

February 15, 2011

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

Re: End-User Exception to Mandatory Clearing of Swaps, RIN 3038-AD10

Dear Commission Members,

Please accept this comment responding to your request for information in connection with rulemaking for sections 723 and 763 of the Dodd-Frank Act. I am writing in my own private capacity, with a view to helping formulate the best rules to achieve the requirements of the Act and meet the Commission's goals.

I am limiting my comments in this letter to concerns that the public input process may inadvertently steer rulemaking towards inferior market structures that disadvantage end-users to the benefit of patent holders. In general, many rulemaking and standard-setting processes struggle to handle the problem of input from interested parties, but disclosure of several communications to the commission raise patents as a particular issue in this rulemaking process.¹

End-Users Should Have Market Access Unencumbered by Patents

The Dodd-Frank Act's Title VII provides a framework for derivatives that includes a list of conditions under which the mandatory clearing requirement shall not apply to a swap. It thus explicitly permits end-users to transact on a bilateral, over-the-counter basis.

To the best of its ability, the commission should ensure that no patents will encumber end-user transactions under the rules that it sets. A patent holder may have the right to prohibit end-users from entering transactions if the commission's rules require a structure that is covered by the patent's claims. Or the patent holder may instead charge a fee to license its patent to the end-user or to facilities required for transactions, even on a discriminatory basis. Notably, any requirements on end-user transactions for margining terms or for other credit support should have sufficient flexibility that end-users are able to meet their full hedging needs without undue constraints or costs.

Patents on elements of market structure pose a danger to market participants, because a patent

¹For example, see <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27652>

grants exclusive rights to its holder that allow it to operate as a monopoly without the possibility of competition to provide better service or pricing.

Interested Parties May Advocate Unwarranted Restrictive End-User Rules

The commission is clearly well-aware that its interactions in the rule-making process will expose it to interested parties that advocate rules that suit their own understanding of the markets and that may work to their own benefit. Its job is to navigate through the thicket and find solutions that meet legislative requirements and best serve its mission to ensure well-functioning markets.

Greatly complicating this task is that advocates potentially have interests not obvious from their current affiliations. Such non-obvious interests may well include patent rights. Some standards bodies that are able to control conditions for participation have policies designed to protect against hidden problems from patents that may not even become public until after standards are finished and adopted. The commission may not be able to implement any similar safeguards and so will have to operate with heightened awareness of the problem.

Title and Abstract of the Potentially Relevant Patent Application

The Commission should be aware that US Patent Office has accepted and now published an application for a patent numbered 20090327160 with title and abstract as below. Note that one inventor has been active in the rulemaking process through a newly set-up advocacy organization. This inventor was also a principal in a company dedicated to credit support for swaps transactions.

This text is available from the USPTO website by searching for its number at <http://appft1.uspto.gov/netathtml/PTO/srchnum.html> . Note that my comments here are not in any way intended to support the application's claims as to usefulness, novelty, applicability, or recommend it in any respect.

PAIRED BASIS SWAP RISK AND CREDIT MITIGATION SYSTEM AND COLLATERAL MINIMIZATION SYSTEM

Abstract

A paired basis swap risk and credit mitigation system and collateral minimization system. In swaps used to hedge forward contracts a system authority interposes itself and forms paired basis swaps with each of the paired swap participants and itself together with a Swaption to allow it to maintain a level book in the event of a default by any counterparty. In the event of a default the system authority has the ability to either terminate a swap and pay the non-defaulting counterparty an agreed upon termination payment, terminate the non-defaulting counterparty's swap and exercise the swaption to substitute a correlated swap with appropriate correlated termination payment; or substitute a new counterparty with an identical swap as the paired swap participant. Paired basis swap control through delivery

can be enabled to continue the risk and credit mitigation benefits of the system.

Inventors: Perry, J. Scott; Turbeville, Wallace C.; Hamilton, Paul

Conclusion

The Commission is respectfully requested to ensure its rules do not force derivatives end-users to use systems encumbered by patent rights.

Best Regards,
Bindicap Comster