SadisGoldberg LLP
ATTORNEYS AT LAW

551 Fifth Avenue, 21st Floor
New York, New York 10176
T: (212) 947-3793
F: (212) 947-3796

50 California Street, Suite 2320
San Francisco, California 94111
T: (415) 490-0561
F: (415) 391-1377

February 7, 2011

Via Internet: http://comments.cftc.gov
and rule-comments@sec.gov

Commodity Futures Trading Commission
1155 21st Street, NW
Washington, D.C. 20581
Attention: David A. Stawick, Secretary of the CFTC

Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549
Attention: Elizabeth M. Murphy, Secretary of the SEC

RE: **Proposed Rule on Real Time Public Reporting of Swap Transactions and Pricing Data (RIN: 3038-AD08); Proposed Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information (File No. S7-34-10)**

Ladies and Gentlemen:

We are responding to the invitations of the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC" and, together with the CFTC, the "Commissions") for comments to the CFTC's proposed rule governing the real time reporting of swap transaction data and the SEC's proposed Regulation SBSR, Reporting and Dissemination of Security-Based Swap Information (together, the "Proposals"). We appreciate the effort and consideration that the staffs of the Commissions have dedicated to developing the Proposals.

As background to our interest in these matters, Sadis & Goldberg LLP represents a wide variety of financial market participants, including investment advisers ("advisers") that manage hedge funds, private equity funds and venture capital funds. We are counseling clients daily on the legislative initiatives and rulemakings arising out of the Dodd-Frank Wall Street Reform and Consumer Protections Act ("Dodd-Frank Act").

A fundamental part of establishing a transaction reporting system is appropriately defining which transactions require reporting and when such reporting is required, if at all. We respectfully request that the Commissions clarify which types of transactions are subject to reporting and specifically define the categories to ensure that the subject categories are not overbroad.

For example, the real time reporting of non-deliverable forward transactions cannot be treated in a similar manner as futures contracts that are reported on the CME. In a futures contract each party's anonymity is protected as the contract terms are generic and standardized. However, non-deliverable forwards are specific as to price, date, rate, fixing date, valuation date, amount and currency pairs and can be identified easily. Although this effect would occur with any trade, this effect is magnified by a block trade or customized trade. Just by the nature of disclosing these terms to the public, the parties to a transaction are easily identifiable as each trade is unique. When a party's anonymity is revealed they will be unable to close a position at a fair price in an efficient manner, which can lead to a disruption in the functioning of the foreign-exchange ("FX") marketplace. The Proposals will achieve the opposite of their intention as the advisers will not be protected and will be afraid to initiate a trade which will result in liquidity drying up in the marketplace. Publishing the data in question may also make it impossible for a market participant to exit a transaction at a fair price. Perhaps the data can be reported to regulatory authorities immediately and the reporting to the public will not be required, or at least will be sufficiently delayed after the day of the trade? At a minimum, the data in question should be delayed from the public reporting requirements at least one (1) day after the trade date.

Moreover, Section 721(a)(21) of the Dodd-Frank Act permits the Secretary of the Treasury to issue a determination exempting FX swaps and FX forwards from the definition of a "swap" under the Commodity Exchange Act. We recommend that FX swaps, FX forwards and non-deliverable forwards be excluded from the "swap" definition since, like the FX spot market, these transactions tend to be short-dated and present little opportunity for speculation or leveraged returns that are associated with longer-dated swaps. Also, the collateralization of FX spot transactions is not market practice and would present significant operational issues, including the frequency of valuations. We have sent a courtesy copy of this letter to Ms. Mary J. Miller of the U.S. Department of Treasury and urge the Secretary of the Treasury to exclude FX swaps and FX forwards, including non-deliverable FX forwards, from the definition of "swap" and to clarify that FX spot transactions or short term FX transactions are not included within the definition of "swap."

The Commissions must also balance the benefits of transparency against the risks of disclosing confidential trading strategies to the general public, which may use the public data to the detriment of an adviser and its clients or investors. For example, such disclosure may be detrimental to certain advisers and their clients or investors since their investment strategies may

be compromised by others, based on the data that is being reported to the public. Specifically, trading along with or against an adviser may create negative consequences for the adviser and its clients or investors.

Moreover, the Proposals may have unintended consequences. The government sanctioned real-time dissemination of swap transaction and pricing data in real-time could violate the Fifth Amendment (taking of trade secrets) and the First Amendment (non-commercial speech disclosure) of the United States Constitution.

Regarding the Fifth Amendment, in determining whether the transaction data represents trade secrets, the question of whether it is in the public interest to compel disclosure is irrelevant. Consistent with the settled law on takings of trade secrets, the courts have determined that the plaintiffs' propriety formulas were trade secrets without knowing what they were. *See*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) and Philip Morris, Inc. v. Reilly, 312 F.3d 24 (1st Cir., 2002). The same is true with respect to transaction and/or holding data described by the Proposals. This data is the product of expensive and time consuming research and analysis. If the data and holdings are trade secrets, the Fifth Amendment requires that advisers cannot be compelled to publicly disclose the data or holdings without compensation (because public disclosure destroys their value). Thus far, the Commissions have failed to explain why the Proposals do not violate the Fifth Amendment. We respectfully request an explanation.

Similarly, regarding the First Amendment, the Commissions have not explained why the Proposals do not violate the First Amendment since the Proposals compel advisers to disclose data about their private investment strategies. In First Amendment litigation, the government is not afforded any deference. To the contrary, the burden of proof is on the government to demonstrate that the challenged law does not violate the First Amendment. Since 1976 the United States Supreme Court has distinguished "commercial speech" from "non-commercial speech" by defining the former as either "expression related solely to the economic interests of the speaker" or "speech proposing a commercial transaction." The classic example of commercial speech is advertising. Since some advisers may oppose public disclosure of their trade data or holdings and such disclosure is unrelated to any business transaction, the Proposals compel such advisers to engage in purely non-commercial speech.

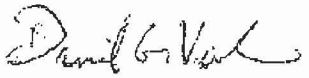
A law compelling non-commercial speech must pass strict scrutiny. Under strict scrutiny, the government must prove that: (1) the challenged law is designed to address a compelling governmental interest, (2) it actually advances that interest, and (3) it is narrowly tailored, i.e., it is the least restrictive means to meet the asserted end. The sorts of interests that courts have found to be compelling are national security, preserving the lives or health of people, protecting the welfare of children, and not violating explicit constitutional protections. No goal asserted in the Proposals appears to be this compelling. Even if a compelling goal exists, the

Commissions have not indicated how they intend to prove that the reported transaction data will advance the goal or that no less restrictive means are available to advance the goal. For example, in Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, the Court noted that the fact that a law compels speech is "without constitutional significance," i.e., such a law is subject to the same strict scrutiny as a law that restricts speech. Moreover, laws compelling factual non-commercial speech are subject to the same strict scrutiny as laws compelling opinionated speech. The Riley Court ruled that a North Carolina law requiring professional fundraisers for charities to disclose to potential donors the average percentage of gross receipts actually turned over to such charities within the previous twelve months was "compelled speech." It then struck down the law because it failed the strict scrutiny test:

> "The State's interest in informing donors how the money they contribute is spent to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity, is not sufficiently weighty, and the means chosen to accomplish it are unduly burdensome and not narrowly tailored."

We appreciate the opportunity to comment on these matters and respectfully request that the Commissions consider the comments and recommendations set forth above. I am available to discuss these comments and recommendations should you so desire.

Respectfully submitted,



Daniel G. Viola
Partner
Sadis & Goldberg LLP
551 5th Avenue, 21st Floor
New York, NY 10176
Tel. 212-573-8038

CC: Ms. Mary J. Miller
Assistant Secretary for Financial Markets
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington D.C. 20220