April 8, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

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

Dear Ms. Murphy:

The American Benefits Council (the "***Council***") appreciates this opportunity to provide comments to the Securities and Exchange Commission (the "***SEC***" or "***Commission***") regarding the proposed rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("***Dodd-Frank***")[1] relating to registration and regulation of security-based swap execution facilities (the "***Proposed Rule***").[2]

The Council is a public policy organization principally representing Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

IMPORTANCE OF SECURITY-BASED SWAPS TO PENSION PLANS

Pension plans use security-based swaps ("***SB swaps***") to manage risk and to reduce the volatility of the plan funding obligations imposed on the companies maintaining the plans. If SB swaps were to become materially less available or become significantly more costly to pension plans, funding volatility could increase. This would in turn undermine the retirement security of the millions of Americans who rely on their pensions for such security.

Increased funding volatility would also force companies in the aggregate to reserve additional amounts to satisfy possible funding obligations, most of which may never need to be contributed to the plan because the risks being reserved against may never materialize. Those greater reserves would have a significant effect on the working capital that would be available to companies to create new jobs and for other business activities that promote economic growth.

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[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

[2] Registration and Regulation of Security-Based Swap Execution Facilities; Proposed Rule, 76 Fed. Reg. 10948 (proposed Feb. 28, 2011); see also the comments filed by CIEBA and the Council with the Commodity Futures Trading Commission on March 8, 2011, available at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=955.

SUMMARY

As further discussed below, we believe that:

- Pension plans should be able to transact on an over-the-counter ("***OTC***") basis if they send requests for quotes (**"*RFQs*")** and either no parties provide a responsive quote or trading with the responding party would be a non-exempt "prohibited transaction" under ERISA, and thus illegal;
- Resting bids or offers on the Limit Order Book of a security-based swap execution facility ("***SB SEF***") should not be automatically executed against any related RFQs that are sent out because the requesting party may decide against executing the transaction based on the quotes received, and because under certain circumstances it is illegal for pension plans to enter into transactions with certain parties;
- Market participants should be permitted to execute block trades off of SB SEFs because the type of pre-trade transparency that accompanies execution on SB SEFs will increase the cost of hedging these transactions;
- Counterparties should be permitted to communicate prior to execution of a transaction so long as they execute the transaction on a SB SEF;
- The Commission should codify its proposal to establish criteria for the determination of whether SB swaps are "available to trade" and we also believe that the Commission should ultimately decide which SB swaps meet this criteria;
- After one year of data collection and analysis, the Commission should be able to designate swaps as made available for trading according to a procedure similar to that established under Dodd-Frank for cleared contracts, including a public comment period;
- The Commission should codify its proposal to permit RFQs to be sent to as few as one liquidity provider because it may increase costs in some circumstances to send RFQs to multiple liquidity providers;
- SB SEFs should be free to offer market participants any type of trading platform that meets the Commission's definition of SB SEF, as the Proposed Rule permits, and should not be limited to any set types of platforms;
- The Commission should require SB SEFs to establish policies and procedures reasonably designed to prevent any provision in a valid swap transaction from being invalidated or modified through the utilization of, or execution on, a SB SEF; and
- The Commission should sequence its rules so that it can collect at least one year of data before implementing the Proposed Rule to ensure that the Commission will have sufficient data to analyze before making a proposal regarding which SB swaps are "available to trade".

COMMENTS

We appreciate the Commission's commitment to balancing the need for market reform and the practical effects that regulation will have on industry and the economy. For the most part, we support the SEC's well-thought out rules. Nevertheless, we believe that the Commission should consider the following points in order to further refine its proposed rulemaking.

I. In the Absence of Quotes from Qualified RFQ Providers On a SB SEF, Plans Should Be Able to Execute Required Transactions Over-the-Counter.

Under ERISA, transactions between pension plans and certain persons, *e.g.*, "parties in interest" and fiduciaries, may be prohibited. We are concerned that situations may arise, particularly in illiquid markets, where a pension plan has requested quotes from potential market participants on a SB SEF and either: (i) none of such RFQ dealers provide a quote; or (ii) the only dealers to provide quotes are unable to execute the transactions as a result of legal restrictions under ERISA. In both of these circumstances, we believe the Commission should allow pension plans to conduct the SB swap transaction on an OTC basis.

We note that even transactions that are executed OTC can be subject to post-trade transparency requirements. SB SEFs could therefore still require that these transactions be entered into an audit trail system and become a part of the composite indicative quote. Therefore, by adopting this approach, the Commission could permit flexibility for particularly illiquid transactions in order to encourage innovation and new markets, while at the same time ensuring price discovery and transparency that would facilitate competition.

II. Resting Bids and Offers Should Not Be Automatically Executed Against RFQs.

We believe that the Commission correctly proposed the "baseline approach" to permit SB SEFs to offer various types of execution platforms, including RFQ and Limit Order Book systems.[3] We also support the SEC's approach of not specifically prescribing how transactions not subject to the clearing requirement and not determined to be "available to trade" should be executed, and only describing execution methods of transactions subject to the clearing requirement and determined to be "available to trade".[4] We believe that the Commission should not limit the manner of execution of swaps not subject to the clearing requirement and not "available to trade" because Dodd-Frank only requires swaps subject to the clearing requirement which are "available to trade" to be traded on SB SEFs.[5]

Nonetheless, we are troubled by the footnote in the preamble to the Proposed Rule which states that, if an SB SEF operates both an RFQ and Limit Order Book system, the SB SEF system would be *required* to execute any resting orders on its Limit Order Book system against any RFQs for that same SB swap if the resting order is at the same or better price as the RFQ response(s).[6] We believe it would be reasonable to require RFQ requesters to be *shown* any resting bids or offers posted on a SB SEF's Limit Order Book, but we do not believe that these

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[3] *See* Proposed Rule, 76 Fed. Reg. at 10955 ("The Commission's proposed interpretation of the definition of SB SEF would result in permitting to be registered as SB SEFs systems or platforms for the trading of SB swaps with a variety of features, and not just those systems or platforms with exchange-like features. . . .").

[4] *See id.* at 10974 (discussing block trades and stating that "until a SB swap [] is determined to be subject to the mandatory clearing requirement, . . . the SB swap could be traded in block size off a SB SEF or exchange.")

[5] *See* Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq*. (the "***Exchange Act***"), Section 3C(h). We note that the rules prescribing whether a SB swap is "available to trade" "shall take into account the price and nonprice requirements of the counterparties to a swap and the goal of this section. . . ." Dodd-Frank § 733 (adding Commodity Exchange Act Section 5h(d)(1).

[6] *See* Proposed Rule, 76 Fed. Reg. at 10974 n. 163 ("If the resting limit order has a price equal to or greater than the price at which a response(s) comes back in the RFQ mechanism to execute the RFQ order, the SB SEF system would be *required* to execute . . . the RFQ order against the resting limit order. . . .").

resting orders should be automatically executed. In contrast, the SEF rule proposed by the Commodity Futures Trading Commission ("***CFTC***") only requires that resting bids or offers be "taken into account and communicated to the requester along with the responsive quotes."[7] The CFTC's rule, therefore, does not require requesting parties to act upon any resting bids or offers.

Market participants using an RFQ system may decide that they do not want to consummate a trade based on the responses received from an RFQ. Using the Commission's illustration, for example, if a market participant sends an RFQ for 100,000 notional in SB swap A, and there is a 5,000 notional resting order on the SB SEF's Limit Order Book in that same SB swap, the requesting party may not want to consummate that transaction if the only available interest in that SB swap is that resting order. This example illustrates that Limit Order Book systems are only well suited for liquid markets.

Additionally, a requirement that resting bids and offers be automatically executed may pose particular problems for pension plans. Under ERISA, transactions between pension plans and certain persons, *e.g.*, "parties in interest" and fiduciaries, may be prohibited. Without further clarification by the Commission, we are concerned that a pension plan could be required to enter into an illegal transaction because it chose to send an RFQ and a party in interest had already placed a resting bid on the SEF's Limit Order Book.

We therefore respectfully request that the Commission only require SB SEFs to make requesting parties aware of resting bids in the same SB swap which are at a price equal to or greater than the price at which any RFQ responses come back.

III. Block Trades Should Be Permitted to Be Executed Off of SB SEFs.

Under Regulation SBSR, "block trade" means "a large notional security-based swap transaction that meets the criteria set forth in § 242.907(b)."[8] Section 242.907(b) states that SDRs will establish criteria for determining block trade thresholds in accordance with a yet-to-be-proposed formula which will be specified by the Commission. The Proposed Rule would require block trades to be subject to the same pre-trade transparency rules as those applicable to all other trades.[9] In contrast, the CFTC has proposed to permit block trades to be executed via voice methods, which would be "consistent with the use of voice in the futures market for executing block trades, where in light of the size of the trades, pre-trade transparency is not required."[10] The Commission requested comment on whether commenters agreed with its approach and whether pre-trade transparency is desirable for block trades.[11] In response, we believe that the Commission's requirement will significantly raise prices for block trades, that it

[7] Core Principles and Other Requirements for Swap Execution Facilities; Proposed Rule, 76 Fed. Reg. 1214, 1241 (proposed Jan. 7, 2011) ("***CFTC SEF Rule***") (to be codified at 17 C.F.R. § 37.9(a)(ii)(A)).
[8] *See* Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75208, 75283 (proposed Dec. 2, 2010) ("***Regulation SBSR***") (to be codified at 17 C.F.R. § 242.900).
[9] *See* Proposed Rule, 76 Fed. Reg. at 10974 ("block trades would still be subject to the various minimum requirements that the Commission has established with respect to pre-trade transparency.").
[10] CFTC SEF Rule, 76 Fed. Reg. at 1221.
[11] *See* Proposed Rule, 76 Fed. Reg. at 10974.

defeats much of the purpose of delayed post-trade reporting of block trades in Regulation SBSR,[12] and that it will impose inconsistent requirements on traders.

If information about block trades is displayed to SB SEF participants not party to the block trade, these other participants will be more able to trade ahead of the transactions necessary to hedge the risk associated with these block trades. For just this reason, Regulation SBSR requires security-based swap data repositories ("***SB SDRs***") to withhold public dissemination of block trades until either 7:00 UTC of the day following execution or until 13:00 UTC of the same day, depending upon when the trade was executed.[13] According to the Commission in Regulation SBSR, "[w]ith immediate real-time public dissemination of a block trade . . . market participants who might be willing to offset [] risk . . . could extract rents from a dealer that takes the risk from the natural long," which could lead to higher prices to dealers and natural longs, less liquidity in the market, and could potentially drive large traders to other markets.[14] Requiring market participants to execute these transactions on a SB SEF, which is then required to include the information on a composite indicative quote screen available to all SB SEF participants,[15] creates just the type of potentially damaging dissemination which Regulation SBSR sought to avoid.

The Commission states that exempting block trades from pre-trade transparency requirements "could circumvent the mandatory trade execution requirement. . . ."[16] We do not believe that is so because Dodd-Frank gives the Commission flexibility in promulgating rules regarding pre- and post-trade transparency of swaps executed on SB SEFs. Specifically, Dodd-Frank states that SEFs "shall make public timely information on price, trading volume, and other trading data on security-based swaps *to the extent prescribed by the Commission*."[17] Thus, even swaps that are traded on SB SEFs are only subject to pre-trade transparency requirements to the extent prescribed by the Commission.

Therefore, in order to encourage parties to engage in block trades in the SB swap market and ensure consistency in rules regarding trading practices, we respectfully believe that the Commission should permit block trades to be executed outside of SB SEFs, or to be exempt from pre-trade transparency requirements.

IV. Counterparties Should Be Able To Communicate Prior to Execution As Long As the Trade is Executed on a SB SEF.

The Proposed Rule is unclear on what limitations, if any, apply to communicating with a potential counterparty prior to making a trade.[18] Parties to a transaction frequently negotiate prices with dealers prior to entering into a transaction, and we believe that this free flow of information assists market participants in finding the most appropriate products at the best

[12] *See* Regulation SBSR, 75 Fed. Reg. at 75285-86 (to be codified at 17 C.F.R. § 242.902(b)).
[13] *See id.*
[14] *See id.* at 75225.
[15] *See* Proposed Rule, 76 Fed. Reg. at 10972 n.152.
[16] *Id.* at 10974.
[17] Dodd-Frank § 763(c), adding Exchange Act Section 3D(d)(8) (emphasis added).
[18] The Proposed Rule mentions that an advantage to requiring RFQs to be sent to more than one liquidity provider is that the requester may get a better price than the "pre-arranged" transaction it negotiated with a dealer. This implies that such pre-trade negotiation would be permitted, but the rule does not explicitly address the issue.

available prices. This is a long-standing practice, for example, applicable to designated contract markets ("***DCMs***"), where parties can pre-negotiate certain transactions before posting those transactions on the DCM within a certain time frame, such as 5 seconds. Particularly for block trades, it is a common practice for traders to call several dealers and pre-negotiate an offsetting trade and then enter into such trade and the offsetting trade(s). Conversely, if no trader is willing to enter into offsetting trades of this size, traders may offer to enter into a trade of a smaller size and retain the risk until an offsetting trade can be made. We believe that this type of pre-trade interaction would meet the Commission's definition of a SB SEF so long as the parties comply with the requirement to execute the trade on the SB SEF. We therefore suggest that the Commission explicitly permit pre-execution communication between the counterparties for price discovery purposes in its final rule.

V. The Commission, Not SB SEFs, Should Decide Whether SB Swaps Are Made Available to Trade.

The Commission requested comment on whether it would be appropriate for the Commission, rather than one or a group of SB SEFs, to determine that a SB swap is "made available to trade."[19] We believe such an approach is appropriate and is the correct approach considering market realities. Under Dodd-Frank, all SB swaps subject to the clearing requirement must also be executed through a SB SEF or on an exchange if a SB SEF or exchange makes the SB swap "available to trade".[20] As a result, all market participants, including plans, will be required to trade a SB swap that is subject to mandatory clearing through SB SEFs or exchanges once that SB swap is determined to be made available to trade. We agree with the Commission that this is an important decision,[21] and therefore believe that the Commission correctly decided that it, rather than any SB SEF or group of SB SEFs, should develop objective measures to determine whether SB swaps are "made available to trade".[22]

In addition to creating the standards for determining whether a SB swap is "made available to trade", however, we believe that the Commission should ultimately decide which SB swaps satisfy those standards. If SB SEFs are permitted to ultimately decide whether swaps are "made available to trade", there will be tremendous incentives for each SB SEF to be the first to make this determination because that SB SEF, as the single trading facility at least temporarily, will have significant influence with respect to how the SB swap trades and the relevant costs and execution arrangements.

We also believe that the Commission is better positioned to make this ultimate determination. First, the Commission will have access to market-wide data, which we believe

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[19] *See* Proposed Rule, 76 Fed. Reg. at 10970.

[20] *See* Exchange Act, Section 3C(h).

[21] *See* Proposed Rule, 76 Fed. Reg. at 10968 ("the determination of what it means for a SB swap to be "made available to trade" . . . [is] central to the implementation of Title VII of the Dodd-Frank Act.").

[22] Under the CFTC's proposed rule, SEFs will determine whether swaps are "made available for trading," *see* CFTC SEF Rule, 76 Fed. Reg. at 1241 (to be codified at 17 C.F.R. § 37.10(a)), and if ***one*** SEF makes the swap "available for trading" designation, ***all other*** DCMs and SEFs will have to treat the same swap contract as made "available for trading". We do not agree with the CFTC's approach because we believe that, under that approach, one SEF, without any public comment and approval by the Commission, can bind the entire U.S. market to treating, for all market participants, a certain swap contract as "made available for trading". Particularly for illiquid markets, such designation may cause these markets to contract dramatically.

should be taken into consideration when determining whether a SB swap is "made available to trade". Second, as explained below, we believe that the determination that a SB swap is "made available to trade" should be presented for public comment even when such determination will be based on objective standards. (While the Proposed Rule requires SB SEFs to either approve their rules with the Commission or self-certify their rules, this procedure does not provide for public comment unless the Commission stays the certification of a rule.[23]) The Commission would be better able to solicit and review public comments on each determination than SB SEFs.

We therefore support and respectfully request that the Commission codify its proposal to establish an objective measurement to determine whether SB swaps are "made available to trade" and that the Commission also makes the important decision of which SB swaps actually meet those criteria.

VI. The Commission Should Collect One Year's Worth of Data Regarding SB Swap Liquidity Before Deciding Whether SB Swaps Are "Made Available to Trade"

We commend the Commission for acknowledging that there is currently insufficient data to propose the objective standards pursuant to which a determination will be made that a SB swap is "made available to trade".[24] Today, SB swap markets are not subject to any reporting regime. Accordingly, the true size of the SB swap market and other relevant basic swap market data are not known.

The Commission solicited comments regarding how to create an objective standard for determining whether SB swaps are "available to trade".[25] We believe that such standard should be based on a finding that there is a certain degree of liquidity in the trading of such SB swap. If illiquid SB swaps are required to trade on a SB SEF, plans will have less access to potential counterparties, thus reducing competitive pricing and increasing SB swap transaction prices for pension plans. In order to set a factually-based, rational formula identifying which SB swaps are liquid so that they can be deemed to be available to trade, the Commission must obtain and analyze the data obtained from OTC swap reporting to SB SDRs.

We strongly urge the Commission to wait until SB SDRs have collected one year's worth of data on SB swaps and then begin to develop criteria for determining if a market for a particular SB swap is sufficiently liquid such that it may be deemed available to trade on a SB SEF. Importantly, we believe that the Commission should not only analyze the SB swap's liquidity in determining whether a SB swap may be deemed available to trade on a SB SEF, but should also analyze the characteristics of the SB SEFs that list the SB swap (*e.g.*, number and types of participants, typical sizes of trades executed on the SB SEF in other types of SB swaps, etc.) to arrive at such a determination.

Given the episodic nature of SB swap transactions and liquidity, any less time would not provide a sufficient sampling of the market. Once SB SDRs have collected one year's worth of

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[23] *See* Proposed Rule, 76 Fed. Reg. at 11057 (to be codified at 17 C.F.R. §242.806(c)(2)).

[24] *See id.* at 10969 ("The Commission does not, however, have sufficient data at this time to propose the objective standards pursuant to which a determination whether a SB swap is 'made available to trade' would be made.").

[25] *See id.* at 10970 ("What would be an appropriate method or standards to determine whether a SB swap should be made available for trading?").

data on SB swaps, the Commission should analyze the data and propose formulas based on this data for determining whether a SB swap is available to trade, as well as what transactions for a particular SB swap should be considered "block trades."[26] We believe that any such proposed formulas should be subject to public comment.

This approach is consistent with Congressional intent. In a colloquy, Senator Blanche Lincoln, Chairwoman of the Senate Agriculture Committee and a key author of Dodd-Frank, confirmed that "block trades are transactions involving a very large number of shares or dollar amount of a particular security or commodity and which ***transactions could move the market price for the security or contract***."[27] Congress expects the Commission, in establishing what constitutes a block trade for SB swaps, to distinguish between different types of SB swaps based on the product, size of the market, term of the contract and liquidity in that contract and related contracts.[28] In other words, for each type of SB swap, Congress intends that any SB swap large enough that it would likely be expected to move the market price for the relevant contract in a material way be included as a block trade.

As alluded to by Senator Lincoln, in order to set a formula to define "block trades", it is necessary to first have available data that will inform the Commission as to the transaction involved, the size of the relevant market, the terms of the particular contract, and the liquidity in that contract and related contracts. (For example, a smaller notional amount of a SB swap in a less liquid contract would more likely be expected to move the market price materially for a contract than if the market for the contract were more liquid.) The same information that is necessary to determine what a block trade is for a particular SB swap market should be used by the Commission to determine whether a SB swap is available to trade.

Without actual available data regarding the size of the relevant market, the terms of the particular contract, and the liquidity in that contract and related contracts, the Commission cannot identify the threshold at which any given SB swap should be considered liquid enough to be deemed available to trade as well as the corollary threshold for a "block trade" for such SB swap.

VII. Commission Designation of Swaps as "Made Available to Trade" Should Be Subject to Public Comment.

After the Commission collects one year's worth of data, we believe that the Commission should determine whether swaps are "made available to trade" by following a process similar to

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[26] Under Regulation SBSR, "block trade" means "a large notional security-based swap transaction that meets the criteria set forth in § 242.907(b)." *See* Regulation SBSR, 75 Fed. Reg. at 75283 (to be codified at 17 C.F.R. § 242.900). Section 242.907(b) states that SDRs will establish criteria for determining block trade thresholds in accordance with a yet-to-be-proposed formula which will be specified by the Commission. The Proposed Rule would require block trades to be subject to the same pre-trade transparency rules as those applicable to all other trades. *See* Proposed Rule, 76 Fed. Reg. at 10974 ("block trades would still be subject to the various minimum requirements that the Commission has established with respect to pre-trade transparency."). In contrast, the CFTC has proposed to permit block trades to be executing via voice methods, which would be "consistent with the use of voice in the futures market for executing block trades, where in light of the size of the trades, pre-trade transparency is not required." CFTC SEF Rule, 76 Fed. Reg. at 1221.

[27] S5921, Congressional Record – Senate (July 15, 2010) (emphasis added).

[28] *Id.*

that established for the approval of SB swaps that would be subject to the clearing requirement.[29] This, therefore, would entail SB SEFs submitting to the Commission each SB swap it plans to accept for trading, and ongoing Commission review of those SB swaps to determine whether such SB swaps should be considered "available to trade". We believe that it is critical that plans and other non-member market participants have advance notice of SB SEF submissions. Because mandatory execution will have a very significant impact on every market participant, plans and other market participants should be granted the right to voice their views on a submission before it is made. Therefore, we request that the Commission clarify that any determinations made by the Commission that a swap is "available to trade" shall be subject to advance notice and public comment before becoming effective.

VIII. The Proposed Rule Correctly Permits Market Participants to Seek Quotes From As Few As One RFQ Provider.

Pension plan fiduciaries, particularly those advising pension plans under the ERISA,[30] are subject to the highest fiduciary standards under United States law. Under these standards, many pension plan fiduciaries find that it is in the best interest of a pension plan not to shop a potential trade to a large group of potential counterparties. One of the main reasons for limiting the number of potential counterparties is to lower the pension plan's transaction costs. If potential dealer counterparties believe that their trade with the pension plan will be known by other market counterparties, they may be reasonably concerned that it will be more expensive for the dealer counterparty to hedge the trade with the pension plan, and the dealer will necessarily protect itself from increased risk of hedging by raising the price of the transaction with the plan.

For these reasons, we also applaud the Commission for permitting RFQs to be sent to as few as one potential counterparty,[31] and request that the Commission codify this proposal in its final rule.

IX. The Commission Correctly Permits SB SEFs to Have Flexibility to Determine What Types of Trading Platforms to Offer to Market Participants.

Section 733 of Dodd-Frank adds Commodity Exchange Act Section 5h(d), which directs both the CFTC and the SEC on their rulemaking processes for defining whether swaps or SB swaps must be traded on a SEF of SB SEF. That section specifically states that "all swaps that are not required to be executed through a [SB SEF] … may be executed through any other available means of interstate commerce."[32] Dodd-Frank therefore only requires SB swaps subject to the clearing requirement and those SB swaps which are "available to trade" to be traded on SB SEFs,[33] and, unlike other provisions of Dodd-Frank, this section is not qualified by

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[29] *See* Exchange Act Section 3C(b).

[30] The Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (enacted September 2, 1974).

[31] *See* Proposed Rule, 76 Fed. Reg. at 10953 ("a SB SEF would be able to offer functionality to a participant . . . enabling that participant to choose to send a single RFQ to any number of specific liquidity providing participants, including just a single liquidity provider.").

[32] Commodity Exchange Act Section 5h(d)(2).

[33] *See* Exchange Act Section 3C(h). We note that the rules prescribing whether a SB swap is "available to trade" "shall take into account the price and nonprice requirements of the counterparties to a swap and the goal of this section. . . ." Dodd-Frank § 733 (adding Commodity Exchange Act Section 5h(d)(1)).

the phrase "except as provided by the Commission."[34] We therefore believe that the Commission correctly permits SB SEFs to offer market participants any type of trading platform which satisfies the Commission's definition of a SB SEF. We do not believe that the Commission should be required to affirmatively approve of each new type of trading platform, and therefore request that the Commission codify its open-ended definition of SB SEFs.

X. The Commission Should Require SB SEFs to Establish Policies and Procedures Reasonably Designed to Prevent any Provision in a Valid SB Swap Transaction from Being Invalidated or Modified Through the Utilization of, or Execution on, a SB SEF.

We believe that there are no circumstances under which a validly executed SB swap should be modified or altered by a SB SEF other than by the express agreement of the counterparties at the time of such modification or alteration. Dodd-Frank established that the Commission must determine whether a SB swap contract is required to be cleared[35] and only after that determination and the submission by a clearing agency to clear such contract, will a SB swap contract be required to be traded on an exchange or SB SEF. Under Dodd-Frank, the terms of a SB swap contract required to be cleared will never be established by a SB SEF nor should a SB SEF have the power to modify the terms of SB swap executed on it.[36]

Accordingly, we believe the Commission should establish by regulation that SB SEFs "***establish policies and procedures reasonably designed to prevent any provision in a valid SB swap transaction from being invalidated or modified through the utilization of, or execution on, a SB SEF***." In addition to requiring that SB SEFs maintain such policies and procedures, we respectfully request that the Commission clarify in its release accompanying the final rule that such policies and procedures are expected, among other things, to preclude the practice of changing SB swap terms agreed upon by counterparties through SB SEF agreements which require users to agree that changes to their SB swap terms by the SB SEF will be "deemed to have been accepted" by users if users utilize such SB SEF after notice of such term change. We believe that the Commission has the authority to adopt such a rule to prevent market participants from modifying SB swaps terms carefully negotiated by plans and other counterparties. We note that the Commission has proposed a similar rule for SB SDRs.[37]

XI. Sequencing Implementation.

Based on the practical implications of the foregoing discussion, all of the proposed rules relevant to the implementation of the mandatory execution of SB swaps on SB SEFs cannot be

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[34] *See, e.g.*, Exchange Act Section 3D(d)(1)(B) ("Unless otherwise determined by the Commission. . . .").

[35] *See* Exchange Act Section 3C(b)(2)(C)).

[36] On the contrary, SB SEFs may be tasked, in some circumstances, with *confirming* the accuracy of trades, rather than changing those terms. *See* Proposed Rule, 76 Fed. Reg. at 10975 ("Should the Commission require SB SEFs to compare and report confirmed trades to clearing agencies?"). In response to the Commission's question, we believe that SB SEFs should not be required to confirm any transactions because market participants should have the option of how to confirm trades whether or not they are executed on a SB SEF. In this regard, we note that execution, confirmation, and the creation of an audit trail are distinct actions, so executing a SB swap on a SB SEF will not automatically create a confirmation of a SB swap.

[37] *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. 77306, 77331 (proposed Dec. 10, 2010) (Section e: "Controls to Prevent Invalidation").

imposed on market participants at the same time. For example, SB swaps cannot be required to be traded on a SB SEF until a determination has been made that those SB swaps are subject to the mandatory clearing requirement and that those SB swaps are "available to trade". Therefore, we believe that the Commission must implement the relevant rules and perform the necessary tasks in the following order: (1) the Commission should impose reporting requirements through which SB SDRs will collect market data and report such data to the Commission, (2) the Commission should collect one year's worth of data and analyze that data, (3) the Commission should determine which SB swaps are subject to the mandatory clearing requirement and which SB swaps are "available to trade", and (4) those SB swaps that meet the statutory requirement should be mandatorily traded on SB SEFs.

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We thank the SEC for the opportunity to comment on the proposed rules on the SB swap execution facility requirements.

American Benefits Council

Cc: Chairman Mary L. Schapiro

Commissioner Kathleen L. Casey

Commissioner Elisse B. Walter

Commissioner Luis A. Aguilar

Commissioner Troy A. Paredes