June 10, 2010

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

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: CFTC and SEC Public Roundtable Discussion on Dodd-Frank Implementation

Dear Mr. Stawick and Ms. Murphy:

The Association of Institutional INVESTORS (the "Association") appreciates the opportunity to provide additional comments related to the implementation and phase-in of new rules promulgated under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[1] On May 2 and 3, 2011, several members of the Association participated in the joint staff roundtable hosted by the Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC" and together with the CFTC, the "Commissions") on the implementation of the Dodd-Frank Act (the "Roundtable"). As a follow-up to the Roundtable discussions, the Association seeks to reinforce the importance of prudent sequencing of final rules and regulations.

The Association of Institutional INVESTORS is an association of some of the oldest, largest, and most trusted investment advisers in the United States. Our clients are primarily institutional investment entities that serve the interests of individual investors through public and private pension plans, foundations, and registered investment companies. Collectively, our member firms manage ERISA pension, 401(k), mutual fund, and personal investments on behalf of more than 100 million American workers and retirees. Our clients rely on us to prudently manage participants' retirements, savings, and investments. This reliance is built, in part, upon the fiduciary duty owed to these organizations and individuals. We recognize the significance of this role, and our comments are intended to reflect not just the concerns of the Association, but also the concerns of the companies, labor unions, municipalities, families, and individuals we ultimately serve.

I. PHASE-IN APPROACH IS ESSENTIAL

The Association supports the overall efforts of the Commissioners and staff to advance the goals of increasing market transparency without reducing liquidity and mitigating systemic risk while protecting open market access for all participants. Further, we believe early, open, and universal access to new market facilities with balanced, practical, and prudent phasing in of mandates for

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

conversion of specific classes of participants and instruments will advance the overarching goals of the Commissions' efforts.

The Association supports the basics concepts enumerated in the CFTC Staff Concepts and Questions Regarding Phased Implementation of Effective Dates for Final Dodd-Frank Rules,[2] released prior to the Roundtable. In particular, the Association agrees with the CFTC that a phased-in implementation approach is essential to ensuring minimal market disruption and optimal risk reduction.[3] While the Association embraces the principles behind these reform efforts, we believe that the significant undertaking of implementing this new regulatory regime may necessitate as long as two years for every market participant to be brought into compliance. Substantial effort will be required to conduct the renegotiation of tens of thousands of contracts between ERISA clients and counterparties. These renegotiations must take place while Association members are also laboring to meet additional regulatory requirements mandated by these new rules, such as establishing the connectivity infrastructure for reporting. Thus, we believe that 18-24 months is an achievable time frame to ensure full compliance with these new requirements among all market participants, and reflects what is physically possible based on existing conditions.

In addition, we also strongly agree that the phasing in process should not limit immediate access to new infrastructure, and believe that our clients must be able to utilize this new infrastructure, if they are able and so choose, as early as any other market participant.[4]

Perhaps most importantly, the Association agrees that some Dodd-Frank Act proposed rules should be based on a thoughtful analysis of data the Commissions have not yet collected.[5] For example, we believe that the rulemakings related to block trades and position limits would best be guided by data the CFTC will soon begin collecting from swap data repositories ("SDRs"). The Association supports the CFTC's conclusion that many non-swap dealer or non-major swap participant ("MSP") financial entities may need more time to comply with the new regulatory requirements than swap dealers or MSPs. We also believe that parties should not be required to comply with rules relating to margin for uncleared swaps for a particular product until the clearing mandates for that product and entity become effective. It is essential that market infrastructure be in place prior to requiring market participant compliance.

II. TIMING OF PHASE-IN APPROACH

As stated previously, the Association believes 18-24 months is an achievable time frame to bring all market participants into compliance with Dodd-Frank Act final rulemakings. Although the Commissions have indicated that they believe the industry can comply with the new regulatory regime sooner, we offer the following timeline as a starting point for discussion. We hope that it provides additional insight into why we believe this amount of time is necessary, given the

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[2] *See* CFTC Staff Concepts and Questions Regarding Phased Implementation of Effective Dates for Final Dodd-Frank Rules, *available at*: http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/staffconcepts050211.pdf.
[3] *See* Id.
[4] *See* Id.
[5] *See* Id.

complexity of infrastructure needed and various types and numerous amounts of entities required to comply with new regulations.[6]

- Stage 1 (approximately 6 months from final rulemakings): As soon as possible, SDRs, DCOs, and SEFs will complete build-out of infrastructure.

- Stage 2 (approximately 6 to 12 months from final rulemakings): As soon as feasible, voluntary engagement of all participants in reporting, clearing and trading platforms. This will allow time for dealers, MSPs, and other participants to complete build-out of infrastructure and it will also allow for the collection and analysis of trade data by regulators.

- Stage 3 (approximately 12 to 18 months from final rulemakings): As soon as practical, the Commissions may require mandatory reporting of all swaps involving all parties and clearing of the first list of "standardized swaps" between dealers and MSPs. This period will also include the ability for voluntary engagement by all other participants.

- Stage 4 (18 months to two years from final rulemakings): As soon as prudent, mandatory clearing of the first list of "standardized swaps" by all other participants. This period will also include an assessment of "standardized swaps" "made available for trading" by SEFs, together with determination of block trade size and reporting delay and "appropriate" position limits, if any, applicable thereto based on data analysis of volume and liquidity from SDR data reports. Mandatory trading of the first list of "standardized swaps" determined by SEFs as "available for trading" by dealers and MSPs may also begin in this stage.

- Stage 5 (after two years from final rulemakings): After two years, the Commissions may require mandatory trading of first list of "standardized swaps" determined by SEFs as "available for trading" by all other participants.

The Association also believes sequencing is important. We believe the following sequencing of mandates would advance the Commissions' goals in a manner that encourages vibrant markets:

- Parties: The Association believes dealers & MSPs should be required to comply before fund managers and commercial end-users. Dealers and MSPs present the most risk and should already have much of the infrastructure in place. The buy-side, in contrast, will have significant costs associated with infrastructure upgrades and require additional ramp-up time.

- Business Operations: We also believe that the clearing of "standardized swaps" should be required before any other exchange-related listing or "made available for trading" requirement. In addition, the criteria for "made available for trading" should focus on the instrument's volume and liquidity, as well as the number of market participants transacting in that product.

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[6] *See* letter from John Gidman, President, The Association of Institutional INVESTORS to the SEC and CFTC, dated June 2, 2011, *available at*: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=44579&SearchText (providing additional discussion regarding the Association's positions on phasing in Dodd-Frank Act rulemakings).

- Asset Class: The Association believes that clearing and other requirements should come first for highly liquid, standardized instruments, such as credit default swaps ("CDSs"). Less liquid products, such as certain physical commodity instruments, should come afterward.

III. IMPLEMENTATION RELATED ISSUES

The following is a summary of key issues related to implementation that are of unique importance to the Association. We feel that these issues are of particular importance to not only our member firms and our clients, but also the market as a whole.

Necessary Negotiation

The Commissions must allow for sufficient time for asset managers and their clients to arrange for changes to current accounts. As noted by several participants at the June 3, 2011 CFTC Staff Roundtable on Customer Collateral in Cleared Swap Transactions, it will take up to two years for institutional asset manager participants to conduct the necessary negotiations and legal tie-ins to bring customers into compliance with the new regulatory regime. Currently, there is potential for a "bottle-neck" both in the document negotiation process and in moving to clearing. The bandwidth available for the parties to negotiate the new required contract terms simply has practical limitations.[7] Likewise, it may be impractical for all entities to begin clearing at the same time. Currently, ISDA agreement negotiations take up to a year to complete for certain of our clients. To renegotiate each of our clients' contracts could take just as long. In order to speed up these negotiations and the implementation process, it would be helpful for certain categories of terms to be included in the documents. We recommend that the agreements be structured similar to the ISDA master agreement and schedule. While we firmly believe it is important that our clients have the ability to negotiate, negotiations could take longer unless a comprehensive template serves as a starting point for discussions.

Importance of Early Adoption of SDRs and Reporting

To date, the marketplace has not seen sufficient collection and analysis of swap trading data on which to base determinations regarding block trade size thresholds. We believe that the CFTC and the markets might be best served by considering sequencing the reporting rules by first implementing Parts 45 and 49, the proposed rules on SDRs.[8] Then, after the CFTC has collected and analyzed sufficient data to study the market, the CFTC may effectively implement block trading and real-time reporting requirements.[9] By first implementing the SDR reporting requirements and

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[7] There is also concern amongst asset managers that it may be difficult or even impossible to process accounts at swap clearinghouses overwhelmed with an influx of documentation and applications. *See* the comment letter submitted by SIFMA, together with the Futures Industry Association ("FIA"), the International Swaps and Derivatives Association ("ISDA") and the Financial Services Forum regarding the phase-in schedule for Title VII (May 4, 2011), *available at:* http://www.futuresindustry.org/downloads/TitleVII-ImplementationLetter.pdf.

[8] *See* Swap Data Repositories, 75 Fed. Reg. 80,898 (Dec. 24, 2010); *see also* Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76,574 (Dec. 8, 2010).

[9] *See* Real-Time Reporting of Swap Transaction Data, 75 Fed. Reg. 76,930 (Dec. 10, 2010). The Association notes that SIFMA AMG also agrees that the Commission should sequence implementation of the real-time reporting rules after the SDR rules in order to collect sufficient information to set block thresholds and time delays. *See* SIFMA AMG's February 7, 2011 comment letter submitted in response to the CFTC's proposed rules on "Real Time Public Reporting

collecting data prior to implementing final rules related to block trading, the CFTC can analyze the data and determine the correct block size thresholds so that disclosure of the trades does not impact liquidity, while also providing the market with sufficient time to prepare clients for implementation.

To avoid interruptions or disruptions in market liquidity, the Association requests the CFTC collect market data for one year prior to implementing any rulemakings related to block trades. Without adequate market data, there is the possibility that block trading sizes will be set artificially high in the short term, causing greater, potentially negative, impacts on the marketplace. For these reasons, the Association hopes that during the first year of calculating block size thresholds, the CFTC will be sensitive to tailoring thresholds to the specific liquidity characteristics of products to ensure that the calculations do not yield unnaturally high results.

Similarly, the Association recommends the CFTC delay adoption of position limits until sufficient data has been collected on open interest in the commodity swaps market in order to ensure that limits are not set too low. If the CFTC should choose to proceed with the adoption of limits prior to collecting this data, it should limit the scope of the first phase only to physically-settled contracts, and should not adopt the proposed second phase at this time, given the absence of sufficient market data and the lack of evidence that non-spot-month positions have caused excessive price volatility.[10]

Equal Access

We support the CFTC's assertion that clearinghouses and trading platforms must provide for client clearing and access at the same time for all participants who wish to use the platform.[11] Every participant is highly vested in ensuring the safety and soundness of financial markets, and it is important that various, sometimes disparate, perspectives are given adequate consideration at every level. By encouraging at the outset equal access for institutional investors, in the development of new market infrastructures, conflicts of interest will be mitigated and transparency will be facilitated by ensuring a level playing field among market participants.[12]

Regulatory Harmonization

Before finalizing registration or conduct regulations, the Commissions must resolve the interplay between the various regulations being considered on several levels. The Commissions must ensure that the proposals are consistent with their own regulations, both rules proposed concurrently as well as existing requirements. Furthermore, the Commissions and prudential regulators must work

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of Swap Transaction Data," "Swap Data Recordkeeping and Reporting," and "Swap Data Repositories," *available at:* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27614&SearchText.

[10] *See* Position Limits for Derivatives, 76 Fed. Reg. 4,752 (Jan. 26, 2010).

[11] *See* CFTC Staff Concepts and Questions Regarding Phased Implementation of Effective Dates for Final Dodd-Frank Rules, *available at:* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/staffconcepts050211.pdf.

[12] For example, once clearing rules are implemented, the majority of institutional investors will clear most trades through derivatives clearing organizations ("DCOs"). However, under the proposed rule, customer participants will likely not have a voice on both the Board of Directors and the governance committee at the DCO, but rather one or the other. This voice will also be small; the Commission is proposing only requiring ten percent of the Board or Committee to be customers of the DCO. By marginalizing the voice of an important group of market participants, the important considerations they bring to the table regarding the safety and soundness of the financial system will be minimized. While customer participants may not contribute to the DCO default fund, they are highly vested in ensuring the continued operations of DCOs, and can be substantially impacted if a DCO improperly measures risk.

to ensure regulatory consistency across the agencies. This includes harmonizing reporting requirements, as well as margin and collateral standards. An important consideration in this area is the proposed Legal Entity Identifier ("LEI") system and the CFTC Unique Counterparty Identifier ("UCI") system. As it appears unlikely that the LEI system will be complete in time for the launch of SDRs, a UCI system will be needed as a stopgap until this system is created. By considering the needs of both systems simultaneously, the industry will only have to initiate one process.[13] Finally, there must be harmonization on an international level. For example, Section 737 of the Dodd-Frank Act mandates the CFTC coordinate with international regulators to ensure that new position limit regulations do not cause price discovery in the commodity to shift to trading on Foreign Boards of Trade (FBOTs).[14] The Association agrees with Commissioner Sommers that the Commission should not adopt any position limit proposal until an analysis has been performed regarding how the proposal attempts to accomplish this goal.[15] Any failure to resolve conflicting, duplicative or overly burdensome regulatory requirements among these authorities will delay implementation and frustrate market participants' attempts to ensure compliance.

New CPO/CTA Requirements

The CFTC proposed rules amending the registration requirements for Commodity Pool Operators ("CPOs") and Commodity Trading Advisors ("CTAs") that would repeal exemptions for potentially thousands of funds that currently operate under the existing rules.[16] The Association strongly believes that no changes are necessary to the current exemptions under Sections 4.5, 4.13(a)(3) and 4.13(a)(4).[17] Nevertheless, if the CFTC proceeds, we respectfully request that it delay finalizing the CPO and CTA proposed rule and re-propose the rulemaking once the Dodd-Frank Act implementation efforts are complete. Such a delay is prudent because it is impossible to appreciate the complete impact of the Proposed Rule until the Commissions have addressed the numerous yet-to-be-defined elements that are fundamental to its application, such as certain product definitions and margin requirements. In addition, as the CFTC acknowledged in its release, the proposed language was meant to be a beginning point for discussions: the Association agrees that any rule changes would need to be significantly modified before being adopted. At a minimum, we agree with Commissioner O'Malia, in his proposed sequencing time-line in which CPO and CTA

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[13] Several agencies including the CFTC and SEC, are working to create data identification system regulations. The Association joins with other groups, including SIFMA AMG, in asking for coordinated efforts between regulators to creating a single, coherent approach to entity identification. *See* SIFMA AMG's February 7, 2011 comment letter submitted in response to the CFTC's proposed rule "Real Time Public Reporting of Swap Transaction Data," "Swap Data Recordkeeping and Reporting," and "Swap Data Repositories."

[14] *See* Section 737 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

[15] *See* Commissioner Sommers' Opening Statement, Open Meeting on the Ninth Series of Proposed Rulemakings under the Dodd-Frank Act, *available at:* http://www.cftc.gov/PressRoom/SpeechesTestimony/sommersstatement011311.html.

[16] Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations; Proposed Rule, (Feb. 11, 2011), *available at*: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-2437a.pdf

[17] *See* letter from John Gidman, President, The Association of Institutional INVESTORS to the CFTC, dated April 13, 2011, *available at*: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42186&SearchText (providing additional discussion regarding the Association's positions on the proposed rulemaking regarding Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations).

amendments are part of the last group of items to be phased-in,[18] and believe the CFTC should ensure that any adopted rule changes are harmonized with related SEC provisions.

Self-Executing Provisions

There is a great deal of uncertainty amongst market participants as to the legal and practical implications regarding the various self-executing provisions found in Title VII of the Dodd-Frank Act set to become effective July 16, 2011. Many of these provisions would require market participants, including asset managers, to make significant changes within sixty days from the effective date, a date that will likely be prior to the finalization of many relevant Dodd-Frank Act rulemakings. The Association agrees that it is becoming increasingly important, as this deadline looms, for the market to fully understand what the law will be on July 16, 2011.[19] We support the Commission's efforts to create relief from compliance with these self-executing provisions, providing certainty that these provisions will not be applicable until the relevant final rulemakings are finalized and effective.[20]

IV. CONCLUSION

The Association recognizes the challenges of the Commissions' and staff's efforts to increase market transparency without reducing liquidity and to mitigate systemic risk while protecting open market access for all participants. Further, we support early, open, and universal access to new market facilities supported by balanced, practical, and prudent phasing of mandates for conversion of specific classes of participants and activities. The Association thanks the Commissions for the opportunity to comment on these proposed rules. Please feel free to contact me with any questions you may have regarding our comments at jgidman@loomissayles.com or (617) 748-1748.

On behalf of the Association of
Institutional INVESTORS,

John R. Gidman

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[18] *See* CFTC Staff Concepts and Questions Regarding Phased Implementation of Effective Dates for Final Dodd-Frank Rules, Dissent of Commissioner Scott O'Malia, *available at:* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/staffconcepts050211.pdf.

[19] *See* Letter from Senators Pat Roberts (R-KS), Richard Lugar (R-IN) and Saxby Chambliss (R-GA), United States Senate, to the CFTC, dated May 27, 2011.

[20] CFTC Commissioner Scott O'Malia confirmed publicly, including in an interview with Reuters, that the CFTC is working on a document and a proposal to create certain safe harbors for self executing rules, "to delay them until the new rules are in place." The Association supports these efforts and looks forward to further clarification from the Commission. *See* Huw Jones, Traders to Get 'Safe Harbors' on Some Rules, Reuters, June 7, 2011, *available at:* http://www.reuters.com/article/2011/06/07/us-cftc-omalia-idUSTRE7563CL20110607.

cc: Gary Gensler, Chairman, Commodity Futures Trading Commission
Mary Schapiro, Chairman, Securities and Exchange Commission
Michael Dunn, Commissioner, Commodity Futures Trading Commission
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