



February 7, 2011

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

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

Re: RIN No. 3038-AC96: Notice of Proposed Rulemaking on Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants

Dear Mr. Stawick:

Managed Funds Association (“MFA”)¹ appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the “Commission”) on its notice of proposed rulemaking on “Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants” (the “Proposed Rule”)² related to Title VII³ of the Dodd-Frank Wall Street Reform and Customer Protection Act (the “Dodd-Frank Act”).⁴ MFA supports increased market transparency and generally supports the Commission’s proposed approach to reporting and the maintenance of records as set forth in the Proposed Rule. In particular, we agree with the Commission in recognizing “that there will be differences in the size and scope of the business of particular swap dealers and major swap participants”.⁵ Thus, we welcome the opportunity to assist the Commission by identifying distinctions between major

¹ 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.

² Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants; 75 Fed. Reg. 76666, 76666 (Dec. 9, 2010) (to be codified at 17 C.F.R. pt. 23) (the “Proposed Rule Release”).

³ Entitled “The Wall Street Transparency and Accountability Act”.

⁴ Pub. L. No. 111-203, § 701, 124 Stat. 1376 (2010).

⁵ Proposed Rule Release at 76667.

swap participants (“MSPs”) and swap dealers (“SDs”) such that implementation of the Proposed Rule will not subject MSPs to certain requirements that are more appropriate for SDs.

As a result, we recommend certain changes to the Proposed Rule to address some of the fundamental differences between MSPs and SDs. 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. Distinctions between SDs and MSPs

MFA notes that the Proposed Rule treats MSPs and SDs as equivalent entities and, as a result, would require MSPs to maintain and report information that, under current market practice, entities likely to be classified as SDs would maintain, but entities that may be classified as MSPs would not.⁶ Although the Dodd-Frank Act imposes similar obligations on SDs and MSPs,⁷ it does not state that the Commission must subject SDs and MSPs to identical regulation. SDs and MSPs are entirely different types of entities, as the definitions of such terms in the Dodd-Frank Act make clear.⁸ Generally, SDs are market makers, while MSPs are non-dealers with substantial positions in swaps.⁹ Thus, since there are fundamental differences in the businesses, structures and characteristics of SDs and MSPs, we hope that the Commission will make careful and appropriate distinctions between SDs and MSPs and not employ the same regulatory regime to oversee such different market participants. This approach would be consistent with the Commission’s views of MSPs and SDs, since the Commission itself recognizes the differences between SDs and MSPs,¹⁰ and has explicitly solicited comment on whether it should adjust certain provisions of the Proposed Rule to reflect these differences.¹¹

⁶ The Commission has not yet promulgated final rules defining MSP and SD, but for the remainder of this letter, when reference is made to either MSP or SD it shall mean an entity likely to be included in such category based on the Commission’s current proposed definitions.

⁷ See Section 731 of the Dodd-Frank Act, which imposes various registration and business conduct requirements on SDs and MSPs.

⁸ See Section 721(a)(21) of the Dodd-Frank Act, which defines the term “Swap Dealer”; see also Section 721(a)(16) of the Dodd-Frank Act, which defines the term “Major Swap Participant”.

⁹ See Section 721(a)(16) of the Dodd-Frank Act, which includes within the MSP definition an entity that “maintains a substantial position in swaps” or “whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects” on the financial markets. Consideration of an entity’s swap positions is central to the definition of an MSP, and militates for a focus on records and reporting that relate to the size and character of an MSP’s swap portfolio, as opposed to the activities and details around market making and execution.

¹⁰ See, e.g., Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”; Proposed Rule, 75 Fed. Reg. 80174, 80185 (Dec. 21, 2010) (to be codified at 17 C.F.R. pts. 1 & 240) (noting that the major swap participant definition differs from the swap dealer definition in that the former focuses on market impacts and risks associated with an entity’s swap *positions* and the latter focuses on an entity’s *activities*).

¹¹ Proposed Rule Release at 76667.

II. Specific Recommendations for MSPs

MFA agrees that it may be appropriate for MSPs to keep records of the same type and in the same manner as SDs in those circumstances where an MSP is a counterparty to a non-SD or non-MSP, unless an SD is acting as an intermediary between the non-SD or non-MSP parties and executing the transaction on behalf of such non-SD or non-MSP parties. In addition, consistent with the principles stated above, we respectfully request that the Commission make certain changes to the Proposed Rule so that MSPs are not generally required to maintain certain records and information that are only appropriate for, and customarily maintained by, SDs because of the relevance of those records to an SD's market making activities. These records would include the following, as described in the Proposed Rule:

- (i) *Record of formal and informal complaints against personnel (including how complaint was resolved).*¹² Customers or clients of entities likely to be classified as SDs typically file such "complaints", often with a self-regulatory organization such as the National Futures Association ("NFA"), which regulates futures commission merchants that would likely be SDs, as well as commodity trading advisors ("CTAs") and commodity pool operators ("CPOs"). We do not believe this requirement is generally appropriate for MSPs because, except in the event such entities are registered as a CTA or CPO: (a) entities that may be classified as MSPs would not be members of NFA or similar organizations; and (b) the filing of such complaints against entities that may be classified as MSPs is neither customary nor consistent with such entities' activities in the market. We would appreciate further guidance from the Commission as to the types of complaints it envisions would be applicable to MSPs such that MSPs would need to record them.
- (ii) *Record of marketing and sales materials.*¹³ SDs typically provide these materials to their customers or publicly disseminate them as part of their efforts to generate business for their market making activities. Since MSPs are not market makers, they do not produce such materials for public dissemination. Therefore, we feel that the concerns about SD marketing and sales materials that necessitate the SDs' recordkeeping requirement are inapplicable to MSPs.
- (iii) *Record of all oral communications provided or received containing relevant pre-execution trade information.*¹⁴ Under current market practice, customers that are counterparties to SDs do not record or maintain a record of all relevant oral communications with SDs because such customers generally do not have the significant infrastructure or administrative capacity to maintain such recordings

¹² *Id.* at 76674 (proposed § 23.201(b)(3)(i) and (ii)).

¹³ *Id.* at 76674 (proposed § 23.201(b)(4)).

¹⁴ *Id.* at 76675 (proposed § 23.202(a)(1)).

and/or records. Rather, such customers customarily maintain only records confirming the final terms of a swap transaction. While the Proposed Rule Release states that the Commission does not intend to impose an affirmative obligation on SDs and MSPs to record all relevant oral communications,¹⁵ MFA feels that it would be inappropriate to impose on MSPs the additional burden of maintaining a record of all oral communications made or received that contain relevant pre-execution trade information. Such a requirement is more appropriate to SDs in a market making position. Since SDs should keep such records in connection with their market making activities, to require the MSP customer to maintain the same records would be duplicative and unnecessary.

- (iv) *Record of the date and time of each quotation provided to, or received from, the counterparty.*¹⁶ For the same reasons cited in (iii) above, it is not current market practice for non-SDs to maintain such detailed records of quotations received from SDs that did not result in execution. We are not in a position to say whether SDs customarily maintain such information at this time, but we believe such information reasonably relates to SDs' activities as dealers and market makers in swaps. Since in most cases MSPs will be counterparties to SDs, this recordkeeping requirement would be duplicative. As a result, we believe that it would create a significant and unnecessary burden to require MSPs to maintain essentially identical records as SDs in this regard.
- (v) *Record of the date and time of trade execution to the nearest minute.*¹⁷ Entities likely to be classified as SDs generate this information as part of executing a trade for their counterparties in the ordinary course of business. Under standard swap documentation and market practice, an MSP, should it desire this information, would be affirmatively obligated to request it from its SD counterparty. As we have stated above, requiring MSPs to maintain this information, when SDs already maintain it, would result in needless duplication and an increased recordkeeping burden on MSPs. Furthermore, since such information more reasonably relates to a party's market making activities in the swap market than to a party's swap positions, it is more appropriate for SDs to maintain than for MSPs.
- (vi) *Daily trading records for related cash and forward transactions.*¹⁸ To the extent these transactions are relevant for an MSP, the same principles as set forth in (iv) and (v) above should apply with respect to an MSP's obligation to maintain detailed records of quotations and trade execution.

¹⁵ *Id.* at 76668.

¹⁶ *Id.* at 76675 (proposed § 23.202(a)(1)(ii)).

¹⁷ *Id.* at 76675 (proposed § 23.202(a)(2)(iv)).

¹⁸ *Id.* at 76675-76 (proposed § 23.202(b)).

- (vii) *Records must be maintained for the life of the swap (or for the period during which the swap is kept on the SD's or MSP's books), plus 5 additional years.*¹⁹ MFA believes that this requirement should differ for SDs and MSPs. The vast majority of our members, including those that may be classified as MSPs, do not maintain such records for such a length of time, and requiring them to do so would represent an increased compliance burden entailing substantial additional administrative costs.

III. Conclusion

MFA urges the Commission to make careful and appropriate distinctions between SDs and MSPs in finalizing the reporting and recordkeeping requirements under the Proposed Rule. The Commission logically should require SDs, as market makers, to maintain more detailed information and for a longer period than MSPs. Moreover, to the extent that the Proposed Rule requires SDs to maintain certain records and information consistent with their role as market makers, it does not enhance the goals of the Commission to require MSPs to maintain the same set of records, especially where maintaining such additional records would result in substantially increased compliance burdens for MSPs.

MFA appreciates the opportunity to comment on the Commission's Proposed Rule. 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

¹⁹ *Id.* at 76676 (proposed § 23.203(b)(2)).