

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

August 2, 2011

***Re: Proposed Margin and Capital Requirements: RIN 3038-AD54***

Dear Secretary Stawick:

Please accept this letter regarding the CFTC's Proposed Rule on Capital Requirements for Swap Dealers and Major Swap Participants (17 CFR Parts 1, 23 and 140). Although this letter is being submitted after the end of the official comment period, we note the Commission's discretion to accept and review comments submitted after that date. Because this submission addresses a discrete and somewhat obscure aspect of the proposed rule, we respectfully request the Commission's indulgence in considering the letter.

#### **About Siff & Associates**

Siff & Associates, PLLC is a Washington, DC law firm with a diverse legal-regulatory practice that entails keeping clients informed of significant regulatory developments, including the implementation of the Dodd Frank Act. Review of the CFTC's proposed rulemaking on the Dodd Frank Act's capital requirements for swap dealers and major swap participants could pose significant issues for companies that retain, either on an enterprise wide or subsidiary level, information that is confidential and non-public. Portions of the proposed rule may permit or authorize the public disclosure of such information. We respectfully submit that the Commission clarify that it will not release such confidential, proprietary, and non-public information except as specifically authorized by statute.

#### **The Proposed Rule and Confidential Company Information**

Section 23.106(i)(3) of the Proposed Rule states:

All information that is exempt from mandatory public disclosure under paragraph (i)(1) of this section will, however, be available for official use by any **official or employee** of the United States or any State, by the National Futures Association **and by any other person to whom the Commission believes disclosure of such information is in the public interest.** (Emphasis added).

Paragraph (i)(1) refers to financial information required to be disclosed under Proposed Section 23.106, which includes, *inter alia*, audited financial reports, changes in equity ownership over the reporting period, cash flows and income/loss information. Much of this information will be highly proprietary, confidential and/or non-public information for a number of swap dealer or major swap participant entities, including those that are not publicly traded.

The purpose of this letter is to highlight the inconsistency between the current draft rule and normal agency practice relating to handling of confidential information and the conflict between the draft rule and existing provisions in the Commodity Exchange Act. This letter also offers revised language to address these concerns.

### **Treatment of Confidential Information under the CEA**

The Commodity Exchange Act strictly enjoins the Commission to keep confidential information which is not otherwise publicly available. For instance, Section 8(a) of the Act states:

For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the Commission may make such investigations as it deems necessary to ascertain the facts regarding the operations of boards of trade and other persons subject to the provisions of this Act. The Commission may publish from time to time the results of any such investigation and such general statistical information gathered therefrom as it deems of interest to the public: ***Provided, That except as otherwise specifically authorized in this Act, the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers . . .*** (emphasis added).

Also, Section 8(b) provides for extremely limited public disclosure of confidential business information by the Commission:

The Commission may disclose publicly any data or information that would separately disclose the market positions, business transactions, trade secrets, or names of customers of any person when such disclosure is made in connection with a **congressional proceeding**, in an **administrative or judicial proceeding** brought under this Act, in any **receivership proceeding** involving a receiver appointed in a **judicial proceeding** brought under this Act, or in any **bankruptcy proceeding** in which the Commission



has intervened or in which the Commission has the right to appear and be heard under title 11 of the United States Code.

Consistent with these statutory guidelines, Commission regulations also strictly limit the circumstances in which the Commission or its employees may disclose information. For instance, Part 40, Section 140.735-5 states:

A Commission employee or former employee shall not divulge, or cause or allow to be divulged, confidential or non-public commercial, economic or official information to any unauthorized person, or release such information in advance of authorization for its release. . .

Footnote 11 of Section 140.735-5 makes clear that this prohibition applies to information covered under not only various provisions of the Act and other provisions of federal law, but also where “apart from specific prohibitions in any statute or rule, the disclosure or use of such information would be unethical.” Nothing in the Dodd-Frank statute alters or amends the foregoing limitations.

### **Proposed Alternative Language**

To address these important concerns, we respectfully propose revising 23.106(i)(3) of the Proposed Rule so that it reads as follows:

All information that is exempt from mandatory public disclosure under paragraph (i)(1) of this section will, however, be available for official use by any agency of the United States or any State and by the National Futures Association.

### **Conclusion**

The Proposed Rule’s suggestion that the Commission may disclose otherwise non-public information solely upon a determination that such disclosure is “in the public interest” breaks from established policy, appears contrary to the statute, and creates uncertainty and potential liability for entities which otherwise keep such information confidential and non-public. We respectfully request that the Commission correct this by revising the Proposed Rule as set forth above.