

May 1, 2012

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

Re: Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades (RIN 3038-AD08); Core Principles and Other Requirements for Swap Execution Facilities (RIN 3038-AD18)

Dear Mr. Stawick:

The Wholesale Market Brokers' Association, Americas¹ ("WMBAA" or "Association") appreciates the opportunity to provide comments to the Commodity Futures Trading Commission ("CFTC" or "Commission") on the proposed rules related to the procedures to establish appropriate minimum block sizes for large notional off-facility swaps and block trades ("Proposed Rules"),² pursuant to section 727 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

The WMBAA will supplement this filing with comments on specific provisions of the Proposed Rules before the close of the public comment period. To that end, the WMBAA believes the Proposed Rules are the product of a results-oriented economic analysis that proposed an approach to block trades motivated by the CFTC's invented classification system of "required" and "permitted" transactions in its proposed rules related to the core principles and other requirements for swap execution facilities ("SEF Proposal").³ The WMBAA remains concerned that this approach is inconsistent with Congressional intent to create a delayed public dissemination regime for over-the-counter ("OTC") swaps "involving a very large number of shares or dollar amount of a particular security or commodity and which transactions could move the market price for the security or contract."⁴

¹ The WMBAA is an independent industry body representing the largest inter-dealer brokers (IDBs) operating in the North American wholesale markets across a broad range of financial products. The five founding members of the group are: BGC Partners; GFI Group; ICAP; Tradition; and Tullett Prebon. The WMBAA seeks to work with Congress, regulators and key public policymakers on future regulation and oversight of OTC markets and their participants. By working with regulators to make OTC markets more efficient, robust and transparent, the WMBAA sees a major opportunity to assist in the monitoring and consequent reduction of systemic risk in the country's capital markets. For more information, please see www.wmbaa.com.

² See Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 77 Fed. Reg. 15,460 (March 15, 2012).

³ See Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. 1,214 (January 7, 2011).

⁴ 156 Cong. Rec. S5921 (daily ed. July 15, 2010) (Statement of Sen. Blanche Lincoln).

As the WMBAA reviews the recent release, it is compelled to express its immediate concern that the Proposed Rules violate the statutory authority provided in the Commodity Exchange Act (“CEA”) and could seriously undermine the law’s clearing and trading requirements. The WMBAA also remains concerned that the interplay between the Proposed Rules and the SEF Proposal artificially restrict the permitted methods of swaps execution, in direct conflict with the SEF definition as set forth in Section 1a(50) of the Commodity Exchange Act.⁵ This precise issue was raised by two Commissioners at the January 23 Open Meeting and must be addressed effectively.⁶

The potential implementation of the CFTC’s Proposed Rules, when combined with certain provisions of the SEF Proposal, almost certainly will produce an outcome that is “arbitrary, capricious, or manifestly contrary to the statute.”⁷ The CFTC should strongly reconsider implementation of this regime, as it is inconsistent with statutory authority and would cause irreparable harm to OTC markets.

With respect to the Proposed Rules, block trades are only considered by the CEA with respect to the public reporting of swap transaction data, noting that the rule providing for the public availability of transaction pricing data for certain swaps must, among other things, (i) “specify the criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts;”⁸ and (ii) “specify the appropriate time delay for reporting large notional swap transactions (block trades) to the public.”⁹ The statute does not provide any exemption from SEF trading for block trades. Within the relevant statutory provisions for SEFs, the only reference to block trades is that a SEF’s rules governing the operation of the facility include rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades.¹⁰ There is no provision in the SEF portions of the CEA that exempt block trades from the SEF trade execution requirement.¹¹ Similarly, the statute clearly does not impose

⁵ See CEA Section 1a(50) (“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, including any trading facility, that—(A) facilitates the execution of swaps between persons; and (B) is not a designated contract market.”).

⁶ See Statement by Commissioner Bart Chilton, Open Meeting of the Commodity Futures Trading Commission, available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement022312> (“The balancing test is particularly evident, for example, with regard to the block trading rule that we are proposing today. While I plan on voting for this proposed rule, I do so with the caveat that we must, as we go forward, be extremely cognizant that all of these swaps rules are an interdependent set. It is a grave error to look at each rule as free-standing—they are not. These swaps regulations—the SEF rule, the block trade rule, the reporting rules, for example—all have to work together, have to be perfectly balanced, in order for the markets to function and for consumers to be protected.”); see also comments by Commissioner Mark Wetjen, Open Meeting of the Commodity Futures Trading Commission, available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission4_022312-trans.pdf (“the Commission’s final block rules must address the interaction of the related SEF reporting and execution method rules.”).

⁷ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

⁸ CEA Section 2(a)(13)(E)(ii).

⁹ CEA Section 2(a)(13)(E)(iii).

¹⁰ CEA Section 5h(f)(2)(C).

¹¹ CEA Section 2(h)(8) (“With respect to transactions involving swaps subject to the clearing requirement of paragraph (1), counterparties shall (i) execute the transaction on a board of trade designated as a contract market under section 5;

any requirement for pre-trade price transparency, as it does for post-trade reporting to swap data repositories. The Commission's singular focus on achieving a "goal" of Section 5h of the CEA is being done at the expense of flexible trade execution that fosters liquidity and affordable options to hedge commercial risk.

In addition to being inconsistent with the plain statutory language adopted by Congress, the WMBAA believes that imposition of such a restrictive regime will severely impair and fragment the liquidity in OTC swaps markets that rely on anything other than a fully electronic central limit order book or request for quote systems, such as voice-based systems or hybrid systems, which contain a voice component to create liquidity. Such restricted execution will result in fewer transactions having sufficient liquidity to be mandatorily cleared and then mandatorily executed, frustrating one of the central tenets of Title VII of the Dodd-Frank Act.

If the block trade threshold is set in a manner consistent with the statute, the focus should be on maintaining liquidity for large transactions. In that instance, the block trade threshold can be set relatively high in each asset class given the average size of those institutional transactions.

However, if, as proposed, the block trade rule dictates the permitted modes of trade execution, then the block trade threshold must be significantly lower (much lower than currently contemplated by the Proposed Rules) to ensure that an inappropriate block trade rule does not cut off the market's ability to create liquidity and competitive price discovery for American businesses to hedge risk. An inappropriate block trade rule will, as discussed by end-users at recent Congressional hearings, significantly restrict the ability for market participants to properly offset risk prior to public dissemination of large trades and will preclude these entities from engaging in necessary risk mitigation activity in the United States. As a result, end-users will either be unable to hedge their risk or will transact in non-U.S. markets.¹²

The CFTC's proposed Section 37.9 and its use of the "required" and "permitted" transactions will ultimately result in a loophole being created that allows trades of size to evade the mandatory trade execution provisions of the CEA. The Proposed Rules enhance this "work-around" of the rules because the permitted methods of execution for "required" transactions is artificially restricted to central limit order books and request-for-quote systems, neither of which have the features necessary to foster liquidity in large block transactions. By further comparison, the modes of SEF

or (ii) execute the transaction on a swap execution facility registered under 5h or a swap execution facility that is exempt from registration under section 5h(f) of this Act.").

¹² See, e.g., Comments from Ms. Brenda Boulwood, Chief Risk Officer and Senior Vice President, Constellation Energy and the Coalition for Derivatives End-Users, House Financial Services Committee Hearing "To review legislative proposals amending Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act," ("Limiting the means of interstate commerce market participants may utilize, may result in the unintended consequence of reducing liquidity, price discovery, and access to markets that are simply not developed enough to justify the costs of mandatory screen based trading. Furthermore it is not consistent with the actual language contained in Dodd-Frank, which sought to allow trading through *any* means of interstate commerce. The CFTC's proposed regulations concerning SEFs compromises efficiency and transparency.") *available at* <http://financialservices.house.gov/UploadedFiles/101411boulwood.pdf>.

execution are even more restrictive than those for designated contract markets, which are also regulated centralized marketplaces.¹³

Finally, the WMBAA remains concerned that the Commission has failed to adequately consider the Proposed Rules' economic effects.¹⁴ Based on the limited subset of data analyzed in the Proposed Rule, only a three-month period of transaction data from nearly two years ago, the WMBAA believes the CFTC has failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made,"¹⁵ as well as "determine as best it can the economic implications of the rule."¹⁶ To that end, there is a good likelihood that the Commission's rulemaking will be deemed to have failed to "apprise itself . . . of the economic consequences of a proposed regulation" and result in the promulgation of a rule that is arbitrary, capricious, and not in accordance with the law.¹⁷

The analysis of more timely and more complete transaction information would allow the CFTC to formulate block trade rules that are more reflective of current market conditions. As the WMBAA has previously indicated, it remains supportive of a block trade regime tied to the public dissemination provisions of the CEA and is not related to methods of swaps execution. Any other regulatory regime would violate the statutory authority granted by Congress.

The WMBAA thanks the Commission for the opportunity to comment on the Proposed Rules.

Please feel free to contact the undersigned with any questions you may have on our comments.

Sincerely,



Christopher Ferreri
Chairman

¹³ See Core Principles and Other Requirements for Designated Contract Markets, 75 Fed. Reg. 80572, 80615 (Dec. 22, 2010) ("The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade."); ("All purchases and sales of any commodity for future delivery, and any commodity option or swap, on or subject to the rules of a designated contract market, must be executed openly and competitively by open outcry, posting of bids and offers, or other equally open and competitive methods, in a place or through an electronic system provided by the designated contract market, during the hours prescribed by the designated contract market for trading in such commodity, commodity option or swap.").

¹⁴ *Bus. Roundtable v. Sec. and Exch. Comm'n*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

¹⁵ *Id.* (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted)).

¹⁶ *Id.* (citing *Chamber of Commerce v. Sec. and Exch. Comm'n*, 412 F.3d 133, 143 (D.C. Cir. 2005)).

¹⁷ *Id.* (citing *Chamber of Commerce v. Sec. and Exch. Comm'n*, 412 F.3d at 144; *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209 (D.C. Cir. 2004)).