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April 4, 2011

Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Registration and Regulation of Security-Based Swap Execution Facilities – File Number S7–06–11

Dear Ms. Murphy:

MarkitSERV[1] is pleased to submit the following comments to the Securities and Exchange Commission (the "***SEC***" or the "***Commission***") on the proposed rulemaking to implement certain requirements included in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "***DFA***")[2] titled Registration and Regulation of Security-Based Swap Execution Facilities (the "***Proposed Rule***").[3]

Introduction

MarkitSERV views its role in the global derivatives markets as a facilitator making it easier for derivatives market participants to interact with each other. To facilitate this goal, MarkitSERV provides trade processing, confirmation, matching and reconciliation services for swaps and security-based swaps ("***SB swaps***") across regions and asset classes, as well as universal middleware connectivity for downstream processing such as clearing and reporting. With over 2,000 firms currently using the MarkitSERV platform, including over 21,000 buy-side fund entities, its legal, operational, and technological infrastructure plays an important role in supporting the SB swaps markets in the United States and globally.

As a service and infrastructure provider to the domestic and international swaps markets, MarkitSERV supports the Commission's objectives of increasing transparency and efficiency in these markets, of detecting market abuse or manipulation, and of reducing both systemic and counterparty risk.

Executive Summary

MarkitSERV recognizes that, in addition to providing execution and clearing services, SB SEFs could potentially perform additional services such as confirmation and trade routing. We believe that some SB SEFs might choose to build their own confirmation capability and/or downstream connectivity to central counterparty clearing agencies ("***CCPs***") and/or security-based swap data repositories ("***SB SDRs***"), and that market participants may choose to use those services. At the same time, we believe that some SB SEFs may not wish to make those investments themselves, instead preferring to rely on a third party. Additionally, we believe that some SB SEF customers, including security-based swap dealers ("***SB SDs***") and major security-based swap participants ("***SB MSPs***"), could benefit from using third party middleware services or may value the simplicity of using common infrastructure across multiple SB SEFs. We therefore believe that the rules should be less prescriptive and should allow SB SEFs and their customers to make their own commercial choices by deciding

[1] MarkitSERV, jointly owned by The Depository Trust & Clearing Corporation (DTCC) and Markit, provides a single gateway for OTC derivatives trade processing. By integrating electronic allocation, trade confirmation and portfolio reconciliation, MarkitSERV provides an end-to-end solution for post-trade transaction management of OTC derivatives in multiple asset classes. MarkitSERV also connects dealers and buy-side institutions to trade execution venues, central clearing counterparties and trade repositories. In 2010, more than 19 million OTC derivatives transaction sides were processed using MarkitSERV. Please see www.markitserv.com for additional information.
[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).
[3] Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. 10948 (proposed Feb. 28, 2011).

how to confirm transactions and how to route those transactions to CCPs. We believe that the Commission should set standards for the connectivity and the legal support required that should apply equally to any entity providing those services, but that market participants should be allowed to make their own choices regarding how these requirements are met.

Given this, our comments on the proposed rule are designed to point out enhancements to the rules which will give participants the ability to choose optimal solutions while meeting the objectives of the Act.

As further explained below, MarkitSERV believes that: (i) "comparing" SB swap transactions is different from "confirming" them, both of which are different from arriving at "locked-in" or executed trades in the equity and debt markets; (ii) security-based swap execution facilities ("***SB SEFs***") could, but should not be *required* to, confirm SB swap transactions that are executed on these platforms, but instead parties to a transaction should have the option to use a third party confirmation service provider or to confirm transactions themselves for that purpose; and (iii) SB SEFs could, but should not be required to, route transactions directly to entities providing clearing functionality because the parties to a transaction should have an option to use other means to route their transactions to those entities.

Comments

1. Current Post-Execution Market Practices.

Proposed Rule 811(f) would require SB SEFs to establish and enforce rules regarding the reporting and processing of trades executed on the SB SEF. In this regard, the Commission requested comment on whether SB SEFs should be required to "compare and report confirmed trades to clearing agencies," which the Commission describes as similar to certain reporting requirements "for locked-in trades in the equity and debt markets."[4] Before addressing the Commission's request for comment, we believe that the terms "comparing," "confirming," and "locked-in" require further clarification as they all have different meanings. In order to ensure that the Proposed Rule implements requirements on SB SEFs as intended, please find below our thoughts on the meaning of such terms according to current market practice.

a. Comparing vs. Confirming Transactions

As a provider of confirmation services in the SB swap market, we stress that "comparing" a bond or equity transaction is quite different from "confirming" a SB swap transaction. This is not only based on the limited number of fields that counterparties to a bond or equity transaction are required to agree upon in contrast to SB swap transactions[5], but is also caused by the necessary steps of trade enrichment and legal attachment (as defined below) that are necessary for transactions in SB swaps.

b. Confirmations

The process of documenting SB swaps in today's market involves three functions: (i) trade enrichment; (ii) trade affirmation or matching; and (iii) attachment to a legal framework. These three steps are present in the "confirmation" of the vast majority of all SB swap transactions, regardless of the execution method (*i.e.*, transactions executed via bilateral paperwork, telephone, voice-brokered, or electronic execution platform), whether or not transactions are centrally cleared, and whether or not they are confirmed electronically or through other means.

[4] *See* Proposed Rule, 76 Fed. Reg. at 10975 & n.169.

[5] In an OTC equity share swap transaction, owing to the multiple combinations related to each of the equity and floating interest rate legs of the swap, there can be up to 140 distinct fields including those related to: share and interest rate terms, valuation and payment, dividends and other continuation data-driven events, independent amounts, and other terms uniquely identifying the product, counterparty, and transaction.

i. Trade enrichment[6]

Trade enrichment is the process of adding information to the execution details to create complete documentation. At the time of execution, parties to a transaction in a SB swap typically agree only to the main economic terms of the transaction (such as price and notional size), and additional terms which are specific to the terms of the counterparty relationship (for example, master agreement reference or other credit terms). Other economic details are typically only explicitly agreed to at the time of execution where they vary from accepted market practice (for example payment frequency, business day conventions, defaults, disruption fallbacks, termination events and termination calculation methodology, and holiday calendars). Therefore, parties engage in trade enrichment subsequent to the execution-level agreement being reached in order to agree on the balance of issues. Enrichment can happen through a variety of means, including trade capture systems and automated confirmation services such as the ones provided by MarkitSERV.

ii. Trade affirmation and matching

Trade affirmation is the process whereby one party alleges the details of a SB swap transaction to its counterparty and those details are affirmed by the counterparty if correct. For transactions that are facilitated through an intermediary, *e.g.* an inter-dealer broker or an electronic trading system, the intermediary may propose the transaction details to both parties, who then affirm them with each other. Matching is the process whereby both counterparties to the SB swap transaction allege the transaction details to each other, which are then compared. Trade affirmation and matching can be used individually or together, where the parties who receive alleged details of the SB swap transaction will perform a local match to their satisfaction, and then affirm to their counterpart. Automated confirmation services such as MarkitSERV provide these services electronically. Our services can be used as a means for the parties to communicate and rectify any discrepancies prior to completing a confirmation. Notably, MarkitSERV provides notification to both parties when the process of affirmation or matching is complete, thereby completing the confirmation process.

iii. Attachment to a legal framework

Attachment to a legal framework is equally important. Parties to a transaction typically sign a Master Agreement prior to entering into a trading relationship, and all subsequent transactions to which the Master Agreement is applicable are governed by the terms of this agreement. For some products, the parties also sign a Master Confirmation Agreement ("***MCA***") which contains those terms that do not vary across individual transactions within a product or regional sector. The use of MCAs allows individual trade confirmations to reference the relevant MCA, which reduces the number of terms required in those trade confirmations. Automated confirmation services such as those provided by MarkitSERV allow participants to agree in advance to rely on master level documentation or commonly accepted industry-wide conventions. This reliance is created by both parties signing operating procedures with the platform providers which evidence that agreement, and which can be relied upon by both parties to a trade being confirmed using the service. Importantly, these platforms afford flexibility related to standardization.

It is likely that different legal frameworks may ultimately emerge and exist in the future and that flexibility of these frameworks and participants' option to be able to use them will be important (*e.g.*, in some markets we can see a basic intention to create a cleared trade acting as a legal framework in and of itself, while in other markets counterparties will want to rely on the full legal definition of a potential bilateral trade). The legal framework that is being put in place today should leave room for innovation in the future.

[6] *See* Trade Acknowledgment and Verification of Security-Based Swap Transactions, 76 Fed. Reg. 3859, 3869 n.60 (proposed Jan. 21, 2011) ("The Commission understands that in some instances, additional transaction details may have to be entered post-execution but prior to processing. In the industry, this process generally referred to as 'enrichment.'").

2. SB SEFs Should Not Be Required to Confirm Transactions, As Parties to the Transaction Should be Able to Decide How to Confirm Their Transactions.

In introducing the same Proposed Rule 811(f) discussed above, the Commission requested comments in the Preamble on whether SB SEFs should be required to "compare and report confirmed trades to clearing agencies."[7] We do not believe that SB SEFs should be *required* to fulfill all responsibilities imposed by the Dodd-Frank Act regarding the confirmation, reporting, and processing of SB swaps. First, not all SB SEFs will necessarily be sufficiently proficient at confirming transactions to be capable of adequately confirming all SB swaps without significant additional investment and the building of substantial infrastructure. This is not changed by the fact that transactions will be executed on a SB SEF. As explained below, execution and confirmation are two different steps in the workflow of a swap transaction, and SB SEFs should not be exclusively relied upon for confirmation services merely because they provide an execution platform.

Instead of requiring SB SEFs to confirm trades, we believe that the decision of how to satisfy these responsibilities should be left with the counterparties to a SB swap, since security-based swap dealers ("***SB SDs***") and major security-based swap participants ("***SB MSPs***") are ultimately responsible for confirming their transactions.[8] Therefore, SB SEFs should only be required to fulfill these responsibilities if the counterparties choose to use SB SEFs for these purposes, and the relevant SB SEF is sufficiently proficient at completing those tasks. We believe that this would be in keeping with current market practices, which have evolved for good reason.

a. Trade execution and confirmation should not be conflated

Execution and trade confirmation are separate and distinct legal and operational functions. These functions may not necessarily take place at the same time or place or even be carried out by the same parties. The DFA and Commission rules recognize this by, for example, referring to execution venues as "security-based swap execution facilities" and not as "security-based swap confirmation facilities." Further, the DFA specifically states that trade processing is only one of the functions of a SB SEF, and that a SB SEF's core function is execution of swaps.[9] Indeed, considerable time will often be required between execution and confirmation, such as in the very common case where a fund manager enters into a transaction with a counterparty for an agreed notional amount and price at an "execution" level, and then subsequently will distribute the trade to multiple underlying funds at the "allocation" level, whereupon the transaction can be legally confirmed with the best evidence that identifies each counterparty and fund for each transaction.

b. SB SEFs should not be presumed to supply adequate confirmations of SB swaps

We asserted in an earlier comment letter that we do not believe that execution on a SB SEF can be a *per se* satisfaction of the confirmation requirement.[10] We believe that confirmations should provide the counterparties with best evidence of the agreement between the parties and the terms applicable to that agreement, but do not believe that just the execution on a SB SEF will necessarily do so. In order to provide best evidence, a confirmation process must entail: (i) trade enrichment, (ii) trade affirmation or matching of material terms negotiated between the counterparties, and (iii) attachment to a legal framework. While some SB SEFs might

[7] Proposed Rule, 76 Fed. Reg. at 10975.
[8] *See* DFA § 764, 124 Stat. at 1792 (adding Section 15F(i)(1) of the Securities Exchange Act of 1934 (the "***Exchange Act***")) ("Each registered *security-based swap dealer and major security-based swap participant* shall conform with such standards as may be prescribed by the Commission, by rule or regulation, that relate to the timely and accurate confirmation, processing, netting, documentation, and valuation of all security-based swaps.") (emphasis added).
[9] DFA § 763, 124 Stat. at 1770 (adding Section 3D(b) of the Exchange Act) ("… a security-based swap execution facility that is registered under subsection (a) may – (1) make available for trading any security-based swap; and (2) facilitate trade processing of any security-based swap."). Note that these functions are listed as two separate and distinct functions.
[10] *See* Letter from MarkitSERV to the Commission, Section 5 (February 22, 2011).

possess or acquire the capabilities necessary to confirm transactions by incorporating all three of these important components, we do not believe that execution on a SB SEF, in and of itself, will do so.

A SB swap transaction that is not required to be cleared but is entered into a SB SEF's systems provides a noteworthy example of why execution on a SB SEF should not be presumed to generate an adequate confirmation. As explained above, confirmation must entail attachment to a legal framework. For transactions that are expected to be cleared, the parties may be satisfied with attachment to the terms and conditions of a SB SEF because the parties likely only anticipate having a short term relationship before the trade is novated to a clearing agency. However, because of the risk that a transaction is not accepted for clearing, and certainly where a swap transaction is not expected to be cleared, the parties will require a framework that anticipates a long-term credit relationship between two parties and is tailored to the specific circumstances of the trade. For example, confirmations by SB SEFs are unlikely to record Master Agreement dates specific to bilateral trading relationships, and it would create an additional burden on parties to maintain at, or communicate this type of information to, every SB SEF they use to execute transactions with every other party. Parties today typically rely on their own systems or those of a central electronic confirmation service to maintain bilaterally unique data such as Master Agreement or MCA dates.

Therefore, while SB SEFs may be able to provide adequate confirmation services, we believe there will be many instances where SB SEFs are unable to do so or would prefer not to. As a result, we do not believe that the mere fact that execution will take place on a SB SEF should mean that SB SEFs should be tasked with all of the confirmation responsibilities as well.

c. Parties to a transaction should be able to choose how to satisfy their confirmation requirements even when a transaction is executed on a SB SEF; SB SEFs should be able to delegate confirmation and trade processing functions

Because SB SEFs may not be able to provide adequate confirmations and because of the additional reasons explained below, we believe that counterparties should have the option to: (i) have their SB swap transactions that were executed on a SB SEF legally confirmed by that SB SEF (if such SEF offers adequate confirmation and trade processing functionality); (ii) meet their confirmation obligations themselves (*e.g.*, by signing a paper form of a confirmation), or (iii) use a qualified third party service provider for confirmation services (even if the SB SEF is able to offer adequate confirmation services). Many third party service providers currently offer confirmation services, and counterparties may have good reason to use those parties or to confirm a transaction themselves.

Parties might not wish to use SB SEFs for confirmation services because tying the confirmation requirement to the SB SEF used for execution may increase the burden on all participants in the market. For example, if market participants executing a transaction on a SB SEF were required to use that SB SEF for confirmation services, members of a particular SB SEF would need to perform legal and operational reviews not only on the SB SEF's trading rules and procedures, but also on the legal framework for confirmations on that SB SEF. Because this will be quite costly, tying confirmation to SB SEF execution might limit the number of execution venues that market participants choose to use, thereby reducing the overall liquidity in the market and decreasing competition among SB SEFs. Changes to existing legal and operational confirmation infrastructures that have been well-developed and robustly implemented will place a substantial and costly burden on market participants that are already faced with considerable transformational challenges related to trading, clearing and reporting functionalities.

Further, market participants may find it to be operationally inefficient to confirm a transaction on the SB SEF that was used for execution. For example, if counterparties confirm a transaction on a SB SEF and decide, at some point during the lifetime of a SB swap, to novate or terminate the SB swap, the novation or termination of that SB swap would be reliant on the operating procedures of the SB SEF upon which it was originally

executed. Thus, the parties would be limited in their ability to use a different SB SEF for the novation or termination of the transaction. On the other hand, the use of bilateral documentation between the parties to trades, or the use of an independent confirmation platform with common operating procedures which are located outside any SB SEF, would create better conditions for competition, fungibility and efficiency.

For these reasons, and because under the DFA the ultimate responsibility to confirm rests with SB SDs and SB MSPs,[11] we believe that counterparties to a transaction should have the choice of satisfying the confirmation obligations by confirming a transaction themselves, by using a SB SEF, or by using a third party service provider. Qualified third parties such as the various providers of confirmation platforms have become very effective at providing detailed and accurate confirmations through services which facilitate all three components of the confirmation process in a consistent manner, independently of the execution process. Whatever approach is used, we believe that the Commission should require that confirmations be legally binding and provide best evidence of the transaction and its terms.

Finally, even when the parties choose to satisfy their confirmation requirements by using the SB SEF, we recommend that the Commission additionally allow SB SEFs to outsource their confirmation and trade processing tasks to qualified third parties. As discussed above, it should not be presumed that SB SEFs will be well-equipped to confirm all types of trades. We therefore believe that permitting SB SEFs to outsource their confirmation and trade processing tasks to qualified third parties would best ensure that confirmation services are available to provide legal certainty related to SB swap transactions.

3. Parties to a Transaction Should Be Able to Decide How to Route Transactions to Clearing Agencies.

Proposed Rule 815 would require SB SEFs to establish and enforce rules to ensure the financial integrity of SBSs entered on or through the SB SEF.[12] As a means of ensuring the financial integrity of transactions, the Commission requested comment on whether SB SEFs should be required to have the capacity to route transactions to clearing agencies.[13] As an initial matter, we assume that this question refers to entities that offer central counterparty (*i.e.*, novation) services ("***CCPs***"), and not entities providing trade matching services, which also may meet the Commission's definition of "clearing agency."[14] For the sake of discussion, we will proceed as if this assumption is correct. We believe that it is reasonable to require SB SEFs to have the *capacity* to route transactions to CCPs. However, similar to our views on confirmation as explained above, we note that it is ultimately the *parties'* responsibility to submit transactions for clearing, not the SB SEFs'[15], and those parties might prefer to perform this function through other means. Because market participants today frequently use third parties to route their transactions to CCPs, and do so for good reason, we do not believe that parties should be required to use SB SEFs to submit their transactions for clearing.

In today's SB swaps markets, various CCPs offer central clearing services, while execution takes place via a multitude of methods and venues. An operational infrastructure has therefore evolved where specialized Third-Party "Middleware" Providers ("***TPMPs***") provide timely and secure connectivity between the numerous counterparties, execution venues, and CCPs, as well as with SB SDRs and other post-trade service providers. SB swap transactions are communicated to TPMPs either directly by the counterparties to a bilaterally executed trade, by electronic trading platforms where the SB swap was executed, or by the interdealer broker who arranged a transaction. TPMPs not only route trades to CCPs, but also provide SB swap counterparties

[11] *See* DFA § 764, 124 Stat. at 1792 (adding Exchange Act Section 15F(i)).
[12] *See* Proposed Rule, 76 Fed. Reg. at 11062 (to be codified at 17 C.F.R. § 242.815(a)).
[13] *See id.* at 10979.
[14] *See, e.g.*, Clearing Agency Standards for Operation and Governance, 76 Fed. Reg. 14472, 14495 (proposed March 16, 2011) (explaining the role of "Trade Matching Services" and that these entities will be required to register as clearing agencies). We plan to comment on this proposed rulemaking separately.
[15] *See* DFA § 763, 124 Stat. at 1762 (adding Exchange Act Section 3C(a)(1)) ("It shall be unlawful for any person to engage in a security-based swap unless *that person* submits such security-based swap for clearing to a clearing agency. . . .") (emphasis added).

with notifications to indicate that their SB swap has been received, registered, or rejected by the CCP, which is important for the counterparties' risk management. Where applicable, such as in the case of MarkitSERV, TPMPs will also provide trade enrichment, matching or affirmation of all the terms of the transaction, as well as allocation and legal attachment.[16]

The use of TPMPs for routing purposes in the SB swaps markets has become common because it offers benefits not only for the counterparties to SB swap transactions but also for SB SEFs and CCPs:

- The use of TPMPs reduces the number of interfaces that market participants, SB SEFs or CCPs must establish and maintain with different entities because TPMPs act as "universal adapters". As a result, SB swap counterparties using TPMPs do not need to individually build separate interfaces for each CCP. Equally, the existence of TPMPs enables CCPs that enter the SB swap market to achieve a much faster "go-live". This is because they need only establish connectivity with a limited number of TPMPs in order to be in a position to receive SB swap transactions from a large number of counterparties.[17]

- Using TPMPs can significantly reduce the cost of technology implementation and technical support necessary for market participants. For example, SB swap counterparties using a TPMP for their routing needs will have the benefit of a consistent messaging interface and format, which reduces the risk of errors and the need for all entities involved to test and verify a wide variety of different routing mechanisms.

- The existence of TPMPs simplifies the process of routing those SB swap transactions to CCPs that were not cleared at the time of execution but only at a later stage, be it on a voluntary or on a mandatory basis. Many of these non-cleared SB swap transactions would have been confirmed by TPMPs, so TPMPs would be able to quickly and efficiently route those SB swaps to CCPs for clearing if and when this was desired.

For these reasons the use of TPMPs for routing purposes can increase the availability, speed of uptake, and level of operational efficiency of central clearing for SB swaps, thereby supporting implementation of the clearing mandate in the DFA. TPMPs are already established and are successfully serving the market today (*i.e.*, even before the effectiveness of the Proposed Rule), and market participants recognize this architecture as being efficient and fostering competition on both the execution and the clearing level.

We therefore believe that market participants should be entitled to continue using these third party providers for routing, or connectivity, services. Thus, even if the Commission required SB SEFs to have the *capacity* to submit transactions for clearing, it should not require the parties to a transaction to only use this method of submission for transactions that were executed on SB SEFs. In addition, any "capacity" requirement should be capable of being satisfied by a SB SEF through a relationship with a TPMP, rather than require the building of new connectivity and infrastructure. Otherwise, counterparties, who are ultimately responsible for the submission of SB swaps for clearing, would be forced to use SB SEFs for that purpose even if they found it more efficient to submit their transactions for clearing through alternate means.

4. Parties to a SB Swap Transaction Should Be Able to Decide How to Report Transaction Data to Swap Data Repositories.

We agree that, as provided by Proposed Rule 817(b), market participants should have the option of having SB SEFs report transaction data to a registered SB SDR on behalf of the counterparty responsible for reporting

[16] Whether such additional functions are required for a given transaction will depend on whether the swap is executed on a SB SEF, whether the SB SEF provides some of those services itself, and the desired legal status of transaction prior to being cleared.
[17] MarkitSERV has established connectivity with 8 central clearinghouses to date.

such data.[18] We support the Commission's stated purpose of providing market participants with options of how to carry out their post-execution responsibilities. Both the reporting counterparty and SB SEF, as the case may be, should have an option to choose the most suitable form of reporting, and be permitted to use third parties for reporting purposes when they believe it would be in their best interest to do so.

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MarkitSERV appreciates the opportunity to comment on the Proposed Rule, and would be happy to elaborate or further discuss any of the points raised.

In the event you may have any questions, please do not hesitate to contact the undersigned or Gina Ghent at gina.ghent@markitserv.com.

Sincerely,

Jeff Gooch
Chief Executive Officer
MarkitSERV

[18] *See* Proposed Rule, 11063 (to be codified at 17 C.F.R. 242.817(b)).