

September 22, 2011

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

Re: Customer Clearing Documentation and Timing of Acceptance for Clearing – RIN 3038-AD51

Dear Mr. Stawick:

MarkitSERV¹ is pleased to submit the following comments to the Commodity Futures Trading Commission (the “**CFTC**” or the “**Commission**”) on the proposed rulemaking to implement certain requirements included in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**DFA**”)² titled Customer Clearing Documentation and Timing of Acceptance for Clearing (the “**Proposed Rule**”).³

Introduction

MarkitSERV views its role in the global derivatives markets as an independent facilitator, making it easier for derivatives market participants to interact with each other. To achieve this goal, MarkitSERV provides trade processing, confirmation, matching and reconciliation services for swaps and security-based swaps across regions and asset classes, as well as universal middleware connectivity for downstream processing such as clearing and reporting. Such services, which are offered also by various other providers, are widely used by participants in the swaps markets today and are recognized as tools to increase efficiency, reduce cost, and secure legal certainty. With over 2,100 firms currently using the MarkitSERV platform, including over 22,000 buy-side fund entities, its legal, operational, and technological infrastructure plays an important role in supporting the swap markets in the United States and globally.

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

Executive Summary

MarkitSERV appreciates that the Commission considered public comments in response to the proposed rule titled Requirements for Processing, Clearing, and Transfer of Customer Positions (the “**Processing Rule**”)⁴ and that the Commission re-proposed certain of the provisions from the Processing Rule based on those comments. MarkitSERV commented on certain provisions in the Processing Rule in an earlier comment letter, and would like to further comment on these provisions as they stand in the Proposed Rule. Specifically, we

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

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

³ Customer Clearing Documentation and Timing of Acceptance for Clearing, 76 Fed. Reg. 45730 (published August 1, 2011).

⁴ Requirements for Processing, Clearing, and Transfer of Customer Positions, 76 Fed. Reg. 13101 (published March 10, 2011).

believe that the Commission should amend or clarify the proposed rules in the following aspects in order to avoid an unnecessary increase to the cost of implementation for the industry, and to more closely align its provisions with requirements in the DFA: (1) clarify that swap dealers (“**SDs**”) and major swap participants (“**MSPs**”) are permitted to decide how to route their swap transactions to derivatives clearing organizations (“**DCOs**”) for clearing, including via third parties, even when those swaps are executed on a swap execution facility (“**SEF**”) or a designated contract market; (2) limit a DCO’s ability to require SDs and MSPs to use a specific routing mechanism when those methods pose no threat to the DCO; and (3) clarify that, in the event it is not possible for a swap transaction to be accepted for clearing within the time frames established for mandatory confirmation, parties will satisfy their statutory confirmation requirement by confirming the pre-clearing swap transaction prior to clearing.

Comments

In the Proposed Rule, the Commission revised certain aspects of the Processing Rule. Specifically, the Commission revised proposed rule 39.12(b)(7), which relates to the process and timing for clearing swaps, but only to (i) require DCOs to coordinate with SEFs to facilitate the *accurate*, in addition to *prompt and efficient*, processing of trades, (ii) require DCOs to coordinate with clearing members that are FCMs, SDs, and MSPs regarding the process for clearing trades, and (iii) expand the timeframe that DCOs have to accept or reject trades executed on a SEF from “immediately” (in the case of SEF-executed trades) or “upon submission” (in the case of non-SEF executed trades) to “as quickly after execution [or submission] as would be technologically practicable if fully automated systems were used.”⁵ The Commission also re-designated proposed rule 39.12(b)(7)(v), which relates to the confirmation of trades by DCOs, as rule 39.12(b)(8), but did not revise the substance of that rule.

MarkitSERV submitted a comment letter to the Commission on April 11, 2011 (the “**April Comment Letter**”),⁶ attached as Exhibit A, in response to the Processing Rule. Given that the Proposed Rule pertains to some of the same issues addressed in the April Comment Letter, we further elaborate on these issues in this comment letter.

1. The Commission Should Explicitly Permit SDs and MSPs to Determine How to Route Transactions to DCOs Regardless of How Transactions Are Executed

In the April Comment Letter, MarkitSERV argued that SDs and MSPs should be able to choose how to route swaps to DCOs for clearing. This would not only reflect current market practice but would also make use of existing infrastructure and ensure that the industry is not burdened with unnecessary cost by forcing it to change to new (and potentially less efficient) routing arrangements. While the Processing Rule (as well as the Proposed Rule) explicitly permits SDs and MSPs to choose how to route *non*-SEF executed swaps to a DCO, it is silent as to whether SDs and MSPs can choose how to route SEF-executed swaps to a DCO. Indeed, the Commission has never explicitly required SEFs, as opposed to SDs or MSPs, to route SEF-executed swaps to DCOs. Instead, in proposed rule 39.12(b)(7), the Processing Rule merely requires DCOs to coordinate with SEFs to “develop[] rules and procedures to facilitate prompt and efficient processing of all contracts, agreements, and transactions submitted to the [DCO] for clearing.”⁷

Nonetheless, the Commission appears to expect SEFs, not SDs or MSPs, to control the routing of swaps to DCOs. In the Cost-Benefit section of the SEF Rule, for example, the Commission wrote that the rule will “necessitate that SEFs that determine to make certain swaps available for trading will have to coordinate with

⁵ See Proposed Rule, 76 Fed. Reg. at 45738 (to be codified at 17 C.F.R. §§ 37.12(b)(7)(i)-(ii)); Processing Rule, 76 Fed. Reg. at 45738 (to be codified at 17 C.F.R. §§ 37.12(b)(7)(i)-(ii)).

⁶ See Letter from MarkitSERV to the Commission (April 11, 2011), *available at* <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=35543&SearchText=markitserv> (last visited Sept. 22, 2011).

⁷ See Processing Rule, 76 Fed. Reg. at 13110 (to be codified at 17 C.F.R. § 39.12(b)(7)(i)).

DCOs in order to effect clearing and thus be subject to the DCO's risk management and margining procedures."⁸

As we submitted in the April Comment Letter, we believe that the Commission should permit SDs and MSPs to decide how to route transactions to DCOs regardless of whether the trade is executed on or off of a SEF for a number of reasons. First, the statutory requirement to submit a swap for clearing ultimately resides with the counterparties to that swap, not the SEF.⁹ Therefore, the counterparties should have ultimate control over how this obligation is satisfied. Second, market participants (including swap counterparties, would-be SEFs, and DCOs) realize significant benefits even today from using third parties for connectivity purposes and therefore may wish to continue using third parties for such connectivity and routing. These benefits are further explained in the April Comment Letter, but include reduced cost, operational efficiency, process simplification and certainty.¹⁰

The Proposed Rule does not provide any clarity regarding whether SDs or MSPs will be able to choose how to route SEF-executed trades to DCOs. Therefore, as currently proposed, SDs and MSPs may not have any control over how their swaps are routed to DCOs. We do not believe that the Commission should assume that the most efficient, safe, or cheapest method for transaction routing will always be for a SEF to submit swap trades directly to a DCO. This method may be efficient for some counterparties but not for others. Given complying with all of the Commission's proposed rules will likely be very costly, the Commission should provide market participants with flexibility where the DFA leaves room for multiple ways of compliance. We urge the Commission to do so by clarifying that SDs and MSPs have the option to choose how to route their swap transactions to DCOs.

2. DCOs Should Be Granted Limited Discretion in Restricting the Routing Methods Chosen by Counterparties

We reiterate our concern that the Processing Rule could allow DCOs to limit the permissible types of routing mechanisms used by counterparties even when those mechanisms pose no threat to the DCO.¹¹ For example, a DCO could require the parties to a trade to use a designated routing mechanism¹² to submit swap transactions for clearing. We believe that this type of requirement would impose an unnecessary restraint on competition between routing services when parties might prefer using an alternative routing mechanism. As explained in more detail in our April letter, we believe that the Commission should therefore clarify in its final rule that DCOs are not permitted to specify the end-to-end routing mechanism that is used by the submitting party.

3. Counterparties Should Be Able to Bilaterally Confirm Transactions that are Not Accepted for Clearing Within the Confirmation Timeframes

In the April Comment Letter, MarkitSERV also highlighted a potential tension between proposed rule 39.12(b)(7)(v) (now renumbered as 39.12(b)(8)) and the Commission's rules regarding swap confirmations. Proposed rule 39.12(b)(8) states that "the confirmation of all terms of the transaction shall take place at the same time as the swap is accepted for clearing,"¹³ while the Commission's rules regarding swap confirmations

⁸ Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. 1214, 1237 (published Jan. 7, 2011).

⁹ See DFA § 723 (adding Commodity Exchange Act ("CEA") Section 2(h)(1)(A)) ("It shall be unlawful for any person to engage in a swap unless *that person* submits such swap for clearing to a [DCO]. . .") (emphasis added).

¹⁰ See April Comment Letter at 3-4.

¹¹ See Processing Rule, 76 Fed. Reg. at 13103 ("*in many instances*, it is *likely* that DCOs will enable SDs and MSPs to submit their swaps to clearing via third-party platforms and other service providers.") (emphases added).

¹² Such service could be either provided by the DCO itself, by a party related to the DCO, or by a third party.

¹³ Processing Rule, 76 Fed. Reg. at 13111 (to be codified at 17 C.F.R. § 39.12(b)(7)(v)).

require swaps to be acknowledged or confirmed within specified time periods.¹⁴ As we explained, circumstances will likely arise where a DCO does not accept a transaction for clearing within the timeframe required for confirmations. For this reason and because the parties are responsible for ensuring that trades are acknowledged and confirmed, we urged the Commission to clarify that cleared swaps may not be confirmed solely by the DCO in all circumstances. Instead, we argued that the rules should clarify that the parties to a transaction must satisfy their confirmation obligations by confirming the pre-clearing transaction (the “**alpha trade**”) prior to clearing when a transaction is not accepted for clearing within the timeframes established for mandatory confirmation.¹⁵ Without adding such clarification, many swap transactions might be left uncleared and unconfirmed for undefined periods of time, leading to increased legal and systemic risk.

The Proposed Rule does not clarify whether counterparties can confirm alpha trades prior to clearing when the transaction will not be accepted by a DCO within the timeframe for confirmation. Indeed, by expanding the time that DCOs have to accept swaps for clearing, the need for counterparties to confirm such swaps bilaterally is even greater now because the rule acknowledges that swaps will not always be immediately accepted for clearing (and thus immediately confirmed by the DCO). Again, we encourage the Commission to explicitly adopt a flexible approach as suggested in our April Comment Letter. Failure to do so may potentially cause the industry to incur very substantial costs and unintended risks even though the prescriptive approach that the Proposed Rule and Processing Rule appear to adopt is not mandated by the DFA.

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

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

Sincerely,



Jeff Gooch
Chief Executive Officer
MarkitSERV

¹⁴ See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81519, 81531 (to be codified at 17 C.F.R. § 23.501(a)) (published Dec. 28, 2010) (detailing mandatory timelines for executing a confirmation which vary depending on several factors).

¹⁵ See April Comment Letter at 6-7.

Exhibit A

See attached.

April 11, 2011

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

Re: Requirements for Processing, Clearing, and Transfer of Customer Positions – RIN 3038-AC98

Dear Mr. Stawick:

MarkitSERV¹ is pleased to submit the following comments to the Commodity Futures Trading Commission (the “**CFTC**” or the “**Commission**”) on the proposed rulemaking to implement certain requirements included in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**DFA**”) ² titled Requirements for Processing, Clearing, and Transfer of Customer Positions (the “**Proposed Rule**”).³

Introduction

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

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

Executive Summary

MarkitSERV recognizes that some swap execution facilities (“**SEFs**”) might choose to build their own confirmation capability and/or downstream connectivity to derivatives clearing organizations (“**DCOs**”) and/or swap data repositories (“**SDRs**”), and that market participants may choose to use those services. At the same time, we believe that some SEFs may not wish to make those investments themselves, instead preferring to rely on a third party. Additionally, we believe that some SEF customers, including swap dealers (“**SDs**”) and major swap participants (“**MSPs**”), could benefit from using third party middleware services or may value the simplicity and efficiency of using common infrastructure across multiple SEFs. We therefore believe that the rules should allow SEFs and their customers to make their own commercial choices by deciding how to confirm transactions and how to route those transactions to DCOs. We believe that the Commission should set standards for the connectivity and the legal support required that should apply equally to any entity providing

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

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

³ Requirements for Processing, Clearing, and Transfer of Customer Positions, 76 Fed. Reg. 13101 (proposed March 10, 2011).

those services, but that market participants should be allowed to make their own choices regarding how these requirements are met.

Given this, our comments on the Proposed Rule are designed to point out enhancements to the rules which will give participants the ability to choose optimal solutions while meeting the objectives of the DFA.

As further explained below, MarkitSERV believes that: (i) SDs and MSPs should be permitted to decide how to route their swap transactions to DCOs for clearing, including via third parties, even when those swaps are executed on a SEF or a designated contract market ("**DCM**"); (ii) DCOs should be permitted to require certain formats for data that is routed to them, but should not be allowed to dictate the use of specific platforms for routing services; (iii) several of the timing restrictions imposed on SDs and MSPs for submitting swaps to DCOs may prove to be impractical when applied to all possible transactions, and some seem inconsistent with other rules proposed by the Commission; (iv) the Commission should clarify that, in the event it is not possible for a swap transaction to be accepted for clearing within the time frames established for mandatory confirmation, parties may satisfy their confirmation requirement by confirming the swap transaction prior to clearing; and (v) "execution," "confirmation," "audit trail," and "clearing" are distinct legal and practical concepts and should be reflected as such in the regulations.

Comments

1. SDs and MSPs Should Be Allowed to Decide How to Route Their Swap Transactions to DCOs Regardless of How These Transactions Are Executed

Proposed Rule 23.506(a) provides SDs and MSPs with the ability to determine how to route swaps to a DCO when these swaps are not executed on a SEF or a DCM, as long as the routing method chosen is acceptable to the DCO.⁴ According to the Preamble in the Proposed Rule, such routing methods are "likely" to include third party platforms which provide routing services.⁵ When a swap is executed on a SEF or DCM, however, Proposed Rule 39.12(b)(7) would seem to prevail. This rule is silent on what role the parties to a swap might have in deciding how to route swaps to a DCO and instead merely states that DCOs must coordinate with SEFs and DCMs (not SDs and MSPs) to "develop[] rules and procedures to facilitate prompt and efficient processing of all contracts, agreements, and transactions submitted to the [DCO] for clearing."⁶ Thus, it is unclear whether the Proposed Rule would permit the parties to a swap to decide how to route swaps that are executed on a SEF or a DCM to a DCO, and whether such routing could be performed by third party platforms.

Note that the DFA does not mandate the DCOs, the SEFs and the DCMs to dictate to the SDs and MSPs how they should execute and clear the swaps between themselves – instead, the ultimate obligation to clear, trade, report, maintain records and confirm the trades rests with the SDs and the MSPs; accordingly, the final say should be with the SDs and the MSPs on what should be the best and the most efficient method of accomplishing this while leaving room for organic development of swap markets and the infrastructure that supports these markets in the future.

As described below, we believe that participants in the swaps markets (*i.e.*, SDs, MSPs and the end-users) today realize significant benefits from using third party platforms for the processing and routing of swaps. As a result, and because the obligation to submit a swap for clearing ultimately resides with the counterparties to that swap,⁷ not the SEF or DCM, we believe that parties to a swap should be permitted to use various methods,

⁴ See Proposed Rule, 76 Fed. Reg. at 13109 ("Each [SD] and [MSP] shall ensure that it has the capacity to route swap transactions not executed on a [SEF] or [DCM] to a [DCO] in a manner acceptable to the [DCO]. . . .").

⁵ See *id.* at 13103.

⁶ See *id.* at 13110 (to be codified at 17 C.F.R. § 39.12(b)(7)(i)).

⁷ See DFA § 723 (adding Commodity Exchange Act ("**CEA**") Section 2(h)(1)(A)) ("It shall be unlawful for any person to engage in a swap unless *that person* submits such swap for clearing to a [DCO]. . . .") (emphasis added).

including third party platforms for these purposes if they choose to do so, regardless of how a swap is executed and regardless where the swap is cleared. Furthermore, and for the same reasons, DCOs should be required to accept swap transactions routed to them by third-parties in a fair and non-discriminatory manner.⁸

a. Benefits of Using Third Party “Middleware” Providers for Routing and Processing Services

In today’s swaps markets, various DCOs offer central clearing services, while execution takes place via a multitude of methods and venues. An operational infrastructure has therefore evolved where specialized Third-Party “Middleware” Providers (“*TPMPs*”) such as MarkitSERV provide universal, timely and secure connectivity between the numerous counterparties, execution venues, and DCOs, as well as with SDRs and other post-trade service providers. Swap transactions are communicated to TPMPs either directly by the counterparties to a bilaterally executed trade, by electronic trading platforms where the swap was executed, or by the interdealer broker who arranged a transaction. TPMPs not only route trades to DCOs, but also provide swap counterparties with notifications as to the swap’s status (e.g., whether it has been received, registered, or rejected by the DCO), which is important for the counterparties’ risk management. Where applicable, TPMPs will also provide trade enrichment,⁹ matching or affirmation of all the terms of the transaction, as well as allocation and legal attachment.¹⁰

The use of TPMPs for routing purposes in the swaps markets has become common because it offers benefits not only to the counterparties of swap transactions but also for SEFs and DCOs:

- *Operational Efficiency:* The use of TPMPs reduces the number of interfaces that market participants must establish and maintain with different entities, *i.e.*, TPMPs act as “universal adapters”.¹¹ As a result, swap counterparties using TPMPs do not need to individually invest in costly infrastructure by building separate interfaces for each DCO. Equally, the existence of TPMPs enables DCOs that enter the swap market to achieve a much faster “go-live” because they need only to establish connectivity with a limited number of TPMPs in order to be in a position to receive swap transactions from a large number of counterparties (regardless of where these counterparties trade, *i.e.*, be it on a platform that may qualify as a SEF, via interdealer voice broker, or purely bilaterally).
- *Cost Efficiency:* Using TPMPs can significantly reduce the cost of technology implementation and technical support, because swap counterparties using a TPMP for their routing needs will have the benefit of a consistent messaging interface and format. This reduces the risk of errors and the need for all entities involved to test and verify a wide variety of different routing mechanisms, codes, naming conventions, data formats, etc.
- *Process Simplification & Certainty:* Using TPMPs simplifies the process of routing those swap transactions to DCOs that were not intended to be cleared at the time of execution should there be a desire or a requirement at a later date to clear them. Many of these non-cleared swap transactions would have been confirmed by TPMPs, so TPMPs would be able to quickly and efficiently route those swaps to DCOs for clearing. Conversely, for trades that were intended to be cleared but did not

⁸ Note that one of the requirements of the DFA is that DCOs, SEFs and DCMs ensure equal access to their platforms for all qualified participants and that they do not unreasonably restrict access to their platforms. See DFA § 725(c) (amending CEA Section 5b(c)(2)(C)) (DCOs); DFA § 733 (adding CEA Section 5h)(f)(2)(B)(ii)) (SEFs); and DFA § 735(b) (amending CEA Section 5(d)) (DCMs).

⁹ See Trade Acknowledgment and Verification of Security-Based Swap Transactions, 76 Fed. Reg. 3859, 3869 n.60 (proposed by the Securities and Exchange Commission Jan. 21, 2011) (“The Commission understands that in some instances, additional transaction details may have to be entered post-execution but prior to processing. In the industry, this process [is] generally referred to as ‘enrichment.’”).

¹⁰ Whether such additional functions are required for a given transaction will depend on whether the swap is executed on a SEF, whether the SEF provides some of those services itself, and the desired legal status of transaction prior to being cleared.

¹¹ MarkitSERV for example has established and maintains today connectivity with 8 central clearinghouses, more than 70 trading venues (including interdealer brokers), and more than 2,000 counterparties.

successfully clear, a TPMP would provide the opportunity for the counterparties to confirm the trade bilaterally.

For these reasons, the use of TPMPs for the routing of swap transactions can increase the availability, speed of uptake, and level of operational efficiency of central clearing for swaps, thereby supporting the timely introduction of the clearing requirement under the DFA. While such architecture is recognized as efficient by market participants, it also fosters competition on both the execution and the clearing level. Functionality of TPMPs is already established and is successfully serving the market today (*i.e.*, even before the effectiveness of the Proposed Rule or the enactment of the DFA).

b. Swap Counterparties Should Be Permitted to Use TPMPs for Routing Regardless of How a Swap is Executed

Given the significant benefits that can be realized by using TPMPs for routing services, swap counterparties, execution platforms, and DCOs may prefer to use such third parties for routing even when a transaction is executed on a SEF or DCM. Other counterparties, however, may prefer to have a SEF or DCM route a swap transaction directly to a DCO, without the use of any middleware providers.

Because the ultimate obligation to confirm, document and, where applicable, clear on a DCO and trade swaps on SEFs and DCMs rests with the counterparties,¹² these counterparties should have the final authority to determine the most efficient and most suitable form and method of execution and routing, be it through the facilities of a SEF, a DCM or a properly qualified TPMP. Counterparties should have this right regardless of whether the transaction is executed on or off of a SEF or DCM, so long as they deliver the data in a format that is acceptable to the DCO. Therefore, we urge Commission to explicitly permit the parties to a swap to decide how to route their transactions to a DCO even when they are executed on a SEF or DCM, and also urge the Commission to explicitly state in the final rule that counterparties can use TPMPs for this purpose.

c. DCOs Should Be Granted Limited Discretion in Restricting the Routing Methods Chosen by Counterparties

Proposed Rule 23.506(a) permits SDs and MSPs to use any method of routing for swaps that are not executed on a SEF or DCM so long as such routing is done “in a manner acceptable to the [DCO] for purposes of risk management.”¹³ We believe this Proposed Rule correctly permits DCOs to refuse routing approaches that might increase risks to their operations. However, we are concerned that it might allow DCOs to limit the permissible types of routing methods even when these would not pose any danger to the DCO’s operations in contravention of the DFA.¹⁴

We do not believe that DCOs should be permitted to arbitrarily prohibit the use of practical routing approaches which would not increase risk to their systems. For example, DCOs should not be allowed to require SEFs to connect directly to the DCO’s own upload mechanisms while refusing to receive transactions via third party providers. Such a requirement would stifle competition and would restrict swap counterparties and SEFs from using TPMPs even if they believed that doing so was most efficient and it would not add risk to the operations of the DCO. In fact, this type of restriction may violate applicable provisions of the DFA.¹⁵

¹² See DFA § 731 (adding CEA Section 4s(i)(1)) (“Each registered [SD] and [MSP] shall conform with such standards as may be prescribed by the Commission . . . that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps.”); DFA § 723 (adding CEA Section 2(h)(1)(A)) (“It shall be unlawful for any person to engage in a swap unless *that person* submits such swap for clearing to a [DCO]. . . .”) (emphasis added).

¹³ See Proposed Rule, 76 Fed. Reg. at 13109 (to be codified at 17 C.F.R. § 23.506(a)).

¹⁴ See DFA § 723(a)(3), 124 Stat. at 1676 (adding CEA Section 2(h)(B)(ii)) (“The rules of a [DCO] . . . shall provide for non-discriminatory clearing of a swap . . . executed bilaterally or on or through the rules of an unaffiliated [DCM] or [SEF].”).

¹⁵ See DFA § 725(c) (amending CEA Section 5b(c)(2)(C)), mandating equal and non-restricted access to DCOs.

Therefore, we urge the Commission to clarify Proposed Rule 23.506(a) in this regard. Specifically, we believe that the final rule should make clear that, while DCOs may specify the format of the data that is submitted to them, they should not be permitted to specify the end-to-end routing mechanism used by the submitting party.

2. Some Timing Requirements for SDs and MSPs To Submit Swaps for Clearing May Be Impractical

Proposed Rule 23.506(b)(1) requires SDs and MSPs to submit all swaps that are subject to the mandatory clearing requirement for clearing “as soon as technologically practicable” following execution, but no later than the close of business on the day of execution. In the Preamble to the Proposed Rule, the Commission solicited comments on whether these requirements were appropriate and operationally feasible.¹⁶ For several reasons noted below, we believe that some aspects of these rules may not be appropriate or may not be operationally feasible.

First, the requirement in Proposed Rule 23.506(b)(1) that swaps subject to the mandatory clearing requirement but not executed on a SEF or DCM be submitted for clearing “as soon as technologically practicable following execution”¹⁷ may be inappropriate in light of the Commission’s proposed rule regarding confirmation requirements.¹⁸ Under that rule, swap transactions must be confirmed within a certain time period after execution,¹⁹ and the Commission has stated in other rules that DCOs will require such confirmation prior to the novation of the transaction by the DCO.²⁰ This confirmation process can take a significant amount of time in some circumstances. Indeed, the confirmation rule does not place *any* restrictions on the amount of time permissible to consummate such confirmations in some circumstances.²¹ Because the confirmation rule permits a significant amount of time to lapse between execution and confirmation, and because swap transactions should be confirmed prior to submission to a DCO, we suggest that the Commission establish time limits applicable to submitting a swap for clearing by reference to the time of confirmation as opposed to the time of execution.²²

Second, requiring SDs and MSPs to submit swaps for clearing “no later than the close of business on the day of execution”²³ fails to accommodate transactions that occur late in the day. We raised a similar concern related to the confirmation requirements in an earlier letter to the Commission.²⁴ Indeed, many swaps may not be executed until after the relevant DCO is closed for the day, making it simply impossible to meet the proposed requirement. Therefore, we suggest that the final rule use time periods (e.g., within 24 hours) as opposed to a specific time of day.

¹⁶ See Proposed Rule, 76 Fed. Reg. at 13104.

¹⁷ See *id.* at 13109 (to be codified at 17 C.F.R. § 23.506(b)(1)).

¹⁸ Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81519 (proposed Dec. 28, 2010).

¹⁹ See *generally*, Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81531 (to be codified at 17 C.F.R. 23.501).

²⁰ See *id.* at 81521 (“the DCO will require a definitive written record of all terms to the counterparties’ agreement prior to novation by the DCO.”).

²¹ For transactions between an SD/MSP and a non-SD/MSP, the confirmation rule requires SDs and MSPs to send an acknowledgment of the transaction to the counterparty within a set amount of time, but does not impose any restrictions on the non-SD/MSP counterparty in terms of when to consummate the actual confirmation. See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81531 (to be codified at 17 C.F.R. 23.501(a)(2)).

²² In a previous letter, we similarly explained why acknowledgment and confirmation time limits should be made by reference to the time when all necessary information is obtained, as opposed to the time of execution. See Letter from MarkitSERV to the Commission 7-8 (Feb. 28, 2011). Confirmation and acknowledgment can be accomplished by affirmation, whereby one party alleges the details of a swap transaction to their counterparty and those details are affirmed by the counterparty if correct, or matching, whereby both counterparties to the swap transaction allege the transaction details to each other, which are then compared. Automated confirmation services such as MarkitSERV provide these services electronically.

²³ Proposed Rule, 76 Fed. Reg. at 13109 (to be codified at 17 C.F.R. § 23.506(b)(1)).

²⁴ See Letter from MarkitSERV to the Commission 9 (Feb. 22, 2011).

3. The Commission Should Clarify that, In the Event It Is Not Possible for a Swap Transaction To Be Accepted for Clearing Within the Time Frames Established For Mandatory Confirmation, Parties May Satisfy Their Confirmation Requirement by Confirming the Swap Transaction Prior To Clearing

Several provisions in the rules proposed by the Commission appear to be inconsistent in their use of the term “transaction.”²⁵ We therefore want to highlight that, according to current market practice, a swap that is submitted for clearing will essentially entail three different transactions: the initial transaction between the original counterparties (the “*pre-clearing transaction*”), and the two subsequent transactions between the DCO and each counterparty upon novation (the “*post-clearing transactions*”). These could, for example, be referred to as the “*alpha*”, “*beta*”, and “*gamma trades*”. We encourage the Commission to use such terminology to clarify which transactions its various rules apply to.

Proposed Rule 39.12(b)(7)(v) is one example of such an inconsistency. That rule requires that “confirmation of all terms of the transaction shall take place at the same time as the swap is accepted for clearing.”²⁶ This proposed rule would therefore require a confirmation of both post-clearing transactions, but is unclear as to whether, when a swap is to be submitted for clearing, confirmation will ever be required of the *pre*-clearing transaction. In contrast, the Commission has elsewhere stated that it expects DCOs to require transactions, *i.e.* the “pre-clearing transactions”, to be confirmed before clearing.²⁷

While we understand that DCOs will generally be able to confirm transactions upon acceptance for clearing, we believe that circumstances will inevitably arise where a transaction is not accepted for clearing within the time frames established by the Commission for a transaction to be confirmed,²⁸ or where a transaction is not successfully cleared upon submission to a DCO. The Commission recognized this by stating that “there may be instances when a delay in acceptance of a transaction by a DCO is unavoidable.”²⁹ Reasons for such delays might be that the DCO is awaiting approval by the futures commission merchant (“*FCM*”) who is acting for a client, or that the clearing member needs time to post some required margin. In either case, these transactions would benefit from greater legal certainty if the swaps were confirmed prior to submission to a DCO because, as the Commission recognized, allowing time to lapse between execution and clearing creates market risks.³⁰

Even when a transaction is not rapidly accepted for clearing, however, the parties will still be responsible for confirming the transaction under the DFA and Commission regulations.³¹ We therefore believe that the

²⁵ Compare, e.g., Proposed Rule, 76 Fed. Reg. at 13111 (to be codified at 17 C.F.R. § 39.12(b)(7)(v)) (“confirmation of all terms of the transaction shall take place at the same time as the swap is accepted for clearing.”), with Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81522 (“The objective is that parties have full written agreement on all terms as soon as practicable after execution and also upon any ownership event during the life of the swap. . . . [including] novation. . . .”). Note that the DFA requires that SDs and MSPs confirm their trades regardless of the clearing or the DCM or the SEF execution requirement. See DFA § 728 (adding CEA Section 21(c)) (requiring SDRs to confirm the accuracy of all transactions); DFA § 731 (adding CEA Section 4s(i)(1)) (requiring SDs and MSPs to conform with rules set forth by the Commission related to confirmation of all swaps).

²⁶ Proposed Rule, 76 Fed. Reg. at 13111 (to be codified at 17 C.F.R. § 39.12(b)(7)(v)).

²⁷ See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81521 (“if a swap is executed bilaterally, but subsequently submitted to a DCO for clearing, the DCO will require a definitive written record of all terms to the counterparties’ agreement prior to novation by the DCO.”).

²⁸ See *id.* at 81531 (to be codified at 17 C.F.R. § 23.501(a)) (detailing mandatory timelines for executing a confirmation which vary depending on several factors).

²⁹ Proposed Rule, 76 Fed. Reg. at 13102.

³⁰ See *id.* (“the value of a position may change significantly between the time of execution and the time of novation, thereby allowing financial exposure to accumulate. . . .”).

³¹ See DFA § 723 (adding CEA Section 2(h)(1)(A)) (“It shall be unlawful for any person to engage in a swap unless *that person* submits such swap for clearing to a [DCO]. . . .”) (emphasis added); see also Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81531 (to be codified at 17 C.F.R. § 23.501(a)) (detailing mandatory timelines for executing a confirmation which vary depending on several factors).

Commission should clarify that, when a transaction is not accepted for clearing within the time frames established for mandatory confirmation, the parties should be permitted to satisfy their confirmation obligations by confirming the transaction prior to clearing. As explained above, the parties should have the right to determine how to confirm the pre- and post-clearing transactions because it is ultimately the parties' responsibility to ensure that the trades are confirmed.³²

4. The Commission Should Clarify What Requirements Apply to the Different Transactions that Form Part Of the Life-Cycle of a Cleared Swap

We request that the Commission clarifies how certain aspects of Proposed Rule 23.506 will interact with other rules proposed by the Commission. Specifically, although the Commission states in the Preamble that Proposed Rule 23.506 is consistent with proposed rule 23.501, which requires confirmation of all swaps,³³ and with the proposed rules requiring reporting of swap transactions to an SDR,³⁴ we believe that the interaction between these rules is somewhat unclear.

For example, using the terminology established above, we note that the Commission's Real-Time Reporting rule would require real-time reporting of the pre- and post-clearing transactions, but we are uncertain why parties must report each of these transactions in circumstances where a trade will be novated very quickly by a DCO.³⁵ We therefore believe that the Commission should clarify which reporting and confirmation requirements apply to which legs of a trade under different circumstances.

5. Execution, Confirmation, Audit Trail Creation, and Clearing Are Distinct Legal Concepts and Should Not Be Conflated

We believe that several statements and provisions in the Proposed Rule conflate the concepts of execution, confirmation, audit trail (recordkeeping), and clearing. In some circumstances, parties to a swap may not have to take any affirmative actions after execution to complete confirmation, such as when they execute on a SEF that submits the swap to a DCO for confirmation and the swap is quickly accepted for clearing, or when a SEF confirms the transaction itself and also submits the transaction for clearing. However, the Commission should recognize that the ultimate responsibility for confirmation, clearing, and execution resides with the SDs, MSPs, or counterparty to the swap, not the SEF, DCM, or DCO.³⁶ Therefore, we believe that the Commission should be careful not to conflate the terms "execution," "confirmation," "audit trail," and "clearing" to indicate, for example, that confirmation of a SEF-executed transaction must be done by that SEF.

First, the Proposed Rule states that "[s]waps executed on a SEF or DCM are confirmed upon execution."³⁷ This statement seems to indicate that execution and confirmation are the same act, and that they necessarily occur at the same time. We believe that this is not accurate as these functions may not necessarily take place at the same time or place or even be carried out by the same parties. The DFA and Commission rules

³² See DFA § 731 (adding CEA Section 4s(i)(1)) ("Each registered [SD] and [MSP] shall conform with such standards as may be prescribed by the Commission . . . that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps.").

³³ See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81531.

³⁴ See Swap Data Recordkeeping and Reporting Requirements; Proposed Rule, 75 Fed. Reg. 76574 (proposed Dec. 8, 2010).

³⁵ See Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76140, 76144 ("A reportable swap transaction includes not only the execution of a swap contract, but also certain price-affecting events that occur over the "life" of a swap. The Commission believes novations and swap unwinds are events that clearly affect the price of the swap and, therefore, should be publicly disseminated in real-time.").

³⁶ See DFA § 731 (adding CEA Section 4s(i)(1)) ("Each registered [SD] and [MSP] shall conform with such standards as may be prescribed by the Commission . . . that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps."); DFA § 723 (adding CEA Section 2(h)(1)(A)) ("It shall be unlawful for any person to engage in a swap unless *that person* submits such swap for clearing to a [DCO]. . .") (emphasis added).

³⁷ Proposed Rule, 76 Fed. Reg. at 13106.

recognize this fact by, for example, referring to execution venues as “swap execution facilities” and not as “swap confirmation facilities.” While SEFs can certainly build and maintain the appropriate infrastructure, legal framework and procedures to provide not only execution but also confirmation services,³⁸ the DFA specifically states that the SEF’s core function is the execution of swaps.³⁹ Also, deadlines that were set in a separate rule⁴⁰ reflect the fact that there may be a time lag between execution and confirmation.

Second, Proposed Rule 39.12(b)(7)(v) states that, for swaps submitted to a DCO, “[t]he confirmation of all terms shall take place at the same time as the swap is accepted for clearing.”⁴¹ We believe that this statement conflates confirmation and clearing processes by giving the impression that pre-clearing confirmation is unnecessary, which we do not believe is necessarily the case as explained above, nor is it consistent with the view that the Commission voiced elsewhere.⁴² We therefore believe that the Commission should clarify that parties can satisfy their confirmation responsibilities by confirming the transaction prior to clearing in those instances where it will be impossible to clear, and thus simultaneously confirm, a transaction within the time frames established for mandatory confirmation.⁴³

Finally, although the Proposed Rule does not use the term “audit trail,” we note that Commission rules requiring the creation of an audit trail (and recordkeeping) are distinct from confirmation requirements. SEFs are required, for example, to maintain an audit trail consisting of original documents that identify the terms of all executed trades.⁴⁴ However, these records do not necessarily entail the kind of review and agreement between the counterparties to a transaction that make up a confirmation.⁴⁵ Therefore, the Commission should not assume that SEFs would be able to satisfy any confirmation requirement merely by maintaining an audit trail.

* * * * *

³⁸ See Letter from MarkitSERV to the Commission (March 8, 2011) (discussing how execution by a SEF should not be presumed to satisfy the confirmation requirement, and why market participants and SEFs themselves should therefore have the ability to determine how to confirm a transaction).

³⁹ DFA § 763, 124 Stat. at 1770 (adding Section 3D(b) of the Exchange Act) (“... a security-based swap execution facility that is registered under subsection (a) may – (1) make available for trading any security-based swap; and (2) facilitate trade processing of any security-based swap.”). Note that these functions are listed as two separate and distinct functions.

⁴⁰ See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81531 (to be codified at 17 C.F.R. § 23.501(a)) (detailing mandatory timelines for executing a confirmation which vary depending on several factors).

⁴¹ See Proposed Rule, 76 Fed. Reg. at 13111 (to be codified at 17 C.F.R. §39.12(b)(7)(v)).

⁴² See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81521 (“if a swap is executed bilaterally, but subsequently submitted to a DCO for clearing, the DCO will require a definitive written record of all terms to the counterparties’ agreement prior to novation by the DCO.”).

⁴³ See Section 3, above.

⁴⁴ See Core Principles and Other Requirements for Swap Execution Facilities; Proposed Rule, 76 Fed. Reg. 1214, 1243-44 (to be codified at 17 C.F.R. § 37.205(b)).

⁴⁵ See Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 81531 (to be codified at 17 C.F.R. 23.501).

Mr. David Stawick
April 11, 2011
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MarkitSERV appreciates the opportunity to comment on the Proposed Rule, and would be happy to elaborate or further discuss any of the points addressed above.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Gooch".

Jeff Gooch
Chief Executive Officer
MarkitSERV