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March 7, 2011

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

Re: Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest (RIN 3038—AD01)

Dear Mr. Stawick:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”) appreciates the opportunity to comment on the notice of proposed rulemaking (the “**Governance NPR**”), promulgated by the Commodity Futures Trading Commission (the “**Commission**”) in response to Sections 725(c), 735(b) and 733 (the “**Operative Provisions**”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “**Dodd-Frank Act**”). These provisions together set forth core principles for derivatives clearing organizations (“**DCOs**”), designated contract markets (“**DCMs**”) and swap execution facilities (“**SEFs**” and, together with DCOs and DCMs, “**Facilities**”) that require each such entity to establish and enforce rules to minimize conflicts of interest in its decision-making process and establish a process for resolving such conflicts. To address these potential conflicts, the Commission previously proposed¹ both structural governance requirements and limits on ownership of voting equity and exercise of voting power (the “**Conflicts NPR**”). In the Governance NPR, the Commission, in order to “more fully implement” these core principles, has now proposed regulations (the “**Proposed Regulations**”) that build on the Conflicts NPR by requiring: (a) reporting to the Commission of board of directors’ overrides of recommendations of certain management committees; (b) programs to identify and fairly resolve conflicts of interest; (c) limits on the use or disclosure of non-public information by a variety of Facility directors, officers and others; (d) reporting on governance to the Commission; (e) specifying and enforcing fitness standards for DCO or DCM members and others; (f) publicly-traded DCMs to “evaluate breadth and cultural diversity” of their boards; (g) DCMs to design a process to consider opinions of market

¹ 75 FR 63732 (Oct. 18, 2010).

participants on certain matters; and (h) DCOs to have certain levels of customer representation on their boards of directors.

ISDA was chartered in 1985 and has 800 member institutions from 54 countries on six continents. Our members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end-users that rely on over-the-counter derivatives to manage efficiently the risks inherent in their core economic activities.

Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business through documentation that is the recognized standard throughout the global market, legal opinions that facilitate enforceability of agreements, the development of sound risk management practices, and advancing the understanding and treatment of derivatives and risk management from public policy and regulatory capital perspectives.

ISDA respectfully submits the following comments in response to the Proposed Regulations.

Absence of Record

ISDA commented on the Conflicts NPR in its letter dated November 16, 2010.² In that letter, ISDA observed that the Commission appeared to be venturing beyond its statutory authorization by proposing unprecedented ownership, voting and structural requirements without the *requisite review* showing such rules to be "necessary or appropriate." ISDA observed that the regulatory scheme introduced in the Conflicts NPR could well introduce more, rather than less, risk into the markets by driving away both capital and expertise.

Instead of responding to these concerns, the Governance NPR continues them. The Governance NPR confirms the Commission's Conflicts NPR strategy. The Governance NPR, like its predecessor, indicates no fact-finding, instead relying on mere contention and theory.³

We agree that precautionary regulation has its place, but we emphasize that regulation itself can have negative effects. The risk of driving capital and expertise from markets and burdening those participants who remain with excessive and duplicative rules must be balanced against the theoretical risks marshaled in both the Governance and Conflicts NPRs.

² <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26411&SearchText=isda>

³ See Governance NPR at 724 (II. Conflicts of Interest).

Need for International Harmonization

The Commission notes that, to forward international harmonization, it has taken account of certain European regulatory proposals in the Proposed Regulations.⁴ The Commission fails to note, however, that the European Proposal is meant to be *an express alternative to* the burdensome ownership and voting strictures the Commission proposed.⁵ The international harmonization requirement of the Dodd-Frank Act was not intended to lead to an internationally inspired doubling or tripling of U.S. regulatory burdens as compared to those in other jurisdictions. We suggest that the Commission abandon the ownership and voting limitations it proposed in the Conflicts NPR in the interest of international harmonization, as well as for the other reasons set forth in our earlier responsive letter.

We respectfully remind the Commission that statutorily prescribed core principles generally cover the material elaborated by the Commission in the Proposed Regulations.⁶ The Dodd-Frank Act itself further provides each facility with “reasonable discretion” in establishing the manner in which it will comply with applicable core principles.⁷ A regulation requiring particulars, such as written reporting of rejection or supersession of various subcommittee recommendations by Facility boards of directors, for example, seems like regulatory excess in the presence of the organizational requirements the Commission would impose. The Commission rationale that “such a reporting requirement may serve to deter conflicts from arising in the first place” ignores the fact that such a requirement might also chill board debate and inhibit the legitimate exercise of managerial rights.

We remind the Commission that the swaps markets are large, diverse and in a process of transition toward compliance with the Dodd-Frank Act. The difficulty and cost of this transition is great. An excessive regulatory burden and over-reporting will interfere with both the business of swaps in the Facilities and the business of regulation of the Commission.

Fitness Standards

The Commission indicates its intention to promulgate fitness standards with respect to certain DCM and DCO personnel, as well as for their members, its affiliate and others. The Commission, however, suggests only negative criteria, that is, attributes that indicate why a person might be unfit. We urge the Commission to establish affirmative attributes, particularly for individuals who will be involved in the higher functions of these facilities. For example, members of the board of directors of DCMs or DCOs that will carry swaps

⁴ See “Proposal for a Regulation of the European Parliament and of the Council on OTC Derivatives, Central Counterparties, and Trade Depositories,” COM(2010) 484/5 (the “**European Proposal**”).

⁵ See Clause 4.3.4 of the European Proposal, specifically rejecting ownership limitations.

⁶ See the Operative Provisions.

⁷ *Id.*

should have prior experience with both swaps and exchange-traded derivatives that will be sufficient to enable them to be informed decision makers.

As we observed in our earlier letter, it is vital to the swap markets in transition that facilities be managed by individuals with sufficient dual-market experience to understand what precedents may be applied directly and what require translation to a new context. Accordingly, minimal experience standards for senior managers and all board members would be a welcome addition.

As further noted in our earlier letter, we do not believe that SEFs, new and still undefined, should be subject to any similar organizational or governance requirements, as proposed by the Commission. Consistently, we would not propose similar fitness requirements, unless the Commission determines that it will impose organizational requirements.

* * *

ISDA appreciates the opportunity to provide its comments on the Proposed Regulations and looks forward to working with the Commission as the rulemaking process continues. Please feel free to contact me or ISDA's staff at your convenience.

Sincerely,

A handwritten signature in black ink, reading "Robert G. Pickel". The signature is written in a cursive, flowing style.

Robert Pickel
Executive Vice Chairman