for the rule of law that underpins the strength and competitive position of U.S. markets.

I. Background

A. Effective Dates of Swap Provisions

As the Commission is aware, Section 754 of Dodd-Frank provides that amendments made by Title VII, Subtitle A shall, unless otherwise specified, take effect on the later of July 16, 2011 or, to the extent a provision requires a rulemaking, not earlier than 60 days after publication of the final rule or regulation implementing such provision. There are several respects in which a statutory provision may "require a rulemaking." These include not only situations in which the provision is expressly directed to be implemented through a Commission rulemaking, but also situations in which a rulemaking is either required to give content to a substantive standard or requirement or defined term used in the statutory provision, or necessary to avoid compelling an impossible requirement or manifestly inappropriate result. Clarity with respect to the application of Section 754, together with a prudent approach to the effective dates of Dodd-Frank's various requirements, is critical because, despite the extraordinary efforts of the Commission and its staff to undertake the rulemakings necessary to implement Dodd-Frank, including more than 50 proposed rules, notices, or other requests seeking public comment, it has become clear that the final rulemakings necessary to implement Title VII will not be completed or effective until after, and in some case considerably later than, July 16, 2011.

As the Commission has acknowledged, compliance with Dodd-Frank does not only require the promulgation of final rules. In many cases considerable effort and time is necessary in order for firms to adopt the compliance systems and other infrastructure necessary to adhere to prospective regulatory requirements. We understand that the Commission anticipates completing its adoption of final rules over the second half of 2011 and that the Commission is considering how to phase in the effective dates of final rules. Both legislators and market participants, including members of the undersigned trade associations, are widely supportive of such a phased-in implementation process.

A coordinated, phased-in approach is clearly necessary, as a practical matter, to prevent undue disruption of the swap markets.[1] It is also clearly necessary to give effect to

[1] *See* Letters from the Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association and Securities Industry and Financial Markets Association to David A. Stawick, Secretary, the CFTC,

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Section 754, which is an unequivocal manifestation of Congress' intent to ensure a coordinated implementation of Commission rulemaking and otherwise applicable statutory provisions. Neither Dodd-Frank nor Congress provides any indication that Congress intended the self-executing provisions[2] of Dodd-Frank to become effective prior to provisions that are not otherwise self-executing. To the contrary, Section 754 indicates that Congress intended statutory and regulatory provisions to come into effect in a coordinated manner and, indeed, intended for statutory provisions that would otherwise be effective by their terms to be delayed pending related Commission rulemaking. Congressional intent to accomplish a coordinated implementation of statutory and regulatory provisions is also evidenced by the 360-day rulemaking timeframe in Section 712(e), which is designed to synchronize the rulemaking process with the effective date provisions of Section 754.

Reasonable minds may differ as to how effectively the wording of Section 754 expresses congressional intent. There can be no question, however, about Congress' intent. Dodd-Frank thus provides no basis for the Commission to proceed based on any assumption that Congress desired the self-executing provisions of Dodd-Frank which depend on related Commission rulemaking to become effective, as a timing matter, before other provisions of Dodd-Frank. Rather, given Congress' careful statutory implementation design, the construction of Section 754 proposed herein is in fact necessary to effectuate congressional intent.

While the Commission has completed an extraordinary volume of proposed rulemaking since the enactment of Dodd-Frank, these rulemakings present novel and complex issues and have attracted a broad range of extensive and substantive comments. Moreover, many of these rulemakings present significant interdependencies. As a result, considerable uncertainty remains with respect to certain key elements of the Commission's emerging regulatory framework for swaps. Also relevant, in light of its potential impact on the structuring of swaps activity, even greater uncertainty exists with respect to the emerging regulatory framework of the SEC with respect to security-based swaps and security-based swap registrants. In the case of at least some significant elements of the swap activities of most firms, the structuring of these swap activities is dependent both upon CFTC and SEC registration, capital, margin and related requirements.

Further complicating matters, until the finalization of a number of critical rulemakings (including, in particular, those applicable to capital, margin, treatment of inter-affiliate transactions, registration requirements and extraterritorial application of Dodd-Frank, among others), financial institutions, particularly internationally-active financial institutions, are

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and Elizabeth M. Murphy, Secretary, the Securities and Exchange Commission ("SEC," and, together with the CFTC, the "Commissions"), dated May 4, 2011, and from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable, to David A. Stawick, Secretary, the CFTC, dated April 6, 2011.

[2] In this letter we refer to those provisions of Dodd-Frank that would come into effect on July 16, 2011, subject to the provisions of Section 754, as "self-executing provisions."

unable to complete the analysis that is needed to determine how to structure their derivatives activities. Specifically, many firms do not yet have the guidance necessary to determine through which entities that activity should continue to be conducted under the new regime. This further complicates the ability of firms to anticipate and plan necessary implementation measures. It also raises problems for any implementation approach that depends on a provisional registration requirement if any compliance obligations attach to that status or if any demonstration of compliance with substantive requirements is required for provisional registration.

Market participants should not be forced to bear the significant and unnecessary costs of building two compliance and systems infrastructures: the first to comply with what Dodd-Frank *may* require pending final rules, and the second to comply with what Dodd-Frank *does* require once final rules are adopted.

A construction of Section 754 that would require guesses, judgments or assumptions to be made regarding these uncertainties would be fundamentally inconsistent with sound policy and prudent stewardship of U.S. markets and, in certain cases, could conflict with the long-standing doctrine that statutes must be sufficiently explicit to determine what persons are covered and what conduct is prohibited. In the absence of such clarity, affected provisions could be void for vagueness. Principles of statutory construction resist interpretations that might raise doubts as to a statute's constitutional validity.[3]

These issues affect not only Commission rulemakings but also those provisions of Dodd-Frank that, while arguably self-executing, depend meaningfully, in one way or another, on related Commission rulemakings. These considerations make it critical for the Commission, in order to avert severe market disruption, widespread, inadvertent non-compliance with the CEA, and litigation, to take urgent measures to ensure an orderly implementation of Dodd-Frank requirements. We believe that Dodd-Frank – and Section 754 in particular – together with the Commission's statutory exemptive authority under Section 4(c) of the CEA, provide the Commission the necessary authority and tools to accomplish this result.

B. Distinction between Swaps and Futures and Other Instruments

Dodd-Frank excludes futures contracts (and options on futures contracts) from the definition of "swap" and repeals those provisions of the CEA that had provided an effective exemptive framework for certain swaps from regulation (or invalidation) as futures contracts. However, Dodd-Frank's definitional exclusion does not establish a functional distinction between these two different categories of instrument. As the Commission is well aware, regulators, practitioners and others have struggled over the years to articulate a clear distinction between the two categories.

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[3] *See* United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) ("[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."); Almendarez-Torres v. United States, 523 U.S. 224, 237-38 (1998); Jones v. United States, 529 U.S. 848, 857 (2000).

The adoption of the context-based exemptive and exclusionary approach to the treatment of swaps under the Commodity Futures Modernization Act of 2000 (the "CFMA"), as opposed to a definitional approach, reflected precisely the challenges presented by this distinction. Although the Commissions have undertaken an extensive proposed joint rulemaking on, and exclusions from, the definitions of the terms "swap" and "security-based swap," the Commissions have not taken steps to-date to address this issue.

Left unresolved, the ambiguity created by the definitional exclusion, however, runs the risk of creating uncertainty, and potentially, consequential disputes, about what is and what is not a swap or a futures contract. This, in turn, raises the prospect that certain types of over-the-counter ("OTC") transactions commonly regarded as swaps might be *per se* illegal if they are conducted in accordance with the framework for swaps but are subsequently held by the Commission or a court also to be futures contracts. We do not think this is Congress' intended outcome. Nevertheless, as a result of this uncertainty, prior to the effective date of repeal of the provisions in the CEA that had provided legal certainty to swap market participants, it is critical that the Commission take timely steps to provide clarity and legal certainty to those who rely on compliance with the swap provisions of Dodd-Frank. Swap market participants complying in good faith with the swap provisions of the CEA and Commission rules should not be subject to rescission, private rights of action or CFTC enforcement risk in the event of an after-the-fact determination by the CFTC or a court that the relevant swap transaction is more properly characterized as a futures contract.

In addition, until the effective date of the Commissions' swap and security-based swap definition rules, the Commission should provide interim relief to market participants who engage in transactions that the Commissions have proposed to exclude from the definition of swap. Otherwise, those transactions would become subject to Dodd-Frank, with potentially significant unintended consequences, such as the possible prohibition under Section 2(e) of the CEA of a wide range of mortgage interest rate protection products and forward contracts, and other instruments that the Commissions have acknowledged were never intended to be regulated as swaps, as well as the possible preemption under Section 12(h) of the CEA of state insurance regulation.

II. Discussion

A. Section 754 of Dodd-Frank

Section 754 of Dodd-Frank specifies the basis for determining the effective date of Title VII's amendments to the CEA. Specifically, Section 754 provides that:

> Unless otherwise provided in this title, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle ***requires a rulemaking***, not less than 60 days after

> publication of the final rule or regulation implementing such provision of this subtitle. [Emphasis added.]

A number of provisions in Dodd-Frank by their terms become effective on July 16, 2011, subject to the provision of Section 754. It is therefore necessary to determine whether these provisions "require a rulemaking," in which case such provisions would become effective at the time that any such related rulemaking becomes effective.

As noted above, there are several respects in which a statutory provision may "require a rulemaking." The most obvious example is one in which the statutory provision is expressly directed to be implemented through a Commission rulemaking. Other clear examples include circumstances in which compliance with a statutory provision requires registration and the registration regime has not become effective, or in which a registrant is required to comply with statutory standards (for example, capital or margin requirements, or the obligation to adopt policies and procedures) that cannot be complied with absent final rules giving content to these standards and requirements. Still others include provisions that rely for their application on a defined term that is required to be implemented through Commission rules that have not been finalized and become effective.

While defined terms that are subject to further definitional rulemaking are subject to different levels of uncertainty, it is essential that any provision using a defined term provide clarity as to the persons, products and activities to which it applies.[4]

The plain meaning reading of Section 754 encompasses each of these situations[5] and, even if the provision were susceptible to multiple interpretations, we are not aware of any legislative history suggesting that Congress intended an interpretation of this provision that would result in a more limited scope. Indeed, we believe Section 754 should be interpreted to evidence a rational implementation design; one in which Congress did not intend to compel untenable results or the imposition of inappropriate requirements and attendant legal uncertainty. Common sense also dictates that the words of Section 754 be given their most natural reading.

Congress also drew a distinction between the finalization of rules and the date as of which they become effective. Indeed, Section 754 imposes a minimum period of 60 days following publication in the Federal Register before a final rule may become effective. This is an important implementation tool for the Commission because it permits the Commission to ensure an orderly implementation of Dodd-Frank by establishing effective dates for its rules that

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[4] *See* note 3, *supra*, and accompanying text.

[5] The definition of "require" is to "call for as suitable or appropriate" or to "demand as necessary or essential." *See* Webster's Third New International Dictionary (16th ed., 1971). The word "require" in Section 754 should also be interpreted in connection with the word "implement," which means to "give practical effect to and ensure of actual fulfillment by concrete measures." *Id.*

are appropriate *both* for the rulemakings themselves as well as for dependent statutory provisions.

We urge the Commission to take these considerations into account in construing Section 754 and otherwise preparing for an orderly implementation of the Dodd-Frank swap regime. This is necessary to prevent the occurrence on July 16, 2011 of a broad range of unintended and highly disruptive consequences, including those summarized briefly below:[6]

- ***Swap Dealers and Major Swap Participant Registration.*** The provisions of Section 4s(a) of the CEA requiring swap dealers and major swap participants to be registered are dependent on a number of required rulemakings and raise a number of issues. Most obvious, the definitions of these terms, as required under Section 712(d) of Dodd-Frank, have not been finalized, nor has the application of these substantive definitions extraterritorially or to inter-affiliate transactions. Additionally, rules establishing a registration regime for these entities, as required by CEA Section 4s(b)(5), have not been finalized and become effective.

  Although the Commission could hastily adopt a provisional registration framework, other required rulemakings that have not been finalized would make that approach imprudent and inconsistent with Section 754's plain meaning and intent. In order to register a swap dealer, firms must be in a position to determine which entity (or entities) within their holding company group is (are) the most suitable one (ones) in which to conduct the activity requiring registration. Firms cannot complete the regulatory, financial, operational and related analyses necessary to reach that conclusion without understanding applicable capital and margin regulations, how inter-affiliate transactions will be treated for purposes of various requirements, and whether, and if so how, registration and substantive regulatory requirements will be applied extraterritorially. In this regard we note that all of the 15 largest swap dealers are internationally active and 8 of the 15 largest swap dealers are part of consolidated financial holding company groups that are organized and headquartered outside the United States. A very significant portion, and in some cases a majority, of the global swap activity of these 15 swap dealers is conducted with counterparties located outside the United States.

  These related rulemakings are expressly required under Dodd-Frank. More importantly, they are required as a practical matter in order for firms to complete the structuring of their swap activities that is a pre-condition to their implementation of the infrastructure necessary to adhere to Dodd-Frank's regulatory requirements.

[6] We have summarized here some of the key issues that illustrate the serious consequences arising from premature effectiveness of Dodd-Frank, although we note that this summary is not necessarily an exhaustive list of all such issues.

In the absence of the approach recommended above (or equivalent Commission relief), market participants would be required to make a judgment regarding whether they qualify as a "swap dealer" or "major swap participant." Many substantive definitional questions for which the CFTC has solicited comment in its mandatory rulemaking under Section 712(d) remain unresolved and firms would have to guess or otherwise make judgments or assumptions as to how these provisions will be finalized. For example, when is a person regarded as "regularly enter[ing] into swaps with counterparties as an ordinary course of business"? Or when do outstanding swaps "create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets"? Is dealing in foreign exchange swaps and forwards relevant prior to finalization of any exemptive relief by the U.S. Department of the Treasury? Are inter-affiliate or extraterritorial transactions excluded or included? Who is a "U.S. person" for purposes of all these rules? What is the relevance, if any, of inter-affiliate guarantees?

As a result of these considerations, provisions applicable to swap dealers and major swap participants should not take effect until final rules defining those terms are effective. In particular, registration should not be required absent an effective registration regime and finalization of rules governing the regulatory requirements that are manifestly material to the structuring of swap activities by prospective registrants.

- ***Advisors to Special Entities and Other Business Conduct Standards.*** CEA section 4s(h) both imposes, and requires that the Commission adopt certain rules establishing, business conduct standards for swap dealers and major swap participants. Section 4s(h)(4) imposes special requirements on swap dealers who act as advisors to Special Entities. At this point, it is not clear to whom the rules apply or what the rules, in fact, require to be done. They should not take effect until those uncertainties are resolved by Commission rulemaking, as discussed below.

  First, as a result of uncertainties in the definitions of the terms "swap" and "swap dealer," many market participants are not in a position to make a clear judgment regarding whether these requirements apply to them. These uncertainties are compounded by the fact that, read literally, Section 4s(h)(4) does not refer to ***registered*** swap dealers. We note, however, that Section 4s(h) makes inconsistent references to "swap dealers and major swap participants," on the one hand, and "***registered*** swap dealers and major swap participants," on the other hand. (Compare the reference in Section 4s(h)(1) to "***registered*** swap dealers and major swap participants," to "swap dealers and major swap participants" in Section 4s(h)(3), which specifies the business conduct rules to be adopted by the Commission and to be adhered to by ***registered*** swap dealers and major swap

participants.) Accordingly, it is not at all clear that the references in Section 4s(h)(4) are intended to apply to swap dealers that are not registered under the CEA.

This lack of attention to the distinction between registered and unregistered status was likely not considered consequential by Congress precisely because Dodd-Frank includes no statutory exemptions from registration as a swap dealer. Congress also clearly could not have intended for the Commission to be responsible for enforcing compliance with substantive (as opposed to anti-fraud) regulatory requirements by persons not subject to Commission oversight as registrants. Accordingly, the distinction is consequential only in the implementation phase and, as a result, the Commission should utilize its further definitional authority under Section 721(b) of Dodd-Frank to clarify that all of the external business conduct standards apply only to registered swap dealers and major swap participants. Pending such rules, the Commission should not apply Section 4s(h)(4) or other external business conduct standards until its registration and definitional rules for swap dealers are effective.

In addition, as indicated in the Commission's proposed rulemaking for external business conduct standards, the statute does not specify the meaning of, and the Commission has requested comment as to the appropriate scope of, a number of critical terms, including the terms "acts as an advisor," "best interests" and "Special Entity." These terms must be clarified prior to the effectiveness of Section 4s(h)(4).

Moreover, as a practical matter, it makes no sense to implement the provisions of Section 4s(h)(4), as well as the other business conduct standards required under Section 4s(h), until the business conduct rules required by Section 4s(h)(6) and related definitions are finalized and take effect, and firms understand what is required of them and have the opportunity to implement the compliance and systems infrastructure required to adhere to these requirements.

If these rules become effective before their scope and content is clarified, given the extremely negative consequences that could result if a swap dealer were to be deemed, inadvertently and in hindsight, to be an advisor, pension plans and other Special Entities could face the prospect of a period of significantly reduced access to the swap markets or, at a minimum, a curtailment in access to important information and communications from swap dealers. Special Entities whose access to the swap market for risk management purposes becomes restricted would be exposed to greater levels of credit, interest rate and other risk, and overall market liquidity could be diminished.

- ***Duties of Swap Dealers and Major Swap Participants.*** We understand that the Commission is considering a provisional registration requirement for swap dealers and major swap participants. Under Section 4s(j), certain duties,

including those involving the implementation of risk management programs and diligent supervision, arguably would technically apply to such a provisionally registered swap dealer or major swap participant.

For the reasons discussed above, we believe such an approach would be imprudent and inconsistent with Section 754. In addition, we note that the content of the proposed duties is the subject of pending Commission proposed rules. Accordingly, the duties applicable to registered swap dealers and major swap participants under Section 4s(j) should not take effect until the rules governing those duties required under Section 4s(j)(7) are finalized and take effect, and firms have the opportunity to implement the compliance and systems infrastructure required to adhere to these requirements.

- ***Chief Compliance Officer.*** Chief compliance officers of swap dealers and major swap participants are responsible for ensuring compliance with the new requirements applicable to such registrants under Dodd-Frank. As a result, the chief compliance officer requirements of Section 4s(k) should not take effect until the regulatory requirements under Section 4s for which the chief compliance officer is responsible are finalized and become effective. Any other interpretation would render the role of the chief compliance officer largely meaningless, although not free from costs. Another interpretation would also be inequitable for the particular individual who would be the chief compliance officer, who would not know the obligations for which he or she would be taking responsibility. For reasons analogous to those discussed above in relation to external business conduct standards, it is not likely that Congress intended these requirements to apply to entities that are not registered under the CEA. The considerations noted above regarding the pending status of key definitions are also relevant to this provision.

- ***Segregation of Initial Margin for Uncleared Swaps.*** Section 4s(l)(1)(A) requires swap dealers and major swap participants to provide their swap counterparties with notice of their right to request segregation of initial margin for uncleared swaps. However, the content of that segregation arrangement – including the scope of permissible custodians, the type of permitted custody arrangements and the eligible investments for segregated collateral – are subject to further Commission rulemaking under Sections 4s(l)(1)(B) and (2)(B)(ii)(I).

  As a result, in order for there to be any content to the "right" that is the subject of the notice, and therefore for there to be practical meaning to the notice itself, Section 4s(l)(1)(A)'s notice requirement should not take effect until the effectiveness of the Commission's rules regarding Dodd-Frank's segregation requirements, as well as Commission rules providing for the definition and registration of swap dealers and major swap participants, for the reasons noted above.

- ***SEFs and SDRs.*** Similar considerations apply to swap execution facilities ("SEFs") and swap data repositories ("SDRs"). Although the definitions of SEF and SDR are not subject to mandatory further definitional rules, and the relevant registration provisions (Sections 5h(a)(1) and 21(a)(1)(A), respectively) do not by their terms require independent Commission rules, the Commission is required to adopt rules generally regarding the regulation of SEFs and SDRs (Sections 5h(h) and 21(h), respectively). Moreover, it is simply not possible to comply with a registration requirement absent an effective registration regime. Additionally, in order to become registered, an SDR and SEF must comply with rules to be adopted by the Commission, but these rules will not be finalized and become effective as of July 16, 2011.

  As a result, the SEF and SDR provisions of Dodd-Frank should not take effect until the effectiveness of the Commission's final rules for the registration of and regulatory requirements applicable to SEFs and SDRs.

- ***Existing Commission Registrant Categories.*** Neither Dodd-Frank's amendments to the definitions of "futures commission merchant," "floor trader," "floor broker," "introducing broker," "commodity trading advisor" and "commodity pool operator" nor the existing CEA provisions governing the regulation (or, in some cases, exemption) of such persons specifically provide for any mandatory CFTC rulemaking provisions. Similarly, Section 4d(f)(1)'s requirement that a person accepting margin for cleared swaps register as a futures commission merchant does not specifically provide for a mandatory CFTC rulemaking. The substantive requirements for such persons' swap activities, and the conforming amendments that are necessary to the existing exemptions for such persons under CFTC regulations, will, however, almost certainly not be effective by July 16, 2011, leaving affected market participants with little practical ability to comply or have available to them appropriate exemptions.[7]

  By way of a simple example of the significant issues that can arise prior to the Commission's adoption of appropriate conforming amendments, there is no exemption from introducing broker registration for the activities of an individual who is a person associated with a swap dealer (in contrast to the very important exemptions that currently exist for associated persons of a futures commission merchant).

[7] *See, e.g.*, Notice of Proposed Rulemaking, Adaption of Regulations to Incorporate Swaps, 76 Fed. Reg. 33066 (June 7, 2011); Notice of Proposed Rulemaking, Registration of Intermediaries, 76 Fed. Reg. 12888 (Mar. 9, 2011); and Notice of Proposed Rulemaking, Amendments to Commodity Pool Operator and Commodity Trading Advisor Regulations Resulting from the Dodd-Frank Act, 76 Fed. Reg. 11701 (Mar. 3, 2011).

We believe the Commission has clear authority under CEA Section 4(c) to grant appropriate exemptive relief from the effectiveness of provisions regarding such registrant categories as they apply to activities in swaps during the period prior to Commission finalization and effectiveness of the necessary conforming amendments to the substantive regulatory and exemptive provisions applicable to these registrant categories.

As noted above, we believe that Section 754 and the Commission's exemptive authority enable the Commission to effectuate the orderly implementation of Dodd-Frank, including Dodd-Frank's self-executing provisions, through the appropriate sequencing and effective dates of its regulations to avoid market disruption, widespread inadvertent non-compliance and potentially consequential litigation (particularly in the event of an intervening market break).

Requested relief.

Accordingly, we urge the Commission to grant relief by issuing an order (1) interpreting Section 754 in a manner consistent with the foregoing discussion[8] and (2) to the extent that any uncertainty exists with respect to the appropriate application or construction of Section 754, (a) adopting a Commission non-enforcement policy with respect to non-compliance with self-executing provisions of Dodd-Frank prior to finalization and effectiveness of related rulemakings specified by the Commission, as discussed above and (b) exempting affected market participants, pursuant to CEA Section 4(c), from the private rights of action provisions of CEA Section 22(a) with respect to the self-executing provisions of Dodd-Frank prior to finalization and effectiveness of the specified related rulemakings.

Additionally, as noted above, we urge the Commission to issue an exemption pursuant to CEA Section 4(c) for affected swap market participants with respect to non-compliance with the registration and regulatory requirements applicable to "futures commission merchants," "introducing brokers," "commodity trading advisors" and "commodity pool operators" during the period prior to Commission finalization and effectiveness of the necessary conforming amendments to the substantive and exemptive provisions applicable to these registrant categories.[9]

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[8] In the alternative, we request that the Commission exercise its further definitional authority in Section 721(b) of Dodd-Frank to define the words "requires a rulemaking" in Section 754 in a manner consistent with this discussion. Further definition of Section 754 is within the scope of the Commission's authority under Section 721(b) because Section 754 amends the CEA by specifying the effective dates of Title VII's amendments to the CEA.

[9] Such relief is also necessary for the reasons stated by, and intended to be consistent with, the request for relief from Section 4d(f) previously submitted by the Futures Industry Association on behalf of members of ICE Clear Europe. *See* Letter from John Damgard, President, Futures Industry Association, to David A. Stawick, Secretary, the CFTC, dated June 1, 2011.

B. Section 739 of Dodd-Frank

Section 723(a)(1)(A)'s repeal of Sections 2(d), 2(e), 2(g) and 2(h) of the CEA will take effect on July 16, 2011. Additionally, as noted above, Dodd-Frank's exclusion of futures contracts from the CEA's "swap" definition does not establish a functional distinction between the two different instruments.[10]

As the CFTC is aware, for many years uncertainty existed as to whether OTC swaps might be regarded as futures contracts under the CEA. Congress addressed this issue initially through the CFMA and, more recently, through Dodd-Frank's statutory framework for the regulation of swaps.

Left unresolved, the ambiguity created by the definitional exclusion, however, seems destined to lead to serious uncertainty, and potentially consequential disputes, common before the enactment of the CFMA, about what is and what is not a swap or a futures contract. This, in turn, raises the prospect that common types of OTC transactions might be *per se* illegal if they are conducted in accordance with the framework for swaps but are subsequently held by the CFTC or a court to be futures contracts.

In order to prevent certain of these consequences, Congress included Section 739 of Dodd-Frank ("Legal Certainty for Swaps"), which amends Section 22(a)(4) of the CEA to include the following provision:

> (B) SWAPS.—No agreement, contract, or transaction between eligible contract participants or persons reasonably believed to be eligible contract participants shall be void, voidable, or unenforceable, and no party to such agreement, contract, or transaction shall be entitled to rescind, or recover any payment made with respect to, the agreement, contract, or transaction under this section or any other provision of Federal or State law, based solely on the failure of the agreement, contract, or transaction . . . to meet the definition of a swap under section 1a . . . .

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[10] H.R. 4173, as engrossed in the House of Representatives, excluded "(i) any contract of sale of a commodity for future delivery (or any option on such a contract) or security futures product traded on or subject to the rules of any board of trade designated as a contract market under section 5 or 5f." *See* H.R. 4173 (E.H.), Section 3101. The Senate incorporated a similar exclusion in the Bill in its considerations in March 2010: "any contract of sale of a commodity for future delivery or security futures product traded on or subject to the rules of any board of trade designated as a contract market under section 5 or 5f." *See* Dodd Bill as amended by the Manager's Amendment of March 23, 2010. H.R. 4173, as engrossed by the Senate, however, changed this language to the exclusion clause listed in the final bill: "(i) any contract of sale of a commodity for future delivery (or option on such a contract), leverage contract authorized under section 19, security futures product, or agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i)." *See* H.R. 4173 (E.A.S.), Section 721 and H.R. 4173 (ENR), Section 721.

We believe this provision is intended to protect eligible contract participant ("ECP") parties to an agreement, contract, or transaction conducted as a swap from rescission in circumstances where the agreement, contract or transaction is recharacterized by the CFTC (or a court) as a futures contract or other instrument other than a swap. Its reference to recovery of payment also seems intended to protect such ECPs from private rights of action under Section 22 of the CEA violations arising solely from such recharacterization.

Requested relief.

We request that the CFTC confirm our interpretation immediately above of Section 22(a)(4).

We further request that, consistent with the objectives of Section 739, the CFTC adopt an order pursuant to Section 4(c) of the CEA exempting ECP parties to an agreement, contract, or transaction conducted in accordance with the swap provisions of the CEA and CFTC rules, as and to the extent effective, (and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to such agreements, contracts or transactions) from compliance with the provisions of the CEA and CFTC rules applicable to futures contracts (and options thereon), other than any agreement, contract, or transaction previously determined by the CFTC to be subject to the provisions of the CEA and CFTC rules applicable to futures contracts (or options thereon) in accordance with the CEA.[11]

Finally, we urge the Commission to adopt an interim order pursuant to CEA Section 4(c) exempting from the CEA persons who, prior to the Commissions' adoption of final rules defining "swap," engage in transactions proposed by the Commissions to be excluded from the definition of "swap" in the Commissions' proposed rules regarding Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement,"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping[12] without compliance with the provisions of the CEA and Commission rules applicable to swaps (and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to any such transaction).

We believe the interpretative and exemptive relief proposed above would be in the public interest and consistent with Congress' legal certainty objective by protecting ECPs who, in good faith, comply with Dodd-Frank's swap provisions. It would also permit the CFTC to retain the flexibility to determine, on a prospective, case-by-case or categorical basis, and subject to the CEA, whether particular swaps or types, classes or categories of swaps are instead

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[11] Additionally, we note that Section 723(c)(3) appears to make existing Commission Regulation 32.4 inapplicable to agricultural commodity options because Part 32 was adopted pursuant to CEA Section 4c(b), rather than Section 4(c). Pending adoption of final Commission rules regarding the treatment of agricultural commodity options, we urge the Commission to re-adopt Part 32 pursuant to Section 4(c), in order to preserve, on at least an interim basis, existing authority to transact in agricultural commodity options.

[12] 76 Fed. Reg. 29818 (May 23, 2011).

properly characterized as futures contracts. Finally, it would prevent the prohibition under Section 2(e) of the CEA of off-exchange transactions with non-ECPs in instruments never intended to be regulated as swaps, as well as the possible unintended preemption of all state insurance law under Section 12(h) of the CEA.

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If you have any questions regarding this letter, please do not hesitate to contact Edward J. Rosen of Cleary Gottlieb Steen & Hamilton LLP, outside counsel to the undersigned in this matter, at 212-225-2820.

Respectfully submitted,

Futures Industry Association
Institute of International Bankers
International Swaps and Derivatives Association
Investment Company Institute
Securities Industry and Financial Markets Association
U.S. Chamber of Commerce

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Trade Association Signatories

The **Futures Industry Association** ("FIA") is the leading trade organization for the futures, options and OTC cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearinghouses, our member firms play a critical role in the reduction of systemic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions. FIA's core constituency consists of futures commission merchants, and the primary focus of the association is the global use of exchanges, trading systems and clearinghouses for derivatives transactions. FIA's regular members, who act as the majority clearing members of the U.S. exchanges, handle more than 90% of the customer funds held for trading on U.S. futures exchanges.

The **Institute of International Bankers** represents internationally headquartered financial institutions from 39 countries around the world; its members include international banks that operate branches and agencies, bank subsidiaries, and broker-dealer subsidiaries in the United States.

Since 1985, the **International Swaps and Derivatives Association** ("ISDA") has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA is one of the world's largest global financial trade associations, with over 800 member institutions from 56 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

The **Investment Company Institute** ("ICI") is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13.41 trillion and serve over 90 million shareholders.

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