CIEBA

June 3, 2011

David Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street NW
Washington, DC 20581

Re: Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act;

RIN3038-AC96 – Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants

Dear Mr. Stawick:

The Committee on the Investment of Employee Benefit Assets ("CIEBA") appreciates this opportunity to provide further comments to the Commodity Futures Trading Commission (the "CFTC" or "Commission") regarding the CFTC's proposed rulemaking entitled "Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants" (the "Proposed Rules") under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the Commodity Exchange Act ("CEA").

CIEBA represents more than 100 of the country's largest pension funds. Its members manage more than $1 trillion of defined benefit and defined contribution plan assets on behalf of 15 million plan participants and beneficiaries. CIEBA members are the senior corporate financial officers who manage and administer corporate retirement plan assets governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). CIEBA's recent annual survey of members showed an increased emphasis on managing and reducing plan risks and a corresponding increase in usage of swaps to address those risks.

Swaps play a critical role for our members' plans. Many plans regulated by ERISA use swaps to hedge or mitigate the risks endemic to plan liabilities and investments. These plans conduct swap transactions through fiduciaries that are subject to stringent regulation under ERISA, such as a duty to act solely in the interests of the plan's participants. Consistent with ERISA, we are sure the Commission will want to

avoid any possibility that the documentation requirements of swaps, directly or indirectly, would adversely affect an ERISA fiduciary's ability to obtain the best possible swap terms for plan participants.

If swap trading becomes materially less available to plans, millions of Americans' retirement security would be detrimentally affected. Moreover, funding volatility could increase substantially, undermining participants' retirement security and forcing companies in the aggregate to needlessly reserve billions of additional dollars to satisfy possible funding obligations. Those greater reserves would vastly diminish working capital that would otherwise be available to companies to create new jobs and for other business activities that promote economic growth.

DEVELOPMENTS & INTERACTION OF THE COMMISSION'S PROPOSALS

Since February 28, when CIEBA last filed comments on the Proposed Rules ("Prior Comment Letter"), industry developments have occurred that concern ERISA plans. These developments heighten the prospect of negative consequences to ERISA plans if the Commission's proposals are implemented as proposed.

On March 31, the "G14" Dealers and a few others (collectively, the "Signatories") submitted a letter ("Commitment Letter") to the Federal Reserve Bank of New York ("NY Fed") that makes "industry" commitments regarding the processing of derivatives trades. Confusingly, these commitments were made to the NY Fed at the same time as the CFTC had proposed regulations or was considering governing much of the subject matter of the Commitment Letter.

In its release reopening the comment period on the Proposed Rules, the CFTC notes that the rules which it has proposed "present a substantially complete mosaic of the Commission's proposed regulatory framework for swaps under the Dodd-Frank Act." 76 Fed. Reg. at 25,275. We appreciate the opportunity to provide further comments on the Proposed Rule in the context of these new industry developments and the significant number of other proposals which have been released.

SUMMARY OF FURTHER COMMENTS

The Commitment Letter process initiated by the NY Fed several years ago has been superseded by Dodd-Frank and the CFTC should re-examine, with the public interest in mind, the swap matters covered by the Commitment Letter rather than "build upon" the Commitment Letter. *See* Further Comment Letter at 4. Unless the CFTC clarifies that commitments in the Commitment Letter may not be imposed by swap dealers on entities not regulated by the NY Fed, we are concerned that such commitments will be used to bind and regulate the entire universe of swap counterparties that trade with these swap dealers, to the detriment of buy-side participants. *See* Further Comment Letter at 5.

Notwithstanding the Commitment Letter, a plan should have the right to determine, when entering into a swap with an SD or MSP, whether an uncleared swap will be confirmed electronically or manually. If the plan chooses an electronic confirmation, the plan should have the right to select which electronic confirmation platform will be used. *See* Further Comment Letter at 6; *See* Prior Comment Letter at 6-7. Electronic confirmation services must not be permitted to change the terms of a validly executed swap. *See* Further Comment Letter at 6-7.

Just like the Commission's proposed requirement that swap dealers and major swap participants communicate in a fair and balanced manner based on principles of good faith and fair dealing under Proposed Rule 23.433, swap dealers and major swap participants should be required to have fair, impartial and even-handed procedures for reconciling portfolio discrepancies. *See* Further Comment Letter at 7; *See* Prior Comment Letter at 9-10.

SUMMARY OF PRIOR COMMENT LETTER

We remain concerned about, and resubmit all prior comments on, this Proposed Rule by reference to our Prior Comment Letter. The following summarizes those comments in our Prior Comment Letter which are not discussed further below.

- Policies and procedures of SDs and MSPs should not have the force of law against non-SDs, non-MSPs. P. 4-5.

- Plans, whether or not they are MSPs, should not be required to engage in portfolio compression exercises. P. 2-4.

- The CFTC's proposed regulation regarding "Reconciliation by Qualified Third Parties" should allow the use of a third party only if all counterparties agree. P. 8-9.

- It is unnecessary and detrimental to impose the same confirmation requirements for interest rate swaps as those for credit default swaps. P. 5-6.

- All terms of a swap, except terms related to price, must be disclosed in writing prior to execution. P. 7.

- Plans' current swap contractual terms and their order of priority among the components of a swap agreement should not be changed as a result of the CFTC's proposed requirements. P. 7-8.

- The CFTC's "Same Calendar Day" confirmation requirement would unduly hamper late in the day trading and negatively affect plans and market liquidity. P. 8.

FURTHER COMMENTS

The Commitment Letter process initiated by the NY Fed several years ago has been superseded by Dodd-Frank and the CFTC should re-examine, with the public interest in mind, the swap matters covered by the Commitment Letter rather than "build upon" such Commitment Letter process.

In support of its proposals with respect to portfolio compression, electronic confirmation and portfolio reconciliation, the CFTC lauds the work of the NY Fed and notes that "[t]he regulations proposed by the Commission would build upon the [NY Fed's] work." 76 Fed. Reg. 81,520. The NY Fed has focused over the last few years on developing "commitments" principally with swap dealers and their trade group which have served as "regulations" in the absence of federal legislation on the subject matter of the Commitment Letter. As one member of the NY Fed said during 2010, "we cannot wait to see if Congress will enact derivatives legislation."

With the passage of Dodd-Frank, Congress did enact derivatives legislation. The processes that might have been prudent to follow by the NY Fed prior to Dodd-Frank are necessarily superseded by Dodd-Frank. Dodd-Frank was enacted against a backdrop in which Congress evidenced great concern about Wall Street's efforts to reform itself. Once Dodd-Frank takes effect, the CFTC's regulations should govern. Congress granted exclusive jurisdiction for swap regulations to the CFTC (and granted jurisdiction for security-based swap regulations to the SEC). The CFTC's mission is to protect market users from various risks related to derivatives that are subject to the CFTC's jurisdiction and to foster open, competitive, and sound markets.[1] We, like all market participants, have benefited greatly from the CFTC's open and inclusive process in which the CFTC has listened to, and considered comments from, a broad range of market participants.[2] This process is essential to the CFTC's regulation of swaps and we very much appreciate it.

The CFTC's open and inclusive regulatory process contrasts greatly with the Commitment Letter process. The Commitment Letter was not subject to a public notice and comment period in accordance with the Administrative Procedure Act. The Commitment Letter was developed by the NY Fed in cooperation with a large number of swap dealers and a minimal number of other market participants through a process that did not provide the opportunity for public input or comment.[3] Importantly, we understand based on a meeting we had with the CFTC that the CFTC did not solicit the Commitment Letter. We are looking to the CFTC to protect the public interest. **If the CFTC "builds upon" the Commitment Letter and the related Commitment Letter process in adopting regulations, we believe that the CFTC would be disadvantaging**

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[1] http://cftc.gov/About/MissionResponsibilities/index.htm

[2] In considering rules to implement Dodd-Frank, the CFTC has published more than 1,000 Federal Register pages of proposals for public comment, held eight public roundtables to hear from market users, and held more than 475 meetings with the public.

[3] The heavy influence of swap dealers in the Commitment Letter is evident in that ISDA, a trade group dominated by swap dealers, is charged with overseeing a significant number of the deliverables under the Commitment Letter.

the buy-side participants by giving legal authority to a "closed process" in which the interests of pension plans and many other market participants were not considered or heard.

Unless the CFTC clarifies that commitments in the Commitment Letter may not be imposed by swap dealers on entities not regulated by the NY Fed, such commitments will likely be used to bind and regulate the entire universe of swap counterparties that trade with these swap dealers, to the detriment of buy-side participants.

CIEBA, along with the American Benefits Council, wrote a letter to the NY Fed expressing the concern that the Commitment Letter will be used to bind the buy-side. The NY Fed responded to CIEBA's letter and stated that the commitments made in the Commitment Letter are not binding on non-signatories; and we greatly appreciate the NY Fed's response and position on this issue. We continue to be concerned however, that swap dealers can claim that their obligations are "regulatory" obligations restricting their ability to trade with any counterparty which does not adhere to such commitment.

Although CIEBA sought to get clarification from the NY Fed on this particular issue, the NY Fed's letter to CIEBA did not address the important issue as to whether dealers will be viewed "in violation" of a "regulatory" obligation or subject to negative regulatory consequences if they transact swaps with non-signatory counterparties without adhering to the obligations set forth in the Commitment Letter. Without sufficient clarification, the requirements of the Commitment Letter may be used to bind and regulate the entire universe of swap counterparties that trade with these swap dealers, to the detriment of buy-side market participants.[4] Congress did not intend this nor would such private "regulation" be consistent with U.S. law (e.g., the Administrative Procedures Act).

Congress correctly granted exclusive jurisdiction for swap regulations to the CFTC, which has the power to consider the interest of all market participants (and granted jurisdiction for security-based swap regulations to the SEC). We urge the CFTC to protect market users against swap dealers' claims that such "commitments" are regulatory obligations of the swap dealers that market users must accept. The CFTC's reference to the Commitment Letter process in its release for the proposed rule raises the question of how the CFTC views the commitments of swap dealers in the Commitment Letter and whether the CFTC intends to permit dealers to claim that these commitments are "regulatory" obligations. Accordingly, we believe that market users would greatly benefit from a clarifying statement by the CFTC in its preamble to the final rules.

[4] Signatories claim that because they made submitted a letter to regulators containing commitments that such commitments are "regulatory" obligations of the swap dealers which they must comply with in order to trade with ERISA plan counterparties and that their ERISA plan counterparties must accept terms and/or processes resulting from such commitments even if the plan fiduciary believes it is not in the best interest of the plan.

The CFTC Should Establish by Regulation That Counterparties to SDs/MSPs Have the Right:

1) ***To Determine Whether or Not to Confirm Their Uncleared Swaps Electronically; and***

2) ***If they Choose to Confirm Electronically, to Choose Which Electronic Confirmation Platform Will Be Used.***

When entering into an uncleared swap with an SD or MSP, it is essential that plans have the right to decide whether the swap is confirmed electronically or manually. *See Prior Comment Letter at 6-7.* We support the CFTC's proposals that contemplate that confirmations may be processed manually. *See* Proposed Rules 45.1(b), 23.200(k), 23.500(c), and 43.2(g), each providing that "[a] confirmation must be in writing *(whether electronic or otherwise).*"[5]

The Commitment Letter commits to processing on electronic platforms 75% of electronically eligible confirmation events for interest rate swaps entered into with non-G14 Members. Commitment Letter at 11. To deliver on this commitment, the majority of swaps, including swaps entered into between the Signatories and their swap counterparties (who are not Signatories), would need to be processed electronically. This commitment effectively negates the ability of market participants to elect to confirm swaps manually. **To ensure that ERISA plans may choose whether an uncleared swap will be confirmed manually or electronically, we request that the Commission adopt a rule that grants non SD/MSP counterparties to SDs/MSPs with this explicit right to choose. The CFTC should also adopt a rule which grants non SD/MSP counterparties to SDs/MSPs the explicit right to choose a particular confirmation platform for any swap for which a non SD/MSP counterparty chooses to confirm electronically.**

Electronic Confirmation Services Must Not Be Permitted to Change the Terms of a Validly Executed Swap.

The Commitment Letter is especially disconcerting given that currently there is only one electronic confirmation platform and it is strongly influenced, if not controlled, by dealers. To use this platform, a market participant must agree to the terms in the platform's user agreement and operating procedures. These operating procedures provide that the terms of a swap which a market participant and its counterparty negotiate and agree upon may be overridden by the terms set forth in the platform's user agreement and operating procedures. The platform further reserves the right to change the terms in its operating procedures at any time. Importantly, this platform has in the recent past

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[5] Similarly, Proposed Rules 45.3(a)(1)(ii)(C) and (iv) would require that confirmation data for certain swaps be reported no later than "24 hours after confirmation of the swap *if confirmation was done manually rather than electronically.*"

changed its operating procedures at the request of a dealer led trade group to change the terms of trades confirmed on such platform.

A requirement that market participants confirm their swaps through this platform would effectively mandate that participants consent to any swap terms that the platform unilaterally includes within its user agreement and operating procedures, even when these terms conflict with the terms of validly executed swaps. The CFTC has raised similar concerns that SDRs should not be in a position to alter, amend or invalidate valid swaps; the CFTC has proposed Rule 49.10(c) to prevent the terms of validly executed swaps from being invalidated or modified by the confirmation or recording process of SDRs.

Electronic confirmation service providers fall within the statutory definition of an SDR and thus must register, and be regulated, as SDRs. *See Prior Comment Letter at 13-14.* **We ask that the Commission confirm in its final rulemaking that electronic confirmation service providers must register as SDRs. Alternatively, we request that the CFTC extend the application of Proposed Rule 49.10(c) to prohibit an SDR from using an electronic confirmation service provider which may modify or invalidate swap terms reported to it.**

The CFTC Should Impose Good Faith and Fair Dealing Requirements For SDs and MSPs in Portfolio Reconciliation

The Commission's proposed business conduct standards require that, with respect to any communication between a SD or MSP and any counterparty, the SD and MSP communicate in a fair and balanced manner based on principles of good faith and fair dealing. *See* Proposed Rule 23.433. The CFTC should confirm that the procedures required of SDs and MSPs aimed at resolving valuation discrepancies in a portfolio reconciliation process in Proposed Rule 23.502(b)(4) must also be fair and balanced and based on principles of good faith and fair dealing. *See Prior Comment Letter at 9-10.* To that end, we believe that proposed rule 23.502(b)(4) should be revised to require that an SD or MSP's written procedures must be fair, impartial and even-handed so that plans and other market participants will not be placed at a disadvantage when dealing with SDs and MSPs. Proposed Rule 23.502(b)(4) should read as follows:

> "Each swap dealer or major swap participant shall establish and maintain written procedures reasonably designed to resolve any discrepancies in the material terms or valuation of each swap identified as part of a portfolio reconciliation process in a ***fair, impartial, even-handed and*** timely fashion ***provided that any written procedure that is contrary to the terms of any agreement with a counterparty shall not apply to the portfolio reconciliation of swaps with such counterparty. These procedures must permit the swap dealer or major swap participant's counterparty to, in addition to any contractual rights that it has under the relevant agreement with the swap dealer or major swap participant, designate one or more third parties to resolve any discrepancies and require the swap dealer and major swap participant to cooperate with such third parties.*** A

difference between the lower valuation and the higher valuation of less than 10% of the higher valuation need not be deemed a discrepancy."

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We thank the CFTC for the opportunity to comment on the proposed rules on the confirmation, portfolio reconciliation and portfolio compression requirements.

Committee on the Investment of Employee Benefit Assets