FX Alliance
1250 Connecticut Avenue NW
Suite 200
Washington, DC 20036
Tel: +1 202 261 6538

November 4, 2011

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

Re: (RIN 3038-AD60) Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA

Dear Mr. Stawick:

FX Alliance Inc. ("FXall") welcomes the opportunity to submit its comments on RIN 3038-AD60 Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA (the "Proposed Rule")[1] as proposed by the Commodity Futures Trading Commission (the "Commission") to establish a schedule for phasing in certain requirements from Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "DFA").[2]

I. FXall BACKGROUND

FXall operates an electronic trading system for foreign exchange ("FX") spot and various FX derivative instruments that serves over 1,000 institutions globally ranging from industrial companies, asset managers, governments, international agencies and other financial institutions. FXall facilitates competitive pricing, internal trading controls, risk management and a granular audit trail. We have succeeded in improving efficiency and transparency and reducing risk for an important market. FXall's peak daily volumes currently reach $140 billion in notional contract value. Today, a large part of the FX market is traded on electronic systems such as FXall – including less liquid or infrequently traded instruments customized by end users to meet their specific commercial requirements. FXall presently intends to register one of its trading platforms as a SEF for those FX contracts that must be executed on a SEF. Based on its extensive experience, FXall believes that it is able to provide a valuable perspective on the manner in which the Commission's DFA-related rules should be phased-in.

II. EXECUTIVE SUMMARY

FXall appreciates that, by publishing the Proposed Rule, the Commission provided market participants with certainty as to when they must be in compliance with the clearing and trade execution requirements of the Commission's DFA-related rules. In order to ensure a smooth and successful transition into the new Dodd-Frank regulated regime, however, we believe that

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[1] Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 Fed. Reg. 58186 (published Sept. 20, 2011).

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).

the Commission should also use this opportunity to provide clarity for SEFs. In response to the Commission's question as to which other rules should have been taken into consideration when proposing an implementation schedule regarding the trade execution requirements,[3] we believe that the Commission should have considered many aspects of the proposed rule regarding SEFs.[4] SEFs will be a key component in fulfilling Congress's mandate to promote transparency and impartial access to the swaps market, so we believe that the implementation of the SEF registration requirements and mandatory trading requirements will be particularly important. However, many aspects of the Proposed SEF Rule remain unclear, and many SEFs may therefore be unable to fully comply with all aspects of the Proposed SEF Rule in what we believe will be the relatively short time, perhaps three months, between publication of the final SEF rule and the date when SEF execution becomes mandatory for the first market participants.

In developing a plan for implementing the rules, we believe that the Commission must minimize the barriers to entry for SEFs, ensure that the Commission's regulations do not create an un-level playing field for SEFs, and consider the practical ability of SEFs to comply with various regulations. Any clarity that the Commission provides in terms of when SEFs (as opposed to market participants using a SEF) will be responsible for complying with the relevant rules will be very helpful in this regard.

Therefore, we believe that the Commission should establish a provisional registration period for SEF applicants that show they are "substantially compliant" with the final SEF rules and allow them to operate for one year following the date when SEF execution first becomes mandatory. In order to be substantially compliant, we believe that SEFs should be required to, at a minimum, offer just one of the acceptable trading methods, such as a request-for-quote ("RFQ") functionality, and the ability to perform just certain self-regulatory organization ("SRO") obligations. However, we do not believe that SEFs should have to provide market participants with the ability to post both firm and indicative quotes on a centralized screen accessible to all market participants who have access to the SEF (*i.e.,* an order book or automated bulletin board), or fully comply with all SRO obligations. As proposed, these requirements are particularly vague, unclear and somewhat contradictory, so we believe it would be unfair to require SEFs to comply with them immediately. Once these requirements have been clarified and explained in the final rule, SEFs will still need a substantial amount of time to develop operations and procedures that are compliant.

Additionally, we urge the Commission to identify in the final implementation schedule when and how swaps will be determined to be "made available for trading." The Commission has yet to provide the market with any certainty regarding how or when this important determination will be made, and we believe that the implementation schedule would be an opportune place to address this issue. We believe that the Commission should make this determination itself, rather than leave it to the SEFs, in order to ensure that these determinations are made in the best interest of the market.

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[3] *See* Proposed Rule, 76 Fed. Reg. at 58192.

[4] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. 1214 (published Jan. 7, 2011) (the "***Proposed SEF Rule***").

III. SEFs SHOULD BE PERMITTED TO REGISTER PROVISIONALLY BY DEMONSTRATING SUBSTANTIAL COMPLIANCE

While the Proposed Rule delays mandatory SEF execution for some market participants, all would-be SEFs that wish to facilitate or continue facilitating swaps trading would be required to be registered and operational when SEF execution becomes mandatory for the first group of market participants. According to certain statements by CFTC Commissioners, this could be as early as the third quarter of 2012.[5] Meanwhile, the final SEF rule may not be approved until sometime in the first quarter of 2012 or later.[6]

We are concerned that under the Proposed SEF Rule these would-be SEFs will have to be fully compliant with all of the applicable rules in as little as three months in order to submit their application and operate as a SEF by the mandatory trading date.[7] Therefore, in response to the Commission's question as to which other rules should have been taken into consideration when proposing an implementation schedule regarding the trade execution requirements,[8] we believe that the Commission should have considered many aspects of the Proposed SEF Rule and permitted a provisional registration period. During this provisional registration period, we believe that SEFs should be permitted to operate if they are in substantial compliance with the final SEF rules, as defined below.

We fully believe that SEFs should be up and running and contributing to the new regulatory regime as quickly as possible. After all, Congress explicitly stated that the goal of Section 733 is to "promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market."[9] We are concerned, however, that it is asking too much of SEFs to require them to be fully compliant with all applicable rules, many of which are vague or unclear at this point, in three months and that it will have the effect of actually *deterring* SEF execution. Albeit temporarily, such a requirement may effectively shut down several entities currently facilitating electronic swaps trading until they are able to come into compliance. Moreover, if certain would-be SEFs cannot operate during the initial phase of mandatory SEF execution because they are not completely compliant, any competitors whose pre-DFA business models arguably appear to be in-line with the Commission's rules would have a competitive advantage. We do not believe that the Commission should consequently favor certain business models over others in order to meet artificial deadlines and thereby cut-off potential SEF competitors for the long run.

Additionally, while SEFs can already begin to implement certain components of the SEF rules based on the Proposed SEF Rule, many SEFs are understandably hesitant to fully invest in

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[5] *See, e.g.,* Commissioner Scott O'Malia, Keynote Address before 2011 ISDA Annual North America Conference (Sept. 13, 2011); Commissioner Scott O'Malia, Opening Statement at Open Meeting on Proposed Rulemakings on Implementation of Mandatory Clearing, Trading, Documentation and Margining Rules (Sept. 8, 2011).

[6] *See,* Chairman Gary Gensler, Keynote Address before 2011 Wholesale Markets Brokers' Association conference in New York (SEFCON II). ("We are hopeful that we'll be able to consider the SEF rules in the first quarter of 2012.")

[7] We are also concerned that the already strained Commission staff and resources could not process and approve dozens of SEF applications during this short period.

[8] *See* Proposed Rule, 76 Fed. Reg. at 58192.

[9] DFA § 733, adding CEA § 5h(e).

compliance with the proposed rules because of the chance that they can change in the final rule. For example, we do not believe that the Proposed SEF Rule would prohibit SEFs from routing transactions to a Derivatives Clearing Organization ("DCO") through a third party or even one of the counterparties (so long as such method is approved by the DCO).[10] However, if (as an example) the Commission were to decide that swaps must be routed directly to the DCO and it were to codify as much in the final rule, any SEFs that built their systems so that swap data could be routed to a third party or one of the counterparties before being routed to the DCO would have wasted their time and resources. In this regard, we ask that the Commission clarify whether or not SEFs can route swaps to DCOs through such third parties, one of the counterparties, or if it must be done directly.

Similarly, even slight differences in the reporting requirements could require any SEFs that began preparing for the new regime according to the proposed rules to rewrite a significant amount of code related to the reporting process. Many other aspects of the new regulations applicable to SEFs are also unclear, such as the extent to which SEFs will be able to delegate disciplinary and oversight responsibilities, the obligations that will be placed on chief compliance officers, and how detailed records of SEFs must keep.[11]

This issue is exacerbated by the fact that the Commission will likely delegate certain regulatory functions to the National Futures Association ("NFA"), and the scope and manner of NFA regulation is unclear at this time. As a result, the regulatory requirements imposed on SEFs could change significantly from what is currently presumed based on the Proposed SEF Rule. It would therefore be very demanding to require SEFs to be fully operational and compliant with all of the proposed rules by the third quarter of 2012. The third quarter is less than eight months away, and the Commission has not published final SEF rules yet nor has it described the details of NFA's regulatory function.

Therefore, we believe that the Commission should institute a provisional registration period where SEFs could continue operating after SEF execution becomes mandatory even when such SEFs are only substantially compliant. The Commission proposed and finalized a rule permitting Swap Data Repositories ("SDR") to operate pursuant to a provisional registration,[12] but has not done so for SEFs. We agree with Commissioner O'Malia's recent statement that this provisional registration period is crucial to the success of mandatory SEF execution and that the Commission should address this provisional registration in the Proposed Rule.[13] We

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[10] *See* Proposed SEF Rule, 76 Fed. Reg. at 1248 (to be codified at 17 C.F.R. § 37.702(b)) (requiring SEFs to have the capacity to route swaps to a DCO in a manner acceptable to the DCO, but not prohibiting the SEF from routing the swap to a DCO in any specific manner or imposing any specific time restrictions on the SEF).

[11] We wish to highlight the fact that it is not uncommon for a SEF to create a terabyte of data each day, and that maintaining all of this data will be very costly per year.

[12] *See* Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. 54538, 54577 (to be codified at 17 C.F.R. § 49.3(b)) (published Sept. 1, 2011).

[13] *See* Commissioner Scott O'Malia, Keynote Address before 2011 ISDA Annual North America Conference (Sept. 13, 2011) ("the proposals should at least reference the provisional swap execution facility (SEF) registration process, which is crucial to the success of the trading mandate."). While the Proposed SEF Rule would permit currently-existing SEFs to operate before formal Commission approval pursuant to a grandfathering provision, this is different from the type of provisional registration we believe

believe, however, that the Commission should explicitly define "substantial compliance" as it applies to SEFs (which the Commission did not do for SDRs) as described below. Provisional registration for substantially compliant SEFs would permit a larger number of would-be SEFs to compete on a level playing field while, at the same time, moving swaps trading onto regulated platforms.

A. SEFs Should Be Able to Provisionally Register Without an Order Book or Automated Bulletin Board System

One aspect of the Proposed SEF Rule that we believe will cause complications for several would-be SEFs relates to the type of required execution system. The Proposed SEF Rule would mandate that all SEFs, "provide market participants with the ability to post both firm and indicative quotes on a centralized screen accessible to all market participants who have access to the [SEF]."[14] This type of "centralized screen" where executable quotes are displayed to all participants is an attribute of order books[15] or automated bulletin boards. Therefore, while the Proposed SEF Rule would permit SEFs to offer an RFQ[16] platform, we believe it would also ***require*** them to provide (and build, if necessary) an order book or automated bulletin board for the applicable derivative instrument in order to comply with the ability to post quotes to all participants requirement.[17] This requirement is not explicit in the Proposed SEF Rule and as such causes confusion about the acceptable trading methods for SEFs.

Order books and automated bulletin boards are expensive and time consuming to build or adapt to a more complex and customized derivative. Therefore, would-be SEFs may not invest in building such a system until it is clear that the Commission will require an order book or automated bulletin board and the details of such a requirement are finalized. As a result, a system may not be finished by the first wave of mandatory trading. This is especially true for

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should be adopted because the grandfathering period is not intended to permit SEFs to operate when they are only substantially compliant, but rather requires full compliance.

[14] Proposed SEF Rule, 76 Fed. Reg. at 1241 (to be codified at 17 C.F.R. § 37.9(b)(2)).

[15] An order book is an automated execution platform for firm orders such as a trading facility, which is typically more useful for highly liquid swaps than for illiquid or irregularly-traded swaps.

[16] As traditionally understood, an RFQ platform is one where participants choose to send requests to one or multiple liquidity providers on a disclosed basis and those liquidity providers send bids and offers which the inquirer may accept.

[17] We note that the DFA does not require SEFs to have any such functionality. The DFA defines a SEF as a "trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce. . . ."[17] This definition does not require SEFs to provide a centralized screen through which market participants can post firm bids executable by any other SEF participant. Indeed, nowhere does this definition ***require*** that SEF participants have the ability to access ***all*** other SEF participants. Instead, it only requires participants to have the ***ability*** to access ***multiple*** other participants, which an RFQ system provides. Therefore, the DFA does not limit SEFs to those platforms that provide an order book or automated bulletin board functionality.

The DFA further defines a SEF to include a trading facility, as defined in the CEA[17] (which limit order books and automated bulletin boards are typically defined as), but does not ***limit*** SEFs only to such trading facilities. Therefore, if Congress wanted to require SEFs to provide a limit order book or automated bulletin board, it could have easily done so.

markets like FX where order books are not used for certain products, such as non-deliverable forwards ("NDFs"). Would-be SEFs in these markets are less likely to already have an order book or automated bulletin board built for such products. Additionally, we have found that many FX participants have no interest in trading on automated systems like order books and automated bulletin boards for these products. Instead, most of these participants strictly use platforms such as traditional RFQs, through which they can customize their transactions and choose the desired degree of exposure of their inquiry.

Therefore, if the Commission were to prohibit SEFs without an order book or automated bulletin board from operating during that first wave, we believe it would be penalizing those SEFs because of the lack of clarity in the Proposed SEF Rule. Moreover, the Commission would be favoring SEFs that already have an order book or automated bulletin board by providing them with a competitive advantage over all other SEFs. We do not believe that the Commission should favor one existing business model over another, but should provide for a level playing field where all SEFs can openly compete.

Besides removing this provision, the Commission could provide such a level playing field by delaying the compliance date for the ability to post quotes to all participants requirement and have an order book or automated bulletin board for one year. During this time, more SEFs would be able to facilitate swaps executions which would bring competition and lower prices for market participants. This would also encourage more swaps to be executed on regulated platforms, fulfilling the goals of the DFA.

We also request that the Commission clarify in its final compliance schedule rule (or in a subsequent rulemaking) that SEFs will be permitted to operate for one year following the date when SEF execution first becomes mandatory by offering an RFQ system, order book, or automated bulletin board individually or in any combination. We believe that the Commission should inform the market whether it intends to permit this delayed requirement as soon as possible to provide much-needed clarity.

B. Provisionally-Registered SEFs Should Not be Required to Satisfy all Self-Regulatory Obligations

1. SEFs Cannot Comply with Most Self-Regulatory Obligations Before Reaching an Agreement with the National Futures Association ("NFA")

The Proposed SEF Rule would also impose numerous SRO obligations on SEFs which would make it extremely difficult for many SEFs to be fully compliant by the first application acceptance date or even the third quarter of 2012. We therefore believe that the Commission should delay the compliance date for certain requirements[18] for one year after SEF execution becomes mandatory.

The Proposed SEF Rule expressly permits SEFs to "contract" with a regulatory service provider ("RSP") such as a registered futures association to assist in complying with the SEF core

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[18] Specifically, we believe that compliance with the following SRO obligations should be delayed for one year: (i) rule enforcement program (§ 37.203); (ii) disciplinary procedures and sanctions (§ 37.206); (iii) swaps subject to mandatory clearing (§ 37.207); (iv) monitoring of trading and trade execution (Subpart E); (v) ability to obtain information (Subpart F); (vi) mandatory clearing (§ 37.701); and (vii) monitoring for financial soundness (§ 37.703).

principles,[19] but the rules are unclear what, exactly, may be delegated to such third parties and in what manner. For example, the Proposed SEF Rule explicitly requires SEFs, not RSPs, to establish certain disciplinary panels.[20] We are therefore uncertain whether SEFs must conduct investigations and disciplinary proceedings themselves or if they can delegate those responsibilities to an RSP. Most of these SRO requirements would be immensely expensive and time consuming to implement, especially for SEFs that have not been regulated prior to the DFA.[21] Therefore, SEFs must be permitted to use RSPs for the SRO obligations as much as possible, and should not be forced to comply with these rules on their own before reaching an agreement with the relevant RSP and having time to implement the surveillance, compliance and enforcement program.

However, we believe it is very unlikely that RSPs will have agreements and compliance programs in place with every SEF (or even several SEFs) by the time that SEF execution becomes mandatory. SEFs will need a considerable amount of time because every SEF will need to reach a regulatory service provider agreement and have a compliance program implemented with the same RSP (*i.e.*, the NFA). For the foreseeable future NFA is the only RSP who is offering these regulatory services to SEFs. With a dozen or more SEFs requiring these services at the same time, the waiting period for implementation of the surveillance, compliance and enforcement program could be substantial.

As a result, we do not believe that SEFs can be reasonably expected to comply with all the SRO rules until they can delegate those responsibilities to the NFA (as permitted under the final SEF rule). But SEFs will not know which SRO provisions they will be individually responsible for and which they can delegate to the NFA until they are provided with further guidance in this regard. Therefore, SEFs will be effectively unable to comply with the SRO obligations without potentially wasting resources until they receive this guidance.

2. The Commission Should Clarify the Timing and Substance of SEF Chief Compliance Officer Responsibilities

We note that in two of the rules the Commission has finalized so far, the Chief Compliance Officer ("CCO") duties have been revised or delayed in certain ways. First, in both the SDR and DCO rules, the CCO is no longer responsible for "ensuring" compliance with the DFA, but only for "taking reasonable steps to ensure compliance with the Act and Commission regulations. . . ."[22] Second, in both rules the Commission clarified that the CCO (i) is more than an advisor to the entity; (ii) must be able to enforce compliance with the CEA; and yet (iii) does not have the

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[19] *See* Proposed SEF Rule, 76 Fed. Reg. at 1243 (to be codified at 17 C.F.R. § 37.204(a)).

[20] *See* Proposed SEF Rule, 76 Fed. Reg. at 1244 (to be codified at 17 C.F.R. § 37.206(b)).

[21] As opposed, for example, to entities that currently operate regulated exchanges which will also register as a SEF.

[22] *Compare* Swap Data Repositories; Proposed Rule, 75 Fed. Reg. 80898, 80934 (to be codified at 17 C.F.R. § 49.22(d)(4)) (published Dec. 23, 2010) *and* General Regulations and Derivatives Clearing Organizations, 75 Fed. Reg. 77576, 77587 (to be codified at 17 C.F.R. § 39.10(c)(2)(iv)) (published Dec. 13, 2010), *with* Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. 54538, 54584 (to be codified at 17 C.F.R. § 49.22(d)(4)) (published Sept. 1, 2011) (the "***Final SDR Rule***"); Derivatives Clearing Organization General Provisions and Core Principles, § 39.10(c)(2)(iv) (not yet published as of Nov. 4, 2011).

authority (under these rules) to hire or fire anyone outside of his or her compliance staff.[23] Third, the Commission delayed compliance with the CCO provisions for one year in the DCO rule[24] but did not do so in the SDR rule.[25]

We appreciate the Commission's response to several comment letters by removing the requirement for CCOs to "ensure" compliance. However, by stating in the preamble that CCOs must be able to enforce compliance with the CEA and yet limiting their real authority to only the compliance staff, we believe that the Commission has given CCOs supervisory responsibilities without any meaningful supervisory authority to enforce compliance. Under existing law, supervisors are held to high standards of oversight and enforcement. This will be impossible for a CCO to achieve without the same general power available to the top business-line supervisors to set compensation, hire and fire. Imposing supervisory responsibilities on CCOs without bestowing the requisite business-line authority hands them the gun without any bullets. Therefore, we believe that the Commission's revisions might make it even ***more*** difficult for SEFs to hire CCOs than it would have been under the relevant proposed rules.

If the final SEF rule has similar language to the DCO and SDR rules explaining the CCO's role, we believe that SEFs will have difficulty hiring a competent CCO in time to establish policies and procedures and have a well-working compliance program operational by the date when SEF execution first becomes mandatory. Therefore, in response to the Commission's request for comment on which other rules should have been taken into consideration when proposing an implementation schedule regarding the trade execution requirements,[26] we request that the Commission clarify the requirements that will be applicable to CCOs of SEFs. In contrast to the DCO and SDR rules, we believe that SEF CCOs should be responsible for (i) taking reasonable steps to ensure compliance with the CEA and Commission regulations; (ii) monitoring compliance with the CEA and Commission regulations; and (iii) advising the appropriate business-line supervisor (*e.g.*, the Chief Executive Officer), who has the authority to implement the necessary remedies, of any actual or potential violations.

Additionally, we request that the Commission clarify in its final compliance schedule rule (or in a subsequent rulemaking) that the CCO requirements (*i.e.*, the entirety of Subpart P) in the SEF rules will not be mandatory for one year following the date when SEF execution first becomes mandatory. As newly regulated entities, we believe that SEFs should have at least as long as DCOs to comply with the CCO provisions.

C. SEFs Can Demonstrate Substantial Compliance By Complying with Certain Core Requirements

As noted above, we believe that SEFs should contribute to the new regulatory regime as quickly as possible. In order to do so, we acknowledge that SEFs must fulfill certain responsibilities. The Commission could require SEFs to fulfill these responsibilities by requiring SEFs to demonstrate "substantial compliance" with the SEF rules before being provisionally registered,

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[23] *See* Final SDR Rule, 76 Fed. Reg. at 54558; Final DCO Rule at 27.

[24] *See* Derivatives Clearing Organization General Provisions and Core Principles, 2 (not yet published as of Nov. 4, 2011) (the "***Final DCO Rule***").

[25] *See* Final SDR Rule, 76 Fed. Reg.at 54538.

[26] *See* Proposed Rule, 76 Fed. Reg. at 58192.

as the Commission did for SDRs.[27] However, we believe that the Commission should define substantial compliance for SEFs, which was not done in the Final SDR Rule, so that SEFs do not have to guess as to whether they are, in fact, substantially compliant. We believe that SEFs would substantially comply if they met the following requirements:

- Access requirements (§ 37.202);
- Audit trail requirements (§§ 37.205; 37.406);
- The ability to route swaps data to at least one DCO (§ 37.702);
- Reporting and recordkeeping requirements (§§ 37.900-37.1003); and
- Financial resource requirements (§§ 37.1300-37.1306).

For the reasons discussed above, we do not believe that, in order to be substantially compliant, SEFs should have to comply with: (i) any requirements to have a specific type of execution system such as an order book, automated bulletin board, or RFQ system; (ii) the SRO obligations listed in note 18, above; or (iii) the CCO obligations set forth in Subpart P of the Proposed SEF Rule.

We believe that SEFs who satisfy these requirements would comply with all DFA requirements and would offer many benefits to the market and the Commission. Perhaps most importantly, these substantially compliant SEFs would keep records of all swaps executed on their regulated platforms and report the applicable information for regulatory and public purposes. This would ensure that even provisionally-registered SEFs facilitate the accountability and transparency called for by the DFA, but would do so in a way that does not erect barriers to entry right out of the gate for would-be SEFs.

IV. THE PROPOSED RULE SHOULD IDENTIFY WHEN A SWAP WILL BE "MADE AVAILABLE FOR TRADING"

We believe that the Commission should address when exactly a swap will be considered "made available for trading."[28] We believe that granting SEFs too much discretion in making this determination could create dangerous incentives for SEFs to make swaps "available for trading" in order to create a temporary monopoly on trading in that swap. Therefore, in clarifying when a swap is "made available for trading," we urge the Commission to restrict when and how the "available for trading" determination can be made, as described below.

The Proposed Rule explains that mandatory SEF execution will not be imposed until the later of the date that the CFTC requires compliance with mandatory clearing or 30 days after a SEF or DCM makes a swap available for trading.[29] Neither the Proposed Rule nor the Proposed SEF Rule, however, require a SEF or DCM to provide any notice of when they make a swap "available for trading" or to obtain any Commission approval before doing so.

We believe that this freedom could cause several problems. First, it would incentivize SEFs to list a wide variety of swaps and determine, without providing notice if possible, that such swaps are "available for trading" prior to the determination that such swaps are subject to mandatory

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[27] *See* Final SDR Rule, 76 Fed. Reg. at 54577 (to be codified at 17 C.F.R. § 49.3(b)).

[28] *See* Commissioner Scott O'Malia, Keynote Address before 2011 ISDA Annual North America Conference (Sept. 13, 2011).

[29] *See* Proposed Rule, 76 Fed. Reg. at 58195 (to be codified at 17 C.F.R. § 37.12(a)).

clearing. This way, when swaps become subject to mandatory clearing, a SEF could have a monopoly on trading of a given swap if that swap is not listed or "made available for trading" by any other SEF. Therefore, full discretion surrounding this determination might encourage SEFs to make an "available for trading" determination for monopolistic reasons instead of based on a swap's liquidity. This would be especially troublesome during the initial mandatory trading period when those SEFs without the benefit of a provisional registration, as discussed above, would have to wait for full compliance before applying to be a SEF and could not trade the swap. Such an unfair competitive head-start could cripple a would-be SEF.

We note that SEFs will have notice of when swaps are being considered for mandatory clearing (and therefore have equal opportunity to list such swaps during Commission review),[30] but this would lead to the second problem stemming from SEFs being able to unilaterally determine that swaps are "available for trading." Specifically, once the Commission or a DCO notifies the public that a category of swap is being considered for mandatory clearing, SEFs would be incentivized to list every single swap in that category even if the individual products are not liquid enough to make SEF execution valuable. For example, if the Commission were to determine that NDFs as a group were subject to mandatory clearing, SEFs would have an incentive to list every conceivable currency pair to force trading on their SEF. However, some currency pairs, such as U.S. dollars to Pakistan Rupees, trade so infrequently that it arguably should not be mandatory that they trade on a SEF. However, if one SEF makes such currency pair "available for trading," NDFs based on that currency pair can ***only*** trade on that SEF until another SEF makes the operational changes to trade the same instrument. Depending on the product or instrument involved, there could be enough of a gap to give competitive advantage to the first mover. We do not believe this is an ideal result.

We believe that the "available for trading" determination will have a significant impact on market liquidity because it is the final prerequisite to mandatory SEF execution. Therefore, we urge the Commission to specify in the final rule that the Commission, instead of SEFs, will determine when swaps are "made available for trading" and that the first such determination will either coincide with provisional registration capabilities or not be implemented until the first known group of proposed SEFs are all registered. This way, SEFs will be unable to use this determination to secure a monopoly on facilitating the trading of any swap. Alternatively, the Commission could ensure that the "available for trading" determinations are made in an orderly and transparent fashion by: (i) prohibiting such determinations from being made before a swap is determined to be subject to mandatory clearing, (ii) coinciding with provisional registration capabilities and (iii) requiring each "available for trading" determination to be subject to public notice. Under this approach, SEFs would be unable to make every conceivable swap "available for trading" prior to a clearing determination, and all SEFs would know which swaps were being "made available for trading." As such, there would be a level playing field that would ensure open and fair competition.

V. CONCLUSION

As discussed above, while FXall appreciates the clarity provided by the Proposed Rule, we believe that the Commission should have also set forth a provisional registration period where SEFs can operate while being substantially compliant and should have explained when and how a swap will be determined to be "made available for trading."

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[30] *See* DFA § 723(a)(3), adding CEA § h(h)(2) (detailing process for determining that swaps should be subject to mandatory clearing).

FXall appreciates the opportunity to provide the Commission with its perspective on the Proposed Rule. If you have any questions regarding our comments, please contact the undersigned at (202) 261-6538.

Thank you for the opportunity to comment on the Implementation Schedule.

Respectfully submitted,

Wayne Pestone
Chief Regulatory Officer