



February 13, 2012

Via Electronic Submission

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

Re: Comment Letter on Proposed Rulemaking Relating to Process for Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade; 76 FR 77728 (December 14, 2011)

Dear Mr. Stawick:

CBOE Futures Exchange, LLC ("CFE") appreciates the opportunity to provide its comments to the Commodity Futures Trading Commission ("CFTC") with respect to the CFTC's proposals in the above-referenced release ("Release"). The Release proposes regulations to establish a process for a designated contract market ("DCM") or swap execution facility ("SEF") to make a swap "available to trade" as set forth in Section 2(h)(8) of the Commodity Exchange Act ("CEA").

CFE supports the CFTC's proposals in the Release.

DCMs and SEFs Should Make Initial Determinations that Swaps Made Available to Trade

In particular, CFE agrees with the CFTC's proposal that a DCM or SEF should be the party that initially determines that a swap is available to trade rather than the CFTC. A DCM or SEF will have undergone all of the preparations necessary to offer a swap for trading and will have prepared a product submission to the CFTC regarding the listing of the swap on the DCM or SEF pursuant to CFTC Regulation 40.2 or 40.3. Accordingly, the DCM or SEF will be the party that is in the best position to make the initial determination that a swap is available to trade given its familiarity with the information that is relevant to the determination and with the trading of the swap.

Rule Review Process Is Appropriate Process for CFTC Review of Determinations that Swaps Made Available to Trade

CFE also agrees with the CFTC's proposal that the initial determination by a DCM or SEF that a swap is available to trade be subject to oversight by the CFTC through the rule certification or approval process under CFTC Regulations 40.5 and 40.6. CFE believes that taking this approach strikes an appropriate balance by providing the CFTC with the opportunity to review the determination while at the same time not unduly delaying the implementation of the

determination.

Consistent with the CFTC's proposals in the Release, CFE does not believe that the CFTC should establish a different review process for DCMs and SEFs to make a swap available to trade than the process that already exists for CFTC review of DCM and SEF rules. There are a number of reasons why utilizing the rule review process for this purpose makes sense and is consistent with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

First, many DCM and SEF rules have a level of importance or impact on market participants that is equivalent to or even greater than a determination to make a swap available to trade. Accordingly, the process that the CFTC has found to be sufficient with respect to DCM and SEF rules should be just as satisfactory in this instance as well.

Second, under CEA Section 2(h)(8), the CFTC must first have determined that a swap is required to be cleared in order for the swap to become subject to the requirement that it be executed on a DCM or SEF. The CFTC has already established an extensive process under CFTC Regulation 39.5 to make the determination of whether a swap is required to be cleared. As part of that process, the CFTC is required under CEA Section 2(h)(2)(D) to have determined that the swap, among other things, has significant outstanding notional exposures, trading liquidity, and adequate pricing data. These factors are very similar to the various factors listed in proposed CFTC Regulations 38.12(b) and 37.10(b) to be considered, as appropriate, with respect to whether a swap is made available to trade. Because these factors will have already been carefully considered by the CFTC in connection with its determination that a swap is required to be cleared, there is no reason for the CFTC to establish another new review process for DCM and SEF determinations to make a swap available to trade that is separate from the DCM and SEF rule review process.

Finally, not establishing a separate process for the CFTC to make or review determinations regarding whether a swap is made available to trade is consistent with the Dodd-Frank Act itself and Congressional intent. This is evidenced by the fact that Congress included a specific process in Section 723 of the Dodd-Frank Act for the CFTC to determine whether a swap is required to be cleared and included no such process with respect to the determination that a swap is made available to trade.

#### Factors for Consideration Regarding Whether Swaps Made Available to Trade Should Be Flexible

CFE also believes that it is appropriate, as the CFTC has proposed, that no single factor be dispositive in the list of factors for consideration by a DCM or SEF under proposed CFTC Regulations 38.12(b) and 37.10(b) in making a swap available to trade; that a DCM or SEF be able to consider any one factor or several factors from the list; and that a DCM or SEF be able to consider any other relevant factor in making its determination. Given the vast number of potential types of swaps and the differing facts and circumstances that can exist relating to each type of swap, it is important to provide for a standard that is flexible in its application and not overly prescriptive. For example, some factors may predominate over other factors depending on the type of swap. Therefore, it is important not to establish an inflexible test that may not work for all types of swaps and may prevent the legitimate consideration of other pertinent factors. Otherwise, swaps that should be subject to the trade execution requirement will be excluded and the intent of the Dodd-Frank Act to provide for the execution of swaps on DCMs and SEFs in order to bring greater transparency, competition, and oversight to the swaps market will be

frustrated.

Similarly, it is appropriate, as the CFTC has proposed, for the list of factors relating to whether a swap is made available to trade to include transaction frequency or size and trading volume on DCMs and SEFs as well as through bilateral transactions. Consideration of the trading activity in a swap should not be limited to activity solely on DCMs and SEFs because this may provide market participants with an incentive not to transact in swaps on DCMs and SEFs in order to cause the swap not to be made available for trading and to avoid the additional transparency, competition, and oversight that DCMs and SEFs will bring to the swaps market as intended by the Dodd-Frank Act.

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CFE is available to provide any further input desired by the CFTC regarding these issues and to work cooperatively with the CFTC to address them. Please contact Arthur Reinstein in our Legal Division at (312) 786-7570 if you have any questions regarding our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "James F. Lubin". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

James F. Lubin  
Managing Director