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October 25, 2010

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

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

Re: Swap Execution Facilities under Dodd-Frank

Secretary Murphy, Secretary Stawick:

The undersigned firms (the "Firms") welcome the opportunity to provide the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC" and, together with the SEC, the "Commissions") with some preliminary observations on provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") applicable to swap and security-based swap execution facilities (collectively, "SEFs") and related transaction reporting requirements. The Firms appreciate the Commissions' open and transparent approach to the administrative implementation of Dodd-Frank.[1]

INTRODUCTION

The provisions of Dodd-Frank applicable to SEFs will regulate a competitive marketplace of platforms for the execution of swaps.[2] The number and variety of these platforms, on which a significant portion of swaps trading activity will occur, reflect the diversity

[1] This letter memorializes and elaborates on a telephone conference held on August 12, 2010 and a meeting held on September 17, 2010 between members of the Commissions' staff and representatives of the Firms.

[2] For convenience, references in this letter to "swaps" are also intended to include "security-based swaps."

and characteristics of the products traded on these platforms. As a result, these statutory provisions, including the SEF definition itself,[3] the provision requiring registration as a SEF[4] and the core principles required to be satisfied by SEFs,[5] require interpretation in order to arrive at a coherent statutory framework for SEFs that implements congressional intent and accords with governing principles of statutory construction, while promoting competition among platform models and fostering continued product innovation.

Congressional intent under Dodd-Frank seems clear: swaps subject to the requirements of CEA Sec. 2(h)(8) or SEA Sec. 3C(h) (collectively, the "mandatory trading requirement") are intended to be executed, if not on a designated contract market or securities exchange (each, an "exchange"), then on a facility whose characteristics might vary, within prescribed parameters, from the characteristics of an exchange. A qualifying facility must also be capable of satisfying applicable core principles. Swap transactions that are not subject to the mandatory trading requirement would continue to be executable by and with swap dealers and major swap participants ("MSPs")[6] on a bilateral basis in the so-called "over-the-counter market," in accordance with applicable reporting, business conduct and related statutory requirements.

In order to give content to Dodd-Frank's statutory framework for SEF regulation in a manner consistent with congressional intent, the Commissions must construe Dodd-Frank's SEF definition, its provision requiring registration as a SEF, and the core principles applicable to SEFs.

DISCUSSION

I. The SEF Definition

Dodd-Frank defines a SEF as a "trading system or platform" that provides "multiple participants [with]…the ability to execute or trade swaps by accepting bids and offers made by multiple participants."[7] The statutory context and legislative history of this definition both suggest that Congress intended that the SEF definition encompass a broader range of execution platforms than exchanges. We believe that the statutory text, and its evolution in the course of congressional consideration of Dodd-Frank, accord with this intent.

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[3] See Commodity Exchange Act as amended by Dodd-Frank ("CEA"), Sec. 1a(50); Securities Exchange Act of 1934 as amended by Dodd-Frank ("SEA"), Sec. 3a(77).

[4] See CEA Sec. 5h(a)(1); SEA Sec. 3D(a)(1).

[5] See CEA Sec. 5h(f); SEA Sec. 3D(d).

[6] For convenience, references in this letter to "swap dealers" are also intended to include security-based swap dealers and references to MSPs are also intended to include major security-based swap participants.

[7] See note 3, supra.

The SEF definition differs from the definition of "trading facility" in the CEA.[8] It also differs from the definition of "exchange" in the SEA[9] as well as the text of SEA Rule 3b-16 further defining the term "exchange."[10] The establishment of a category of execution platform additional to and distinct from that of "exchange" and "trading facility" confirms that Congress intended the SEF definition to encompass a different category of facilities than that covered by either the definition of "trading facility" or "exchange." Had Congress intended SEFs to encompass only the central limit order book functionality of an exchange or trading facility, it would, as a matter of statutory presumption, have used the relevant definition(s).[11] Indeed, earlier versions of the bill specifically used the term "trading facility" in the SEF definition, but the term was expressly deleted in the legislative process leading up to enactment of Dodd-Frank. Additionally, certain SEF core principles, such as the core principle in the CEA applicable to position limits, explicitly distinguish between SEFs that are trading facilities and SEFs that are not.

Other changes made by Congress to the SEF definition near the end of the legislative process confirm that this departure from the text of existing statutory definitions was intentional and not inadvertent. Specifically, the legislative text used as the base text for the House-Senate conference defined a SEF as a "facility in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by other participants that are open to multiple participants …" (emphasis added).[12] This wording closely mirrors much of the wording in the CEA's existing "trading facility" definition. During the House-Senate conference, however, Congress specifically modified the SEF definition to require only that bids

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[8] Sec. 1a(34) of the existing CEA defines a trading facility as "a person or Firm of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions— (i) by accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or (ii) through the interaction of multiple bids or multiple offers within a system with a pre-determined non-discretionary automated trade matching and execution algorithm…" (emphasis added).

[9] See SEA Sec. 3(a)(1).

[10] Rule 3b-16 further defines the term "exchange" as "[a]n organization, association, or Firm of persons shall be considered to constitute, maintain, or provide 'a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,' as those terms are used in section 3(a)(1) of the [SEA], if such organization, association, or Firm of persons: 1. Brings together the orders for securities of multiple buyers and sellers; and 2. Uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade…"

[11] Applicable principles of statutory construction disfavor a construction that would render the SEF definition merely redundant of other existing definitions or that would fail to give meaning to the unique wording used in the SEF definition.

[12] See Conference Base Text (HR 4173), Sec. 721(a) (amending CEA Sec. 1a(50)).

and offers be "made by multiple participants" and deleted the requirement that these be bids and offers "made by other participants that are open to multiple participants" (emphasis added).[13]

In other words, in the context of the execution of an individual transaction, a participant's bid(offer) must have the ability to interact with multiple offers(bids) on the other side of the market, but need not interact or compete with multiple bids(offers) on the same side of the market, so long as multiple market participants can obtain access on the platform to bids and offers of multiple other participants on the other side of the market. This construction is consistent with the text of the SEF definition.[14] It is also consistent with the statutory objectives under the CEA of fostering enhanced pre-trade transparency and enabling market participants to benefit from quote competition.

Under this construction, a platform that enables multiple participants individually[15] to obtain access to and execute against the bids(offers) of multiple other participants would be encompassed within the SEF definition. Such platforms may encompass a variety of execution mechanics, including central order books, request-for-quotes systems, matching engines, platforms that provide access to quotations of multiple dealers with whom the market participant can execute, as well as brokerage facilities that enable market participants to access multiple quotations from swap dealers with whom they can execute. In addition to being faithful to the statutory text, the foregoing construction is necessary if the Commissions are to foster the use of, and competition between, execution models that are designed to accommodate the various types and characteristics of swaps that are expected to be, and in many cases will be required to be, executed on SEFs.

As noted above, to satisfy the SEF definition, a platform must afford participants seeking quotes "the ability" to access multiple bids(offers). Nothing in the definition specifies that any minimum number of participant quotes is necessary to satisfy the "multiple" participants requirement in the SEF definition. Similarly, nothing in the SEF definition requires that a participant request or seek any minimum number of quotes. More generally, Dodd-Frank does not specify in further detail the functionality, structure or other characteristics a SEF must have. Nonetheless, in order to qualify as a SEF, a facility must be able to satisfy the core principles made applicable to SEFs under Dodd-Frank.

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[13] See note 3, supra.

[14] Indeed, even in the context of a central limit order book, there is no assurance that there will even be any minimum number of resting bids(offers) on the opposite side of an individual market participant's offer(bid).

[15] The conclusion that the SEF definition only requires one participant to have the ability to access multiple quotes in the context of a single transaction is supported by the reference to "multiple bids and offers" in the provision. In the context of an individual transaction a participant on one side of the market would only access "bids or offers." It is only from the perspective of multiple transactions that market participants would have access to multiple bids and offers.

II. SEF Registration Requirement

In Dodd-Frank, Congress clearly intended to establish a framework under which certain swaps (those subject to the mandatory trading requirement) would be required to be executed on platforms falling within the SEF definition and other swaps (those not subject to the mandatory trading requirement) would be permitted to be executed on a bilateral basis, subject to applicable reporting, business conduct and other regulatory provisions.[16]

We note, however, that Dodd-Frank also includes a provision specifying that "[n]o person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or as a designated contract market."[17] Read broadly, this provision could be construed as imposing a SEF registration requirement on any platform or system (whether or not electronic) for the execution or processing of swaps to the extent it is deemed to be a "facility," including existing platforms and systems used for the execution and processing of swaps that will not be subject to the mandatory trading requirement. Indeed, even executions directly with swap dealers or using an individual dealer's execution functionality or trade processing systems could be captured under such a broad reading.

Any such broad reading of the registration requirement must, for a number of reasons, be rejected as inconsistent with the framework established under Dodd-Frank.

If the registration requirement were read to require that any swap dealer or other organization that provides a "facility" (broadly construed under common parlance) for swap execution or processing must register as a SEF, all swaps would, in effect, become subject to the mandatory trading requirement, including bespoke swaps and other swaps that are not subject to the mandatory clearing requirement. Indeed, even swaps that are exempted by a Commission from the mandatory trading requirement specifically because the Commission determines that the swap cannot be executed on a SEF would be required to be executed on a facility registered as a SEF under this reading. Ignoring the impact this would have on the availability of non-standardized swaps, any such reading of the SEF registration requirement would render meaningless all the provisions of Dodd-Frank specifying the circumstances under which a swap will be subject to the mandatory trading requirement.

A broad reading of the SEF registration requirement would also, in effect, render the SEF definition superfluous, as SEF registration would not depend at all on whether a so-called facility for the execution or processing of swaps actually fell within the SEF definition. It bears noting that any facility that registers as a SEF must be able to satisfy the core principles applicable to SEFs (as well as any ownership or governance restrictions the Commissions may

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[16] See, e.g., CEA Secs. 2(h)(8) (mandating execution on a designated contract market or SEF only for swaps subject to the mandatory clearing requirement that are not otherwise exempt from the execution requirement) and 5h(d) (providing authority for the Commissions to define "the universe of swaps" that can be executed on a SEF and providing that other swaps "may be executed through any other available means of interstate commerce").

[17] See note 4, supra.

adopt in the case of SEFs). As a consequence, execution facilities incapable of satisfying the requirements applicable to SEFs would become unavailable even for the execution of swaps that will not be subject to the mandatory trading requirement. Market participants would also have no way of processing their swaps, including recording them on their own books and records.

However, nothing in Dodd-Frank or its legislative history suggests that Congress intended to restrict the bilateral or other execution models that could be used in the case of swaps that will not be subject to the mandatory trading requirement.

In short, neither the text of the statute nor the legislative history supports any of the alternative interpretations of the registration provision outlined above that would require the registration of facilities that do not meet the definition of SEF.[18] As a result, the Commissions must give content to the term "facility," as it is used in the SEF registration requirement, that accords with the statutory framework and principles of statutory construction.[19]

To accomplish this result, the term "facility" in the SEF registration requirement must be construed as referring to a facility that falls within the SEF definition (in the case of a facility on which only eligible contract participants ("ECPs") may transact in swaps) or a facility that is a designated contract market (in the case of a facility on which either ECPs or non-ECPs may transact in swaps). Any broader construction of the SEF registration requirement would require that the Commissions interpret the SEF definition and SEF core principles in a manner that would accommodate the full range of bilateral transaction execution models and trade processing systems that are necessary to support the execution and processing of non-standardized and less liquid swaps that will not be subject to the mandatory trading requirement.

III. Core Principles

Under Dodd-Frank, registered SEFs will be required to comply with certain core principles specified in the CEA and SEA. Many of these core principles are based on core principles in the CEA applicable to designated contract markets and include obligations that require interpretation in the case of SEFs that do not operate a central limit order book, have an integrated clearinghouse or act as a central counterparty. As noted above, Congress did not impose any requirement that a SEF operate a central limit order book, have an integrated clearinghouse or act as central counterparty.

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[18] On the other hand, the Commissions should consider permitting facilities falling outside the SEF definition to voluntarily register as SEFs, provided that such entities can demonstrate that they are capable of satisfying the core principles. This would be in keeping with CEA Sec. 5h(f)(1) and SEA Sec. 3D(d)(1), which provide SEFs with reasonable discretion over the manner in which they comply with the core principles in order to register and maintain registration as SEF.

[19] In addition to their inherent interpretational authority, Dodd-Frank additionally authorizes the Commissions to further define terms used in the statute. See Dodd-Frank Secs. 721(b), 721(c) and 761(b).

Subject to parameters that may be established by the Commissions, SEFs are afforded discretion under Dodd-Frank with respect to the manner in which they implement the core principles. We have summarized below suggestions for the implementation of certain core principles specifically in the case of certain types of SEFs that operate outside of the vertically integrated exchange-clearing paradigm common to the futures markets. We believe these proposals achieve the statutory objectives underlying the core principles while also providing the flexibility that is appropriate to accommodate the full range of execution platforms intended by Congress to qualify as SEFs.

There are many additional and potentially significant issues that will undoubtedly need to be addressed by the Commissions in applying the SEF core principles, and the Firms urge the Commissions to solicit public comment in connection with the adoption of any related interpretations or constructions. The Commissions will, for example, need to give thought to the standards that will be appropriate for ensuring orderly markets on SEFs and that non-professional market participants obtain the protections afforded by transacting on SEFs with, or through the intermediation of, market professionals that are Commission registrants.[20]

A. Compliance with Rules

SEFs are required to establish and enforce rules relating to the terms and conditions of executed transactions, access, trading, governance and compliance with Dodd-Frank.[21]

A SEF should be deemed to satisfy this requirement in circumstances where its rules (or other terms of participant access)[22] impose the requirement that participants comply with applicable SEF rules and legal requirements and terms of participation; entitle and require the SEF to terminate platform access based on violations of the SEF's rules and/or applicable law; and require the SEF to refer violations of applicable law (where there is a reasonable basis for believing that a violation has occurred)[23] to the CFTC and/or SEC as appropriate and, if applicable for the relevant SEF participant(s), an SRO.

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[20] We note in this context the role that designated market makers and specialists play in promoting orderly markets and professional standards of conduct.

[21] See CEA Sec. 5h(f)(2) and SEA Sec. 3D(d)(2).

[22] For ease of reference we use the term "rules" in this letter to refer to terms and conditions of participation whether denominated as rules or as contractual terms of participation on the SEF.

[23] To the extent that a SEF is also obligated to conduct an inquiry into a suspected violation of applicable law (e.g., a failure to comply with a mandatory clearing requirement), the SEF should be permitted to outsource that obligation to a self-regulatory organization ("SRO"), or other qualified organization, while remaining responsible for the due performance of such inquiries.

B. Swaps not Readily Susceptible to Manipulation

SEFs must only permit trading in swaps that are not readily subject to manipulation.[24]

A SEF should be deemed to satisfy this requirement if its rules governing listing standards and execution are not designed in a manner that facilitates manipulation and the SEF does not list for trading any swap that the CFTC or SEC determine to be readily subject to manipulation.

C. Monitoring of Trading and Trade Processing

SEFs will be required to define and monitor trading procedures and trade processing.[25]

The Commissions should work with SEFs seeking registration to establish collaborative procedures with an SRO or the relevant Commission for reviewing swap execution data and generating appropriate exception reports identifying activity that may potentially evidence a rule violation. What is appropriate for an individual SEF should be evaluated based on the characteristics of the SEF's execution model. SEFs should be permitted to outsource the relevant monitoring and reporting activities to appropriately qualified organizations, while retaining responsibility for their due performance. Violations should be handled in accordance with the core principle for "Compliance with Rules," described above.

D. Ability to Obtain Information

SEFs will be required to establish and enforce rules that will allow the facility to obtain any necessary information to perform its functions, provide such information to the relevant Commission on request, and have the capacity to carry out such international information-sharing agreements as the Commissions may require.[26]

A SEF should be able to satisfy these requirements through the adoption of rules that authorize the SEF to provide the needed information to the relevant Commission and require market participants to provide to the SEF, on demand, any additional required information relating to their trading activities on the SEF.

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[24] See CEA Sec. 5h(f)(3) and SEA Sec. 3D(d)(3).

[25] See CEA Sec. 5h(f)(4) and SEA Sec. 3D(d)(4).

[26] See CEA Sec. 5h(f)(5) and SEA Sec. 3D(d)(5).

E. Position Limits and Accountability

A SEF that is a "trading facility" (as defined in the CEA) will be required to adopt position limitations or accountability standards at levels no higher than the limits and levels set by the CFTC.[27] SEFs will also be required to monitor positions to ensure compliance with the CFTC's or its own limits.

A SEF should be deemed to satisfy these requirements in the following ways. If the SEF acts as central counterparty and knows each participant's trades, the SEF would be obligated to monitor its aggregate position with each participant to whom it is a counterparty and to block any execution that would cause the aggregate position with the participant to which it is a counterparty to exceed the relevant limits. (In the event that the SEF does not know a participant's individual trades as a result of transaction intermediation arrangements, additional or alternative measures would be necessary involving the Commission's large trader reporting framework.) Whether or not the SEF acts as a central counterparty, if the SEF receives notice from the Commission that a participant is exceeding position limits, the SEF would be obligated to block any subsequent execution on the SEF by the relevant participant (in the relevant swap) that does not reduce excess exposure. Other measures will be appropriate to ensure the integration of SEFs into the Commissions' large trader reporting and position limit frameworks.

F. Financial Integrity of Transactions

SEFs will be required to "establish and enforce rules and procedures for ensuring the financial integrity of swaps," including for their clearance and settlement.[28]

A SEF should be deemed to satisfy this requirement in circumstances in which it (1) requires that each swap executed on the SEF be executed by ECPs and either (a) be submitted to a duly registered or exempt clearinghouse in compliance with applicable law (where required) or (b) in the case of transactions not subject to the mandatory clearing requirement, be governed by legally enforceable bilateral transaction documentation and (2) requires, in the case of trades not subject to the mandatory clearing requirement or given-up to another swap dealer, that each dealer participant conduct an internal credit review of the participants "permissioned" to execute bilateral transactions with it or to clear through it or its affiliate and comply with its internal credit risk management policies and procedures implemented by the swap dealer and disclosed to the swap dealer's relevant prudential regulator with respect to its permissioned customers.

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[27] This core principle does not apply to security-based swap execution facilities. Cf. CEA Sec. 5h(f)(6) with SEA Sec. 3D(d).

[28] See CEA Sec. 5h(f)(7) and SEA Sec. 3D(d)(6).

G. Emergency Authority

SEFs will be required to adopt rules providing for the exercise of emergency authority as necessary and appropriate and in consultation with the SEC or CFTC.[29]

A SEF should be deemed to satisfy this requirement by including in its rules authorization, upon a determination by the SEF in consultation with the relevant Commission that an emergency condition exists, or notice from a Commission that emergency authority is required to be exercised, to take such actions as the Commission or the SEF determines appropriate in order to address the emergency.[30] The SEF's rules should also be required to authorize the SEF, in the case of an emergency, to extend or shorten trading hours, impose trading halts or trading limits or take other similar measures.

IV. Block Trades and Public Trade Reporting

Dodd-Frank requires that SEFs establish "rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades" (emphasis added).[31] Designated contract markets already have such rules in the context of futures transactions and may provide a useful model for SEF block trading rules. Moreover, the Commissions are authorized under Dodd-Frank to promulgate rules defining the universe of swaps that can be executed on a SEF, provided that those rules "take into account the price and nonprice requirements of the counterparties to a swap" and the goals of promoting trading of swaps on SEFs and pre-trade price transparency in the swaps market.[32]

These statutory requirements recognize the fact that, in order for professional intermediaries to provide liquidity and risk intermediation to counterparties with large or illiquid risk exposures, the statutory framework must accommodate the bilateral execution of such transactions and the delayed public reporting (as opposed to regulatory reporting) of such transactions. This need exists equally in the case of block-size transactions that are not subject to the mandatory trading requirement. The Dodd-Frank public transaction reporting requirements expressly recognize the need for delayed public reporting of block transactions.[33]

In order for either of these provisions to achieve their statutory purpose, however, the Commissions must establish a reporting framework that takes into account the specific

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[29] See CEA Sec. 5h(f)(8) and SEA Sec. 3D(d)(7).

[30] A number of practical considerations may be presented by the need for emergency actions, such as the appropriate mechanisms for liquidating, or generating orders to liquidate or reduce, outstanding positions. We would be pleased to provide further comment in relation to mechanisms that may be appropriate for accomplishing these objectives.

[31] See CEA Sec. 5h(f)(2)(C) and SEA Sec. 3D(d)(2)(C).

[32] See CEA Sec. 5h(d)(1). This provision applies both to the SEC and the CFTC, although it is only present in the CEA.

[33] See CEA Sec. 2(a)(13)(E) and SEA Sec. 13(m)(1)(E).

liquidity/illiquidity characteristics of the relevant swap transaction. Unless the risk intermediary has the necessary opportunity, prior to public disclosure of its risk position, to lay off or hedge that risk, end users with large exposures will either not have access to such liquidity and risk intermediation or will be required to assume additional, frictional costs of execution that may be uneconomic.

The Firms recognize that existing frameworks, such as the Trade Reporting and Compliance Engine ("TRACE"), provide appealing models for the Commissions. However, the Firms do not believe that the wholesale adoption of the TRACE model (or a similar, uniform reporting model) is an appropriate regulatory goal. Swaps vary widely in the economic terms and data elements that define them. Their liquidity characteristics also vary widely and have proven to be dynamic. A product-oriented reporting framework that utilizes a scaled and more granular approach[34] will likely be more adaptive and effective in balancing the statutory objectives of transparency and liquidity. Accordingly, the Firms recommend that the Commissions solicit specific comment on an appropriate public reporting framework for swaps. The Firms further commend to the Commissions' attention the framework established under the European Union's Markets in Financial Instruments Directive for public transaction reporting in the equity market.[35] This framework establishes reporting intervals based on a matrix that looks both to the characteristics of the individual transaction and the liquidity characteristics of the market for the relevant security.

We believe an analogous framework would faithfully and effectively implement Dodd-Frank's transparency and liquidity objectives. We therefore recommend that the Commissions adopt such a similar approach to the public reporting of block-size transactions (whether or not subject to the rules of a SEF), in order to preserve the ability of end users to access risk intermediation for their largest and most significant risk exposures without adverse impacts on costs of execution or liquidity.

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[34] For example, the Commissions may wish to consider the advisability of multiple, but product aligned, reporting models. One benefit of such an approach would be an increase in registrants' ability to meet their reporting requirements.

[35] See also Committee of European Securities Regulators, CESR Technical Advice to the European Commission in the Context of the MiFID Review: Review and Responses to the European Commission Request for Additional Information, July 29, 2010. Available at http://www.cesr.eu/data/document/Compiled_version_Technical_Advice_and_Additional_Information_MiFID_Review.pdf.

The Firms appreciate the opportunity to comment on the SEF provisions of Dodd-Frank. We would be pleased to provide further information or assistance at the request of the Commissions or their staffs. Please do not hesitate to contact Edward J. Rosen (212 225 2820) of Cleary Gottlieb Steen & Hamilton LLP, outside counsel to the Firms, if you should have any questions with regard to the foregoing.

Respectfully submitted,

Edward J. Rosen, for

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UBS Securities LLC
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