

May 26, 2011

**Futures Industry Association
The Financial Services Roundtable
Institute of International Bankers
Insured Retirement Institute
International Swaps and Derivatives Association
Securities Industry and Financial Markets Association
U.S. Chamber of Commerce**

Via Electronic Submission: <http://comments.cftc.gov>

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

Re: Reopening and Extension of Comment Periods for Rulemakings Implementing the
Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Mr. Stawick:

We are writing to the Commodity Futures Trading Commission (the “**Commission**”) in response to the Commission’s action re-opening and extending comment on proposed rules as published in the Federal Register May 4, 2011 and further regarding the process by which the Commission will finalize its proposed rules (the “**CFTC Proposed Rules**”) establishing a comprehensive new framework for the regulation of swaps under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**Dodd-Frank Act**”). While we appreciate the Commission’s recognition of the need for additional comment and feedback given the volume and complexity of the proposed rules as required by Title VII, we believe the extension, as proposed, is inadequate to ensure an efficient and timely implementation of the Title. Rather, we strongly urge the Commission to re-propose the CFTC Proposed Rules, along with an implementation timetable and guidance on the extent of their extraterritorial application, to allow an additional comment period after the rule proposals have been amended to reflect comments received.

The Commission’s re-opening and extension of comment periods adopted on May 4, 2011 permits further comment on earlier rule proposals where more recent rule proposals raise unforeseen issues, but it cannot replace the value of allowing consideration of how the over 15,000 comments in the Commission’s 2011 comment file will be incorporated into the rules. While we welcome the Commission’s effort to allow for additional comment, simply re-opening the comment period does not provide any insight on how the extensive prior comments on the original proposals may influence the Commission’s thinking in crafting final rules. Given the Commission’s serious consideration of comments, and the significant comments submitted by a wide range of market participants on the prior proposals, it seems likely that the Commission may revise the prior proposals. If the Commission does not allow for public comments on revised versions of the CFTC Proposed Rules, market participants will not have the opportunity

to provide constructive feedback on the impact of changes from the originally proposed versions, which is particularly worrisome in light of the disjointed manner in which the CFTC Proposed Rules were originally introduced.

We applaud the Commission for demonstrating a clear commitment to a transparent and open rulemaking process. The process for finalizing the CFTC Proposed Rules is critical and market participants should have an opportunity to review and comment on revised versions of the rules, and their interdependencies, prior to implementation. Historically, an iterative approach to rulemaking has been taken when rules have an unusually large impact on market structure and participants; allowing for more than one round of comments helps ensure that market participants can more fully assess the implications of a set of rules in their entirety. For example, after the initial release of proposed Regulation NMS by the Securities and Exchange Commission (“SEC”), the SEC held public hearings, sought supplemental comments, and re-proposed the entire Regulation NMS for additional comment. Likewise, prudential regulators provided for a subsequent round of comments on implementation of the Basel II capital rules. Title VII requires the Commission and market participants to implement regulatory changes on a much larger scale, an undertaking that merits a more considered review than is possible with only one round of proposed rules.¹ After noting that Congress “forgot what physically is possible” in imposing a one-year deadline for most Title VII rulemaking, Commissioner Dunn indicated a belief that “it takes about three years to really promulgate a rule.”²

The scale of change required in the swaps market by the Dodd-Frank Act, including new trading, reporting and clearing requirements, registrations, compliance regimes, and documentation requirements and the impact on market structure cannot be overstated. Moreover, the ability of market participants to review and provide comments on the proposed Title VII regulatory framework in a timely and comprehensive fashion is further complicated by the need for such entities to simultaneously address many other changes resulting from the Dodd-Frank Act that will impact their businesses. As an indicator of the size of that undertaking, as of the beginning of this month, with approximately 62% of the 387 required rules still to be proposed, regulators had published over three million words of implementing regulation in the Federal Register.³

While we appreciate that the Commission has been working diligently to meet legislative deadlines, aspects of the CFTC Proposed Rules undoubtedly will require revision, particularly as the proposed rules interact with others. Given the speed and complexity of the regulatory undertaking and interdependencies of the rules, that is not surprising. However, in order to ensure that the substance of the final rules works efficiently as a whole, it is essential that market participants have an opportunity for additional review to comment on the entire framework as

¹ As a point of comparison, the CFTC issued a total of 11 new rules in the two years before the financial crisis, but has issued over 40 proposed rules since the enactment of the Dodd-Frank Act.

² Commissioner Dunn speech at the “Managing Counterparty and Systemic Risk Under Dodd-Frank” conference (Nov. 17, 2010).

³ “Overhaul Grows and Slows,” Wall Street Journal (May 2, 2011).

envisioned by Congress in Title VII. We endorse Professor Hal Scott's recommendation that the Commission decide an order for issuance of final rules, re-propose the entire set of CFTC Proposed Rules, along with plans for implementation, and permit another round of comment on the substance of the proposed set of rules.⁴ We also suggest that the Commission wait and be informed by additional data gathered pursuant to regulatory reporting requirements before determining the details of market data-dependent rules (e.g., block size definition and position limits).

The need for a second or subsequent comment period on rule proposals is distinct from the on-going discussions of phase-in of implementation of the rules across markets and market participants. Although phase-in is critical for a smooth implementation of the changes required under the Dodd-Frank Act, it is also essential that rules be appropriately tailored, work in tandem, and avoid unduly impairing market liquidity or adversely impacting investors. It is not enough to phase-in implementation if the final rules themselves are unworkable or in conflict.

In addition, given the highly interdependent relationship between many CFTC Proposed Rules, even relatively modest aspects of key provisions (such as the block trade definition, the swap and security-based swap definitions, dealer and major swap participant definitions, territorial scope, and capital and margin requirements) will dramatically affect the implementation and impact of many other provisions across many other rules. For example, if the Commission were to modify the tests or threshold levels included within the block trade definition, market participants would want to offer further comments on the specific information that must be reported for block trades, the timeframe for public dissemination of such information, position limits and the core principles for swap execution facilities.⁵

While changes to some of the CFTC Proposed Rules may require re-proposal under the Administrative Procedure Act (the "APA"), an issue which we assume the Commission is considering, our recommendation goes beyond any specific requirements under the APA. Our view is that, given the complexity and interdependency of many of these rules, market participants should have the ability to review and comment on a complete set of rules that has incorporated prior comments. This approach is certainly within the spirit of the APA and supports the practical need for further fine-tuning of rules that will have a dramatic impact across the swap markets.

⁴ See testimony of Hal Scott, Director of the Committee on Capital Markets Regulation and Professor and Director of the Program on International Financial Systems at Harvard Law School, before the House Committee on Agriculture, Subcommittee on General Farm Commodities and Risk Management. (April 13, 2011)

⁵ As an additional example, all swaps and security-based swaps that are required to be cleared are required to be executed on an exchange or a swap/security-based swap execution facility, if one makes the swap or security-based swap available for trading. The way in which the "makes available for trading" determination is made will depend on the Commission's trade execution platform rules. The requirement to trade swaps on an electronic system will have significantly different implications on liquidity for different types of instruments that may fall in the definition of "swap" or "security-based swap," terms that have to be further defined by the Commissions.

Despite the deadlines imposed by Congress in the Dodd-Frank Act, it is clear that many members of Congress, on both sides of the aisle, believe that the Commission should take any necessary additional time to solicit more feedback.⁶ The CFTC's additional 30-day comment period is a step in that direction, but it does not go far enough in providing market participants, or Congress for that matter, with the necessary information to fully and accurately assess the market impact and costs of the new regulatory regime. We understand that the Commission may be concerned about additional delay, but re-proposal will only postpone the Title VII rulemaking implementation for a number of months, not years, and the costs of any such delay will be far outweighed by the benefits resulting from further industry, market and public input into, and regulatory deliberation with respect to, the rulemaking process.

We recommend that the Commission re-propose the CFTC Proposed Rules in a manner that reflects, as appropriate, the incorporation of prior public comments. We further suggest that the Commission then allow for a final comment period for all the rules in their entirety that runs from the date of the last proposed rule. Finally, where appropriate, we ask that the Commission wait to be informed by additional data before proceeding with market data-driven rules, such as, for example, real-time reporting. By providing market participants with the opportunity to comment more meaningfully on the new regulatory structure, the Commission will be better able to draft effective final rules and ensure that it has used a process that provides for the least possibility of unintended consequences, adverse market impact and anti-competitive impact while still achieving the objectives of the Dodd-Frank Act.

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We appreciate the opportunity to comment to the Commission and would be pleased to discuss any questions the Commission may have with respect to this letter.

Respectfully submitted,

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⁶ See e.g., statements by Chairman Conaway and Rep. Goodlatte at the House Committee on Agriculture, Subcommittee on General Farm Commodities and Risk Management hearing (April 13, 2011). See also the April 15, 2011 letter from 24 Democratic Congressmen to Chairman Gensler and other regulators, arguing that it is important that the "rule-making process be thorough so that we end up with the right result."

cc: The Hon. Gary Gensler, CFTC Chairman
The Hon. Michael Dunn, CFTC Commissioner
The Hon. Bart Chilton, CFTC Commissioner
The Hon. Jill E. Sommers, CFTC Commissioner
The Hon. Scott D. O'Malia, CFTC Commissioner