THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

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By Electronic Mail (http://comments.cftc.gov)

April 6, 2011

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

Regarding: Proposed Order for Adoption of Final Title VII Rules

Dear Mr. Stawick:

The Financial Services Roundtable[1] respectfully submits these comments on the proposed order of the final rulemakings by the Commodities Futures Trading Commission (the "CFTC") to implement certain requirements of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[2]

Chairman Gensler, in a speech before the Futures Industry Association on March 16, 2011, laid out a possible order for final rulemaking, proposing three broad groups that would be adopted in sequence. We are concerned that the proposed order articulated in that speech will exacerbate the difficulties that market participants will have in adapting to the new regulatory environment. In particular, although we appreciate that rules relating to product definitions and margin and capital requirements have not yet been proposed, and that they cannot be finalized in the near term, we believe that rules that reference and depend on these definitions should not be finalized ahead of these key provisions. The lack of product definitions, especially, has made it extremely difficult for market participants to understand the full scope of the regulatory changes and how they will be affected by them. We cannot envision a scenario in which the final adoption of rules, without the final adoption of the product definitions, would be appropriate to an effective transition to a new regulatory system. Moreover, we believe it is inadvisable for

[1] The Financial Services Roundtable (the "Roundtable") represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

[2] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1897 (July 21, 2010).

the Commission to adopt final rules with respect to matters such as mandatory clearing before the Commission has had a chance to consider those rules in the context of public comments received on the product definitions. We therefore strongly request that the Commission reconsider its proposed rulemaking order.

The following list sets out our proposed order for adoption of final rules, together with a discussion of the basis for this proposed order. This list does not address the effective dates of the rules, but merely the order in which we believe they should be finalized.[3] In preparing this list, we focused on precursors to other rules (*i.e.*, as discussed above, final definitions should precede the adoption of the rules that use those definitions), lead-time items, and critical components of safety and soundness for the new regulatory infrastructure. Thus, rules relating to the financial stability of derivatives clearing organizations (DCOs) and margin requirements should be adopted ahead of rules relating to mandatory clearing and should inform the mandatory clearing rules. Indeed, all regulations that establish fundamental operational aspects for new infrastructure entities should precede all regulations that would make the use of that infrastructure mandatory, and effectiveness dates likewise should be staggered so that the infrastructure has been shown to be operational before its use becomes compulsory. Thus, we have sometimes bifurcated the order of implementation for rules that were proposed in a single release. For example, we believe that rules establishing core aspects of a swap execution facility's (SEF's) trading platform should precede rules determining when a swap has been made available to trade.

We appreciate that the Commission is operating with a sense of urgency to meet Congressional deadlines. We believe, however, that the goals of the Commission, and of Congress, will be best served by taking an approach that allows for full public comment, a consideration of the rules in the context of other regulatory developments, and an adequate transition time for market participants.[4]

1. Product definitions—swap, security based swap, mixed swap, and others

Market participants need to know with certainty which contracts, instruments and products are subject to the new rules. Everything else in the new regulatory regime flows from these definitions, including entity determinations, clearing requirements, and reporting obligations. Although some entities that transact in very conventional products may be able to determine whether they are swap dealers or major swap participants even if they do not know the full parameters of the product definitions, others will not be able to make this primary determination. Participants will encounter tremendous uncertainty and reach inconsistent conclusions as they identify which transactions to report, determine whether the business conduct rules apply, or try to understand the capital and

[3] We will be submitting in the near term a separate letter addressing proposed effective dates for these rules.

[4] We note that other groups have also called for the Commission to do more in terms of cost-benefit analyses for these rules. We agree that such analyses would be helpful to the rulemaking process.

margin requirements applicable to their transactions if they do not know the parameters of the product definitions. Adopting final rules without first having these definitions in place would be like building a high rise without the foundation, with the intention of sliding it under the building later.

2. Entity definitions—swap dealer, major swap participant, and others

Similarly, market participants need to know with certainty their roles and obligations in the new regulatory regime, so they can begin to assess their compliance obligations. A large number of the proposed rules, including those that require trading on a designated contract market (DCM) or swap execution facility (SEF) or central clearing, reporting requirements, and business conduct rules, apply differently based on whether a market participant is a swap dealer, a major swap participant, an eligible contract participant, an end-user or a special entity. These definitions, again, are foundational and they need to be among the earliest rules finalized.

3. Extraterritorial application

In the same way that it is necessary for market participants to know what products are covered and whether they will be regulated under the new system, it is essential that market participants understand the extent to which cross border activity or entities and activity outside of the United States are viewed by the Commission as within the scope of the new regulations. We understand that the Commission has sought comment on the extraterritorial application of registration requirements and the other rules that would apply to registrants, and has received some excellent, thoughtful letters in response, including those from the Institute of International Bankers and the Securities Industry and Financial Markets Association. Any uncertainty created by the Commission's request for comment must be resolved as soon as possible in order to for market participants to understand the scope of entities and activities that are covered by the rules. It is not possible to begin appropriate planning without such an understanding.

4. Governance rules that would affect establishment of new entities or their relationships with other market participants, e.g., restrictions on ownership or voting

The interrelationship between entities, many to be newly formed, is a critical part of the new system, but to form new SEFs, DCMs and DCOs, market participants need to understand the ownership and governance limits that the Commission is placing on these entities. Therefor,e these rules should be among the earliest adopted, as they are crucial to the establishment of the entities on which the remaining rules will depend.

In addition, we believe the Commission should consider the effect of these requirements on existing registered entities, such as DCMs and DCOs, which are

already fulfilling important market roles. These entities already have a significant challenge in adapting to the new compliance structure, and we are reluctant to see that challenge exacerbated by these entities having to deal with issues that potentially would change their ownership structure and the composition of their governing bodies. If these entities are required to conform to the new regime, rather than having their existing structures grandfathered in whole or in part, we recommend a very long conformance period so that their legal teams can focus on core compliance issues rather than corporate restructurings as the market transitions to the new regime.

5. Margin and customer protection rules for cleared swaps; financial resource requirements for DCOs and risk management requirements for DCOs

DCOs are at the center of the new regulatory system, and their ability to manage risk is the critical feature of the move to a central clearing model. They must be able to reduce systemic risk, rather than increase it, if the goals of Title VII are to be fulfilled. To achieve this, DCOs must understand what is going to be required of them in terms of dealing with margin, what access they will have to clearing members' posted margin and what constraints will apply to their admission of new clearing members. Risk management strategies, waterfalls, governance and organizational agreements, clearing member agreements and other core aspects of the operations of the DCO may need to be modified to reflect the new rules, and in some cases may require member consent. The financial stability of the DCOs is the most critical component of safety and soundness for the new swap regulatory system, and we therefore believe the key rules that address that stability should likewise be considered foundational aspects of the new regulatory structure that should precede and inform other rulemakings.

6. Capital and margin requirements for swap dealers and MSPs

Swap dealers and major swap participants feel an urgent need to understand the regulatory capital requirements that will apply to them, and the rules for dealing with margin. If the capital and margin requirements are too high, so that the economics of the business are no longer attractive or viable, or the necessary capital cannot be raised, entities that currently function as swap dealers or major swap participants may decide to exit these business lines. If they are going to do so, they should be given that opportunity before they have to expend significant resources to implement a compliance system that they will not then use.

7. Business conduct rules

In order for swap dealers and major swap participants to confirm they are in compliance, or at least have the ability to bring their activities into compliance with the business conduct rules, they need to know what those rules are going to be. In many ways, we expect the transition to be the hardest for swap dealers and major swap participants, especially as many of these entities will never before

have operated in a regulated industry. These entities will only be able to undertake limited compliance activities during the period before final rules are adopted, and should be given clear guidance as to what will be expected of them as early as possible in the rulemaking process.

8. Registration requirements for swap dealers and major swap participants

After the entity definitions have been finalized, it may be necessary to quickly register swap dealers and major swap participants. Where activities can only be engaged in by registered entities, the registration system needs to be functional before those restrictions become effective. If the Commission decides to defer the adoption of final registration rules, we support a temporary registration process so that market activity can continue uninterrupted during any transition period.

9. Swap trading relationship requirements; customer protection requirements for uncleared swaps

These requirements will require significant lead-time, given that documentation will have to be revised (and perhaps renegotiated) across all customer relationships. In some circumstances tri-party custodial arrangements will need to be negotiated.

10. Rules defining core operational aspects of SEFs and DCMs, such as platform requirements; registration requirements for these entities

Moving swaps trading onto SEFs and DCMs is an important aspect of the new regulatory system. However, the OTC markets currently facilitate robust trading and can continue to do so until the centralized trading infrastructure is established. So long as Title VII is implemented in such a way that OTC transactions can continue to be used until SEFs and DCMs are operational for trading swaps, these rules have less urgency than some of the others the Commission is considering.

11. Rules for confirmation and portfolio reconciliation

Confirmation and portfolio reconciliation requirements need to be adopted in light of the operational aspects of SEFs and DCMs, and thus should follow the rules discussed in the preceding paragraph.

12. Rules for designating swaps as subject to mandatory clearing

As we noted at the outset, we believe that aspects of rulemaking that define operational requirements for DCOs should precede those that define the circumstances in which central clearing will be mandatory, so that there is a clear understanding of how the mandatory designations will affect the overall central clearing framework.

13. Rules for SEFs and DCMs that address when swaps are available to trade

The determination of whether a swap is "available to trade," in conjunction with the mandatory clearing rules, also determines whether a swap *must* be traded on a SEF or DCM. Accordingly, regulations governing this determination should be adopted after the rules for SEF and DCM platform requirements have been finalized, to ensure that these platforms will be able to support mandatory trading, and after the rules determining the requirements for mandatory clearing have been finalized to ensure that these rules work together.

14. Reporting requirements that clearly articulate what data will need to be reported and on what time frame.

It is essential that the reporting requirements for swaps be finalized *after* the product definitions and entity definitions, as we discuss in paragraphs 1 and 2. Beyond that, the reporting requirement rules present different sequencing considerations than some of the other rules. In particular, we believe that the technical aspects of the reporting requirements—what data capture will be necessary and what technology systems and interfaces will need to be in place—are critical to the reporting and recordkeeping rules, and should take precedence over final rules establishing reporting obligations. The technology support for real-time reporting is a rate-limiting step, and the regulations necessary to establish clear specifications should be given priority over other reporting rules.

Having said that, we note also that, as the Commission is well aware, there is an ongoing effort among industry participants and various regulators, including the Commission, the Office of the Comptroller of the Currency, the Office of Financial Research and the Securities and Exchange Commission, to agree to uniform, industry-wide standards for data reporting that are technologically feasible, not cost prohibitive, and capable of being adopted across the industry. The Commission should not move to finalize data technology standards ahead of the completion of this larger, multi-agency, coordinated process. We ask, therefore, that the Commission focus its efforts on bringing this process to closure, rather than on putting final rules in place.

15. Rules governing SDRs; registration requirements for same; **rules mandating reporting, including legacy swaps, position limits, large trader reporting and other reporting obligations**

Until the information technology issues discussed in paragraph 14 are resolved, final rules relating to SDRs and mandatory reporting requirements should not be adopted. Our members believe that real-time reporting requirements could be finalized before the requirements for more detailed swap data reporting, such as reporting that would require filing confirmations, but all of these need to follow product definitions and an understanding of the technological limits of the system. Transparency is an important goal of Title VII, but it should not come at the

expense of developing a sound, technologically feasible and operationally effective system for the trading and clearing of swaps. The reporting requirements, therefore, should be adopted in final form only after the parameters of the infrastructure to which they will relate is fully understood.

16. **Other: anti-manipulation, whistle-blowing, affiliate marketing, fair credit reporting**

    We have included these provisions last, not because they are unimportant, but because other aspects of regulatory implementation do not depend heavily on them, and changes to compliance programs to accommodate them appear to be relatively discrete. On that basis they could also come earlier, but not before the key definitions that would be needed to establish their scope.

We have not proposed an order for the Volcker rule implementation, understanding that those rules may be implemented on a different time frame and depend significantly on the actions of other regulatory agencies. We note, however, as we have before, that the Volcker rule should be implemented in a way that is consistent with the regulatory framework established under Title VII. For instance, if banks are permitted to take certain actions under the Title VII rules, they should likewise be permitted to take such actions under the Volcker rule.

We appreciate the opportunity to express our views on these extremely complex issues. We are confident that the Commission will adequately address the areas of specific concern that the Roundtable has described above. If you have any questions about this letter, or any of the issues raised by our comments, please do not hesitate to call me or Brad Ipema, the Roundtable's Senior Regulatory Counsel, at (202) 589-2424.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel
Financial Services Roundtable