July 11, 2011

Via E-mail (www.comments.cftc.gov)

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

Re: "Capital Requirements and Financial Condition Reporting for Swap Dealers and Major Swap Participants," 76 Fed. Reg. 27802 (May 12, 2011) (RIN 3038-AD54)

Dear Mr. Stawick:

The undersigned firms[1] appreciate the opportunity to comment on the Commodity Futures Trading Commission's ("Commission") Notice of Proposed Rulemaking on capital and related reporting requirements for Swap Dealers ("Proposed Rulemaking").[2] We support transparent, competitive, and well-regulated markets and regulatory measures that support these goals. We, therefore, support the Commission's efforts to implement those provisions of the Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[3] designed to bring much needed regulation, transparency and oversight to the over-the-counter derivatives market.

I. Introduction

The undersigned firms trade their own capital in the exchange-traded and cleared derivatives markets. These firms engage in manual, automated and hybrid methods of trading and are active in cash and derivatives in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income.

The undersigned firms are active participants in the exchange-traded markets and many also are active in trading certain cleared derivatives products, including energy

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[1] These firms include: Allston Trading, LLC; Atlantic Trading USA LLC; Bluefin Trading, LLC; Chopper Trading LLC; CTC Holdings, LP; DRW Holdings, LLC; Eagle Seven, LLC; Endeavor Trading, LLC; Gator Trading Partners, LLC; Geneva Trading USA, LLC; GETCO; HTG Capital Partners; IMC Financial Markets; Infinium Capital Management LLC; Jump Trading, LLC; Ketchum Trading LLC; Kottke Associates, LLC; Marquette Partners, LP; Nico Holdings LLC; Optiver US LLC; RGM Advisors, LLC; Templar Securities, LLC; Tibra Trading America LLC; TradeForecaster Global Markets LLC; Traditum Group, LLC; WH Trading; XR Trading LLC.

[2] "Capital Requirements and Financial Condition Reporting for Swap Dealers and Major Swap Participants," 76 Fed. Reg. 27802 (May 12, 2011).

[3] Public Law 111-203, 124 Stat. 1376 (2010).

contracts currently executed in the bi-lateral over-the-counter markets and cleared by a Derivatives Clearing Organization (DCO), such as CME Clearport, or cleared through the Intercontinental Commodity Exchange. We generally do not solicit counterparties for these transactions and never hold customer funds.

Currently, the undersigned firms are not required to be registered with the Commission in any capacity. Rather, we are properly considered customers of the futures commission merchants ("FCMs") that carry and clear our trades. In some cases, we self-clear our proprietary trades. Any capital requirements in connection with one of the undersigned firm's trading activity, over and above the obligation to assure that open positions are fully margined at all times, are imposed by the FCM guaranteeing a firm's obligations or, if self-clearing, by the DCO. This regulatory framework has always worked well, including during the most recent financial crisis.

The undersigned firms are a critical source of liquidity in the markets in which we trade, enabling those who use these markets, including commercial end-users, to manage their business risks and to enter and exit the markets efficiently. Consistent with our current trading activities, the undersigned firms expect to trade cleared swaps listed for execution on Swap Execution Facilities ("SEF") when such markets develop. Participation by the undersigned firms will support the changes to the swaps markets envisioned by the Dodd-Frank Act by providing additional sources of liquidity and diversifying the number and types of counterparties, which will reduce systemic risk and benefit end-users.

Each undersigned firm's decision to participate in these markets will depend upon a number of factors, not the least of which will be the costs associated with compliance with the applicable regulations. For this reason, the Commission should carefully consider the impact of regulatory costs on the establishment of a more competitive and diverse swaps market. In this regard, an important cost consideration will be any new capital requirements that the Commission may apply to principal trading activities of firms trading cleared swaps and the associated recordkeeping and reporting requirements.

II. The Proposed Rules

The Commission has proposed to require certain Swap Dealers[4] to maintain minimum regulatory capital in an amount equal to $20,000,000 of "tangible net equity"

[4] A swap dealer would not be subject to the CFTC's proposed capital rule if it is: (1) subject to the capital requirements of a prudential regulator; (2) a futures commission merchant; or (3) a non-bank financial company designated as a systemically important financial institution.

plus amounts for the Swap Dealer's market risk exposure arising from non-cleared transactions and its derivatives credit risk arising from its non-cleared transactions.[5]

In addition, the Commission is proposing various associated reporting requirements for such Swap Dealers. These reporting requirements include, filing monthly unaudited financial statements and annual audited financial statements with the Commission and any registered futures association.[6] In addition, the Commission is proposing that certain of the information required to be reported be made publicly available. Specifically, the Commission would make publicly available for each such Swap Dealer its tangible net equity and its tangible net equity in excess of its minimum tangible net equity requirement.[7]

A. There is No Policy Reason to Apply Minimum Regulatory Capital To Participants That Do Not Have Customers and Trade Only Cleared Swaps

Many of the undersigned firms have previously commented that firms solely engaged in proprietary trading of cleared swaps on SEFs should not be considered Swap Dealers.[8] We requested in our comment letter that the Commission clarify and confirm that the definition of "Swap Dealer" should not be read so broadly as to include such limited trading activities within its meaning.

We reasoned in this comment letter that proprietary traders trading cleared swaps executed on or through a designated contract market or SEF, should be treated no differently than when they trade futures or options on a designated contract market.

Under the Commodity Exchange Act and Commission rules thereunder, proprietary traders are not required to register with the Commission in any capacity in connection with exchange-traded futures and options. There is no economic or policy reason to treat those trading cleared swaps on a SEF (or designated contract market) any differently than when they trade futures or options.

We hold the same view with respect to the proposed capital requirements for Swap Dealers, as they may apply to firms solely using their own capital to trade cleared swaps. There currently are no CFTC capital requirements applicable to firms trading

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5 76 Fed. Reg. 27806 (May 12, 2011); *see also* Proposed rule 23.101. Tangible net equity is generally defined as the equity of the firm, as computed under U.S. generally accepted accounting principles, minus goodwill and other intangible assets.

6 76 Fed. Reg. 27816 (May 12, 2011); *see also* Proposed Rule 23.106.

7 Proposed Rule 23.106(i); *see also* 76 Fed.Reg. at 27818 (May 12, 2011).

8 *See* comment letter from the undersigned firms dated March 11, 2011 filed with the Commission in response to the proposed definitions of "Swap Dealer," "Major Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80174 (December 21, 2010).

futures and options solely as principal (i.e., without customers) and no evidence that the absence of such requirements has been a problem. The undersigned firms believe that it is similarly unnecessary for the CFTC to impose capital requirements on such firms when they trade cleared swaps.

1. Regulatory Capital is Intended to Safeguard Customers

As noted by the Commission in the proposed rule,

> FCM capital requirements in Rule 1.17 are designed to require a minimum level of liquid assets in excess of the FCM's liabilities to provide resources for the FCM to meet its financial obligations as a market intermediary in the regulated markets. The capital requirements also are intended to ensure that an FCM maintains sufficient liquid assets to wind-down its operation by transferring customer accounts in the event that the FCM decides, or is forced, to cease operations.[9]

Accordingly, the role of regulatory capital as the Commission correctly has described it is to provide a cushion to enable an FCM to carry out its functions to its customers without disruption. This requirement is an important systemic and customer protection. However, this particular financial safeguard has application only to entities that carry customer accounts. Where a market participant does not have customers it does not require minimum capital to carry out market functions on their behalf, nor must it have regulatory capital to ensure an orderly wind down in order to keep customers whole.

That is not to say that a market participant that has no customers should be able to engage in trading activities without adequate financial resources. The adequacy of the financial resources when trading cleared contracts is ensured through numerous other regulatory requirements, which make a separate independent Commission capital requirement for these activities unnecessary. In particular, DCOs require a market participant to post margin in proportion to the nature and amount of positions that it takes. In addition, DCOs establish capital requirements for market participants that are clearing members.[10] DCOs also require that clearing members maintain current written risk management policies and procedures, and subject clearing members to periodic examination with respect to their compliance with such risk management policies and with applicable financial requirements. Market participants that are customers of a clearing member will have to meet requirements established by the clearing member,

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[9] 76 Fed. Reg. at 27803 (May 12, 2011).

[10] *See* Proposed Rule 39.12(a)(2) which prescribes the financial resources requirements for participation with a DCO.

including risk controls and limits,[11] appropriately set credit filters and sufficient margin,[12] to ensure that it can meet its obligations to the clearing member. If a market participant self-clears, the DCO will actively monitor to ensure that the financial resources of the self-clearing member remain adequate for the nature and type of its trading.

Tying the amount of resources that a principal trader must have available to the positions that it holds is logically related to the risks that it poses to the market and has worked well for exchange-traded futures. However, requiring a principal trader to maintain a separate *minimum* amount of regulatory capital before it may maintain *any* trades in the market is not correlated with the risk that it poses or to the purposes of a regulatory capital requirement. Accordingly, principal traders that do not trade non-cleared swaps should not be subject to CFTC capital requirements.

2. Regulatory Capital is Appropriate for Uncleared Transactions

Section 4s(e)(3) of the Act suggests that there is a second purpose to apply regulatory capital requirements to Swap Dealers. That section of the Act explains that a purpose for setting regulatory capital requirements for Swap Dealers is to help ensure the safety and soundness of the Swap Dealer. This purpose is not dependent upon whether the Swap Dealer has customers. However, section 4s(e)((3) makes equally clear that the risk to be addressed by a capital requirement based on this rationale is the risk to the Swap Dealer in entering into bi-lateral, over-the-counter swaps. Section 4s(e)(3) instructs the Commission that the capital rules shall take into account the risk of non-cleared contracts, providing that:

> To offset the greater risk to the swap dealer or major swap participant and the financial system arising from the use of swaps that are not cleared, the requirements imposed under paragraph (2) shall—
>
> (i) help ensure the safety and soundness of the swap dealer or major swap participant; and

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[11] *See* "Risk Management Requirements for Derivatives Clearing Organizations," 76 Fed.Reg. 3698 (January 20, 2011).Proposed Rule 39.13(h)(1)(i) would require a DCO to impose risk limits on a clearing member to prevent a clearing member from carrying positions where the risk exposure of those positions exceeded a threshold specified by the DCO relative to the financial resources of the clearing member, the DCO, or both. 76 Fed. Reg. at 3707 (January 20, 2011).

[12] *See e.g.*, Proposed Rule 39.13(g)(8)(ii) which would require a DCO to require its clearing members to collect customer initial margin from their customers for nonhedge positions at a level that is greater than 100% of the DCO's initial margin requirements with respect to each product and swap portfolio. The Commission noted that such "a cushion would enable clearing members to deposit additional margin with a DCO on behalf of their customers, as necessitated by adverse market movements, without the need for the clearing members to make frequent margin calls to their customers." 76 Fed. Reg. at 3706 (January 20, 2011).

(ii) be appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.

The understanding that non-cleared transactions present a higher risk than cleared transactions that should be reflected in capital requirements is consistent with the application of the capital requirements by banks under the Basel I and Basel II capital rules.[13]

Consistent with Section 4s(e)(3) of the Act, proposed Rule 23.01(a)(1) provides that the minimum regulatory capital required of a Swap Dealer include an amount that addresses both the market risk and credit risk associated with over-the-counter swap transactions. The undersigned firms support applying these measures of market and credit risk exposure in determining the regulatory capital required for Swap Dealers with positions in uncleared swaps. The basis for these proposed requirements, however, do not apply to market participants that trade only cleared swaps.

B. Effects of Requiring Principal Traders to Meet Proposed Minimum Regulatory Capital Requirements

The Commission has correctly assessed the significant costs associated with subjecting firms to regulatory capital requirements, not only to the firms themselves, but also to the swaps market. The Commission noted that "[d]epending on the level of the increased capital required and the effect it has on the willingness of market participants to engage in swaps transactions, market efficiency may be negatively impacted through the introduction of higher costs." [14] The Commission also recognized that any "significant reduction in market participation would be anticipated to exercise corresponding negative consequences on price discovery through reductions in liquidity."[15]

These costs from imposing a minimum regulatory capital requirement on entities that do not have customers and that trade only cleared swaps contracts are not balanced by any corresponding regulatory benefit. Based upon its own correct identification of the significant harm to the markets that can arise from its proposal, the Commission should refrain from imposing unnecessary requirements. The participation of firms willing to commit their own capital, like the undersigned firms, will increase competition and efficiency in the cleared swaps market. Additionally, participation of such firms will strengthen the resilience of the swaps market by diversifying the counterparties on whom

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[13] Under both the Basel I with Market Risk Rules and the Basel II Rules, most banks and bank holding companies will calculate their capital to be held on swap transactions utilizing internal value-at-risk models, which the prudential banking regulators will inspect during their regulatory examinations. Generally, under the current framework, cleared swaps are risk-rated at 0 in these internal models.

[14] 76 Fed. Reg. 27823 (May 12, 2011).

[15] 76 Fed. Reg. 27823 (May 12, 2011).

the swaps market relies. With increased diversity, the "inter-connectedness" of market participants will decrease, achieving one of the goals of the financial reforms.

The benefit of many of the undersigned firms' participation in the successful development of cleared over-the-counter transactions has been previously demonstrated. As noted above, we are active participants in cleared derivatives. For example, many of the undersigned firms' participation and support of Clearport was a significant factor in migrating OTC swaps into a cleared environment. Our continued commitment to cleared derivatives similarly would support the development of liquid SEF trading and clearing opportunities. The Commission should avoid imposing a significant and unwarranted regulatory burden on our participation in these markets.

C. The Financial Condition Information for Swap Dealers that Do Not Have Customers Should Remain Confidential

Proposed Rule 23.106 would require Swap Dealers that are not FCMs, designated as a systemically important financial institution, or subject to the capital requirements of prudential regulator to file, an annual audited financial report and on a monthly basis, financial reports that include (1) a statement of financial condition; (2) a statement of income/loss; (3) a statement reconciling the net equity in the statement of financial condition to the firm's tangible net equity; and (4) a schedule detailing the calculation of the firm's minimum tangible net equity requirement or its minimum risk-based capital ratios requirements.[16]

The Commission is also proposing to make publicly available the amounts calculated by the Swap Dealer as its tangible net equity; its minimum tangible net equity requirement; and its tangible net equity in excess of its minimum tangible net equity requirement.[17]

The undersigned firms understand the proposed requirement to make certain financial information public is based on a similar requirement that FCMs make financial information publicly available.[18] The financial condition of an FCM is relevant to

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[16] 76 Fed. Reg. at 27838.

[17] 76 Fed. Reg. at 27839; proposed rule 23.106(i)(2).

[18] Rule 1.10(g) requires the following information be made available: (i) The amount of the applicant's or registrant's adjusted net capital; the amount of its minimum net capital requirement under §1.17 of this chapter; and the amount of its adjusted net capital in excess of its minimum net capital requirement; and (ii) The following statements and footnote disclosures thereof: the Statement of Financial Condition in the certified annual financial reports of futures commission merchants and introducing brokers; the Statements (to be filed by a futures commission merchant only) of Segregation Requirements and Funds in Segregation for customers trading on U.S. commodity exchanges and for customers' dealer options accounts, and the Statement (to be filed by a futures commission merchant only) of Secured Amounts and Funds held in Separate Accounts for foreign futures and foreign options customers in accordance with §30.7

customers and potential customers because under applicable segregation requirements for FCMs, customers are exposed to the risk that other FCM customers fail to meet their financial obligations if the FCM becomes insolvent. However, if a Swap Dealer does not have customers there is no such risk. Therefore, it is an unnecessary intrusion on the confidential nature of this information to require firms that do not have customers and do not trade non - cleared swaps to make this information publicly available.

The undersigned firms believe that regulatory oversight should be implemented consistently, as Congress has instructed, and therefore respectfully recommends that proposed Rule 23.106(i) should not apply to Swap Dealers that do not have customers.

III. Conclusion

The undersigned firms appreciate the opportunity to provide comments to the Commission regarding capital requirements and financial condition reporting for Swap Dealers.

Sincerely,

Allston Trading, LLC
By: /s/ Carlton Jones, CEO

Atlantic Trading USA LLC
By: /s/ Matt Joyce, Manager

Bluefin Trading, LLC
By: /s/ Arthur Duquette, Partner

Chopper Trading LLC
By: /s/ Raj Fernando, CEO

CTC Holdings, LP
By: /s/ Eric Chern, CEO

DRW Holdings, LLC
By: /s/ Donald R. Wilson, Jr., CEO

Eagle Seven, LLC
By: /s/ Chris Lorenzen, CEO

Endeavor Trading, LLC
By: /s/ Mark Dixon, Chief Operating Officer

Gator Trading Partners, LLC
By: /s/ Jack Newhouse, Partner

Geneva Trading USA, LLC
By: /s/ Robert S. Creamer, President

GETCO
By: /s/ Stephen Schuler, Co-Founder and CEO

HTG Capital Partners
By: /s/ William McNeill, Managing Director

IMC Financial Markets
By: /s/ Robin Van Boxsel, Managing Director

Infinium Capital Management LLC
By: /s/ Charles Whitman, CEO

Jump Trading, LLC
By: /s/ Jim Draddy, Director of Regulatory Affairs

Ketchum Trading LLC
By: /s/ Blair Hull, Managing Member

Kottke Associates, LLC
By: /s/ J. Michael Crouch, Vice-President

Marquette Partners, LP
By: /s/ James F. Heinz, Jr., Managing Partner

Nico Holdings LLC
By: /s/ Peter J. Meyer, CEO

Optiver US LLC
By: /s/ Sebastiaan Koeling, Managing Director

RGM Advisors, LLC
By: /s/ Richard B. Gorelick, CEO

Templar Securities, LLC
By: /s/ Gary Sagui, Managing Member

Tibra Trading America LLC
By: /s/ Steven A. Schwab, Chief Compliance Officer & General Counsel

TradeForecaster Global Markets LLC
By: /s/ G. Keith H. Fishe, Managing Partner

Traditum Group, LLC
By: /s/ Michael Creadon, CEO

WH Trading
By: /s/ Will Hobert, Managing Member

XR Trading LLC
By: /s/ Matt Haraburda, President