February 13, 2012

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

Re: CFTC RIN 3038-AD18 – Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade

Dear Mr. Stawick,

The International Swaps and Derivatives Association ("ISDA"), the Securities Industry and Financial Markets Association ("SIFMA") and the Futures Industry Association ("FIA")[1] appreciate this opportunity to provide comments to the Commodity Futures Trading Commission (the "Commission") regarding the recently released notice of proposed rulemaking and request for comments ("NPR") concerning the process by which swaps will be made "available to trade" and the implementation of the related statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which amends the Commodity Exchange Act (the "CEA").

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[1] ISDA's mission is to foster safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products. ISDA has more than 800 members from 58 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. For more information, please visit: www.isda.org.

SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

The FIA is the primary industry association for centrally cleared futures and swaps. Its membership includes the world's largest derivatives clearing firms as well as exchanges and clearinghouses from more than 20 countries. The FIA seeks to promote best practices and standardization in the cleared derivatives markets, provide policymakers with an informed perspective on the derivatives markets, and advocate for the interests of its members, its markets and its customers. The FIA strives to protect open and competitive markets, protect the public interest through adherence to high standards of professional conduct and financial integrity, and promote public trust and confidence in the cleared markets. For more information visit" www.fia.org.

The designation of a swap as "available to trade" will have broad ramifications for the market because such a swap will no longer be permitted to trade on a bilateral basis. As a result, an incorrect designation of "available to trade" would result in a decrease in liquidity, increase in costs and a decrease in the availability of hedges. The goals of the Commission and the Dodd-Frank Act would therefore be best served if the determination of what swaps are "available to trade" are made by the Commission, based on careful and studied analysis that includes a finding of sufficient market liquidity. We note that the rules related to swap execution facilities ("SEFs") have not yet been finalized and our comments might be affected by the final SEF rules.

Executive Summary

The following comment letter focuses on five topic areas: Process, Factors to Consider, Reviews, Economically Equivalent Swaps and Effective Date. Below is a brief summary of some of our key points.

1. Process - The Commission should make the determinations of which swaps are "available to trade". If swap execution facilities or designated contract markets ("DCMs") make the initial determination, the process should include a six month period for Commission review before a submitted swap is made "available to trade" that will include an opportunity for public comment. A SEF/DCM should be required to list and support trading in a swap before the SEF/DCM may submit the swap as "available to trade".

2. Factors to Consider – Liquidity should be a prerequisite for a swap to be made "available to trade". The submitting SEF/DCM should provide detailed reasoning for its determination and specific supporting evidence of any valid factors considered.

3. Reviews – Swaps that are "available to trade" should be reviewed more frequently than annually and SEF/DCM participants/members should be able to submit swaps for review as no longer "available to trade".

4. Economically Equivalent Swaps – We ask that the Commission clarify the purpose of this rule as efforts to evade mandatory trade execution can be dealt with under existing anti-evasion authority. In the alternative, the definition of an "economically equivalent swap" should be based on fungibility, rather than "material pricing terms".

5. Effective Date – If the Commission does not establish a six (6) month review period, we recommend that the trade execution requirement take effect as of six (6) months after the later of (1) the applicable deadline for the clearing requirement, or (2) the date on which the swap is made "available to trade".

I. Process for Determination of "Available to Trade"

A. The Commission, not SEFs or DCMs, should determine which swaps are "available to trade".

The Commission is better positioned than SEFs/DCMs to make the determinations as to which swaps are "available to trade". The Commission has an overall view of the market and an ability to assess how the "available to trade" determination will affect market participants and financial markets generally. In contrast, SEFs and DCMs have an economic incentive to designate as many swaps as "available to trade" as possible, and to do so as soon as possible in order to acquire market share in trading those swaps. Accordingly, there is an inherent conflict of interest between the profit incentive of SEFs/DCMs to have as many swaps as possible required to be traded on their platforms and whether there is actual benefit to the market of requiring a swap to be traded on a SEF/DCM.

Our concern about allowing SEFs/DCMs to make the initial determination is exacerbated because of the proposed procedure for the "made available to trade" determination. In particular, if a SEF/DCM uses the certification procedure, the Commission will only have ten (10) days to review the determination, and potentially will have difficulty in rejecting a determination in the absence of a manifest error (especially when the rule is first implemented and multiple swaps are being submitted to the Commission.) This proposal therefore carries an implicit risk that SEFs/DCMs will be able to create monopolies in certain swaps by being the first to the market, shifting liquidity to it and thereby gaining market power in a particular swap. This result is contrary to the Dodd-Frank Act objectives of increasing competition and transparency in the derivatives markets. As stated by Commissioner Sommers, Congress did not intend "to allow a single DCM or SEF to make determinations that will have profound market-wide implications."[2]

There have been a number of instances in which exchanges have listed and maintained listings of products for which there is limited trading volume on the exchange. For example, there is very little or no trading volume in exchange listed calendar spread options in the interest rate market. By comparison, the OTC market for a comparable product, curve options, has significantly more trade volume. Although the volume for curve options is greater than that for the comparable calendar spread options, it is still probably not enough to justify imposing the trading requirement on market participants that occasionally need to hedge that type of unique risk on the basis of the trade volume in the curve option itself or as an "economically equivalent swap" to the exchange listed calendar spread option. However, under the proposed rule, a SEF/DCM would be able to designate the calendar spread option as "available to trade" and the curve option could be subject to the trade requirement as an "economically equivalent swap".

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[2] Commissioner Sommers views the proposal as effectively "delegate[ing] implementation of the trade execution requirement of Section 2(h)(8) of the Act to DCMs and SEFs" and "an abdication of our responsibility as market regulators to provide clear rules of the road." CFTC Commissioner Jill E. Sommers, Opening Statement before the Sixth Open Meeting to Consider Final Rules Pursuant to the Dodd-Frank Act, December 5, 2011 ("Commissioner Sommers' Statement Dec. 5, 2011"); available at http://www.cftc.gov/PressRoom/SpeechesTestimony/sommersstatement120511

We are very supportive of having SEF/DCMs list products for trading in order to allow liquid and transparent markets to develop. However, allowing SEFs and DCMs to make determinations about whether a swap should be subject to a mandatory trading obligation on a SEF/DCM could add unnecessary frictions that prevent a justifiable risk hedge from being executed if a market participant needs to concern itself with (i) compliance reviews as to whether or not it can execute that risk bilaterally and (ii) the establishment of costly operational infrastructure necessary to connect to a SEF/DCM.

We note that a broad cross-section of market participants (including firms that run derivative trading platforms, the Federal Home Loan Banks, an insurance company and dealer firms) have urged the Commission to make these determinations, as evidenced by numerous comment letters in response to the earlier NPR regarding core principles for SEFs.[3]

In the commentary to the release, the Commission noted "that as it gains experience with its oversight of swaps markets, it may decide, in its discretion, to determine that a swap is available to trade."[4] However, because the trade execution requirement is new, no other parties should be deemed to be better suited or have more experience to make such determinations. In fact, it is particularly important that the Commission makes decisions when the rules are new and potential benefits and dangers are not fully known. The Commission has the broader market responsibility to assess the cost-benefit trade-off of whether the potential benefit of execution on a SEF/DCM outweighs the potential cost and liquidity impact of mandatory execution. For example, bespoke swaps with complex terms are a very important, though illiquid, component of risk hedging activity. It would not benefit, and indeed may harm, the markets and participants to designate such swaps as "available to trade", potentially making the market for such swaps even more illiquid or hindering market participants from trading in those swaps.

Finally, we note that the proposal differs from the approach taken by the European regulators. The European Commission has proposed that the determination of which derivatives will be required to trade on multilateral trading facilities ("MTFs") and organized trading facilities ("OTFs") will be made by the European Securities and Markets Authority ("ESMA").[5]

B. If SEFs/DCMs are given the authority to make the initial determination that swaps are "available to trade", then the process should require approval by the Commission after a six (6) month review period, that will include an opportunity for public comment.

The proposed process provides insufficient time for the Commission to perform a thorough review of submissions. Under the proposed rule, a SEF/DCM has the option to submit a determination under §§40.5 or 40.6 of the Commission's regulations.[6] It is likely that

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[3] CFTC proposed rule, "Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade" ("Proposed Rule"), 76 FR 77728 at 77730 and fn 21.
[4] Proposed rule at 77731.
[5] See European Commission, Proposal for a Regulation of the European Parliament and of the Council on Markets in Financial Instruments and Amending Regulation [EMIR] on OTC Derivatives, Central Counterparties and Trade Repositories, Oct. 20, 2011, ("MiFID II") Article 26, p. 45; available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0652:FIN:EN:PDF
[6] Proposed Rule at 77730 - 1.

SEFs/DCMs will choose to make submissions under §40.6 given the lesser self-certification requirements. Under §40.6, the effective review period for self-certification will be only ten (10) business days (as opposed to the approval procedure which would be 45 days). Even if a SEF/DCM opts for the approval procedure under §40.5, proper review by the Commission and potential public comment within even a 45 day period will be very difficult, especially when the rules are first being implemented.

We urge the Commission to change the review process so that self-certification is not permitted, and to require a submitting SEF/DCM to make an application that must be approved by the Commission. We recommend a minimum six (6) month review period that would include a 30-day public comment period for any DCM/SEF application for an "available to trade" determination. While Dodd-Frank requires the Commission to undergo a rigorous review process for clearing determinations[7], the statute does not prohibit the Commission from stipulating a similar, or more stringent, process for mandatory trading determinations or require that DCMs and SEFs make the determinations through a less robust process than that utilized for mandatory clearing determinations. We believe that a longer review period for a trading determination is more appropriate than the period prescribed by the Commission in its process for review of mandatory clearing because a clearing mandate coupled with a SEF/DCM trading requirement will have far greater impact on the liquidity of a market than the clearing mandate alone.

If the Commission is concerned that a six-month review would unduly delay the initial implementation of the trade execution requirement, then we suggest that the Commission, in cooperation with SEFs/DCMs and market participants, develop an initial list of swaps that could be agreed to be available to trade. On-the-run CDX index swaps, for example, are broadly considered to be very liquid and therefore could quickly be made "available to trade". This will begin applying the trade execution requirement and provide the Commission and the market with a sample set to observe the effectiveness of the proposed process. Thereafter, the Commission could use the suggested six (6) month approval process. If the Commission does initially designate a set of highly liquid swaps as "available to trade", we note that the proposed compliance period should be longer than 30 days so as to permit market participants to put in place the necessary operational requirements.[8]

As noted earlier, we are very supportive of allowing SEFs to list and facilitate trading in many different types of swaps as part of the process of developing liquid and transparent markets. The purpose of a six (6) month approval period (with opportunity for public comment) would be to allow the Commission to have a reasonable time period to observe whether the market for a swap that a SEF/DCM lists for trading demonstrates sufficient liquidity on the relevant SEF/DCM and conformance with the other relevant factors. A review period of six months is both necessary and appropriate in order to (i) gather sufficient data critical for the determination; (ii) allow liquidity to develop in less liquid products and products that are newer to the exchange or SEF markets; and (iii) provide time for market participants to establish operational, technological and

[7] CFTC Final rule, Process for Review of Swaps for Mandatory Clearing, 76 FR 44464; DFA §723(a) – Clearing Requirement.
[8] CFTC proposed rule, Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements Under Section 2(h) of the CEA, 76 FR 58186.

regulatory infrastructure necessary to comply with the trading requirement and offer additional trading facilities. We believe that any determination of "available to trade" should be dependent upon data and analysis that adequately supports a finding of sufficient liquidity. For swaps under review, the Commission can request that DCOs and SEFs/DCMs provide data on transactions in that swap. In addition, the trade reporting and swap data repository rules ensure that the Commission will receive trade data that is relevant and sufficient for the Commission to assess whether there is sufficient liquidity for swaps to be made "available to trade".[9] The members of ISDA, FIA and SIFMA are available to assist the Commission in analyzing that data for purposes of measuring the observed liquidity.

By comparison, the process adopted by the Commission for the review of swaps for mandatory clearing does not rely on §§40.5 and 40.6 and provides more time for Commission review than is proposed for the "available to trade" determination.[10] The Dodd-Frank Act does not prescribe procedures for the trade execution requirement, but we believe that the process should be closer to the review process for mandatory clearing than to the review process for new rules under §40.5 or §40.6.

One final point to note on process is that the Commission characterizes the "available to trade" determination as a "trading protocol" of a SEF/DCM. As a result, in the proposal this determination is subject to the procedures under §§40.5 and 40.6 that apply to the adoption of a new rule. [11] However, the "available to trade" determination is not a trading protocol nor a rule. It is a determination as to whether a particular swap is subject to the trade execution requirement. There is therefore no reason for §§40.5 or 40.6 to apply and the Commission should instead adopt the procedures described above.

C. A SEF/DCM should not be allowed to submit a swap as "available to trade" that it does not list or support for trading.

We do not see a benefit or purpose to allowing a SEF/DCM to submit a swap that it does not list for trading. A SEF/DCM that does not trade in a swap has no direct knowledge of the market for that swap and whether or not it is liquid. Also, the SEF/DCM should have a demonstrated ability to provide that liquidity in a SEF/DCM trading environment, as discussed below. If a SEF/DCM does not need to list a swap in order to make the relevant determination, it will have every incentive to determine as many swaps as possible are "available to trade" to encourage use of SEFs/DCMs. In addition, by having not previously listed a swap and demonstrated the ability and experience to handle all aspects of trading, including post execution flows such as reporting and acceptance for clearing, a SEF/DCM may create significant amounts of operational risk through the introduction of trade breaks, reporting problems, and other errors.

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[9] See CFTC proposed rule - Reporting Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants 75 FR 76666; CFTC final rule - Swap Data Recordkeeping and Reporting Requirements 77 FR 2136; CFTC proposed rule - Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps 76 FR 22833; CFTC interim final rule - Reporting Pre-Enactment Swap Transactions 75 FR 63080; CFTC interim final rule - Reporting Certain Post-Enactment Swaps Transactions 75 FR 78892; See CFTC final rule - Swap Data Repositories: Registration Standards, Duties and Core Principles Regarding Rulemaking 76 FR 54538.
[10] CFTC Final rule, Process for Review of Swaps for Mandatory Clearing, 76 FR 44464.
[11] Proposed Rule at 77730, col. 3.

The Commission should require that a swap be listed by a SEF/DCM in order for it to be "available to trade". Over a six month review period, the Commission can then gather reliable empirical evidence from the submitting SEF/DCM to determine whether there is sufficient liquidity to make the swap "available to trade". If sufficient liquidity is not demonstrated by activity on the SEF/DCM over the review period, the Commission may also draw on other relevant market information available to the Commission to determine that a given swap is "available to trade".

II. Factors to Consider

A. The Commission should require that a swap can only be "available to trade" if the swap is traded with sufficient liquidity.

The final rule should ensure that designation of a swap as "available to trade" is predicated on the determination that there is a liquid market for that swap on a SEF/DCM. As a result, a swap should not be "available to trade" unless there is sufficient liquidity on the relevant SEF/DCM. At a minimum, any determination submitted to the Commission should clearly demonstrate that trading in the swap exceeds minimum thresholds for liquidity. Simply listing eight factors without setting minimum parameters for a standard, as the current release does, does not offer sufficient guidance. In the absence of such guidance, it will be difficult for a SEF/DCM to apply the relevant test and for the Commission to review the determination. We strongly agree with Commissioner Sommers' statement that the general "lack of any parameters on how these factors should be considered will make it very difficult, if not impossible, for the Commission to reverse a determination."[12]

As stated in ISDA's March 2011 letter, liquidity should be determined on a product-specific basis and at a minimum each executable swap should trade multiple times with multiple counterparties.[13] Some examples of standards for which the Commission should prescribe minimum thresholds include: trading frequency (number of trades per day), market participation (number of swap dealers and unaffiliated non-swap dealer entities) and volume (aggregate notional amount per day). There may be other additional standards depending on the relevant product and market. We request a meeting with the Commission to provide further details on standards for liquidity. We urge the Commission to perform an in-depth study of the markets on a swap-specific basis, in conjunction with market participants, to determine appropriate measures of liquidity on a product-specific basis.

B. The "available to trade" determination should not be based solely on (i) "any other factor that the SEF/DCM may consider relevant" or (ii) whether a SEF supports trading in the swap, and those factors should be eliminated from the final rule.

[12] Commissioner Sommers' Statement Dec. 5, 2011.
[13] ISDA comment letter to RIN 3038-AD18 – Core Principles and Other Requirements for Swap Execution Facilities, dated March 8, 2011 ("ISDA SEF Letter"), p. 8.

Proposed factor eight would give SEFs/DCMs too much leeway and subjective control in the determinations. We believe that liquidity is a necessary condition for a swap to be "available to trade" and determinations based solely on a catchall factor would allow illiquid swaps to be made "available to trade". Rather, we believe that, demonstrable liquidity should be a mandatory factor and any other factors considered by a SEF/DCM in its certification or application should also be supported by concrete evidence. In addition, as discussed earlier, we believe that it should be a prerequisite, not a factor for consideration, that a SEF/DCM list and support trading in a swap before the SEF/DCM may submit the swap as "available to trade".

C. Economically equivalent swaps should not be included in the assessment of the "available to trade" factors for a particular swap.

The determination of whether a swap is "available to trade" should be made on the basis of the liquidity for that particular swap, exclusive of any "economically equivalent" swaps. Liquidity is only meaningful for a specific swap, not among economically equivalent swaps. Further, as discussed below, the definition of "economically equivalent" swaps as proposed is too vague to ensure that an assessment including such swaps would be appropriate.

D. The Commission should require that SEFs/DCMs provide detailed reasoning in support of all determinations.

As part of the submission, including submissions under either the approval procedure of §40.5 or the certification procedures of §40.6, the SEF/DCM should be required to provide detailed explanations demonstrating that all relevant requirements, including sufficient liquidity, are met.

III. Reviews

A. Reviews should be held more frequently than annually.

As this process and implementation will be new to all market participants, we strongly recommend that reviews of swaps that have been made "available to trade" be conducted on a more frequent periodicity. Particularly in the early stages of implementation, frequent reviews of the by-products of the process will provide an on-going assessment of the process as well.

The liquidity and other trading characteristics of swap products change dynamically with market conditions. To help ensure that designations of "available to trade" appropriately reflect market conditions, the Commission should provide for more frequent reviews. Annual reviews are too infrequent given the nature and pace of the swaps markets. The cost and risk of infrequent reviews and updates arises when a swap that is "available to trade" becomes illiquid yet remains subject to mandatory trade execution on a SEF/DCM. Depending on the requirements of the final SEF rulemaking and the trading methodologies employed on the relevant SEF, this may constrain, and in some cases may prevent, market participants from executing trades in the swap.

B. The final rule should provide that market participants may request the Commission to determine that a swap is no longer "available to trade".

Market participants are able to observe trends and changes in the swaps market as they occur. The Commission should draw on this resource in determining on an on-going basis whether swaps are "available to trade". The final rule should allow market participants to submit a determination to the Commission that a swap is no longer "available to trade". We note that the Commission's final rule on mandatory clearing allows a swap counterparty to request a stay of the clearing requirement after a determination is made that the swap must clear.[14]

IV. Economically Equivalent Swaps

A. The rule should not address "available to trade" status for SEFs/DCMs other than the submitting SEF/DCM. The Commission can employ its existing anti-evasion authority to prevent evasion of trade execution requirements.

We do not understand the purpose or the effect of the proposed rule that once a swap is made "available to trade", such swap and any "economically equivalent swap" must be made "available to trade" on all other SEFs/DCMs that list such swaps. If the purpose is to prevent circumvention of the trade execution requirement, we suggest that it would be more efficient for the Commission to handle the issue under its existing anti-evasion authority in lieu of establishing a new rule that is not clear. For example, §6(e) of the CEA imposes liability on a swap dealer that knowingly or recklessly evades the requirements of §2(h) of the CEA, which includes the trade execution requirement.[15] Further, the Commission will have information on trading activity and will be able to observe if market participants attempt to evade the trading requirement by trading "economically equivalent swaps". Significant trading in such swaps could evidence sufficient liquidity and the Commission may then make an evaluation as to whether such swaps are "available to trade".

B. The definition of "economically equivalent swap" should be premised on fungibility rather than "material pricing terms".

If, despite our comment above, the Commission uses the phrase "economically equivalent swap", we would recommend that the definition be revised for clarity and specificity. The proposed definition is too ambiguous to be useful. The definition relies on "consideration of each swap's material pricing terms", without providing elucidation on what those terms should include. Commissioner Sommers stated that she does not know what that means and expects that market participants would not either.[16] Because, as stated above, a determination of "available to trade" depends on liquidity, only swaps that are fungible with each other should be affected by a determination that any one swap is available to trade. As a result, "economically equivalent" in this context should mean fungible.

Further, the Commission should provide a process for review of "economically equivalent swaps" before they become subject to the mandatory trade requirement. Under the proposed rule when the relevant submitted swap is made "available to trade", any SEF/DCM listing an

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[14] CFTC final rule, "Process for Review of Swaps for Mandatory Clearing", §39.5(d), 76 FR 44464 at 44474.
[15] 7 USC §9a.
[16] Commissioner Sommers' Statement Dec. 5, 2011.

"economically equivalent swap" must automatically make such swap "available to trade". The "economically equivalent swap" itself is not subject to any antecedent review before being made "available to trade" and, under the proposal, only subject to an annual review by the SEF/DCM. Combined with the ambiguous definition, this approach would risk inappropriately subjecting swaps that are actually not appropriate to trade on a SEF/DCM to the mandatory trading requirement, which in the absence of liquidity may make them unavailable to market participants, to the detriment of their risk management activities.

The Commission should determine "economically equivalent swaps" based on the relevant criteria. Such determinations should be subject to Commission review and public comment and market participants should be able to request a stay for review. By way of analogy, in the context of mandatory clearing, the Commission will define groups, categories, types or classes of swaps that are subject to mandatory clearing, rather than the clearinghouses.[17] For example, for CDS, some parameters which the Commission should prescribe as minimum requirements for "economically equivalent swaps" are as follows: same reference rate, same reference entities, same currency, same exact maturity, same contingent events (e.g. Credit Events), same settlement mechanism, same coupon and same clearinghouse. There may be other additional parameters depending on the relevant product and market. We request a meeting with the Commission to provide further details on parameters for "economically equivalent swaps".

C. "Available to trade" should not be determined on the basis of a group, category, type or class of swaps.

The Commission asks in the NPR whether a SEF/DCM should submit its request with respect to a group, category, type or class of swaps. We believe the determination of "available to trade" should be made on a swap-specific basis. Liquidity is critical to the proper determination of "available to trade" and is only meaningful with respect to a specific swap, not with respect to a group or type of swap. Even the same type of swap can have very different liquidity levels for swaps with different tenors. This fact was highlighted, in particular, by the Federal Reserve Bank of New York analysis of actual trade data shows sharply varying trading volumes for different tenors of CDS.[18] In addition, developing appropriate and applicable definitions of groups, categories, types and classes of swaps presents its own difficulties and thus would add to the difficulty of making a determination of what is "available to trade".

[17] Ibid. at 44468.

[18] Federal Reserve Bank of New York Staff Reports, An Analysis of CDS Transactions: Implications for Public reporting; Staff Report No. 517, September 2011. Available at http://www.newyorkfed.org/research/staff_reports/sr517.pdf

V. Effective Date

A. The trade execution requirement should take effect as of six (6) months after the later of (1) the applicable deadline for the clearing requirement, or (2) the date on which the swap is made "available to trade".

Unless the Commission institutes a six month review period before a swap is designated as "available to trade", the proposed time frame of 30 days for the effective date of the trade requirement is too short. It is critical that market participants have sufficient time and resources to meet compliance deadlines. We urge the Commission to increase the time between a determination and the effective date of the trade execution requirement. If the Commission does not provide the six month review period recommended above, we recommend that the trade execution requirement take effect as of six (6) months after the later of (1) the applicable deadline for the clearing requirement, or (2) the date on which the swap is made "available to trade". Although we have expressed our concerns with the proposed timelines in our prior comment letter[19] to the Commission's proposed rule regarding compliance and implementation schedules, this is consistent with the proposed time schedule for compliance with the clearing execution requirements, under which the three categories of entities must be in compliance within 90, 180 and 270 days after the Commission issues any clearing requirement.[20] The suggested time period would allow for a smoother transition to SEF/DCM trading in the period after a determination is made. During this period many participants will be working to meet the documentation and other operational requirements of the relevant SEF/DCM. These operational requirements would include not only links between SEFs/DCMs and other participants, but also the different stages of testing required for new operations. If the compliance period is too short and market participants are unable to meet compliance deadlines they will be effectively prohibited from trading, which may have severe consequences on the markets. This will particularly be an issue soon after the new SEF rules are adopted, when procedures and requirements have not been standardized. It will also be an issue for a new SEF/DCM which does not have established networks and processes.

VI. Other

A. We strongly support the idea that the Commission post notices of all swaps that are made "available to trade" on its website.

In the absence of a central source for information on which swaps are "available to trade", it may be difficult for market participants to determine which swaps are "available to trade" and subject to the trade execution requirement. Lack of a central source that lists all swaps that are "available to trade" on various SEFs/DCMs would make rule compliance virtually impossible, especially if the Commission does not adopt very specific guidance for determining whether a swap is "economically equivalent" to a swap that has been determined to be "available to trade".

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[19] See FIA, ISDA and SIFMA joint comment letter to RIN 3038-AD60; RIN 3038-AC96; RIN 3038-AC97 – CFTC Proposed Compliance and Implementation Schedules for Clearing, Trade Execution and Margin, dated November 2, 2011.

[20] CFTC proposed rule, Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements Under Section 2(h) of the CEA, 76 FR 58186.

We note that under MiFID II, the European Commission proposed that ESMA post on its website a register of derivatives subject to the trade execution requirement.[21]

B. If a DCO or a member of a DCO defaults, then the trade execution requirements should not apply to a subsequent auction of the swaps to remedy the default.

An auction following a DCO or member default will need to take place very quickly and in a manner that meets the needs of a highly stressed situation. It may be impossible to execute the relevant trades through a SEF/DCM because of the volume, speed and complexity of the overall transaction. Requiring use of the SEF/DCM may, therefore, significantly undermine the procedures dealing with default and thereby cause dangers to the overall swap market. We therefore request that such transactions be exempt from the trade execution requirement.

C. The Commission should consider issues arising from the continuous trading aspect of the swaps market.

The swaps market is a global market in which trading occurs around the clock. The Commission should consider the impact of making swaps "available to trade" and imposing mandatory trade execution on SEFs/DCMs that do not operate 24 hours a day.

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ISDA, FIA and SIFMA appreciate the opportunity to comment on the proposed rule regarding making a swap "available to trade." Please feel free to contact the undersigned or Association staff at your convenience.

Sincerely,

Robert Pickel
Chief Executive Officer
ISDA

John M. Damgard
President
FIA

Kenneth E. Bentsen, Jr.
EVP, Public Policy and Advocacy
SIFMA

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[21] MiFID II, Article 27, p. 46.