November 4, 2011

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

Re: Swap Transaction Compliance and Implementation Schedule: Trading Documentation and Margining Requirements under Section 4s of the CEA (RIN 3038 – AC96 and 3038 – A97)

Dear Mr. Stawick:

Better Markets, Inc.[1] appreciates the opportunity to comment on matters identified in the above-captioned notice of proposed rulemaking ("NOPR") of the Commodity Futures Trading Commission ("CFTC"), relating to proposed rules (the "Proposed Rules") addressing the schedule for compliance by swap dealers ("SDs") and major swap participants ("MSPs") with trading documentation and margining requirements, pursuant to and in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") amendments to the Commodity Exchange Act ("CEA").

INTRODUCTION

Transparent bilateral trading based on prudent counterparty credit management is a central pillar of the Dodd-Frank Act. A primary cause of the financial crisis of 2008 was the enormous amount of uncollateralized counterparty exposure among bilateral derivatives market participants that was completely hidden from regulators and decision-makers, even as events unfolded. These shocking circumstances must be prevented in the future. Trading documentation requirements help regulators and the broader public by providing a basic framework of minimum standards for transparency, disclosure and legal certainty. Sufficient margining requirements assure that financial entities collateralize derivatives counterparty risk between them in safe amounts according to relatively uniform standards. This is a critical step, because when the next market disruption occurs,

[1] Better Markets, Inc. is a nonprofit organization that promotes the public interest in the capital and commodity markets, including in particular the rulemaking process associated with the Dodd-Frank Act.

these regulatory requirements will help to contain the damage to the broader financial system, ensuring that the errors and mismanagement of a few do not spread like a contagion throughout the entire financial system. The schedule for compliance must provide a reasonable time for SDs and MSPs to comply. However, because of the real possibility of market disruption, the need to reach full compliance and minimize the risk of another systemic collapse is immediate.

As pointed out in the NOPR, several rules must be finalized before trading documentation and margining requirements can be put into effect. Moreover, market participants must adapt to the changed requirements. The Proposed Rules lay out an effective plan which allows adaptation, but recognizes that, in this complex market, a "one-size-fits-all" schedule is not necessarily appropriate for all counterparties of SDs and MSPs.

In summary, the Proposed Rules allow reasonable and appropriate (and, in some instances, generous) periods of time in which market participants can transition to compliance with trading documentation and also margining requirements. Moreover, these rules are fully responsive to the expressed needs of the industry as outlined in the NOPR.[2]

DISCUSSION OF THE PROPOSED RULES

The schedules for compliance for SDs and MSPs are based on the types of market participants which will function as their counterparties. This approach recognizes that the process for an SD or MSP will be different depending on the specific characteristics of the counterparty with which documents must be negotiated and margining arrangements established. This approach is entirely sensible.

Four categories of market participants are established, with individual maximum compliance schedules assigned to these categories:[3]

- Category 1 Entities include swap dealers, security-based swap dealers, major swap participants, major security-based swap participants and active funds (any private fund as defined in section 202(a) of the Investment Advisors Act of 1940, which is not a third-party subaccount and that executes 20 or more swaps per month based on a monthly average over the 12 months preceding the mandatory clearing determination).

- Category 2 Entities include commodity pools; private funds as defined in section 202(a) of the Investment Advisors Act of 1940 other than an active fund; employee benefit plans as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974; and persons

[2] *See also,* Transcript of joint CFTC/SEC Roundtable on Implementation, pages 223-7, *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/csjac_transcript050311.pdf

[3] Proposed Rules, Sections 23.175 and 23.575.

predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956, provided that the entity is not a third-party subaccount.

- Category 3 Entities include Category 2 Entities whose positions are held as third-party subaccounts.

- Category 4 Entities include any person not included in Categories 1, 2, or 3.

SDs and MSPs must be in compliance in respect of counterparties which are Category 1 entities not later than 90 days after the transaction documentation and margining requirements go into effect. With respect to counterparties which are Category 2 entities, the compliance period is 180 days. And with respect to counterparties which are Category 3 or 4 entities, the compliance period is 270 days.

This system for scheduling compliance provides reasonable and appropriate time frames for SDs and MSPs. Further, it is responsive to the input provided by the industry, as described in the CFTC's analysis of costs and benefits.[4] It must be remembered that the need to comply with trading documentation and margining requirements has been known by market participants who are ready to be SDs and MSPs for well over a year, and moreover, that they have been planning for the transition all along.[5] Preparation for compliance will not commence when the trading documentation and margining rules become final; it has already been underway for a long time. Finally it is important to note that the market participants involved in this area have some of the most sophisticated legal, compliance, and financial resources of perhaps any economic sector in the country. It is therefore certainly safe to assume that these participants are well prepared for upcoming compliance events.

SPECIFIC QUESTIONS

The NOPR sets out certain specific questions inviting comment, some in the Preamble and some in Commissioner O'Malia's Statement in Appendix 3. Responses to certain of these are set forth below.

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[4] NOPR, 76 FR at pages 58182-84.

[5] *See* exchange between Mr. Diplas and Mr. Turbeville, Transcript of joint CFTC/SEC Roundtable on Implementation, pages 223-7, *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/csjac_transcript050311.pdf

Is an entity's average monthly swap transaction activity a useful proxy for that entity's ability to comply with the Trading Documentation and Margining Requirements? Or whether an entity is required to be registered with the Commission (rather than whether an entity is already registered with the Commission)?

Swap transaction activity goes to the relevant issue: the ability to handle the systems and legal requirements for the transition to trade documentation and margining requirements. On the other hand, required registration is based on an entirely different set of standards, though registrants would all have such capability.

Would it be more appropriate for the Commission to measure a market participant's level of swap activity by measuring notional turnover and/or open exposure, as suggested by some commenters?

Transaction volume is the relevant test. The notional quantity of positions and the amount of exposure represented by open interest is wholly irrelevant to the ability of the entity to handle systems and legal documentation demands. Systemic exposures, while important, are not the main focus in this case.

What, if any, other issues not addressed in current proposed or final rulemakings should the Commission have taken into consideration when proposing the compliance schedule? For example, should the Commission have considered the extent to which its documentation and margin requirements apply to entities and transactions located outside the United States? Also, should the Commission have considered the extent to which such requirements apply to transactions between affiliates (whether domestic or cross-border)? If applicable, how should the Commission adjust the proposed compliance schedule to account for such issues? [From Appendix 3]

Jurisdictional reach and inter-affiliate issues are dealt with in other, substantive rules. If a trading relationship between an SD or MSP and a counterparty with international elements or which constitutes an affiliate falls within the scope of the requirements for trading documentation and margining, **then that relationship is a part of the U.S. market regulated by the CFTC and should not be treated differently under the Proposed Rules.**

CONCLUSION

The Proposed Rules establish a workable schedule for implementation of trading documentation and margining requirements. They are responsive to the needs expressed by industry representatives, while also recognizing the different circumstances applicable to various categories of counterparties of SDs and MSPs. The benefits and costs of this scheduling system have been well balanced, and the CFTC should be commended for the results.

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We hope these comments are helpful in your consideration of the Proposed Rules.

Sincerely,

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