THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

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

November 4, 2011

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

Regarding: Swap Transaction Compliance and Implementation Schedule: Trading Documentation and Margining Requirements Under Section 4s of the CEA

RIN 3038–AC96; 3038–AC97

Dear Mr. Stawick:

The Financial Services Roundtable (the "Roundtable")[1] appreciates the opportunity to submit comments to the Commodity Futures Trading Commission (the "Commission") with respect to its proposed rulemaking, RIN 3038-AC96; 3038-AC97, Swap Transaction Compliance and Implementation Schedule: Trading Documentation and Margining Requirements Under Section 4s of the CEA (the "Proposing Release").[2] We believe it is important to have clarity as to the time frames and order for implementation, and view the Commission's action in putting forth this proposal as a helpful move toward providing that clarity.

We have commented on a large number of Commission proposals relating to the implementation of Title VII of the Dodd-Frank Act,[3] including the Commission's

[1] The Financial Services 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, $1.2 trillion in revenue, and 2.3 million jobs.
[2] 76 Fed. Reg. 58176 (September 20, 2011).
[3] A full list of the comment letter submitted by The Roundtable to the Commission can be accessed at http://www.fsround.org/fsr/policy_issues/regulatory/cftc.asp

previous proposals relating to trading documentation[4] and margining requirements.[5] In addition, we submitted a letter detailing some of the sequencing and implementation considerations we believed the Commission should consider in moving into the implementation stage of these regulations.[6] We appreciate the opportunity to offer further perspective on these important matters.[7]

The proposals for implementation timeframes the Commission has made with respect to trade documentation, margining, and compliance with the clearing and trade execution mandates provide useful information, but still leave significant gaps in market participants' understanding of the way the Commission intends to sequence implementation. In particular, our members continue to seek a better understanding of the likely timeframes for registration, compliance with the business conduct rules, reporting and satisfying capital requirements, among others. We hope that the Commission will expand its guidance on these matters as soon as possible.

We have been reluctant to suggest time frames for the implementation process for any of the Commission's proposed rules because there is tremendous uncertainty among our members as to how long the process will take. As the Commission has acknowledged,[8] there are a number of different regulations that will need to be finalized before implementation of the trade documentation requirements can begin to take place, including product and entity definitions, the margining regulations and the regulations regarding protection of collateral for uncleared swaps. In addition, many of our members expect to be undertaking concurrent implementation of a number of other regulatory mandates from the Commission and other regulators. The Dodd-Frank Act is unprecedented in the scope of regulatory change it is initiating, which is presenting resource challenges for all of our members. Although our members cannot make firm predictions about the necessary time frame for implementation, they are united in the view that the implementation schedule proposed by the Commission regarding trade documentation and margining will be inadequate.[9] They are also united in the view that failure to have a sufficient implementation period will lead both to market disruption and

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[4] See Letter from The Financial Services Roundtable to David A. Stawick, CFTC Secretary, "Swaps Trading Documentation Requirements for Swap Dealers and Major Swap Participants," May 13, 2011, *available at* http://www.fsround.org/fsr/policy_issues/regulatory/pdfs/pdfs11/SwapsDocumentationLetter.pdf.

[5] See Letter from The Financial Services Roundtable to David A. Stawick, CFTC Secretary, "Re: Margin Requirements for Covered Swap Entities," July 11, 2011, *available at* http://www.fsround.org/fsr/policy_issues/regulatory/pdfs/pdfs11/Final_FSR_Margin_Letter_for_CFTC_July_12.pdf.

[6] See Letter from The Financial Services Roundtable to David A. Stawick, CFTC Secretary and Elizabeth M. Murphy, SEC Secretary, "Title VII Implementation Challenges," May 12, 2011, *available at* http://www.fsround.org/fsr/policy_issues/regulatory/pdfs/pdfs11/FSRoundTitleVIIImplementationLetter.pdf.

[7] We are submitting concurrently a letter with respect to implementation of the trading documentation and margin requirements. Where the same points are relevant to both letters, we have generally repeated them verbatim in both letters.

[8] 76 Fed. Reg. 58,178-79.

[9] We support a phased implementation schedule, but as discussed below believe each phase should be extended.

to competitive disadvantages for some market participants based less on their preparedness than on their economic clout.

We believe the implementation process should be viewed as a marathon, rather than a sprint. Market participants should be given enough time to complete implementation at a sustainable pace, rather than finding themselves pushed to the point where they have to give up halfway (or worse, collapse from exhaustion). Market participants who are using diligent efforts to meet the new requirements should all be able to get across the finish line, and finishing first should not matter. Unfortunately, we do not believe the implementation schedule proposed by the Commission will achieve these goals.

In this letter, we make the following key recommendations:

I. Sequence implementation of the trade documentation and margining requirements to begin, for each category of market participant, *after* the implementation of the clearing mandate for the first categories of designated swaps, to allow market participants to focus on compliance with the clearing mandate that is the cornerstone of Title VII.

II. Establish phased compliance for each category of counterparty that begins *after* the completion of the prior phase, to reflect the likelihood that resources will be allocated sequentially. The compliance period for Category 1 entities should be substantially longer (i.e., multiples of what the Commission has recommended); for Category 2 entities it should be at least a year, with that year beginning at the end of the compliance period for the Category 1 entities. Appendix A to this letter sets forth a representative timeline that demonstrates these recommendations.

III. Begin compliance periods for trade documentation only after finalization of end-user documentation requirements, business conduct rules for swap dealers and major swap participants, issuance of final margin regulations by the prudential banking regulators, and issuance of trade documentation requirements and margin requirements by the Securities and Exchange Commission. As a practical matter, a single set of trade documentation will cover all trades, whether they consist of swaps or securities-based swaps, and having to renegotiate such documentation to accommodate later regulations will be a significant time burden and expense.

IV. Revise the proposed implementation rules to make clear which final rulemakings must be completed before implementation can begin.

Finally, we note that uncertainty remains as to just how long the implementation of these aspects of Title VII will take, and it may far exceed the Commission's expectations. We understand that clearing the trade confirmation backlog took several years. We ask that the Commission remain open to adjusting the schedule as needed, or

providing other relief, when better information about how long the process will take becomes available.

I. The initial phase-in of clearing arrangements should be completed before the phase-in of trading documentation requirements begins, to minimize resource constraints.

Arguably the most significant, central element of Title VII is the management of systemic risk by moving the swap markets toward a central clearing model.[10] Some categories of swaps, such as credit default swaps, are already broadly cleared, but other categories are not cleared. Some market participants have extensive experience with clearing arrangements and have already established the required connectivity and legal arrangements necessary to satisfy the clearing mandate. For other market participants, especially many Category 2 participants such as insurance companies, clearing is new and unfamiliar territory that will require education as well as new arrangements with FCMs and others.

It is difficult to know the scope of Category 1 without having final entity definitions.[11] It is likely, however, that some portion of the Category 1 entities who will have to comply during the first phase of the clearing mandate phase-in will be new to clearing. Even for dealers and other market participants that already have substantial experience with clearing, compliance with the clearing mandate will require a revised compliance regime and renegotiation of existing agreements to reflect the Commission's recently adopted rules for DCOs.[12]

We believe the Commission's proposals also underestimate the magnification of resource constraints that will be caused by requiring compliance with different major regulatory changes concurrently, rather than sequentially.[13] Complying with the clearing mandate will be a major endeavor. Complying with the clearing mandate while also complying with the trade documentation mandate potentially compromises both.

Because compliance with the clearing mandate is obligatory, market participants will not be able to avoid complying by continuing to trade on a bilateral basis using trade documentation that has not yet been updated. Deferring the start of the trade documentation compliance period until clearing compliance is well underway simply

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[10] We are concurrently filing a letter with respect to the proposed implementation phase-in of the clearing mandate.

[11] As we stated in a recent letter to the Commission, the current Title VII entity definitions proposal would in fact capture significantly more entities than what was originally anticipated by the Commission. *See* Letter from The Financial Services Roundtable to David A. Stawick, CFTC Secretary, "Further Definition of Swap Dealer," October 17, 2011, 9 at footnote 15. *Available at* http://www.fsround.org/fsr/policy_issues/regulatory/pdfs/pdfs11/Final%20VersionRoundtableDeMinimisIDIExemptionSupplementalLettr. Pdf, *see also* Part VIII. below for a discussion of the definition of "active funds."

[12] See www.cftc.gov/PressRoom/Events/ssLINK/federalregister101811.

[13] Similarly, young couples often believe that having twins will be more efficient—they can get everything done at once—while experienced parents roll their eyes at the suggestion.

means that market participants can devote adequate resources to both endeavors, making a smoother transition that is less likely to lead to significant market disruption.

II. Trade documentation renegotiation is a resource-intensive undertaking that requires the combined efforts and agreement of at least two parties.

The process of renegotiating trade documentation cannot be automated. The parties can have forms that they prefer, and the industry can move toward general standards, but ultimately there are two or more parties who will need to discuss these matters with each other, exchange drafts, argue over both economics and wording, and reach agreement within the boundaries of the regulation. The extent to which market participants are able to do this will depend on how many employees they have with the right experience, training and judgment; how many competing regulatory and business demands are placed on those employees; how many external resources they can bring to bear (and the cost of such resources); the negotiation style of each participant; and how the completion of their documentation has been prioritized by their counterparties.

Because no one party can unilaterally control its compliance with the trade documentation requirements, a compressed time frame for this compliance will cause unintended effects. Some market participants may be excluded. Others may be pressured to accept adverse terms to avoid losing market access. We believe the Commission's implementation should recognize the multilateral nature of this process and provide adequate time for all parties to bring their documentation into conformity with the new regulations.

III. To the extent the time periods are too short to allow renegotiation of trade documentation for everyone, swap dealers will prioritize some clients over others, creating competitive disadvantages, and may impose one-sided terms.

As a practical matter, swap dealers and others will not renegotiate every counterparty's trade documentation concurrently. Instead, they will prioritize the negotiations based on the regulatory category in which the counterparty has been placed by the Commission's phase-in schedule and the strength of the business relationship with that counterparty. If there is not enough time to complete all documentation, the counterparties with the weakest relationships will be the ones who will not be given sufficient opportunity to renegotiate their documentation. These counterparties may be offered "take-it-or-leave-it" terms. Even swap dealers may find that some of their large customers use the time pressure of a too-short deadline to conduct coercive negotiations.

In addition, the implementation of the trade documentation requirements will take effect across the industry at the same time. If all swap dealers are resource-constrained, dissatisfied clients may not have the option to negotiate trade documentation with a different swap dealer to avoid a backlog. Instead, they may go to the back of the queue with that dealer as well.

The resource constraints affecting the revision of trade documentation are not a matter simply of poor resource allocation or unwillingness to hire additional personnel.

The renegotiation of these documents requires experience and judgment, both of which need to develop over time. It is not a problem for which there is an easy fix.

Market participants that cannot renegotiate their trade documentation within the compliance period will be excluded from the market, even when the trade documentation requirements do not specifically apply to them. If a swap dealer cannot make a trade without compliant documentation, and the swap dealer's customer does not yet have compliant documentation, the dealer may lose business but the customer loses *access.* This will place some customers at a competitive disadvantage, as they find themselves unable to enter into necessary hedges. We believe that all time periods should be long enough to avoid the exclusion of some participants from the market.

In particular, we believe that the Commission's proposal for phased-in compliance needs to be revised to allow significantly more time and to recognize these prioritization issues. For instance, several of our insurance company members have stated that the Commission's proposal would not in actuality give them 180 days to comply; it would give them, at best, the 90 days remaining after the completion of the first phase (and to the extent the first phase could not be completed in that time frame, any carryover from the first phase would use a portion of the time intended for the second phase). Accordingly, we believe the Commission should establish phased compliance for each category of counterparty that begins *after* the completion of the prior phase, to reflect the likelihood that resources will be allocated sequentially. For the reasons discussed elsewhere in this letter—including uncertainty as to the number of entities included in Category 1, the complexity of the renegotiation process in light of the regulatory changes, and the new role for third-party custodians—we believe the compliance period for Category 1 should be extended by multiples of the current proposal. Our Category 2 members feel strongly that they will need at least a year to renegotiate their documentation, and that the year should begin after the Category 1 compliance deadline.

IV. We believe the failure to analyze the impact of these proposals on "a substantial number of small entities" as required by the Regulatory Flexibility Act is in error, and these rules will have a material impact on such parties.

As we have discussed elsewhere in this letter, the process of conforming trade documentation is resource-intensive and the allocation of those resources is likely to reflect the relative economic clout of a swap dealer's customers. In particular, swap dealers will not be able to trade with small entities until those small entities' trade documentation has been conformed, but the dealers are likely to prioritize larger and more active entities in conforming documentation. To the extent that the time periods proposed are insufficient, the burden will be borne heavily by small entities that will not be able to trade until their swap dealers are able to finalize their documentation.

Because the burden of an inadequate time period will fall most heavily on a substantial number of small entities, we believe that the impact of these proposals must be evaluated under the Regulatory Flexibility Act. Further, we believe the Commission's proposal would be enhanced generally by a cost-benefit analysis that fully considers the

correlation between the time allotted for compliance and the cost of such compliance (including the cost of potentially excluding some participants from the market).

V. Margin regulations are not solely within the purview of the Commission.

Unless the prudential regulators finalize their margin regulations concurrently with the Commission, some swap dealers and MSPs might become subject to final margin regulations—and hence to the trade documentation requirements—before others. Alternatively, if the trade documentation compliance period begins to run when the Commission has adopted its margin regulations but other regulators have not, banks that are swap dealers may have little or no time to conform their trade documentation, which cannot be done without the final margin regulations. We do not believe either of these would be an appropriate result, and urge the Commission to ensure that its rules do not require compliance before margin regulations become applicable to all registered entities.[14]

VI. There must be legal certainty as to the requirements for revised trade documentation, risk analysis, compliance measures and draft documentation that effectively address the regulatory changes *before* the process of renegotiating documentation can begin.

There is a limited amount of work that market participants can do to prepare for trade documentation revision before key final regulations are available. They can identify the counterparties with whom they have active relationships, and organize their existing trade documentation to the extent this has not already been done. But the primary tasks of implementation require final regulations. In particular, they will need to do the following:

1. Read and analyze the final regulations. The trade documentation and margin requirements will form part of a massive regulatory overhaul, with many interconnected aspects. Market participants will need not only to read the final regulations, but also to interpret what they require by their terms and in the context of the larger regulatory changes. This may involve understanding the differences between the requirements of the Commission, the SEC and the prudential banking regulators and understanding the interplay of these provisions with clearing arrangements.

2. Evaluate economics of final trade documentation and margin regulations. As we have noted previously, the proposed changes will have deep and significant effects on the economics of bilateral swaps. Market participants will also need to evaluate the effects of these changes on netting agreements and other existing relationships with counterparties. Market participants will

[14] We note, as well, that the SEC will also have trade documentation and margin requirements affecting these rules. We appreciate that the SEC process is on a different track than the Commission's; however, the impact of SEC regulations on trade documentation for both swaps and security-based swaps will be substantial and we strongly believe that the timing of final regulations on these points should be a key factor in setting conformance schedules.

need to understand these effects and develop policies and procedures to mitigate the risks and costs of the mandated changes. This will need to be done before documentation can be finalized.

3. Develop forms of provisions that would implement required changes. The drafting of revised forms will fall mostly on swap dealers, but will likely also be a task for large end-users who will want alternatives to dealer-side forms. Until these forms have been developed and fully vetted with business, legal and compliance teams, renegotiation will not be able to begin.

4. Evaluate form changes in the context of each existing set of documentation. Although most swap transactions use the ISDA forms, those forms are tailored for each counterparty relationship and can be heavily negotiated. Counterparties will expect that new regulatory requirements will be incorporated in existing documentation in a way that is respectful of the negotiated relationship and moderates impacts on outstanding transactions. Accordingly, even if swap dealers and others develop "standard" provisions, the process of including those into existing documentation will be time-intensive.

5. Negotiate business and legal terms for each active counterparty. Documentation is bilateral and must be negotiated. Time constraints will work against the buy-side, who may be pressured to accept adverse terms or risk being excluded from the market. We are told that a normal time-frame to negotiate a single set of trade documentation with all parties fully engaged would likely run between four and six weeks under normal circumstances.[15] But these will not be normal circumstances. Every market participant will be trying to redo its trade documentation concurrently with every other market participant, and each negotiation will be unique.

6. Negotiate third-party custodial arrangements, where applicable. The new regulations will include rights to require segregation of initial margin with a third-party custodian, and may mandate such segregation for some counterparties. Such custodial arrangements will need to be negotiated concurrently with the bilateral trade documentation negotiations, adding further time to the process. Moreover, such agreements are not currently market standard, and custodians will need to develop not only forms with which they are comfortable but the requisite expertise. Finally, market participants may need to negotiate more than one of these agreements, even for the same relationship, to the extent they cannot agree on a single custodian.

[15] This is a best-case scenario. One representative of one of our members indicated that, having sent comments on a dealer form in July, he just received a response in late October, rejecting most of his proposed changes. Such lag times are not unusual.

VII. All rules affecting trade documentation, including the end-user exemption and the business conduct rules, should be finalized before the compliance periods begin.

As we have discussed above, the renegotiation of trade documentation will be a lengthy, resource-intensive exercise. To have to undertake such an exercise once is burdensome, but to have to undertake it repeatedly in a limited time frame would be expensive and egregiously inefficient. As a result, we believe that all regulations affecting trade documentation, including the requirements for confirming the availability of the end-user exemption and those portions of the business conduct rules for which compliance through trade documentation was proposed, must be finalized before the compliance period begins. Any cost-benefit analysis conducted by the Commission would surely indicate that the benefit of requiring compliance to commence before all such requirements are final is minimal, while the costs of having to reopen documentation twice would likely run into the tens of millions of dollars.

We note, also, that although the Commission has listed a number of regulations that would have to precede the start of the compliance period, that list does not appear in the language of the proposed regulation.[16] We believe it is essential that the Commission provide clarity in the text of the rule as to when the compliance period begins.

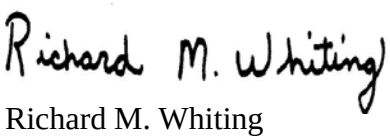
VIII. The correlation between "active funds" and "third-party subaccounts" is unclear and should be clarified in the final rule.

Our fund manager members appreciate the Commission's efforts to allow them the opportunity to complete the administrative work of renegotiating documentation for multiple funds by including third-party subaccounts in the final proposed compliance phase. They note, however, that they believe that most (if not all) entities that would fall into the term "active funds" would also constitute "third-party subaccounts." As a result, they believe that the Commission should better clarify the distinction, if any, between "active funds" and "third-party subaccounts."

[16] The regulations the Commission suggests must be finalized before the implementation of a compliance period for trade documentation and margin requirements include: rules related the confirmation of swap transactions, rules concerning the protection of collateral for uncleared swaps,, final rules for entity and product definitions, and registration procedures for covered swap entities. *See* 76 Fed. Reg. 58,178-79. However, reference to these rules is not included in the regulatory text of the proposed rule. *See id*. at 58,184-85.

We appreciate the opportunity to comment on these proposals. 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 Robert Hatch at (202) 289-4322.

Sincerely,

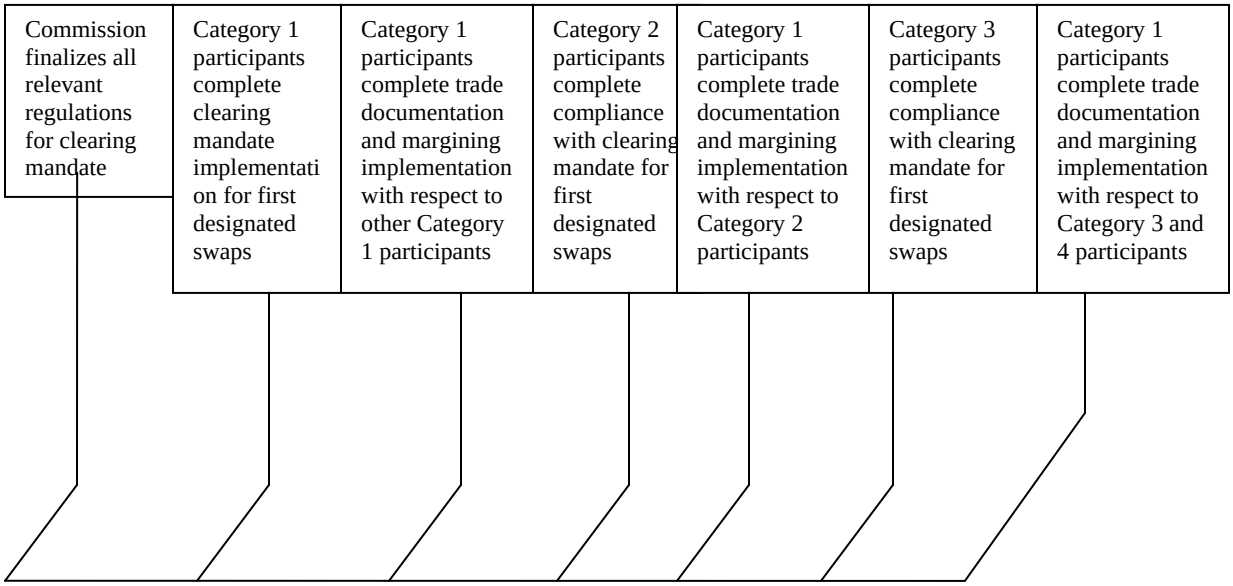


Richard M. Whiting
Executive Director and General Counsel
Financial Services Roundtable

Cc: Chairman Gary Gensler
Commissioner Bart Chilton
Commissioner Scott O'Malia
Commissioner Jill E. Sommers
Commissioner-Designate Mark Wetjen

Appendix A

Representative Time Line[17]



[17] Assumes all necessary regulations have been finalized for compliance with the trade documentation and margining requirements by the time the first stage of compliance with the clearing mandate has been completed.