

June 3, 2011

**VIA ELECTRONIC MAIL**

David Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581  
secretary@cftc.gov

Re: Cost-Benefit Analyses of Rules Proposed Under the Dodd-Frank Act

Dear Mr. Stawick:

CME Group, Inc. ("CME Group"), on behalf of its four designated contract markets ("Exchanges" or "DCMs"), commend the Commodity Futures Trading Commission's ("CFTC" or "Commission") decision to reopen the comment period on all of its rules proposed under the Dodd-Frank Act ("Dodd-Frank" or "DFA"). CME Group appreciates the opportunity to further comment on the Commission's proposed rules. Many of the proposed rules, in our view, would impose onerous prescriptive requirements on registered entities with little or no corresponding regulatory benefit. Respectfully, we believe that the Commission has not performed the requisite cost-benefit analyses and as a result, does not have sufficient information to evaluate the unnecessary burdens many of its proposed rules would place on the market.

CME Group, the world's largest and most diverse derivatives marketplace, consists of four separate Exchanges: the Chicago Mercantile Exchange, Inc. ("CME"), the Board of Trade of the City of Chicago, Inc. ("CBOT"), the New York Mercantile Exchange, Inc. ("NYMEX") and the Commodity Exchange, Inc. ("COMEX"). These Exchanges offer the widest range of benchmark products available across all major asset classes, including futures and options based on interest rates, equity indexes, foreign exchange, energy, metals, agricultural commodities, and alternative investment products.

CME also includes CME Clearing, one of the largest central counterparty clearing services in the world, which provides clearing and settlement services for exchange-traded contracts, as well as for over-the-counter derivatives transactions through CME ClearPort®.

The CME Group Exchanges serve the hedging, risk management and trading needs of our global customer base by facilitating transactions through the CME Globex® electronic trading platform, our open outcry trading facilities in New York and Chicago, as well as through privately negotiated transactions.

**I. Background**

Pursuant to Section 15(a)(1) of the CEA (7 U.S.C. § 19), the Commission is obligated to perform an analysis of the costs and benefits of all proposed regulations. Section 15(a)(1) states: "before promulgating a regulation under this Act or issuing an order . . . the Commission shall consider the costs and benefits of the action of the Commission." Such costs and benefits "shall be evaluated in light of – (A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of the futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations." 7 U.S.C. § 19(a)(2). That is, in addition to weighing the traditional direct costs and benefits, Section 15

directs the Commission to include in its evaluation of the benefits of a proposed regulation the following intangibles: "protection of market participants and the public," "the efficiency, competitiveness, and financial integrity of futures markets," "price discovery," "considerations of sound risk management practices," and "other public interest considerations."

In its releases, the Commission has stated that "by its terms, Section 15(a) of the CEA does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits outweigh the costs; rather, it requires the Commission to "consider the costs and benefits of its actions." We respectfully disagree with this interpretation and suggest that the listing of intangible factors to be considered in Section 15(a) is meant to instruct the Commission to consider such factors *in addition to* the real economic costs of its proposed regulation, not to excuse the Commission from performing a true cost-benefit analysis.

As they stand, the cost-benefit analyses included in the Commission's proposed rulemakings under Dodd Frank take an uninformative, almost boilerplate form and fail to acknowledge many of the economic costs of the proposed rules. Many interested parties, including Commissioner Sommers, individuals providing Congressional testimony, and the Commission's Inspector General have expressed concern regarding the cost-benefit analyses performed with regard to rules proposed under Dodd-Frank thus far. Commissioner Sommers forcefully called this failure to the Commission's attention as recently as February 24, 2011, at the start of the CFTC's Meeting on the Thirteenth Series of Proposed Rulemakings under the Dodd-Frank Act.

Before I address the specific proposals, I would like to talk about an issue that has become an increasing concern of mine – that is, our failure to conduct a thorough and meaningful cost-benefit analysis when we issue a proposed rule. The proposals we are voting on today, and the proposals we have voted on over the last several months, contain very short, boilerplate "Cost-Benefit Analysis" sections. The "Cost-Benefit Analysis" section of each proposal states that we have not attempted to quantify the cost of the proposal because Section 15(a) of the Commodity Exchange Act does not require the Commission to quantify the cost. Moreover, the "Cost Benefit Analysis" section of each proposal points out that all the Commission must do is "consider" the costs and benefits, and that we need not determine whether the benefits outweigh the costs.

Further, following Congressional testimony that raised concerns among members of Congress regarding the Commission's cost-benefit analyses, the Office of the Inspector General of the Commission (the "IG") undertook an investigation of the formulation of cost benefit analyses of four rulemakings.<sup>1</sup> In its investigation, the IG identified several problematic aspects of the Commission's procedures for formulating its cost-benefit analyses. To begin, the IG noted that "the Commission staff viewed section 15(a) compliance to constitute a legal issue more than an economic one, and the views of the Office of the General Counsel therefore trumped those of the Chief Economist, at least for the four rules we reviewed." The IG then suggested: "We believe that as a market regulator, any cost-benefit analysis should take account of price theory economics, which should involve the Chief Economist. While we recognize that an attorney may possess economic insights gained through his or her academic or professional background, the experience of economists who work with such questions on a daily basis should be helpful."<sup>2</sup>

Indeed, after a review of the cost benefit analyses of four proposed rules and a discussion with staff, the IG suggested: "A more robust process is clearly permitted under the cost-benefit guidance issued by the

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<sup>1</sup> "An Investigation Regarding Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act," prepared by the Office of the Inspector General, Commodity Futures Trading Commission, April 15, 2011 (attached hereto as Exhibit A) ("IG Report") at ii.

<sup>2</sup> IG Report at 22.

Office of the General Counsel and the Office of Chief Economist, and we believe a more robust approach would be desirable, with greater input from the Office of the Chief Economist."<sup>3</sup> The IG further acknowledged that in other contexts, agencies have recently faced the overturning of their final rules based on the failure to perform such a robust cost-benefit analysis.<sup>4</sup>

Further, the IG Report suggested that regardless of what precisely is required by CEA Section 15(a), the Commission should engage in a more robust cost-benefit analysis in order to improve its proposed regulations. It stated: "We believe that compliance with section 15(a) should not represent a ceiling when it comes to supporting regulation through economic analysis. We are mindful of the adage, 'just because something is legal doesn't make it right.'" And we wholeheartedly agree that, 'in the end, economic analysis is more than about satisfying procedural requirements for regulatory rulemaking.'"<sup>5</sup>

Notably, the IG report noted that Commission "Staff hoped to obtain cost estimates in comments submitted in response to the proposed rules."<sup>6</sup> Indeed, the Commission has, in effect, delegated its responsibility to conduct a cost-benefit analysis to the industry, relying on costs and benefits to be suggested in comments. The Commission may not assign its responsibility to conduct an analysis to commentators. Indeed, such an assignment is problematic because industry participants may have biased views or incomplete information.

Dodd-Frank challenged the Commission to propose and finalize a large number of necessary rules to close regulatory gaps. But nothing in Dodd-Frank or the CEA allows the Commission to disregard its duty to conduct a thorough and complete cost-benefit analysis covering each rule it proposes to adopt. As discussed at length below, however, the Commission has proposed many rules that would impose innumerable and burdensome costs that the Commission has failed to recognize and address.

To remedy this deficiency, CME Group agrees with the suggestion that the Chief Economist should become more involved in identifying and addressing these costs in the Commission's Notices of Proposed Rulemaking ("NOPRs"). CME Group further agrees that the Commission should employ a more robust methodology in addressing the costs and benefits of its regulations, even if that leads to a slower rulemaking process. An accurate assessment of such costs and benefits is integral to soliciting public comment and to protecting and cultivating the markets the Commission is tasked with regulating.

## **II. Failure to Adequately Analyze the Costs and Benefits of Abandoning the Principles-Based Regulation Regime**

The Commission's failure to adequately assess the costs and benefits of its proposed regulations is particularly noteworthy to the extent that it replaces the principles-based regulatory regime currently operating in the futures markets with a more prescriptive regime. The Commission's cryptic, rote cost-benefit analysis fails to recognize the potential detrimental effects this change will have on the U.S. futures markets. In analyzing the costs and benefits of its prescriptive rules, the Commission fails to acknowledge that a fully-functional, less prescriptive regulatory system is already in place. It fails to take into account the costs and benefits of the proposed rules as compared to the baseline of the current rules. The Commission should simply ask: Is the increased cost of the proposed rule worth any increased benefit?

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<sup>3</sup> Id. at iv.

<sup>4</sup> Id. at 23.

<sup>5</sup> Id. at 23 (internal citations omitted).

<sup>6</sup> Id. at 13.

CME Group submits that if the Commission were to make this calculation, it would find that the costs of abandoning its principles-based regime would far outweigh any benefits of imposing the prescriptive regime it has proposed in several of its NOPRs. To this end, it is important to emphasize that regulated futures markets and futures clearing houses operated flawlessly during the 2008 financial crisis. Futures markets performed all of their essential functions without interruption and, despite failures of significant financial firms, our clearing house experienced no default and no customers on the futures side lost their collateral or were unable to immediately transfer positions and continue managing risk. As such, the aim of Dodd-Frank was to bring swaps, which were previously traded over-the-counter and largely unregulated, into a sound regulatory framework. Dodd-Frank's intent was not to undo the regulatory regime for well-functioning futures markets. Congress specifically maintained principles-based regulation for futures markets. In fact, it extended that regime to the newly regulated swaps market, creating core principles for swap execution facilities as well as for swap data repositories.

Further, the principles-based regime of the CFMA has facilitated tremendous innovation and allowed U.S. exchanges to compete effectively on a global scale. Principles-based regulation of futures exchanges and clearing houses permitted U.S. exchanges to regain their competitive position in the global market. Without unnecessary, costly and burdensome regulatory review, U.S. futures exchanges have been able to keep pace with rapidly changing technology and market needs by introducing new products, new processes and new methods through self-certifying compliance with the CEA. Indeed, U.S. futures exchanges have operated more efficiently, more economically and with fewer complaints under this system than at any time in their history. The transition to an inflexible regime threatens to stifle growth and innovation in U.S. exchanges and thereby drive market participants overseas. As further discussed below, this will certainly impact the relevant job markets in the United States.

The Commission's almost complete reversion to a prescriptive regulatory approach converts its role from an oversight agency, responsible for assuring self regulatory organizations comply with sound principles, to a front line decision maker that imposes its business judgments on the operational aspects of derivatives trading and clearing. This reinstitution of rule-based regulation will require a substantial increase in the Commission's staff and budget and impose indeterminable costs on the industry and the end users of derivatives. Yet there is no evidence that this will be beneficial to the public or to the functioning of the markets.

The Commission responds to criticism of its push to implement a rules-based regulatory system by asserting that its proposed prescriptive regime should be welcomed by the industry since it is modeled on the best practices currently employed by the most successful exchanges and clearing houses. The industry's growth, innovation and commitment to continuous improvement did not occur because it was prescriptively required by CFTC regulation; it occurred because the exchanges and clearing houses were motivated to better serve the marketplace, and thereby the interests of their stakeholders, and because the regulatory structure fostered the freedom and flexibility to innovate within the boundaries of compliance with the core principles.

The prescriptive regulatory approach proposed by the Commission will freeze progress and curtail the drive to find more efficient and effective means to fulfill the core principles. It will diminish competition and put the US back to pre-CFMA days when it was losing business to foreign competitors. As such, the CFTC's apparent decision to impose a multitude of prescriptive rules on both DCMs and swap execution facilities ("SEFs") may have a detrimental effect on employment in the United States. That is, the adoption by the CFTC of a prescriptive regime will stifle this innovation, make U.S. futures markets less attractive to traders, and in the end can only result in the loss of jobs as the markets lose their ability to compete.

Indeed, the CFTC's proposed rules in many areas are not in harmony with international regulators. International regulators, such as the EU, are far from adopting an approach as prescriptive of the CFTC's proposal in this and other areas. This creates an incentive for market participants to move their business to international exchanges where they may be subject to less prescriptive regimes, threatening negative consequences for U.S. exchanges. The CFTC should be careful not to adopt restrictions that tilt the competitive playing field in favor of overseas markets. Such a tilt threatens to export the price discovery

process to overseas exchanges, resulting in both a loss of jobs in the U.S. and less cost-efficient hedging for persons in business in the U.S. As an example, consider the two major price discovery indexes in crude oil: West Texas Intermediate, which trades on NYMEX, and Brent Oil, which trades overseas. If the CFTC places heavy restrictions in areas such as position limits on traders in the U.S., traders in crude oil, and with them the price discovery process, are likely to move to overseas markets.

In short, the Commission has failed to address the baseline costs and benefits of the principles-based system, the costs of abandoning that system and the comparative benefits of adopting a prescriptive approach in its cost-benefit analyses for rules proposed under Dodd-Frank. Several specific examples of the Commission's failure to adequately analyze the costs and benefits of its prescriptive regulations, as well as a brief discussion of the unrecognized costs of the proposed rules, follow:

#### **A. Proposed 85% Exchange Trading Requirement and Core Principles for DCMs<sup>7</sup>**

A striking example of the Commission's failure to address costs associated with adopting a prescriptive regime is the proposed rules for Core Principles for DCMs, most notably, proposed rule 38.502 - the 85% exchange trading requirement. Specifically, that proposed rule provides that no futures exchange "may continue to list a contract for trading unless an average of 85% or greater of the total volume of such contract is traded on the DCM's centralized market," allowing only for 15% or less to be executed via block trade or other means off the central limit order book. If the contract fails this test, the proposed rules would force an exchange to delist the contract.

In its cost-benefit analysis of the rules proposed under the Core Principles for DCMs, the CFTC states only that there will be unspecified costs to the public if the regulations are not enacted. The analysis does not take into account the costs incurred by registered entities, the market or the Commission itself as a result of imposing prescriptive regulations when a principles-based system was already in place and functioning effectively. Likewise, the analysis does not address the costs of any specific prescriptive measure. The analysis merely states that "*bringing their procedures into full compliance with these new regulations may impose some costs on DCMs.*" The only "benefit" listed for the new prescriptive regime is "*greater regulatory certainty.*"

Although, as noted above, there is no specific mention of the 85% exchange trading requirement in the cost-benefit analysis, the Commission asserts in the body of its NOPR that the requirement is necessary because "*the price discovery function of trading in the centralized market*" must be protected. The Commission provides no support for a position that the 85% requirement provides or is necessary to 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," as is required under Core Principle 9. It also fails to acknowledge that many contracts that trade on DCMs do not serve a price discovery function but rather primarily serve risk management needs and that the delisting of such contracts will impair market participants' ability to fulfill these risk management needs.

The Commission does not assert in its proposal that the 85% exchange trading requirement has any regulatory benefit for either it or market participants and does not provide any actual cost estimate. Rather, it fails to acknowledge costs to both the industry and market participants. Imposition of the proposed 85% exchange trading requirement would have extremely negative effects on the industry. The 85% requirement would significantly deter the development of new products by exchanges. This is because new products generally initially gain trading momentum in off-exchange transactions. Indeed, it takes years for new products to reach the 85% exchange trading requirement proposed by the Commission. The 85% requirement would actually impede the development of trading in a contract simply because market participants would be hesitant to trade in a new contract when that new contract could be forced off the exchange, and essentially the terms of the contract could be retroactively changed, if it did not meet the requirement.

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<sup>7</sup> 75 Fed. Reg. 80747 (proposed Dec. 22, 2010) (to be codified at 17 C.F.R. pts. 1, 16, 38).



Imposition of an 85% exchange trading requirement would also have adverse effects on market participants. They would face uncertainty in instruments in which they trade because instruments that do not meet the 85% requirement would be forced off the exchange, and market participants could experience a taxable event and/or operational difficulties in converting their open positions to swaps. Further, market participants could be forced to register as swap dealers or major swap participants if they were forced to convert their positions to swaps.

## **B. Proposed Rulemaking on Position Limits<sup>8</sup>**

The proposed rulemaking on position limits also exemplifies the Commission's failure to recognize the costs related to its proposed rules. In its cost-benefit analysis, the Commission acknowledges that the proposed position limits could impose *"certain general but significant costs,"* which *"may decrease speculative activity and liquidity in the markets, impairing the price discovery process in these markets and encouraging migration of speculative activity to markets outside the CFTC's jurisdiction."* It does not quantify these anticipated costs.

The Commission balances the acknowledged costs by asserting that *"the limits would benefit the public and markets by diminishing, eliminating, or preventing the undue burdens on interstate commerce that result from excessive speculation."* There is no evidence supporting the claim that position limits will diminish, eliminate, or prevent excessive speculation. Rather, the Commission essentially admits that it has no evidence to support the claimed benefits by asserting: "The Commission is not required to find that an undue burden on interstate commerce resulting from excessive speculation exists or is likely to occur in the future in order to impose position limits. Nor is the Commission required to make an affirmative finding that position limits are necessary to prevent sudden or unreasonable fluctuations or unwarranted changes in prices or otherwise necessary for market protection."

It is important not to lose sight of the real economic cost of imposing unnecessary and unwarranted position limits. For the last 150 years, modern day futures markets have served as the most efficient and transparent means to both discover prices and manage risk. Such markets are a vital part of a smooth functioning economy. Futures exchanges allow producers, processors and agribusiness to transfer and reduce risks through bona fide hedging and risk management strategies. Risk transfer only works because speculators are prepared to provide liquidity and to accept the price risk that others do not. Futures exchanges and speculators have been a force to reduce price volatility and mitigate risk. Overly restrictive position limits adversely impact legitimate trading and impair the ability of producers to hedge. They may also drive certain classes of speculators into physical markets and consequently distort the physical supply chain and prices.

Similarly troubling is the fact that the CFTC's proposed rules in this and other areas affecting market participants are not in harmony with international regulators. International regulators, such as the EU, are far from adopting such a prescriptive approach with respect to position limits. Ultimately, this could create an incentive for market participants to move their business to international exchanges, negatively impacting the global leadership of the U.S. financial market. Furthermore, exporting the price discovery process to overseas exchanges will likely result in both a loss of jobs in the U.S. and less cost-efficient hedging for persons in business in the U.S.

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<sup>8</sup> 76 Fed. Reg. 4752 (proposed Jan. 26, 2011) (to be codified at 17 C.F.R. pts. 1, 150-51).

**C. Certification Process for New Rules ("Provisions Common to Registered Entities")<sup>9</sup>**

The CFMA streamlined the procedures for listing new products and amending rules that did not impact the economic interests of persons holding open contracts. These changes recognized that the previous system required the generation of substantial unnecessary paperwork by exchanges and by the CFTC's staff. It slowed innovation without a demonstrable public benefit. As such, under the current rules, DCMs and derivatives clearing organizations ("DCOs") conduct a due diligence review to support their conclusion that a new product or rule complies with the CEA and Core Principles and then self-certifies the new rule or product. The proposed rules would dispense with this self-certification process and instead require DCMs and DCOs to submit massive amounts of documentation with any request to implement a new rule or list a new product, greatly slowing the process of new rule and product introduction and thereby significantly impairing the speed and value of innovation by U.S. exchanges and clearing houses.

Self-certification has been in effect for ten years and nothing has occurred to suggest that this concept is flawed or that registered entities have employed this power recklessly or abusively. The Commission's cost-benefit analysis does not acknowledge that a fully-functional and less costly system of self-certification is already in place nor does it attempt to justify why more onerous requirements are necessary.<sup>10</sup> It states only that *"the Commission's certification and approval procedures ensure that registered entities do not enact rules that may be anticompetitive, unfair to market participants, or otherwise detrimental to the public interest."*

The Commission's analysis also does not address any actual costs. It does not acknowledge the significant costs to registered entities of complying with the new burdens imposed upon an entity that wishes to introduce a new product, rule or rule amendment. Specifically, the analysis does not address the cost of compiling all documentation relied upon to determine whether a new product, new rule or rule amendment complies with the Core Principles nor that of conducting an extensive review of any and all potential legal issues, "including conditions relating to contractual and intellectual property rights," that could arise from a new product, rule or rule amendment.

Further, the new requirements proposed by the CFTC will require exchanges to prematurely disclose new product innovations and consequently enable foreign competitors to introduce those innovations while the exchange awaits CFTC approval. This, again, inhibits the ability of U.S. exchanges to compete, drives market participants overseas and impairs job growth in the United States. Moreover, given the volume of filings required by the NOPR, the Commission will require significant increases in staffing and other resources. Alternatively, the result will be that these filings will not be reviewed in a timely manner, further disadvantaging U.S. exchanges. Again, we would suggest that the Commission's limited resources should be better aligned with the implementation of the goals of Dodd-Frank rather than "correcting" a well-functioning and efficient process.

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<sup>9</sup> 75 Fed. Reg. 67282 (proposed Nov. 2, 2010) (to be codified at 17 C.F.R. pt. 40).

<sup>10</sup> Section 745 of DFA merely states, in relevant part, that "a registered entity may elect to list for trading or accept for clearing any new contract, or other instrument, or may elect to approve or implement any new rule or rule amendment, by providing to the Commission a written certification that the new contract or instrument or clearing of the new contract or instrument, new rule, or rule amendment complies with this Act (including regulations under this Act)." DFA does not direct the Commission to require the submission of all documents supporting the certification nor to require a review of the legal implications of the product or rule with regard to laws other than DFA. Essentially, it requires exactly what was required prior to the passage of DFA—a certification that the product, rule or rule amendment complies with the CEA. Nonetheless, the Commission has taken it upon itself to impose these additional and burdensome submission requirements upon registered entities.

### **III. Without Further Cost-Benefit Analysis, the Commission's Proposed Rules Remain Open to Attack as Arbitrary and Capricious**

As discussed at length above, CME Group respectfully submits that the Commission has failed to perform an adequate cost-benefit analysis of its proposed rules as required by CEA Section 15(a)(1). Courts have recently overturned rulemakings of other agencies on the basis that the agencies' failure to properly perform the required cost-benefit or similar analysis rendered the rulemakings arbitrary and capricious. *See, e.g., Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (vacating an SEC rule for failure to perform required analysis of effects on efficiency, competition, and capital formation); *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010) (same); *Am. Equity Inv. Life Ins. Co. v. SEC*, 572 F.3d 923, 936 (D.C. Cir. 2009) (same); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (finding rule arbitrary and capricious where agency failed to provide notice of and allow comment on an explanation for the methodology of a model used to support the statutorily-required cost-benefit analysis); *Gas Appliance Mfg. Ass'n, Inc. v. Dep't of Energy*, 998 F.2d 1041, 1051 (D.C. Cir. 1993) (holding that DOE failed to perform an adequate cost-benefit analysis as required by the Buildings Act); *see also, Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1218-19 (D.C. Cir. 2004) (finding rule arbitrary and capricious on other grounds but noting, at length, that cost-benefit analysis based on dubious assumptions was a matter of concern). Respectfully, CME Group believes that, unless the Commission performs a more robust cost-benefit analysis, many of the rules proposed by the Commission under Dodd-Frank are vulnerable to such a challenge. Indeed, although not expressing an opinion as to the viability of such a challenge, the IG noted that such challenges to other agencies' rules had been successful and suggested "that a more robust examination of costs and benefits should only enhance the [Commission's] ability to defend its cost-benefit analyses."<sup>11</sup>

The IG also noted that "From all CFTC divisions, the staff and management emphasized that Dodd-Frank required regulation of the swaps industry for the first time and therefore presented unprecedented challenges . . . Staff hoped to obtain cost estimates in comments submitted in response to the proposed rules."<sup>12</sup> Commentators, including CME Group, have submitted letters alerting the Commission to various costs, including some quantifications of cost that are likely to result from their proposed rules.<sup>13</sup> Although these comments do not provide an adequate substitute for the Commission's own cost-benefit analysis,<sup>14</sup> they have provided the Commission with information helpful to it in performing a more robust analysis.

Further, the Commission appears to be initiating an effort to include more robust cost-benefit analyses in its NOPRs. More specifically, the IG Report noted "that the Chairman has initiated a review and revision of the cost-benefit analyses guidance for use with final rulemakings."<sup>15</sup> CME Group commends the Chairman and the Commission on these efforts. Given these ongoing revisions in the Commission's methodology for its cost-benefit analyses, the concern of the IG, commentators, and others, and the

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<sup>11</sup> IG Report at 23.

<sup>12</sup> *Id.* at 13

<sup>13</sup> *See, Id.* at 22.

<sup>14</sup> It is not sufficient for an agency to support a final rule by pointing to a proposal in a public comment if the agency's [NOPR] did not give adequate notice of the possibility of the final rule. *See AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) (stating that an agency "must itself provide notice of a regulatory proposal . . . , it cannot bootstrap notice from a comment" and concluding [NOPR] did not give sufficient notice of final rule even though some commentators proposed change that became final rule); *Small Refiner Lead Phase-Down Task Force v. U.S.E.*, 705 F.2d 506, 549 (D.C. Cir. 1983) (concluding that notice inadequate where agency adopted requirement in final rule "derive[d] from a single comment" by interested party but possibility of requirement was not referenced in agency's own [NOPR]).

<sup>15</sup> IG Report at 23.

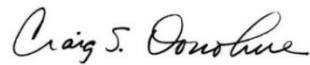


submission of information by commentators useful to the Commission in formulating more robust cost-benefit analyses, CME Group recommends that the Commission re-issue its cost-benefit analyses for its proposed rules under Dodd-Frank with new and more robust cost benefit analyses and allow for comment by interested parties on the revised analyses.

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CME Group thanks the Commission for the opportunity to comment on this matter. We would be happy to discuss any of these issues with Commission staff. If you have any comments or questions, please feel free to contact me at (312) 930-8275 or [Craig.Donohue@cmegroup.com](mailto:Craig.Donohue@cmegroup.com), or Christal Lint, Director, Associate General Counsel at (312) 930-4527 or [Christal.Lint@cmegroup.com](mailto:Christal.Lint@cmegroup.com).

Sincerely,



Craig S. Donohue

cc: Chairman Gary Gensler  
Commissioner Michael Dunn  
Commissioner Bart Chilton  
Commissioner Jill Sommers  
Commissioner Scott O'Malia