From: Julian Harding <Julian.Harding@tradition.com>
Sent: Thursday, December 2, 2010 1:02 PM
To: SEFRules <SEFRules@CFTC.gov>
Subject:
Attach: WMBAA Letter to the Honorable Gary Gensler and the Honorable Mary Schapiro.pdf

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Please see attached letter, delivered to Chairman Gensler on November 30th, 2010

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WMBA
AMERICAS
WHOLESALE MARKETS BROKERS' ASSOCIATION

November 30, 2010

The Honorable Gary Gensler
Chairman
Commodity Futures Trading Commission
1155 21st Street NW
Washington, DC 20581

The Honorable Mary Schapiro
Chairman
Securities and Exchange Commission
100 F St NE
Washington, DC 20549-2001

Re: Self-Regulation and Swap Execution Facilities

Dear Chairman Gensler and Chairman Schapiro:

As you know, on July 29, 2010, the Wholesale Markets Brokers' Association Americas[1] ("WMBAA") submitted to the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") a Discussion Draft of Model Core Principles for Swap Execution Facilities ("SEFs"). Since then the SEC and CFTC have begun an ambitious process to write the rules to regulate the swaps marketplace, including rules necessary to regulate swap execution facilities and security based swap execution facilities (collectively referred to herein as "SEFs").

The Dodd-Frank Act ("DFA") establishes a series of core principles for SEFs that are in many cases the same or substantially the same as the core principles for designated contract markets. These include requirements to (i) establish, investigate and enforce rules, and (ii) monitor trading and obtain information necessary to prevent manipulation. Such requirements are typical for exchanges and self-regulatory organizations.

However, many of the entities that will seek to become registered as SEFs, including the WMBAA's members, are not exchanges. They operate today as futures commission merchants

[1] The Wholesale Markets Brokers' Association Americas (WMBA Americas) is an independent industry body representing the largest inter-dealer brokers ("IDBs") operating in the North American wholesale markets across a broad range of financial products. The WMBA and its member firms have developed a set of *Principles for Enhancing the Safety and Soundness of the Wholesale, Over-The-Counter Markets*. Using these Principles as a guide, the Association seeks to work with Congress, regulators, and key public policymakers on future regulation and oversight of over-the-counter (OTC) markets and their participants. By working with regulators to make OTC markets more efficient, robust and transparent, the Association sees a major opportunity to assist in the monitoring and consequent reduction of systemic risk in the country's capital markets.

("FCMs"), broker-dealers and, where applicable, as alternative trading systems ("ATS"). These entities are required to join and follow the rules of one or more self-regulatory organizations, such as FINRA or the NFA, which together with the SEC and the CFTC, perform many of the regulatory functions assigned by DFA to SEFs. In fact, the regulatory status of a SEF seems to most closely resemble that of an ATS, which is defined as any organization, association, person, group of persons, or system that brings together purchasers and sellers of securities, but that does not (i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on the alternative trading system; or (ii) discipline subscribers other than by exclusion from trading.[2]

Ideally SEFs would be able to delegate relevant functions to an exchange or an SRO. Unfortunately DFA does not expressly contemplate such delegation as, for example, the Commodity Exchange Act permits for other types of registered entities.[3] Further, it is not clear that even if permitted, SEFs would voluntarily delegate responsibilities to the existing SROs.[4]

However, it is clear that the new rules will create a host of new obligations for swap execution facilities, as well as for the CFTC and the SEC. It is also becoming clear that the SEC and CFTC lack the resources necessary to implement and enforce the new rules. And if projections of 50 – 100 SEFs are correct, it will become clear that a new regulatory structure to facilitate compliance by SEFs with the applicable laws and regulations will need to be developed.

To address these issues, members of the WMBAA and possibly others propose to establish a common regulatory organization ("CRO")[5] that will facilitate compliance with the core principles by each of its members as well as for any other SEF that agrees to follow its rules. The CRO would not itself have any direct regulatory responsibilities, but it would, by way of contractual obligations, assist its members by addressing compliance issues that are common to all SEFs, including the following:

1. establishing and maintaining model provisions for each SEF's rule book that would be adopted by each of its SEF members with regard to core principles on investigations, enforcement authority, trade monitoring and obtaining information.

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[2] See 17 C.F.R. § 242.300(a)

[3] See 7 U.S.C. § 7a-2(b)

[4] It is possible that SRO membership could indirectly be required if CFTC and SEC regulations were to require that SEFs also register as FCMs and broker-dealers. Such regulations, however, would have unintended consequences. First, it would create a conflicting web of overlapping responsibilities as SEFs reconcile their obligations under DFA with their obligations as members of the respective SROs. In addition, mandatory broker-dealer or FCM registration for SEFs would likely cause prospective SEFs to file new broker-dealer and FCM applications rather than use existing registered entities that would become subject to SEF regulations on ownership and conflicts of interest. If projections of 50-100 SEF applications are correct, and each SEF also files for registration as an FCM or broker-dealer, the result could cause as many as 200 - 400 regulatory applications associated with SEFs.

[5] Distinguished from an SRO to avoid confusion with the legal and regulatory implications of an SRO.

2. on behalf of its members, enter into one or more regulatory services agreements with existing SROs pursuant to which the CRO will have the capacity to detect, investigate, and enforce those rules for its members. These services would include:

    a. monitoring trading to prevent manipulation

    b. enforcing position limitations

    c. investigating possible violations of SEF, CFTC, SEC rules, or other applicable laws

    d. establishing a code of procedure for administering discipline for rule violations and conducting hearings when necessary to determine if a violation may have occurred

3. on behalf of its members, establish and enforce rules that will allow the facility to obtain any necessary information from other SEFs, other market participants and other markets to perform any of the functions required by the core principles;

4. Review associated persons of each SEF to ensure that that are not statutorily disqualified to be associated with a SEF

Membership in the CRO would initially be open to any entity that intended to register as a SEF. Membership in this CRO would be voluntary, but members would be contractually bound to abide by the rules. Upon implementation of the CFTC and SEC rules, membership would become open to any entity that agreed to adopt the CRO's rules that was either registered with the SEC or CFTC as a SEF, or intended to file for registration with the SEC or CFTC to become a SEF.

The benefits to creating a CRO are several. First, it creates a platform to ensure that certain key rules for SEFs are written fairly and establish a uniform standard of conduct. This in turn would also make it easier and more efficient for the SEC and CFTC to review potential SEF applications in accordance with the above mentioned core principles as any SEF that was a member of the CRO would agree to implement the model provisions for their rule books, and would agree to utilize the services offered by the CRO to aid with satisfying many of their obligations under the core principles. Moreover, by acting as an intermediary for compliance by its members, the CRO would simplify the CFTC's and SEC's oversight responsibilities for SEFs.

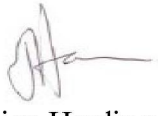
Such a scheme would appear to be permissible under DFA, which provides SEFs with "reasonable discretion" in establishing the manner in which they comply with the core

principles.[6] Further, as a voluntary organization, the CRO would not necessarily need legislative or rule making authority to proceed. However the ambiguity caused by the lack of an express Congressional mandate suggests that some degree of authorization in the rulemaking process for a CRO would be desirable.

Otherwise the CRO could presumably be organized today with a mandate from its originating members to provide services in accordance with the core principles that could be implemented as soon as its members agree, and not necessarily wait for the implementation of the DFA (although any rules adopted may have to be revised to be consistent with the CFTC and SEC rules). It would start by drafting rules, identifying the resources, systems and agreements necessary to become operational and conducting preliminary discussions with NFA, FINRA or others to provide regulatory services where appropriate.

The result would be an entity that could help address the operating issues created for SEFs by the DFA, and through the establishment of uniform standards for its members, make their investigation, surveillance and enforcement efforts more effective. It might also allow the SEC and CFTC to perform their oversight duties with respect to SEFs in a more efficient manner.

Sincerely,



Julian Harding, Chairman

[6] See 7 U.S.C. § 7b-3(f)(1)(B)