



June 29, 2012

Commissioner Scott D. O'Malia  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington DC 20581

Re: Proposed Schedule of CFTC Title VII Rulemaking

Dear Commissioner O'Malia:

The Securities Industry and Financial Markets Association (“**SIFMA**”)<sup>1</sup> and the International Swaps and Derivatives Association<sup>2</sup> (“**ISDA**”) appreciate your publication of a proposed CFTC Title VII rulemaking schedule (the “**Proposed Schedule**”) and your receptiveness to comments on the Proposed Schedule. We strongly believe that a successful transition to the Title VII regulatory regime requires a phase-in plan that is comprehensive, transparent and minimally disruptive to the continued operation of the swap markets. In publishing the Proposed Schedule, you have provided SIFMA and ISDA members and other market participants with critical information that we need to plan for such an efficient and orderly transition.

We believe that the Proposed Schedule appropriately sequences Title VII rulemakings, but is too compressed to allow for an informed and orderly rulemaking

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<sup>1</sup> SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit [www.sifma.org](http://www.sifma.org).

<sup>2</sup> ISDA's mission is to foster safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products. ISDA has more than 800 members from 58 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. For more information, visit: [www.isda.org](http://www.isda.org).

process. In our view, any successful Title VII rulemaking schedule must have four components. It must:

- sequence rules to take into account the interdependencies in the Title VII regime, finalizing rules that rely heavily on prerequisite rules only after the prerequisite rules are adopted;
- provide adequate time between rulemakings to allow the CFTC and market participants to devote sufficient time and attention to each rule;
- provide adequate time between related rules for market participants to begin to implement prerequisite rules and for the CFTC to gather the data needed to inform related rules; and
- take into account the implementation challenges faced by different classes of market participants and with respect to different asset classes.

We believe that the Proposed Schedule appropriately sequences Title VII rulemaking requirements to take into account the interdependencies between rules. For example, Title VII requires that a swap be traded on a swap execution facility (“**SEF**”) or designated contract market (“**DCM**”) if the swap is required to be cleared and is “made available for trading” on a SEF or DCM. In addition, information obtained from swap data reporting and mandatory clearing implementation will be critical in determining which swaps are liquid enough to support SEF or DCM trading. Therefore, reporting and mandatory clearing are prerequisites to trade execution requirements. The Proposed Schedule takes this logical order into account, sequencing rulemakings regarding mandatory clearing before rulemakings regarding SEF core principles and the determination of what is “made available for trading” on a SEF. A complete list of the rules we think are prerequisites to other rulemakings is available as part of our November 4, 2011 letter on the CFTC’s proposed compliance and implementation schedules for swap clearing, trade execution, swap documentation and margin (together, the “**Phase-In Proposals**”).<sup>3</sup>

Of critical importance, the Proposed Schedule requires that the “swap” definition be finalized, and cross-border guidance be proposed, before compliance with other Title VII rules is required. We believe, as we know you do, that these rules are critical prerequisites to the creation of the Title VII regime and market participants’ planning for compliance with that regime. For example, a final and full understanding of the cross-border reach of Title VII is essential to determining which entities firms need to register. As a result, we believe that the cross-border release should be a formal rulemaking, not simply guidance, and that such cross-border rules should be adopted in final form before compliance with other Title VII rules is required. Issuing cross-border rules, rather than

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<sup>3</sup> Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 Fed. Reg. 58,186 (Sept. 20, 2011) and Swap Transaction Compliance and Implementation Schedule: Trading Documentation and Margining Requirements under Section 4s of the CEA, 76 Fed. Reg. 58,176 (Sept. 20, 2011). Our letter on the Phase-In Proposals is available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=49954>.

guidance, will provide market participants with increased certainty regarding the likelihood of, and process for, changes to these critical rules that could have significant repercussions on worldwide swap activity and swap entity structuring. In addition, we believe that importance of cross-border rules necessitates that the CFTC conduct a formal cost-benefit analysis of any approach taken and publish it for public comment.

Though the Proposed Schedule sequences rules in an appropriate order, we believe it is too compressed. Title VII requires unprecedented changes to the swaps market. A compressed rulemaking timetable risks that the CFTC and market participants will not be able to devote sufficient attention to each individual rule or how rules will interact with each other. The likely result would be unintended consequences that significantly decrease liquidity in the swaps market or counteract the systemic risk mandate Title VII was meant to implement. We provide details of some of these potential unintended consequences in our November 4, 2011 letter.

In addition, we believe that the compressed schedule will not allow the CFTC to observe the results of prerequisite rulemakings and their implementation before finalizing related rules. Proper sequencing of rulemaking requirements will only aid an efficient and orderly implementation of the Title VII regime if sufficient time is left between rulemakings to allow market participants to begin to implement a finalized rule, and for the CFTC to react to the market implementation process and incorporate its learning into the next rule. The Proposed Schedule does not provide for sufficient time for implementation, observation and adjustment.<sup>4</sup> For example, as discussed above, market participants and the CFTC will learn important information from the implementation of mandatory clearing that will inform how SEFs should be structured and how the “made available to trade” determination should be made. However, the Proposed Schedule lists mandatory clearing determination proposals and related rules for June 2012 and the SEF core principle and “made available to trade” rules for July 2012, a mere month after the clearing rules are adopted and before they become effective. This does not provide sufficient time for the market or the CFTC to gather and study data related to the implementation of clearing and use that data to help shape the final SEF rules.

While the Proposed Schedule does not appear to be designed to address the implementation and compliance schedule, we believe that each requirement should be phased in by type of market participant as in the CFTC’s Phase-In Proposals,<sup>5</sup> with some

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<sup>4</sup> In addition, a number of practical issues need to be solved through industry efforts prior to the clearing and other mandates, such as risk-based compression for the buy-side, improved margin offset capabilities and improved central counterparty risks controls for FCM exposures. If these practical issues are not solved prior to effectiveness of clearing and other requirements, the interim solutions will be sub-optimal.

<sup>5</sup> Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 Fed. Reg. 58,186 (Sept. 20, 2011) and Swap Transaction Compliance and Implementation Schedule: Trading Documentation and Margining Requirements under Section 4s of the CEA, 76 Fed. Reg. 58,176 (Sept. 20, 2011).

changes as outlined below:

- Compliance should first be required of the largest and most sophisticated market participants—swap dealers, MSPs and “active funds.” The threshold for “active funds” should be increased from 20 or more swaps per month, as in the Phase-In Proposals, to 200 or more swaps per month to avoid including funds that are unlikely to be able to comply on an accelerated time frame.<sup>6</sup>
- Next, compliance should be required of private funds (other than “active funds” described above), commodity pools, ERISA benefit plans and other financial entities, in each case that are not third-party funds or third-party subaccounts.<sup>7</sup> A private fund would be required to represent to its counterparties that it is not an “active fund” and counterparties would be able to rely on this representation in assuring they are in compliance with phase-in requirements.
- Finally, nonfinancial end users, third-party funds<sup>8</sup> and third-party subaccounts would be required to comply in the third phase. All accounts managed for third parties should be in the third phase as managers may want to consult with the third-party owners, regardless of the discretionary authority granted in the management agreement. Managers should be able to institute the same procedures for all third-party accounts.

The length of time for each phase by market participant should be extended beyond the 90-, 180- and 270-day thresholds in the Phase-In Proposals to allow for the significant implementation efforts described in our November 4, 2011 letter on the Phase-In Proposals. Notwithstanding mandatory compliance dates, any market participant should be permitted to voluntarily comply early with respect to any asset class, which would allow a wide variety of market participants, particularly buy-side participants, to take part in the development of Title VII-compliant infrastructure.

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<sup>6</sup> This is particularly relevant if the CFTC finalizes its proposed provision that a DCM may not list any futures contract unless at least 85% of the total volume of the contract is traded on the DCM’s centralized market. See Core Principles and Other Requirements for Designated Contract Markets, 75 Fed. Reg. 80,572, 80,616 (Dec. 22, 2010). Futures contracts that do not meet this threshold would be converted into swaps, subject to transitional rules proposed by the CFTC. If the CFTC adopts this proposal, the number of swaps many market participants enter into will increase rapidly, and a higher threshold for “active funds” would be needed to take account of this extraordinary trading activity.

<sup>7</sup> A “third-party subaccount” would be defined as any account that is not a fund and is managed by an asset manager, irrespective of the level of delegation granted by the account owner to the asset manager. For example, many subaccounts provide general grants of authority, but it may not be clear whether the manager needs to obtain specific approval of the beneficial owner to execute documentation necessary for clearing.

<sup>8</sup> A “third-party fund” would be defined as any fund that is not a private fund and is sub-advised by a subadvisor that is independent of and unaffiliated with the fund sponsor.

Compliance within each of the three stages should also be phased in by asset class, with asset classes that can most easily meet any particular requirement becoming subject to that requirement first. The CFTC has already embraced this view by requiring swap data reporting first for credit and interest rate swaps, then for all other swap categories. As with phase in by type of market participant, compliance would be permitted on a voluntary basis with respect to asset classes for which a requirement is not yet mandatory.

Finally, we note that any phase-in approach should be implemented in close coordination with the SEC, which has recently released a “roadmap” for its sequencing of Title VII compliance dates,<sup>9</sup> as well as self-regulatory organizations such as the NFA and market infrastructure providers. Such synchronization is essential to ensure that market participants whose swap activities are subject to multiple regulators and self-regulatory bodies can coordinate their own internal work streams to avoid duplication of work or conflicting compliance dates.

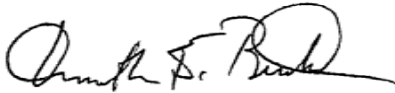
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Once again, SIFMA and ISDA appreciate your willingness to share the Proposed Schedule with us and other market participants and are grateful for the opportunity to comment on it. Please feel free to contact us should you wish to discuss further.

Sincerely,



Kenneth E. Bentsen, Jr.  
Executive Vice President  
Public Policy and Advocacy  
SIFMA



Robert Pickel  
Chief Executive Officer  
ISDA

cc: Honorable Gary Gensler, Chairman  
Honorable Bart Chilton, Commissioner  
Honorable Jill E. Sommers, Commissioner  
Honorable Mark P. Wetjen, Commissioner  
Commodity Futures Trading Commission  
Honorable Mary L. Schapiro, Chairman  
Honorable Luis A. Aguilar, Commissioner  
Honorable Daniel M. Gallagher, Jr., Commissioner  
Honorable Troy A. Paredes, Commissioner  
Honorable Elisse B. Walter, Commissioner  
Securities and Exchange Commission

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<sup>9</sup> Release 34-67177; File No. S7-05-12.