

June 3, 2011

Mr. David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
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: FR Doc. 2011–10884

Swap Data Repositories: RIN 3038–AC20

Swap Data Recordkeeping and Reporting Requirements: RIN 3038–AD19

Real-Time Public Reporting of Swap Transaction Data: RIN 3038–AD08

Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants: RIN 3038–AC96

Core Principles and Other Requirements for Swap Execution Facilities: RIN 3038–AD18

Requirements for Processing, Clearing, and Transfer of Customer Positions: RIN 3038–AC98

Dear Mr. Stawick:

MarkitSERV<sup>1</sup> appreciates the opportunity to revisit and comment on the totality of rules proposed by the Commodity Futures Trading Commission (“**CFTC**” or the “**Commission**”) to implement applicable requirements included in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**DFA**”).<sup>2</sup> In particular, the following comments pertain to the Commission’s proposed rules regarding swap data repositories (“**SDRs**”),<sup>3</sup> swap data recordkeeping and reporting requirements,<sup>4</sup> real-time public reporting,<sup>5</sup> confirmation and portfolio reconciliation,<sup>6</sup> swap execution facilities (“**SEFs**”),<sup>7</sup> and requirements for processing, clearing and transfer of customer positions.<sup>8</sup>

## Introduction

MarkitSERV views its role in the global derivatives markets as an independent 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 across regions and asset classes. MarkitSERV also provides universal middleware connectivity for downstream

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<sup>1</sup> 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](http://www.markitserv.com) for additional information.

<sup>2</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

<sup>3</sup> Swap Data Repositories, 75 Fed. Reg. 80898 (published Dec. 23, 2010).

<sup>4</sup> Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574 (published Dec. 8, 2010).

<sup>5</sup> Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76140 (published Dec. 7, 2010).

<sup>6</sup> Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81519 (published Dec. 28, 2010).

<sup>7</sup> Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. 1214 (published Jan. 7, 2011).

<sup>8</sup> Requirements for Processing, Clearing, and Transfer of Customer Positions, 76 Fed. Reg. 13101 (published March 10, 2011).

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 swap markets in the United States and globally.

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

## Executive Summary

MarkitSERV recognizes that certain steps in the process of trading and processing swaps may occasionally be accomplished almost simultaneously with other steps. For example, SEFs may be able to confirm some swaps executed on the SEF through functionalities incorporated directly into that SEF's platform. However, several of the proposed rules highlighted in this comment letter assume that many steps, such as execution, confirmation, clearing, and recordkeeping, can and will happen concurrently with each other. Further, in several instances, the rules do not provide the counterparties with the necessary choice of how to best satisfy their obligations. We are concerned that such approach is likely to result in a more cumbersome, costly, and less timely implementation.

As explained in our previous comment letters<sup>9</sup> and below, we believe that these assumptions overlook certain market realities. First, the counterparties are ultimately responsible for many requirements under the DFA, and they may prefer to satisfy these requirements on their own or through the use of independent third party providers ("**ITPPs**"). Second, platforms such as SEFs and designated contract markets ("**DCMs**") may wish to outsource certain responsibilities like confirmation to ITPPs rather than complete them internally, especially for the more complex transactions. Third, swap transactions can be complex, and it may therefore be impractical or even impossible to accomplish steps like execution and confirmation at the same time. We therefore believe that the Commission's final regulations should allow counterparties the choice of how to best perform certain functions themselves or through the use of ITPPs.

We also believe that the Commission should revisit certain proposed time frames regarding confirmation, processing and clearing in light of market realities and in order to conform CFTC rules to similar rules proposed by the Securities and Exchange Commission (the "**SEC**").

Finally, we strongly urge the Commission to harmonize its rules with the SEC's rules regarding Clearing Agencies. The SEC intends to require entities that provide certain providers of post-trade services to register as Clearing Agencies. We believe that both Commissions should require all entities that independently verify swap transaction information ("**Independent Verification Services**" or "**IVS**") to register with the appropriate commission in order to ensure that they do not unnecessarily create two very different regulatory regimes, as ordered by President Obama<sup>10</sup> and Congress.

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<sup>9</sup> MarkitSERV has written comment letters to the Commission on the following topics: SDRs and Real-Time Public Reporting of Swap Transaction Data (Feb. 7, 2011); Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for SDs and MSPs (Feb. 28, 2011); Core Principles and Other Requirements for SEFs (March 8, 2011); and Requirements for Processing, Clearing, and Transfer of Customer Positions (April 11, 2011).

<sup>10</sup> Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, 3822 (published January 21, 2011).

## Comments

### 1. The Commission Should Permit Counterparties to Decide Themselves How to Confirm Transactions and Route Them to DCOs and SDRs

#### a. The Proposed Rules Should Permit Counterparties to Choose How to Fulfill Certain DFA Requirements

We believe that several statements and provisions in the Commission's proposed rules do not provide swap counterparties with sufficient control and choice over certain aspects of the transaction process which the counterparties are responsible for under the DFA. Under the DFA, the ultimate obligation to confirm, document and, where applicable, submit a trade for clearing rests with the counterparties.<sup>11</sup> We therefore believe that counterparties should have discretion over how to satisfy these requirements.

However, the proposed rule on Processing, Clearing, and Transfer of Customer Positions (the "**Processing Rule**") restricts counterparties from exercising this discretion in several ways. First, the Processing Rule requires DCOs accepting a swap for clearing to "provide the counterparties with a definitive written record of the terms of their agreement, which will serve as a confirmation of the swap,"<sup>12</sup> thus implying that DCOs, rather than the counterparties, have ultimate responsibility to confirm transactions. Second, the Processing Rule also indicates that SEFs and DCMs, rather than swap counterparties, will have control over transaction processing procedures by stating that DCOs must coordinate with SEFs and DCMs to "develop[] rules and procedures to facilitate prompt and efficient processing of all contracts, agreements, and transactions submitted to the [DCO] for clearing"<sup>13</sup> without referencing any role for swap counterparties in that procedure. Finally, the rules do not state whether parties to SEF- or DCM-executed swaps would be able to decide how to route their transactions to a DCO. While parties to swaps that are not electronically traded are explicitly given this authority under Proposed Rule 23.506(a), no such authority is given to parties that execute on a SEF or DCM.<sup>14</sup>

We also believe that, while it might be possible for a SEF to confirm a transaction at the time of execution, there will be situations in which it is necessary and beneficial to separate the provision of execution from that of confirmation services. For example, the proposed rule on Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements (the "**Confirmation Rule**") indicates that execution on a SEF would, in and of itself, satisfy the confirmation requirement.<sup>15</sup> We believe, on the contrary, that several steps will often be necessary in between execution and confirmation. Additionally, the proposed rule on Core Principles and Other Requirements for SEFs (the "**SEF Rule**") appears to conflate the confirmation of trades and the creation of the record or audit trail of trades by stating that "a transaction entered into on or pursuant to the rules of a SEF shall include written documentation that memorializes all of the terms of the transaction...."<sup>16</sup> This statement

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<sup>11</sup> See DFA § 731 (adding CEA Section 4s(i)(1)) ("Each registered [SD] and [MSP] shall conform with such standards as may be prescribed by the Commission . . . that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps."); DFA § 723 (adding CEA Section 2(h)(1)(A)) ("It shall be unlawful for any person to engage in a swap unless *that person* submits such swap for clearing to a [DCO]. . .") (emphasis added).

<sup>12</sup> Processing Rule, 76 Fed. Reg. at 13105-06.

<sup>13</sup> *Id.* at 13110 (to be codified at 17 C.F.R. § 39.12(b)(7)(i)).

<sup>14</sup> Proposed Rule 23.506(a) provides SDs and MSPs with the ability to determine how to route swaps to a DCO when these swaps are not executed on a SEF or a DCM, as long as the routing method chosen is acceptable to the DCO. When a swap is executed on a SEF or DCM, however, Proposed Rule 39.12(b)(7) would seem to prevail. This rule is silent on what role the parties to a swap might have in deciding how to route swaps to a DCO.

<sup>15</sup> See Confirmation Rule, 75 Fed. Reg. at 81520-21 ("For swaps executed on a SEF or DCM, the SEF or DCM will provide the counterparties with a definitive written record of the terms of their agreement, which will serve as a confirmation of the swap."); see also Requirements for Processing, Clearing, and Transfer of Customer Positions, 76 Fed. Reg. at 13106 ("Swaps executed on a SEF or DCM are confirmed upon execution.").

<sup>16</sup> SEF Rule, 76 Fed. Reg. at 1218.

seems to indicate, incorrectly, we believe, that a SEF's internally-created audit trail can serve as a confirmation of a transaction.

We acknowledge that, in some circumstances, parties to a swap may not have to take any affirmative actions after execution to complete a confirmation, route a transaction to the applicable DCO, or route transaction data to the applicable SDR. For example, for certain swaps executed on a SEF and cleared by a DCO, the SEF could report the primary economic terms to the SDR<sup>17</sup> and the DCO could confirm the swap as part of the clearing process<sup>18</sup> and also report the confirmation data to the SDR.<sup>19</sup> However, we do not believe that swap counterparties will always desire this kind of processing,<sup>20</sup> that all SEFs or DCOs are set up to perform this role, or that such processing will be practical for more complicated transactions. Therefore, by assuming that these functions will always be performed by the SEFs and/or DCOs, we believe that the proposed rules inappropriately restrict swap counterparties from having any control over the confirmation and routing of their transactions, and also conflate the terms "execution," "confirmation," "audit trail," and "clearing."

Before explaining why counterparties should have the ability to control the confirmation and routing of their transactions if they so choose, we will describe how swap transactions are currently confirmed in order to highlight the distinction between execution, confirmation, audit trail, and clearing.

#### b. Current Post-Execution Market Practices

As we have outlined in previous responses,<sup>21</sup> the process of documenting swaps in today's market involves the three functions of (1) trade enrichment (the process of adding additional information to the execution details to create complete documentation); (2) trade affirmation or matching of material trade terms (the process whereby one party alleges the details of a swap transaction to their counterparty and those details are affirmed by the counterparty if correct); and (3) attachment to a legal framework such as a Master Agreement or a Master Confirmation Agreement.<sup>22</sup> These three steps are present in the "confirmation" of the vast majority of all swap transactions, regardless of the execution method, whether or not transactions are centrally cleared, and whether or not they are confirmed electronically or through other means. The combination of these three steps ensures the completeness and maximizes the legal certainty of swap confirmations.<sup>23</sup>

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

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<sup>17</sup> See Swap Data Recordkeeping and Reporting, 75 Fed. Reg. 76581 (published Dec. 8, 2010) ("The proposed regulations therefore call for the SEF or DCM to report the required primary economic terms data for the swap to an SDR in electronic form.").

<sup>18</sup> See Processing Rule, 76 Fed. Reg. at 13110 (to be codified at 17 C.F.R. § 39.12(b)(7)(i)) ("[t]he confirmation of all terms shall take place at the same time as the swap is accepted for clearing.").

<sup>19</sup> See Swap Data Recordkeeping and Reporting, 75 Fed. Reg. at 76581 ("The proposed regulations thus call for DCOs to report confirmation data for all cleared swaps to the appropriate SDR in electronic form.").

<sup>20</sup> As expanded upon below, ultimate responsibility for confirmation, clearing, and execution resides with the SDs, MSPs, or counterparty to the swap, not the SEF, DCM, or DCO. See DFA § 731 (adding CEA Section 4s(i)(1)) ("Each registered [SD] and [MSP] shall conform with such standards as may be prescribed by the Commission . . . that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps."); DFA § 723 (adding CEA Section 2(h)(1)(A)) ("It shall be unlawful for any person to engage in a swap unless *that person* submits such swap for clearing to a [DCO]. . .") (emphasis added).

<sup>21</sup> See, e.g., MarkitSERV Letter to the Commission pp. 2-5 (Feb. 28, 2011) (regarding Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for SDs and MSPs).

<sup>22</sup> 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.

<sup>23</sup> See SEC Rule: Trade Acknowledgment and Verification of Security-Based Swap Transactions, 76 Fed. Reg. 3859, 3869 n.60 (published 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.'").

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.

c. Counterparties Should Be Able to Choose How to Process Their Transactions

Given that the counterparties are ultimately responsible for executing trades on a SEF, confirming trades with their counterparty, and clearing trades through a DCO<sup>24</sup> we believe that counterparties should have control over these aspects of their trades.

i. *Confirmation Services*

There are several reasons why parties may not wish to use SEFs for confirmation purposes. First, as described in more detail in other letters,<sup>25</sup> SEFs may not always be able to provide an adequate confirmation of transactions, particularly for complex trades. We believe that SEFs will likely be built with a focus on speed and efficiency, and that some ability to handle more complex and unique characteristics of certain trades may be lost in that efficiency. Additionally, SEFs may prove to be ill-suited for handling all confirmations because swap dealers (“**SDs**”) and major swap participants (“**MSPs**”) will likely use multiple SEFs, so they would have to perform legal and operational reviews of each SEF’s confirmation system in order to use each SEF for confirmations.

Counterparties may find that confirming trades through ITPPs, who are already accustomed to confirming complex trades, is more appropriate. Additionally, counterparties may wish to use ITPPs for confirmations instead of SEFs because doing so may simplify any potential novation or termination of the swap and would centralize all of an SD or MSP’s confirmation data in one location, rather than scattered among several SEFs.<sup>26</sup> We believe that these types of business decisions should remain with the counterparties.

Separately, parties may require the ability to confirm transactions independently even when the transaction is anticipated to be cleared. While we understand that DCOs will generally be able to confirm transactions upon acceptance for clearing, circumstances will inevitably arise where the time frames established by the Commission for transactions to be confirmed<sup>27</sup> will be exceeded before a transaction is accepted for clearing, or where a transaction is not successfully cleared upon submission to a DCO.<sup>28</sup> We believe that, in these circumstances, the parties should be permitted to satisfy their confirmation obligations by confirming the transaction prior to clearing. As explained above, the parties should have the right to determine how to confirm these transactions because it is ultimately the parties’ responsibility to ensure that the trades are confirmed.<sup>29</sup>

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<sup>24</sup> See DFA § 723 (adding CEA Section 2(h)(1)(A)) (“It shall be unlawful for any person to engage in a swap unless *that person* submits such swap for clearing to a [DCO]. . . .”) (emphasis added); DFA § 723 (adding CEA Section 2(h)(8)) (“... *counterparties* shall—(i) execute the transaction on a [DCM]; or (ii) execute the transaction on a swap execution facility....”) (emphasis added); DFA § 731 (adding CEA Section 4s(i)(1)) (“Each registered [SD] and [MSP] shall conform with such standards as may be prescribed by the Commission . . . that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps.”).

<sup>25</sup> See, e.g., MarkitSERV Letter to the Commission pp. 4-5 (March 8, 2011) (regarding Core Principles and Other Requirements for SEFs).

<sup>26</sup> For more information, see MarkitSERV Letter to the Commission pp. 4-5 (March 8, 2011) (regarding Core Principles and Other Requirements for SEFs).

<sup>27</sup> See Confirmation Rule, 75 Fed. Reg. at 81531 (to be codified at 17 C.F.R. § 23.501(a)) (detailing mandatory timelines for executing a confirmation which vary depending on several factors).

<sup>28</sup> See Processing Rule, 76 Fed. Reg. at 13102 (“there may be instances when a delay in acceptance of a transaction by a DCO is unavoidable.”).

<sup>29</sup> See DFA § 731 (adding CEA Section 4s(i)(1)) (“Each registered [SD] and [MSP] shall conform with such standards as may be prescribed by the Commission . . . that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps.”).

## *ii. Routing Services*

As further explained in a previous comment letter,<sup>30</sup> we also believe that parties will find it beneficial to continue using ITPPs for routing services which has become common practice due to the benefits it offers to the counterparties, SEFs, and DCOs. First, the use of ITPPs reduces the number of interfaces that market participants must establish and maintain with different entities; *i.e.*, ITPPs act as “universal adapters.”<sup>31</sup> Second, using ITPPs can significantly reduce the cost of technology implementation and technical support, because swap counterparties using an ITPP for their routing needs will have the benefit of a consistent messaging interface and format. Third, when counterparties opt against using a SEF or DCO for confirmation purposes, they would likely find it useful to route their transactions to the appropriate DCO or SDR using ITPPs. For example, if an SD confirmed a swap prior to clearing using an ITPP, that SD would very likely decide to use that ITPP to route the transaction to both the DCO and SDR.

For these reasons, the use of ITPPs for the routing of swap transactions can increase the availability, speed of uptake, and level of operational efficiency of central clearing for swaps. Additionally, because ITPPs already have relationships and connectivity established with most of the DCOs and entities which will become SEFs, their routing services are tested and reliable. Therefore, we believe that counterparties should be able to use ITPPs for routing services if they choose to do so.

## *iii. Portfolio Reconciliation Services*

We also believe that counterparties could benefit from using ITPPs to satisfy the portfolio reconciliation requirements proposed by the Commission.<sup>32</sup> The Confirmation Rule appears to require *both* parties to a transaction to supply the other party with mark-to-market data.<sup>33</sup> We encourage this exchange inasmuch as it would facilitate the timely resolution of valuation disputes, but believe that many buy-side parties would hesitate to supply this information to their counterparties. Buy-side parties are not accustomed to communicating their valuation data to counterparties, and they often view this data as confidential. In order to meet the portfolio reconciliation requirement, then, counterparties may wish to use an ITPP which can centrally identify any discrepancies and facilitate the resolution of such discrepancies.

## *iv. End-User Considerations*

Finally, we note that the Commission’s proposed rule regarding swap data recordkeeping and reporting would require commercial end-users to satisfy all regulatory reporting requirements when dealing with non-U.S. counterparties,<sup>34</sup> and that the Commission’s proposed rule on real-time reporting considers requiring commercial end-users to report transaction data to SDRs in real-time when they transact with non-U.S. counterparties.<sup>35</sup> We do not believe that the Commission can rightfully place these requirements on commercial end-users without permitting them to satisfy those requirements by using ITPPs or delegating such reporting to their non-U.S. SD counterparty. Commercial end-users have limited resources and almost no

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<sup>30</sup> See MarkitSERV Letter to the Commission pp. 2-5 (April 11, 2011) (regarding Requirements for Processing, Clearing, and Transfer of Customer Positions).

<sup>31</sup> MarkitSERV, for example, has established and maintains today connectivity with 8 central clearinghouses, more than 70 trading venues (including interdealer brokers), and more than 2,000 counterparties.

<sup>32</sup> See Confirmation Rule, 75 Fed. Reg. at 81531-32 (to be codified at 17 C.F.R. § 23.502).

<sup>33</sup> See *id.* at 81530 (to be codified at 17 C.F.R. § 23.500(i)(1) (defining portfolio reconciliation as the process by which “the two parties ... exchange the terms of all swaps ... [and] exchange each party’s valuation of each swap.”).

<sup>34</sup> See Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574, 76604 (published Dec. 8, 2010) (to be codified at 17 C.F.R. § 45.5(d)) (“Notwithstanding the provisions of § 45.5(a) through (c), if only one counterparty to a swap is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.”).

<sup>35</sup> See Real-Time Rule, 75 Fed. Reg. at 76146 (“In off-facility swap transactions where a non-U.S. swap dealer or non-U.S. MSP transacts with a U.S.-based end-user, which party to the swap should have the obligation to report to a real-time disseminator?”).

connectivity established with SDRs. Therefore, it would be a great burden for them to be responsible for all reporting obligations without the use of ITPPs.

For all of these reasons, we believe that counterparties will frequently desire to use ITPPs for confirmation, routing, processing, and reporting purposes. We therefore urge the Commission to permit counterparties to use ITPPs to satisfy these requirements if they choose to do so.

d. SEFs and SDRs Should Be Permitted to Use ITPPs

As indicated above, we acknowledge that SEFs might possess or acquire the capabilities necessary to adequately confirm certain transactions by incorporating all three components of a complete confirmation (trade enrichment, affirmation or matching, and legal attachment). However, we believe that SEFs may not be willing or able to provide adequate confirmations in some circumstances. Therefore, when counterparties opt to use a SEF for confirmation purposes but the SEF is unwilling or unable to confirm the transaction, we believe that SEFs should be permitted to outsource their confirmation and trade processing tasks to ITPPs because doing so would ensure that parties obtain the most legally sound confirmation available.

We also believe that SDRs may wish to offer certain ancillary services to their customers and that those SDRs may wish to delegate the performance of these ancillary services to ITPPs. Ancillary services that SDRs could potentially offer include asset servicing, confirmation, portfolio reconciliation, portfolio compression, netting services, valuation and pricing functions, collateral management, settlement, position limits management, dispute resolution, and counterparty identity verification. Customers would likely find it efficient to use one entity for all or many of these purposes, but SDRs may have to rely on ITPPs to effectively provide all of these services. Therefore, we believe that the Commission's regulations should permit SDRs to use ITPPs for ancillary services.

**2. The Time Periods Applicable to Confirmation and Clearing Requirements Should Be Consistent and Achievable**

MarkitSERV believes that the Commission should revisit the time periods proposed regarding confirmation and clearing in light of market realities and in order to conform CFTC rules to similar rules proposed by the SEC. The Confirmation Rule would require that all transactions between SDs or MSPs and other SDs or MSPs be confirmed with 15 minutes, 30 minutes, or by the end of the calendar day, and that SDs or MSPs send an acknowledgment of all other transactions to the counterparty within 15 minutes, 30 minutes, or by the end of the calendar day (in both cases depending on whether the transaction is executed and/or processed electronically).<sup>36</sup> The time limits for submission of a swap to clearing, established in the Commission's Processing Rule require SDs and MSPs to submit all swaps that are subject to the mandatory clearing requirement for clearing "as soon as technologically practicable" following execution, but no later than the close of business on the day of execution.<sup>37</sup>

In general, we believe that these time periods are very demanding and may be impossible to meet, especially as the Commission's rules are being initially implemented. We therefore urge the Commission to phase these requirements in so that counterparties have more time to confirm swaps and submit swaps for clearing in the initial phase of Dodd-Frank implementation.

However, there are also certain situations where we believe that confirmation within the proposed time periods may always be impossible. For example, the proposed time requirements will likely be particularly unattainable for fund managers, who frequently enter into transactions with a single counterparty on behalf of several funds.

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<sup>36</sup> See Confirmation Rule, 75 Fed. Reg. at 81531 (to be codified at 17 C.F.R. § 23.501).

<sup>37</sup> See Processing Rule, 76 Fed. Reg. at 13109 (to be codified at 17 C.F.R. § 23.506(b)(1)).

After execution, a fund manager will allocate positions from that transaction across various funds, but this process can and often does take considerably longer than 15 or 30 minutes.<sup>38</sup> Until this allocation has been successfully communicated, however, it would be impossible to confirm a transaction because important information regarding the swap remains unknown.

Moreover, when a confirmation cannot be completed quickly, it may also be impossible to meet the time requirements for submitting a swap for clearing. According to the Commission, confirmation will usually be required prior to the novation of the transaction by a DCO.<sup>39</sup> Because confirmations can occasionally take some time to complete (as explained above), counterparties may not be able to submit all transactions for clearing by the end of the business day.

In order to accommodate these situations but ensure that transactions are confirmed and cleared as quickly as possible, we recommend that the applicable time periods be revised. Specifically, we believe that the time periods for confirming a transaction should commence once all information necessary to issue an acknowledgment is in the parties' possession, and that the time periods for submitting a swap for clearing should commence at the time of confirmation as opposed to execution.

As further explained in other comment letters,<sup>40</sup> we also believe that the Confirmation Rule's time limit for non-electronically processed swaps and the Processing Rule's outer time limit should be "within 24 hours" instead of by the end of the day. Notably, this would also harmonize the Commission's time periods with the SEC's time periods for confirmation.<sup>41</sup> Additionally, we urge the Commission to create separate time periods for acknowledgment and confirmation so that an SD sending an acknowledgment, for example, is not responsible for its counterparty executing a confirmation within the applicable time limits. And finally, we believe that the definition of "Processed Electronically," the application of which determines the amount of time that counterparties have to confirm a transaction, must take into account whether the transaction details are *communicated* electronically, because non-electronically communicated data will slow down the confirmation process.

### **3. The Commission Should Require Providers of Independent Verification Services to Register and Meet Certain Minimum Requirements in Order to Harmonize its Rules With the SEC, Avoid Regulatory Arbitrage, and Comply with the President's Executive Order**

The SEC has proposed that certain providers of post-trade services for security-based swaps ("**SB swaps**"), including entities that provide confirmation or matching services, be required to register with the SEC as Clearing Agencies.<sup>42</sup> No similar rule has been proposed by the Commission, however. We are providing more detailed comments on this topic under a separate letter, but wish to additionally comment on this subject here as it relates the Commission's mosaic of rules.

We believe that the SEC's proposal will have a profound impact on market participants that we refer to as providers of Independent Verification Services ("**IVS**"). We define IVS as "entities that act independently from

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<sup>38</sup> Currently, fund managers typically attempt to complete this allocation by the end of the day. However, because swaps entered into by fund managers can usually be processed electronically, fund managers would likely have to confirm transactions within 15 or 30 minutes under the Confirmation Rule.

<sup>39</sup> See Confirmation Rule, 75 Fed. Reg. at 81521 ("the DCO will require a definitive written record of all terms to the counterparties' agreement prior to novation by the DCO.").

<sup>40</sup> See MarkitSERV Letter to the Commission p. 5 (April 11, 2011) (regarding Requirements for Processing, Clearing, and Transfer of Customer Positions); MarkitSERV Letter to the Commission pp. 7-10 (Feb. 28, 2011) (regarding Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for SDs and MSPs).

<sup>41</sup> See Trade Acknowledgment and Verification of Security-Based Swap Transactions, 76 Fed. Reg. at 3874 (to be codified at 17 C.F.R. § 240.15Fi-1(c)(iii)).

<sup>42</sup> See SEC Rule: Clearing Agency Standards for Operation and Governance, 76 Fed. Reg. 14472, 14495 (published March 16, 2011).

and on behalf of both counterparties of a swap or SB swap to facilitate the agreement of a verified record of the complete transaction details that is used for subsequent processing.” We are concerned that IVSs will be drawn to activities that are unregulated not only because of the lower cost of participation but because of the freedom associated with being an unregulated entity. Thus, given the difference between the SEC’s and the CFTC’s approach, IVSs will be disinclined to participate in the SEC-regulated markets where they would be required to register.<sup>43</sup>

We believe that, in order to encourage the use and provision of Independent Verification Services as the Commission has stated it intends to do,<sup>44</sup> the Commission and the SEC must agree on how to treat IVSs. The performance of these services in the CFTC- and SEC-regulated markets will be nearly identical, so there is no practical reason for such a large disparity in treatment of these different entities. Additionally, we believe that the CFTC and SEC should harmonize their rules in this area in order to comply with the President’s Executive Order regarding Improving Regulation and Regulatory Review. In that order, the President stated that “[s]ome sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping,” and therefore requires that, “[i]n developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote . . . coordination, simplification, and harmonization.”<sup>45</sup> Regulating IVSs under the SEC but not under the CFTC is just the kind of inconsistent regulatory requirements proscribed by this Order, so we strongly urge the Commission and the SEC to harmonize their rules.

In order to harmonize the rules, we urge the CFTC to require IVS to register with the Commission and to meet certain minimum requirements. We believe that confirmation and matching services are important functions, so we do not object to the SEC regulating IVSs to some degree. However, we strongly believe that these entities should not be subject to the full set of regulations applicable to other entities, including, for example, governance rules grounded in conflict of interest concerns.<sup>46</sup> Conflict of interest concerns applicable to traditional Clearing Agencies are inapplicable to IVSs, so they should be subject to a lesser degree of regulation. We expand upon this more in the separate letter specifically addressing this issue.

\* \* \* \* \*

MarkitSERV appreciates the opportunity to comment on the Commission’s proposed rules, and would be happy to elaborate or further discuss any of the points addressed above.

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

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<sup>43</sup> They also will likely be drawn to IVS functions that do not fall under the SEC’s definition of “Clearing Agency.” For example, the SEC has proposed to include within the Clearing Agency definition facilities that perform an independent comparison of data which results in the issuance of binding matched terms, but not the provision of “preliminary comparisons” that do not result in the issuance of legally binding terms. Thus, we believe that the SEC’s rule inadvertently and incorrectly encourages IVS providers who provide less legal certainty than other providers.

<sup>44</sup> See Confirmation Rule, 75 Fed. Reg. at 81523 (“ . . . the Commission encourages the continued use and expansion of [matching] services. . .”).

<sup>45</sup> Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, 3822 (published January 21, 2011).

<sup>46</sup> See SEC Rule: Clearing Agency Standards for Operation and Governance, 76 Fed. Reg. 14472, 14488 n.73 (“The role of governance arrangements in promoting effective risk management has also been a focus of rules recently proposed by the Commission to mitigate conflicts of interest at security-based swap clearing agencies.”)

Mr. David Stawick  
June 3, 2011  
Page 10

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Gooch".

Jeff Gooch  
Chief Executive Officer  
MarkitSERV

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