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: Clearing and Trade Execution Requirements under Section 2(h) of the CEA

RIN 3038–AD60

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–AD60, Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) 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 previous proposals relating to the clearing mandate. In addition, we submitted a letter

[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. 58186 (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.

detailing some of the sequencing and implementation considerations we believed the Commission should consider in moving into the implementation stage of these regulations.[4] We appreciate the opportunity to offer further perspective on these important matters.[5]

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 practicable.

In connection with the proposed implementation schedule for the clearing mandate, we continue to be concerned that the level of preparedness of market participants varies widely. Some market participants already clear a large portion of their swaps, while for others clearing is going to be an entirely new process. Although most active participants in the swap markets have known that they will need to move to a central clearing approach, so many aspects of the new regulatory system have been in flux that there has been a limit to the amount of advance preparation they have been able to do. Finally, there are a large number of financial entities that will become subject to the clearing mandate even though they use their swaps only for ordinary course hedging, such as hedging the interest on their corporate debt. Because these financial entities are end-users who have limited involvement with swaps, many of them have deferred evaluating the significance of the Title VII changes until the regulatory landscape becomes clearer, especially to the extent that their legal and compliance personnel have been addressing other regulatory developments under Dodd-Frank. They will, however, fall within Category 2. We therefore believe an extended implementation schedule, particularly for Category 2 entities, is essential.

In addition, we believe that it is too soon to meaningfully evaluate the implementation of the trade execution requirement, because key aspects of that requirement—and of the structure and functioning of swap execution facilities—have not been finalized. If the Commission determines that swaps are "available to trade" only when they have meaningful liquidity and market participants have had reasonable opportunity to connect to the relevant trading facility, a relatively brief implementation period after the designation of a swap as subject to the clearing mandate may be reasonable. On the other hand, if a swap execution facility or designated contract market is permitted to make its own determination that it has made a swap "available to trade,"

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[4] 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.

[5] 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.

when there is little liquidity or market participation, a significantly longer period would be necessary.

In this letter, we make the following key recommendations:

I. Defer the implementation of the trade documentation and margining requirement, for each category of market participant, to begin *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. Revise the proposed implementation rules to make clear which final rulemakings must be completed before implementation can begin.

IV. Provide further opportunity to comment on the implementation of the trade execution requirement in relation to the clearing mandate after the Commission has determined how it will identify whether a swap is "available to trade."

Finally, we note that uncertainty remains as to just how long these matters will take, and that it may far exceed the Commission's expectations. 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. 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.[6] It is likely, however, that some portion of the Category 1 entities that will have to comply during the first phase of the clearing mandate phase-in will be new to clearing. Even for 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.[7]

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.[8] 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 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. To the extent the time periods are too short to allow all entities subject to the clearing mandate to establish clearing arrangements, clearing members, FCMs and other servicer providers will prioritize some clients over others, creating competitive disadvantages.

As noted above, compliance with the clearing mandate will require establishment of clearing arrangements. For entities that already clear their swaps, there will be updates to reflect the implementation of the Commission's final rules for DCOs, but the core infrastructure will already be in place. Other entities will have a significant amount of work to establish clearing arrangements, and will be competing with each other for available resources. Many will have to establish new relationships with FCMs, and even those that have existing relationships in the futures space may have to negotiate clearing addenda and other documentation. Many financial entities, such as insurance companies, may be forced to accept terms dictated by an FCM on a take-it-or-leave-it basis, rather than lose access to the market, if the compliance periods are not sufficient. FCMs and other providers are also likely to prioritize larger relationships over smaller ones, placing smaller entities at a competitive disadvantage.

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[6] See Part III below for a discussion of the definition of "active funds." 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,

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

[8] 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.

Market participants that cannot establish clearing arrangements within the compliance period will be excluded from the market. We believe that all time periods should be long enough to ensure that participants that have made reasonable efforts to implement the regulations are neither excluded from the market nor forced to accept one-sided terms to avoid such exclusion.

In particular, we believe that the Commission's proposal for phased-in compliance needs to be revised to allow more time and to recognize these prioritization issues. For instance, our insurance company members have stated that the Commission's proposal would not 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 Category 1 members, which may include entities that have not been involved with clearing, we believe the implementation period should be extended significantly from that proposed by the Commission, i.e., to multiples of what has been proposed. Our Category 2 members feel strongly that they will need at least a year to establish clearing arrangements, and that the year should begin after the Category 1 compliance deadline.

III. 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 establishing clearing arrangements 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."

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 establishing clearing arrangements is resource-intensive and the allocation of those resources is likely to reflect the relative economic clout of the market participant. 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 they can establish necessary arrangements with an FCM..

Because the burden of an inadequate time period will fall more heavily on a substantial number of smaller 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. The Commission should provide a mechanism for public comment when it is considering a single conformance date for all market participants, rather than the proposed phased compliance.

Implementation of the clearing mandate for swaps is more complicated than some other compliance requirements because swaps will be designated as subject to the mandate at different times. We agree with the conclusion that market participants may require a shorter time period for implementation, when a similar swap is already being cleared, than the amount of time that would otherwise be provided under the phased implementation schedule. We believe, however that the Commission should provide an opportunity to comment on the amount of time necessary to implement clearing and trade processing requirements for a particular swap any time it considers whether to use a single, industry-wide date. Such an approach would allow market participants to advise the Commission about any special circumstances that would make a tighter schedule unworkable.

VI. The Commission should set a minimum compliance period for mandatory clearing determinations even when it is not adopting the phased approach.

Even when all market participants subject to the clearing mandate have developed the necessary clearing arrangements to clear some swaps, adding new swaps for clearing will require administrative and other updates. Market participants will need time to update their procedures and modify any existing arrangements to accommodate the clearing mandate for that particular swap. As a result we believe it is important that there be some time lag between the Commission making a determination that a swap should be subject to the clearing mandate and the mandate taking effect. For example, a period of not less than 30 days might be appropriate as a transition period for each newly designated swap when the phased implement plan is determined to be unnecessary.

VII. The Commission significantly underestimates the amount of time it will take for Category 2 entities to comply with the clearing mandate.

Establishing clearing arrangements is a major undertaking that will require substantial effort from all relevant parties. If the Commission establishes a compliance schedule that creates significant time pressure, it may have a number of consequences. For instance, FCMs may have significantly greater bargaining power if the consequence for their counterparties of not reaching an agreement is exclusion from the market. Our insurance company members, who have varying degrees of familiarity with the clearing process, are particularly concerned that they will not have sufficient time and that some of their counterparties will use the short timeframes to pressure them to accept adverse terms to avoid losing market access. Our Category 2 members believe a compliance period of approximately one year will be more in line with what they will need to avoid losing market access.

VIII. The Commission should provide a further opportunity to comment on implementation of the trade execution requirement once the parameters for functioning as a swap execution facility and the criteria for determining that a swap is "available to trade" have been clarified.

The Commission has proposed a standard under which a swap would become subject to the trade execution requirements on the later of (1) the date on which the clearing mandate becomes effective, after giving effect to any phased implementation, and (2) 30 days after the swap has become available to trade on a SEF or DCM. Whether that time will be sufficient will depend on what it means for the swap to be available to trade. In particular, we would be concerned if the Commission allowed a newly established SEF that had very limited market acceptance to announce that it had made an already-cleared swap available to trade, potential creating market disruption where necessary trading arrangements were not in place with that SEF for many market participants. In those circumstances, we believe 30 days would not be sufficient. By contrast, if the determination that a swap was available to trade reflected market acceptance of a trading platform for that swap, as evidenced by significant liquidity and broad participation, 30 days might be sufficient. Without understanding how these determinations will be made, however, we cannot evaluate the proposed time frames in a meaningful way. We thus request that the Commission reopen the comment period with respect to these matters once the relevant rules have been finalized.

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,

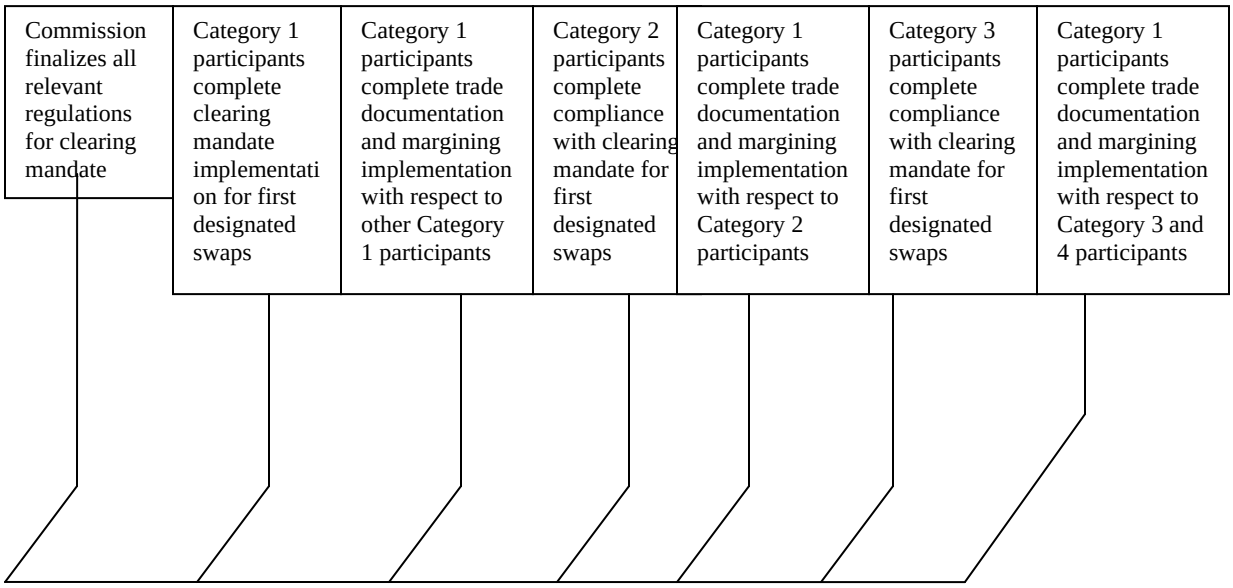
Richard M. Whiting

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[9]



[9] 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.