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November 4, 2011

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

Re: CFTC Swap Transaction Compliance and Implementation Schedule (Clearing, Trading, Documentation, and Margining Requirements) [RIN numbers 3038-AC96; 3038-AD60]

Dear Mr. Stawick:

MarkitSERV[1] is pleased to submit the following comments to the Commodity Futures Trading Commission (the "***CFTC***" or the "***Commission***") on the proposed compliance and implementation schedules for the clearing and trading requirements as well as the documentation and margin requirements (the "***Proposed Rules***")[2] included in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "***DFA***").[3]

Introduction

MarkitSERV views its role in the global derivatives markets as an independent facilitator, making it easier for derivatives market participants to interact with each other. To achieve this goal, MarkitSERV provides trade processing, confirmation, matching and reconciliation services for swaps and security-based swaps (collectively "***Swaps***") across regions and asset classes, as well as universal middleware connectivity for downstream processing such as clearing and reporting. Such services, which are offered also by various other providers, are widely used by participants in the Swaps markets today and are recognized as tools to increase efficiency, reduce cost, and secure legal certainty. With over 2,200 firms currently using the MarkitSERV platform, including over 23,000 buy-side fund entities, its legal, operational, and technological infrastructure plays an important role in supporting the Swaps markets in the United States and globally.

As a service and infrastructure provider to the domestic and international Swaps markets, MarkitSERV supports the objectives of the DFA, and the Commission's objectives to increase transparency and efficiency in these markets, identify any market abuse and/or manipulation, and reduce both systemic and counterparty risk.

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

[2] *See* 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) ("*Implementation Schedule: Clearing and Trading*"); Swap Transaction Compliance and Implementation Schedule: Trading Documentation and Margining Requirements Under Section 4s of the CEA, 76 Fed. Reg. 58176 (published Sept. 20, 2011) ("*Implementation Schedule: Documentation and Margin*").

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

Executive Summary

Market participants and regulated entities will need to make several types of changes to come into compliance with the Commission's rules that have been proposed pursuant to the DFA. For example, market participants will need to make major investments and significant changes to their systems, procedures, and personnel in order to adapt to the new regulatory regime. Each of these changes will take time and resources to implement. Therefore, market participants will require certainty as to how and when the new regulatory requirements will be rolled out in order to effectively allocate and budget their time and resources.

We therefore welcome the Commission's initiative to create more certainty about the time at which market participants will be required to comply with several DFA-related requirements. We also appreciate the Commission's acknowledgment that certain market participants will require more time than others to come into compliance with the Commission's rules. However, we believe that the Commission should stagger compliance dates for different asset classes and address remaining rules and timing.

To reduce the uncertainty and ensure an efficient transition into the new regulatory regime, we believe that the Commission should: (1) publish a comprehensive implementation schedule that: (a) addresses all DFA-related rules, (b) provides greater certainty related to compliance period commencement, and (c) describes the order in which they will be implemented; (2) phase-in the confirmation requirements by asset class or type of swap in addition to the market participant category to take into account the degree of electronification and standardization of a given asset class; (3) establish a phase-in schedule for all other DFA-related rules by asset class, or by swap category, as it would deliver additional benefits; (4) clarify the treatment of cross-border transactions[4]; and (5) create more certainty related to clearing requirements.

1. The Commission Should Publish a Comprehensive Implementation Schedule

We appreciate the Commission's efforts to create more certainty regarding the implementation of its DFA rules. However, while the Proposed Rules set forth the length of time that market participants will have to comply with certain rules once the final rules are published, they do not establish the *order* in which those rules will be finalized or will be effective relative to each other (with limited exceptions[5]). Moreover, the Proposed Rules only address the implementation and phasing of a limited number of rules. As a result, we do not believe that the Proposed Rules create the highest level of certainty, so we encourage the Commission to publish a comprehensive implementation schedule that also establishes the order in which the rules will become effective and subsequently phased-in.

a. <u>The Commission's Implementation Schedule Should Address All DFA-Related Rules</u>

We welcome the Commission's recognition that different categories of market participants are to different degrees prepared to satisfy the various upcoming DFA-related requirements.[6] However, we believe that the

[4] Our response relates to the phase-in of the clearing, trading, and confirmation rules and not any other documentation rules or margin rules. While the Proposed Rules do not explicitly set forth an implementation schedule for the confirmation rules, the Commission stated that it would "ensure that compliance with the final confirmation requirements work together with the compliance schedule as proposed under this release." *See* Implementation Schedule: Documentation and Margin, 76 Fed. Reg. at 58178 n. 30. We therefore assume that the confirmation requirements will be phased-in at or around the same time as the documentation requirements addressed in that rule.

[5] For example, the trading mandate cannot precede the clearing mandate, and the Commission set forth certain rules, such as entity and product definitions, which must be finalized and effective before compliance will be required for the clearing, trading, documentation, or margin rules.

[6] We note, though, that some participant-related issues are likely to require more time to address than the Proposed Rules have provided. For example, traditional asset managers, particularly those that manage numerous third party sub-

Commission should publish a comprehensive implementation schedule for all DFA-related rules instead of a schedule only for the limited number of rules that was addressed in the Proposed Rules.[7] Without such a schedule, market participants will be unable to determine how to allocate their time and resources in order to prepare for compliance with the range of major requirements. For example, market participants need to know how long they will have to implement the reporting requirements, which require entering into external service and other legal agreements, versus the internal business conduct standards, which will require significant revisions to policies and procedures.

In crafting a comprehensive implementation schedule, we believe that the Commission should generally provide market participants with the same phase-in periods that it provided in the Proposed Rules. However, market participants might not require the same type of phase-in for some rules:

- Regulatory Reporting: We believe that market participants will not be able to immediately comply with the Commission's regulatory reporting requirements because significant legal, operational and technical implementation efforts will be required from them to come into compliance with the rules proposed by the Commission while differences between the reporting requirements from the CFTC and SEC might further increase both the time and the cost to implement.[8] Work is already in progress on the infrastructure and procedures that are needed to enable counterparties to report to swap data repositories ("***SDRs***"). Moreover, the relevant rules are designed as such that only one of the counterparties will have any regulatory reporting responsibility,[9] and certain market participants, like end-users, will almost never have any regulatory reporting obligations. For these reasons, we believe that the Commission could implement these rules sooner than others by finalizing this rule earlier and having an earlier phase-in period than for other rules. However, we note that global regulatory considerations will also require additional consideration, including issues such as extraterritoriality, indemnification and client confidentiality.

- Real-Time Reporting: We believe that the real-time reporting requirements can only become effective after regulatory reporting because block trade thresholds, which are a prerequisite to real-time reporting, require consideration and may depend on data gathered from regulatory reporting. As with regulatory reporting, we do not believe that a lengthy phase-in period will be necessary for real-time reporting since it is unlikely that Category 2 or 3 Entities, as defined in the Proposed Rules, will perform any real-time reporting. However, in developing a phase-in period, the Commission should also consider U.S. based commercial end-users who may be required to report transaction data to SDRs in real-time when they transact with non-U.S. counterparties.[10]

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accounts, might need more time than given in the Proposed Rules to set up the relevant procedures and modify their systems to be in compliance with clearing, trading, and documentation requirements for all of their sub-accounts.

[7] *See* Opening Statement by Commissioner Scott D. O'Malia: Open Meeting on Proposed Rulemakings on Implementation of Mandatory Clearing, Trading, Documentation and Margining Rules (September 8, 2011).

[8] This is especially the case for certain categories of swaps such as equity total return products or other structured products. Equity total return *share* swaps, which are likely to be under the jurisdiction of the SEC, will be exposed to numerous regulatory requirements that differ to those that apply to equity total return *index* swaps, which are likely to be exposed to the Commission's regulatory regime. Such products, including multiple regional jurisdictions with various contract terms related to each, are in the earlier stages of product standardization and electronification.

[9] *See* Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574, 76604 (to be codified at 17 C.F.R. § 45.5) (published Dec. 8, 2010) (setting forth rules to determine which counterparty is the reporting counterparty).

[10] *See id.* at 76604 (to be codified at 17 C.F.R. § 45.5(d)) ("Notwithstanding the provisions of § 45.5(a) through (c), if only one counterparty to a swap is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations."); *see also* Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76140, 76146 (published Dec. 7, 2010) ("In off-facility swap transactions where a non-U.S. swap dealer or non-U.S. MSP transacts with a U.S.-based end-user, which party to the swap should have the obligation to report to a real-time disseminator?").

b. The Commission Should Specify When the Phase-in Periods Will Commence

The Proposed Rules describe how long market participants will have to comply with requirements discussed above but do not give any indication as to when those compliance periods will begin. They therefore leave market participants with many questions because they only know that, at some point in the future, they will have a defined amount of time to comply with the DFA-related rules. We therefore urge the Commission to provide a sequence and schedule for when the compliance periods of all of the Commission's DFA-related rules will commence.

c. The Commission's Implementation Schedule Should Set Forth the Order in Which Rules Will Become Effective

We believe that an appropriate order of implementation for the major DFA-related requirements is just as important as the timing of compliance for each individual requirement. Even if the Commission were to publish phase-in schedules for more rules, for example, this information would not be very helpful if market participants did not know whether they will need to comply with those requirements *before, after,* or *at the same time* as complying with other requirements. However, only with this information will market participants be able to effectively allocate their resources and budget their time and money in order to comply with the whole range of the Commission's rules.

As we have stated previously,[11] we believe that it would be practical to implement the DFA-related rules in a certain order because some components build or depend upon other components. We believe that the Proposed Rules contravene this natural order, for example by failing to necessarily provide any time between the mandatory clearing and trading of swaps. The Proposed Rules state that the trading mandate will not be effective until the later of the compliance date for the clearing mandate or 30 days after the swap is first made available for trading,[12] but we believe that swap execution facilities ("***SEFs***") will make swaps available for trading as soon as they are recommended for mandatory clearing. Since a mandatory clearing determination will take 90 days,[13] and we assume that SEFs will always make swaps available for trading at least 30 days before the compliance data for the clearing mandate, in practice we believe that the trading mandate will almost always be effective at the same time as the compliance date for the clearing mandate.

We believe that the Commission should ensure that there is time in between the compliance dates for these requirements to allow market participants to come into compliance. More specifically, we believe that the Commission should finalize and implement the range of major DFA-related requirements in the following order:

- The Commission should first accept applications for SDRs, derivatives clearing organizations ("***DCOs***"), and SEFs and for the registration of Swap Dealers ("***SDs***") and Major Swap Participants ("***MSPs***").[14] Registering and identifying these entities will be an important first step toward establishing the infrastructure on which the rest of the rules will rely. The Commission should also consider pre-registering these entities to facilitate a timely transition to the new market design provided by the DFA.

- Several rules proposed by the Commission cannot be appropriately finalized without an analysis of a significant amount of swaps data. The Commission should therefore initially encourage participants to voluntarily submit swap transaction data to SDRs and collect and use such data for further analysis.

[11] *See* letter from MarkitSERV to the Commission regarding Implementation and Phasing Schedule for Requirements under Title VII of the Dodd-Frank Act (June 10, 2011).

[12] *See* Implementation Schedule: Clearing and Trading, 76 Fed. Reg. at 58195 (to be codified at 17 C.F.R. § 37.12(a)).

[13] *See* DFA § 723(a)(3), adding CEA § 2(h)(2).

[14] In order for entities such as SDs and MSPs to register, the natural order would be for such entity definitions to be finalized accordingly.

Thereafter, it should require parties to comply with regulatory reporting requirements, which will permit the Commission to analyze the swap market.

- Some business conduct requirements, such as the timely confirmation of swap transactions, can be implemented at that point, or shortly thereafter. These requirements should be phased-in by participant and swap category.

- Thereafter, the Commission should implement the clearing requirement because of its importance in reducing systemic risk. We note that this must be implemented before both real-time reporting and execution requirements because these are dependent on the determination of which swaps are subject to mandatory clearing.

- Market participants should then be required to comply with real-time reporting requirements because SEF participants will benefit from the post-trade transparency provided by such reporting. Real-time data will also be useful to SEFs that are in the process of building and optimizing their product offering.

- Finally, the trading requirement should be implemented. We believe that this should be implemented last not only because the determination of traded swaps is based on what can be cleared, but also because SEFs will need to provide real-time data to their participants, which can only be done after the real-time rules are implemented.

We therefore urge the Commission to specify a phase-in period for those requirements that were not included in the Proposed Rules and to provide details about the order in which all of the above rules will be implemented. The Commission should note that our views on the necessary order of implementation are largely independent of the exact date at which the individual requirements become effective.

2. The Confirmation Timing Requirements Should Be Phased-In By Participant Category and Degree of Electronification

As noted above, we believe that the Commission should phase-in the confirmation requirements[15] similar to the method utilized in the Proposed Rules by phasing in the requirements by category of market participant. However, as we stated before,[16] we are concerned that even the most sophisticated market participants will likely be unable to comply with some of the proposed timing requirements for certain Swaps in the near future. For example, certain types of swaps are rarely executed or processed electronically and even large SDs, especially if they are transacting with unsophisticated counterparties, will have difficulty confirming those transactions by the end of the calendar day, as required under the proposed confirmation rules.[17] Additionally, it will be difficult for asset managers to comply with the timing requirements in the near future because transactions that must be allocated[18] are initially entered into at an "execution" level, for a certain notional size and price, and are only allocated by the end-user to multiple underlying funds thereafter (usually by the end of the day but in many cases thereafter upon appropriate counterparty and internal approvals). Until this allocation

[15] *See* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81519, 81531 (to be codified at 17 C.F.R. § 23.501) (published Dec. 28, 2011).

[16] *See id*.

[17] *See id.*

[18] Fund managers will often combine the transactions that they want to enter into for the various funds that they manage in one swap transaction which they then execute with a counterparty. Following execution, the fund managers will notify their counterparty which of the individual funds will enter into what portion of the notional of the overall transaction.

has taken place, the counterparties will not have all of the information required to acknowledge or to verify the transaction.[19]

Therefore, we believe that the confirmation requirements in particular should be phased-in by asset class based on the degree of electronification and standardization of the category of swap. In this regard, we note that swaps in some asset classes are generally confirmed electronically and are so standardized that the confirmation requirements [20] for those asset classes could be phased-in even before the mandatory clearing and trading rules are implemented. On the other side of the spectrum, however, we believe that market participants will require significantly longer to comply with the confirmation timelines for other asset classes. Therefore, we urge the Commission to avoid extending the same 90 day, 180 day, and 270 day compliance schedule that was utilized in the Proposed Rules to the confirmation requirements. Instead, while we believe that the first phase of compliance with the confirmation rules could be implemented in the near term, the final phase must be more than 270 days afterward.

3. All DFA-Related Requirements Should Also Be Phased-in by Swap Category

While we especially believe that the confirmation requirements should be phased-in by asset class in addition to category of market participant, we also believe that the Commission should phase-in *all* DFA-related requirements by asset class. The characteristics of different asset classes must be taken into account in crafting a compliance schedule because of the variety in the existing level of product standardization and electronification between asset classes, the number of product variations, and the number and nature of counterparties in the asset class.

We therefore urge the Commission to establish a phase-in by asset class (or swap category) to provide the relevant market participants with the appropriate time needed to adjust their systems and procedures. The Commission should base its decision on factors such as the existing level of product standardization and electronification, the size of the asset classes, and the amount of central clearing that occurs already today. On that basis, it should consider requiring compliance generally first in asset classes such as interest rates and credit, while requiring later compliance for swaps in the asset classes of foreign exchange, equities, and commodities, and within each asset class further timelines per sub-product can be established as necessary.[21]

4. The Commission Should Clarify the Status of Cross-Border Transactions

The Proposed Rules are unclear as to how the compliance schedule will apply to Swaps that are executed between U.S. and non-U.S. counterparties. In general, the Proposed Rules only explicitly provide compliance times for U.S. entities. We understand that the clearing and trading rule has a third compliance phase for "[a]ll other swap transactions"[22] and that the documentation and margin rule has a third phase for "Category 4"

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[19] Middleware providers such as MarkitSERV currently provide electronic allocation delivery (EAD) mechanisms which can reduce the interval between execution and confirmation.

[20] The percentage of electronically confirmed OTC derivatives transactions by volume ranges from 99% for credit derivatives to 89% for FX Non-Deliverable Forwards, 84% for Interest Rate derivatives, 70% for FX Vanilla Non-Deliverable Options, 40% for Equity derivatives and 23% for FX Simple Exotic Options. These percentages represent the notional volume of bilaterally executed transactions that have been processed on electronic confirmation platforms as a percentage of the total transaction volume reported by the G-14 dealers with their respective counterparts as of June 2011. The numbers are per Markit Metrics as well as Financial Stability Board statistics per its "Progress report on Implementation" dated October 11, 2011.

[21] For example, a customized product such as a basket transaction done for an end-user client may require further implementation phasing due to its complex structure.

[22] *See* Implementation Schedule: Clearing and Trading, 76 Fed. Reg. at 58195 (to be codified at 17 C.F.R. § 39.5(e)(2)(iii)).

entities, which include "any person not included in Categories 1, 2, or 3."[23] However, while it is reasonable to assume that international transactions fall into these third compliance phases, we are concerned that the Proposed Rules do not explicitly assign them to a specific category. Given the fundamentally international nature of the swaps markets, we urge the Commission to clarify this aspect in the final rules.

Additionally, we note that the documentation and margin rule only dictates when a covered swap entity (defined as a "swap dealer or major swap participant for which there is no prudential regulator"[24]) must comply with the rules. For example, the provision related to the third phase states that "[f]or transactions with a Category 3 Entity or a Category 4 Entity, a *covered swap dealer* shall comply . . . ."[25] We do not believe that this provision addresses transactions between U.S.-based end-users and foreign entities because, in this situation, neither counterparty will be a covered swap entity. We therefore urge the Commission to address these transactions in its final rule.

5. The Commission Should Create More Certainty About the Compliance Phase-in With the Clearing Requirement

The Commission noted that the proposed phase-in periods for compliance with the clearing mandate would be used at its discretion and the Commission might choose not to apply them depending on the circumstances.[26] We believe that market participants will need to be able to form an expectation with a reasonable degree of certainty about when to expect the clearing requirement will become effective. Therefore, in response to the Commission's request for comment,[27] we believe that there should be a presumption that the Commission will use the compliance schedule applicable to mandatory clearing determinations for every new product.

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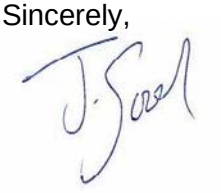
MarkitSERV appreciates the opportunity to comment on the implementation schedule, and would be happy to elaborate or further discuss any of the points addressed above.

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

Sincerely,



Jeff Gooch
Chief Executive Officer
MarkitSERV

[23] *See* Implementation Schedule: Documentation and Margin, 76 Fed. Reg. at 58185 (to be codified at 17 C.F.R. §§ 23.175(a), 23.575(a)).

[24] *See id.*

[25] *See id.* at 58185 (to be codified at 17 C.F.R. §§ 23.175(b)(3), 23.575(b)(3)).

[26] *See* Implementation Schedule: Clearing and Trading, 76 Fed. Reg. at 58191-92.

[27] *See id.* at 58192 ("Should there be a presumption that the Commission will rely on the compliance schedule for each mandatory clearing determination that it issues, unless the Commission finds that the compliance schedule is not necessary to achieve the benefits set forth herein. . . .?").