



February 7, 2011

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

Mr. David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
1155 21<sup>st</sup> Street, NW  
Washington, D.C. 20581

Re: Real-time Public Reporting of Swap Transaction Data; RIN: 3038-AD08  
Swap Data Recordkeeping and Reporting Requirements; RIN: 3038-AD19

Dear Mr. Stawick:

Managed Funds Association (“MFA”)<sup>1</sup> appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the “Commission”) on the following regulations proposed under Title VII<sup>2</sup> of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”):<sup>3</sup>

- (i) Real-time Public Reporting of Swap Transaction Data (the “Proposed Reporting Rule”);<sup>4</sup> and
- (ii) Swap Data Recordkeeping and Reporting Requirements (the “Proposed Recordkeeping Rule”,<sup>5</sup> together with the Proposed Reporting Rule, the “Proposed Rules”).

MFA fully supports the objectives of the Dodd-Frank Act and the Proposed Rules to increase transparency and promote market integrity within the financial system.<sup>6</sup> We

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<sup>1</sup> MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world managing a substantial portion of the approximately \$1.9 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

<sup>2</sup> Entitled “The Wall Street Transparency and Accountability Act.”

<sup>3</sup> Pub. L. No. 111-203, § 701, 124 Stat. 1376 (2010).

<sup>4</sup> Real-Time Public Reporting of Swap Transaction Data; Proposed Rule, 75 Fed. Reg. 76140, 76140 (proposed Dec. 7, 2010) (to be codified at 17 C.F.R. pt. 43) (the “Proposed Reporting Rule Release”).

<sup>5</sup> Swap Data Recordkeeping and Reporting Requirements, Proposed Rule 75 Fed. Reg. 76574, 76574 (proposed Dec. 8, 2010) (to be codified at 17 C.F.R. pt. 45) (the “Proposed Recordkeeping Rule Release”).

acknowledge that the Commission needs access to a comprehensive data set with respect to swap transactions to monitor these markets for potential fraud, abuse and systemic risk. We also understand the need to require real-time disseminators to disseminate publicly a certain sub-set of these data to serve the goal of market transparency. The Proposed Rules, however, impose requirements that may result in reporting and public dissemination of information beyond what the Commission needs to fulfill its oversight function and bring transparency to these markets, and, as drafted, these requirements could diminish market liquidity.

As a result, we recommend certain changes to the Proposed Rules that we believe balance the need for appropriate transparency with the need to protect adequately the information that market participants will provide to real-time disseminators. We hope these comments serve as the beginning of an ongoing and constructive dialogue between MFA and the Commission as the swap market evolves and during the regulatory implementation phase of the Dodd-Frank Act.

#### I. Confidentiality of Participants to a Swap

MFA strongly supports the Commission's commitment to protecting the confidentiality of swap counterparty identities by not requiring real-time disseminators to disseminate publicly swap counterparty identification information.<sup>7</sup> Protecting counterparty identification information is of paramount importance to our members. Each of our members employs a customized and proprietary trading strategy, so disclosure of identifying information of swap participants could result in disclosure of the trading positions and strategy of our members. Proposed Reporting Rule 43.4(b) requires public dissemination of the information listed in the data fields set forth in Appendix A,<sup>8</sup> which does not include any counterparty identification information.

Moreover, we request that the Commission provide confirmation of certain aspects of the Proposed Reporting Rule to enhance clarity and certainty for market participants. Specifically, we would appreciate verification from the Commission that the information subject to public dissemination is limited exclusively to the data fields set forth in Appendix A. That appears to be the Commission's intent, but it is not completely clear from the Proposed Reporting Rule Release. Further, our hope would be that if the Commission were to exercise its authority to modify Appendix A, it would do so consistently with the principles set forth in Section 43.4(e),<sup>9</sup> and not use such authority to require public dissemination of identifying information for the parties to a swap.<sup>10</sup> As discussed above, public dissemination of identifying information raises a number of concerns, thus, we believe that these clarifications are necessary to ensure that counterparty identifying information, even anonymous information (*e.g.*, assigned counterparty ID numbers), will be adequately protected.

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<sup>6</sup> *Id.*

<sup>7</sup> Proposed Reporting Rule Release at 76174.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* Section 43.4(d) permits the Commission to amend the data fields described in Appendix A. Section 43.4(e) specifies that, "[s]wap transaction and pricing data that is publicly disseminated in real-time may not disclose the identities of the parties to swap."

## II. Confidentiality of Data for Swaps Executed on Behalf of Multiple Funds

An investment manager often executes swaps on behalf of multiple private investment funds managed by it (“funds”) and allocates these transactions across those funds. The Proposed Reporting Rule does not address whether the public dissemination of such swap transaction detail is to be completed pre- or post-allocation. We believe the real-time disseminator should publicly disseminate such swap transaction data pre-allocation to be consistent with how investment managers execute trades for their funds in the marketplace. Additionally, we are concerned that post-allocation swap data, if publicly disseminated, will allow any of a fund’s counterparties to identify transactions that the fund executed with others. Counterparties are typically aware of an investment manager’s standard fund allocation methodology, and therefore, reporting transactions at the allocated level with trade execution time will make evident an allocation scheme that other market participants can easily associate with a particular investment manager.

This result would contravene the Dodd-Frank Act’s stated objective of protecting the business transactions and market positions of any person.<sup>11</sup> Also, using the allocated trade sizes to reflect market transactions could distort the reported results of trading activity and provide users with misleading information. For example, a swap transaction for \$2 million notional may be priced differently from two swap transactions for \$1 million notional. We understand, and agree with the Commission that a swap data repository (“SDR”) should maintain swap transaction data on a post-allocation basis to match how trades are legally confirmed and monitor the risk at each individual legal entity, but the real-time disseminator should not publicly disseminate such data.

## III. Minimum Block/Large Notional Transaction Size Thresholds

We appreciate that in the Proposed Reporting Rule the Commission has conducted analysis to develop the “distribution test” and “multiple test” to determine minimum block sizes, and that the minimum thresholds for block and large notional transactions will reset annually.<sup>12</sup> However, we have two primary concerns with the proposed tests. First, the Commission should use minimum block sizes not only to determine which trades are subject to delayed public dissemination, but also to determine the notional data subject to public dissemination because we are concerned that public dissemination of notional data for large notional and block transactions may harm liquidity. Second, because the Commission does not have empirical data to determine whether the distribution and multiple tests are appropriate to determine minimum block sizes that will not disrupt markets or reduce liquidity, we strongly encourage the Commission to first conduct a study to identify the proper minimum block levels that will not harm the swap markets.<sup>13</sup> Upon completion of that study, the Commission would then have the necessary

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<sup>11</sup> Section 727 of the Dodd-Frank Act.

<sup>12</sup> Proposed Reporting Rule Release at 76175.

<sup>13</sup> We note that Congress and the Commission both acknowledge that real-time reporting of customized and block trade information may have an adverse impact on pricing and liquidity. Section 727 of the Dodd-Frank Act requires the Commission to provide for public availability of transaction and pricing data for cleared swaps in a manner that takes into account whether public disclosure will reduce market liquidity.

information to establish suitable block trade levels specifically for each swap instrument (*e.g.*, tenor, underlying reference entity, etc.). If the Commission elects to set block trade levels prior to obtaining appropriate data, it should set the initial levels for all swap asset classes sufficiently low such that they will not reduce market liquidity. The Commission could then adjust these levels over time as evidence supporting higher or lower thresholds becomes available.

#### IV. Public Dissemination of Transaction Data

We appreciate and support the Commission's proposal to establish delays for the public dissemination of block transaction data. We are concerned, however, that the proposed 15 minute delay for dissemination of block transaction data could have a negative impact on pricing and therefore liquidity. Specifically, we think that short reporting timeframes will not provide adequate time for the market maker counterparty (in all likelihood the swap dealer) to hedge its exposure on a swap prior to reporting. As a result, the cost of entering into a swap transaction and publicly disseminating transaction details prior to allowing adequate time to hedge the risk will likely be borne by the end user in the form of wider bid/ask spreads and diminished liquidity. Therefore, we recommend that the Commission establish reporting timeframes based on the relationship of a swap transaction size to the average daily volume for such transaction, which will reflect the time it will take for the party to the swap that is the market maker to hedge its exposure efficiently.

Furthermore, we are concerned that the Commission has proposed a "one size fits all" approach to public dissemination of swap notionals. While we support the public dissemination of rounded notionals (rather than actual), we recommend that the Commission employ disclosure thresholds that are specific to each class or subclass of swap, and are set at levels or ranges that do not threaten to reduce market liquidity. We recognize that the Commission will need to consider the disclosure rules relevant to each class of swap and subsequently may need to revise the thresholds to adapt to changing liquidity levels in each market.

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Also, in the preamble to the Proposed Reporting Rule Release, the Commission explains that it is not aware of any academic literature that offers empirical evidence to support the claim of impaired liquidity given greater transparency or how block trades on swaps or large notional swaps are affected by a post-trade transparency regime. The Commission notes further its intention to continue to analyze and study the effects of increased transparency on post-trade liquidity, particularly in the context of block trades on swaps and large notional swaps. Proposed Reporting Rule Release at 76159.

At this time, we, like the Commission, are not aware of any empirical evidence or studies on this point. Meanwhile, reporting rules that have any adverse impact on pricing and liquidity may have a chilling effect on the swaps market as a whole. Therefore, we suggest that the Commission proceed cautiously in establishing minimum reporting thresholds and requiring public dissemination of block swap data, until such studies and empirical evidence are available. We are concerned that if the Commission requires disclosure of too much block trade information prior to acquiring proper empirical data, the markets may suffer irreversible long-term adverse effects on liquidity. We are also keenly aware that it will be much harder for the Commission to "retract" an over-burdensome disclosure requirement than to add disclosure requirements if the Commission's regulations are not sufficiently protective.

## V. Public Reporting of Non-Standardized (Bespoke) Swap Transaction Data

We are very concerned with the Commission's interpretation of Congress' legislative mandate – *i.e.*, that comprehensive swap transaction data reported to an SDR must be publicly disseminated.<sup>14</sup> Congress did not intend for the public dissemination of comprehensive data for non-standardized (bespoke) swaps.<sup>15</sup> Such disclosure, even anonymously, could reveal proprietary trading strategy information. Moreover, such dissemination undermines Congress' goal of enhancing price discovery through public reporting.<sup>16</sup> Price discovery only serves a purpose if there is a broad market for the relevant transaction. Non-standardized swaps, by nature, are not widely transacted. Public dissemination of transaction information that does not provide all the material information necessary to calculate the price of such swap will be incomplete and of limited use to the public. The Proposed Reporting Rule should require each real-time disseminator to withhold such information so as not to convey misleading or confusing price information to the market.<sup>17</sup> To the extent the Commission requires comprehensive reporting of swap data for non-standardized transactions, we suggest excluding notional amount and price from the information subject to the public dissemination requirements.

MFA believes further clarification is needed on Section 43.4(e)(2) of the Proposed Reporting Rule,<sup>18</sup> which requires reporting parties and swap markets<sup>19</sup> to provide a real-time disseminator with a description of the underlying asset and tenor of the swap that is “general

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<sup>14</sup> The Dodd-Frank Act does not authorize the Commission to require *all* reported swap transaction information to be publicly disseminated. *See* Section 727 of the Dodd-Frank Act creates a new Section 2(a)(13) of the Commodity Exchange Act which distinguishes between public reporting and public dissemination of swap data. Section 2(a)(13)(C) sets out public reporting requirements for swap transactions. Section 2(a)(13)(D) addresses dissemination. It provides that the Commission *may* require an SDR to disseminate publicly the swap transaction and pricing data required to be reported.

In addition, Section 2(a)(13)(C) shows that Congress intended for the Commission to impose less restrictive public reporting requirements for uncleared swaps. Section 2(a)(13)(C)(iii) makes clear that with respect to swaps not cleared at a derivatives clearing organization and which are reported to an SDR or to the Commission, the Commission shall require real-time public reporting for such transactions *in a manner that does not disclose the business transactions and market positions of any person*. In comparison, Sections 13(a)(13)(C)(i) and (ii), which require real-time public reporting of swap information without restriction for transactions that are subject to the mandatory clearing requirement or not subject to the clearing requirement but cleared at a registered clearing agency.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* Congress specified that the purpose of the public reporting requirement is to enhance price discovery. Section 727 of the Dodd-Frank Act, clearly states, “[t]he purpose of this section is to authorize the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.”

<sup>17</sup> In the requests for comment set forth in the preamble to the Proposed Reporting Rule, the Commission asks whether public dissemination of information concerning non-standardized swaps will reduce market liquidity. Proposed Reporting Rule Release at 76158.

<sup>18</sup> *Id.* at 76174.

<sup>19</sup> Defined as any registered swap execution facility or registered designated contract market that makes swaps available for trading. *Id.* at 76172.

enough to provide anonymity but specific enough to provide for a meaningful understanding of the economic characteristics of the swap.”<sup>20</sup> In addition, the Proposed Reporting Rule provides that a swap participant may elect not to report the exact description of the underlying or tenor if such exact description would facilitate the identity of a party to a swap. This reporting requirement is separate from the general requirement that a reporting party report swap data to a registered SDR.<sup>21</sup> MFA would appreciate further explanation whether a party may elect not to disclose asset and tenor information with respect to its swap transactions and still be in compliance with Section 2(a)(13)(G) of the CEA. MFA also seeks clarification on whether such real-time disseminator will publicly disclose the fact that a reporting party made such an election.

## VI. Timing of Reporting

We are concerned that the timing requirements for reporting of swap data to an SDR are impracticable and burdensome. We believe the policy benefits of providing swaps data within minutes of execution do not outweigh the costs in terms of the high likelihood of errors as well as the infrastructure costs to establish a mechanism to report swaps information in these short timeframes.

For swaps not executed on a swap execution facility or derivatives contract market and not cleared on a derivatives clearing organization, the Proposed Recordkeeping Rule requires a reporting counterparty to report all primary economic terms data promptly following verification by the counterparties at or immediately following execution of the swap. The Proposed Recordkeeping Rule further provides that in no event may such reporting occur later than: (i) 30 minutes after execution of the swap if verification of primary economic terms occurs electronically; or (ii) 24 hours after execution of a swap if verification of primary economic terms does not occur electronically.<sup>22</sup> We suggest that the Commission revise the Proposed Recordkeeping Rule to reflect that the time of “execution” for a swap means the time of execution of a confirmation. Thus, for a swap that is neither executed nor confirmed electronically (*i.e.*, a swap where verification of the primary economic terms does not occur electronically), we propose that market participants be required to report swap data 24 hours after the time of manual execution of the relevant swap confirmation. Adjusting the reporting timeframe to align with the execution of a confirmation comports with the practical realities of the timing for these swap transactions.

## VII. Dispute Resolution and Correction of Erroneous Data Reported to a Swap Market or Real-Time Disseminator

MFA supports a robust mechanism to correct erroneous swap transaction information reported to a swap market or real-time disseminator as well as a means to resolve disputes about the data reported. The Commission has recognized these issues by providing a method for

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<sup>20</sup> *Id.* at 76174.

<sup>21</sup> *Id.* at 76172.

<sup>22</sup> Proposed Recordkeeping Rule Release at 76600.

correcting errors or omissions in publicly disseminated swap transaction and pricing data. Proposed Reporting Rule 43.3(f) assigns the *reporting party* the responsibility to correct errors, and as a result, the reporting party is also responsible for correcting the public record of the swap transaction and pricing data.<sup>23</sup> However, we are concerned that a situation may arise where a reporting party and a non-reporting party disagree about whether the reporting party has reported erroneous data and where the reporting party refuses to correct a prior erroneous report.<sup>24</sup> Thus, we believe the Commission's final rule should provide that, if due to a dispute over whether an error exists, the reporting party does not promptly report corrected information to the swap market or real-time disseminator, the non-reporting party may itself report the disputed data. In such event, the Commission should oblige the swap market or real-time disseminator to review promptly the disputed data with both parties. Without the involvement of the swap market or real-time disseminator, we are concerned that the reporting party, who controls the public record with respect to a swap, will always prevail in a dispute.

### VIII. Phase in of Real-time Public Reporting Requirements

MFA agrees with the Commission that the Proposed Rules will take a significant amount of time and resources to implement effectively.<sup>25</sup> Therefore, we recommend that the Commission gradually phase in reporting and public dissemination requirements.<sup>26</sup> In particular, the Securities and Exchange Commission ("SEC") has proposed a phase-in schedule for real-time reporting and public dissemination of security-based swap data that uses six-month increments, and we suggest that the Commission implement a similar phase-in schedule. Such coordination between the Commission and the SEC will facilitate compliance by market participants, since many transact in both swaps and security-based swaps. In addition, we support a phase-in schedule that commences on a date when more than one SDR has registered

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<sup>23</sup> *Id.* at 76173. Section 43.3(f)(ii) states that, "[i]f the reporting party to a swap becomes aware of an error or omission...either through its own initiative or through notice by the other party to the swap, the reporting party shall promptly submit corrected data to the same swap market or real-time disseminator.

<sup>24</sup> We also note that Section 43.3(f) overlaps, yet is inconsistent, with the requirements set forth in 17 CFR Part 49, the Commission's notice of proposed rulemaking on Swap Data Repositories (the "SDR Proposed Rule"). Swap Data Repositories; Proposed Rule, 75 Fed. Reg. 80898, (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pt. 49) (the "SDR Proposed Rule Release"). The SDR Proposed Rule specifies in Sections 49.9(2), 49.11(b), and 49.11(c) that the SDR has a duty to confirm with both parties the accuracy of data submitted. Thus, the SDR Proposed Rule, which clearly requires that each SDR coordinate with both parties to a swap transaction to confirm the data reported, conflicts with the Proposed Reporting Rule which gives the reporting party exclusive responsibility to correct erroneous data.

<sup>25</sup> Proposed Reporting Rule Release at 76142-43. The Commission notes that, "participants will need a reasonable amount of time in which to acquire or configure the necessary systems, engage and train the necessary staff and develop and implement the necessary policies and procedures to implement the proposed rules. The Commission's proposed rules provide that appropriate minimum block sizes will be published by registered SDRs beginning in January 2012. Accordingly, it is anticipated that registered entities and registrants will have begun their compliance by that time."

<sup>26</sup> The financial services industry has generally expressed concern that certain market-wide regulatory changes are of such magnitude that staged implementation will help to mitigate any unintended consequences as market participants adapt. *See* <http://www.managedfunds.org/downloads/Collected%20Trades%20LEI%20Comment%20Letter.pdf>

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with the Commission. If the Commission proceeds with only one registered SDR, then that SDR will have a competitive advantage over new entrants to the SDR market. We think it is to the benefit of the market and its participants to have a diverse range of options when reporting swap data.

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MFA appreciates the opportunity to comment on the Commission's Proposed Rules. If the Commission or its staff has questions, please do not hesitate to call Carlotta King or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell  
Executive Vice President, Managing Director &  
General Counsel

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