

February 22, 2011

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

Re: Proposed Rulemaking Related to Definition of Swap Dealer Definitions

Dear Secretary Stawick:

On behalf of the Industrial Energy Consumers of America (IECA) please consider the attached letter in response to the Joint Notice of Proposed Rulemaking regarding the definition of Swap Dealer set forth in new Section 1a(49) of the Commodity Exchange Act (CEA) as proposed in “Further Definition of ‘Swap Dealer,’ ‘Security-Based Swap Dealer,’ ‘Major Swap Participant,’ ‘Major Security-Based Swap Participant’ and ‘Eligible Contract Participant’”, 75 Fed. Reg. 244 (Dec. 21, 2010) (“JNPR”). IECA appreciates the opportunity to submit these comments in response to the JNPR and looks forward to working with the Commission further on this and other issues.

About IECA

The Industrial Energy Consumers of America is a nonpartisan association of leading manufacturing companies with \$800 billion in annual sales and with more than 750,000 employees nationwide. It is an organization created to promote the interests of manufacturing companies through research, advocacy, and collaboration for which the availability, use and cost of energy, power or feedstock play a significant role in their ability to compete in domestic and world markets. IECA membership represents a diverse set of industries including: plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing.

Uses of Swaps by IECA Members

IECA’s members routinely engage in swap transactions to manage risk, obtain information regarding prices, and take advantage of opportunities related to a company’s primary business. In some cases companies may engage in swap transactions with counterparties related to the primary commercial relationship of the firms. In other cases a company’s treasury operations might use derivatives for investment purposes or to hedge transactions related to investments. In some cases a commercial firm might find itself taking opposite sides of a similar trade, dictating the terms on which it will trade, and accommodating the wishes of counterparties in order to facilitate a commercial relationship. However these companies do not hold themselves out as “swap dealers,” nor would they generally be considered to be such; they are primarily commercial businesses that use swaps for reasons in addition to pure hedging.

Proposed Definition of “Swap Dealer”

IECA is concerned that the proposed definition of “Swap Dealer” may create uncertainty for some commercial companies that use swaps but do not actively engage in dealing swaps as a primary business. As the JNOPR notes, the definition of a “Swap Dealer” (as well as the substantially identical definition of a “Security Based Swap Dealer”) turn on whether a person is engaged in the following activities:

- (i) Holding oneself out as a dealer in swaps or security-based swaps,
- (ii) Making a market in swaps or security-based swaps,
- (iii) Regularly entering into swaps or security-based swaps with counterparties as an ordinary course of business for one’s own account, or
- (iv) Engaging in activity causing oneself to be commonly known in the trade as a dealer or market maker in swaps or security-based swaps.¹

Further, as the JNOPR notes, the statute clarifies that the definitions do not include a person that enters into swaps or security-based swaps “for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.” It is this clarification, when read in conjunction with the “market making” concept embodied in the statutory definition, that IECA believes protects most of its non-bank, commercial members from being swept into a “Swap Dealer” regulatory regime which is most appropriate for banks and other financial companies. However IECA’s members are concerned that the CFTC did not explicitly endorse a key part of this conceptual framework in its proposed definition.

The Final Rule Should Distinguish Between Dealers and Traders

In Dodd-Frank Congress carefully crafted the terms “Swap Dealer” and “Security Based Swap Dealer” to mirror one another, as well as to mirror concepts in existing law. In particular the exception for persons that trade “for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business” contained in CEA section 1a(49)(C) is nearly identical to the exception from the definition of “dealer” contained in the 1934 Securities and Exchange Act.² This exception is also contained in Dodd-Frank’s definition of “Security Based Swap Dealer”, which is no doubt the reason the SEC proposes in the JNOPR that the distinction between a “trader” and a “dealer” long established under the securities laws will also apply in the case of a “Security Based Swap Dealer”. However, despite essentially identical statutory language, the CFTC does not clearly state in the JNOPR that it also will respect the “trader/dealer” distinction. The failure of the CFTC to explicitly state its endorsement of this view creates uncertainty for commercial firms like IECA’s

¹ JNOPR at 80175

² Section 3(a)(5)(B) of the 1934 Act states that “[t]he term ‘dealer’ does not include a person that buys or sells securities for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.”

members, and denies them the ability to rely upon long established precedent and clear guidance when evaluating whether or not their activities may place them in the “Swap Dealer” category. IECA believes the CFTC should clearly state that the definition of “Swap Dealer”, like the definition of “Security Based Swap Dealer” proposed by the SEC, will distinguish between “traders” and “dealers”. To do otherwise would not only be inconsistent with Congress’ clear intent in using the language from the 1934 Act, but would place the CFTC in the untenable position of disagreeing with the SEC’s interpretation of language based on a statute it administers, utilizing essentially identical language, in the same rulemaking. Most importantly IECA believes that by adopting the trader/dealer distinction the CFTC will allow commercial firms to continue to use swaps in a manner that does not pose systemic concerns but does foster economic growth and business expansion.

The Difference Between a Dealer and a Trader

The SEC’s guidance on the difference between a “dealer” and a “trader” promotes a clear distinction between those that trade for their own account and persons that trade a financial product in order to create a market.³ IECA firmly agrees that persons obligated to make a two way market in swaps are most likely “Swap Dealers”, and should be required to register with the CFTC if they exceed a reasonable de minimis level of swap dealing. A company that advertises itself as a swap dealer and stands ready to accommodate either side of a trade is clearly intended to be brought within the regulatory scheme created by Dodd Frank.

But as the SEC notes in the JNOPR, precedent on the trader/dealer distinction-

Recognizes that dealers normally have a regular clientele, hold themselves out as buying or selling securities at a regular place of business, have a regular turnover of inventory (or participate in the sale or distribution of new issues, such as by acting as an underwriter), and generally provide liquidity services in transactions with investors (or, in the case of dealers who are market makers, for other professionals).⁴

³ See SEC Guide to Broker Dealer Registration (<http://www.sec.gov/divisions/marketreg/bdguide.htm#II>): “The definition of “dealer” does not include a “trader,” that is, a person who buys and sells securities for his or her own account, either individually or in a fiduciary capacity, but not as part of a regular business. Individuals who buy and sell securities for themselves generally are considered traders and not dealers. Sometimes you can easily tell if someone is a dealer. For example, a firm that advertises publicly that it makes a market in securities is obviously a dealer. Other situations can be less clear. For instance, each of the following individuals and businesses may need to register as a dealer, depending on a number of factors:

- a person who holds himself out as being willing to buy and sell a particular security on a continuous basis;
- a person who runs a matched book of repurchase agreements; or
- a person who issues or originates securities that he also buys and sells.

⁴ JNOPR at 80177

As noted in the JNOPR not all of the concepts of the trader/dealer distinction are directly applicable to the swaps market (for instance “inventory” in the swaps business may mean a desire to enter into contracts and not a portfolio of particular securities). However the markets are similar enough, and the concepts clear enough, as to provide valuable guidance to a commercial company as to whether its swap activities rise to the level of requiring registration with the Commission.

By endorsing the trader/dealer distinction proposed by the SEC in the JNOPR the CFTC will assure commercial businesses that they can continue to use swaps for legitimate business reasons without fear of the serious consequences of being an unregistered “Swap Dealer”. Importantly, from IECA’s perspective as well as no doubt the Commission’s, endorsing the trader/dealer distinction will ensure that no company that is truly a dealer can escape legitimate oversight by the CFTC.

Addressing Potential Concerns

IECA’s members are deeply committed to ensuring that swap markets are appropriately regulated. Any company that is significantly dealing in swaps should be subject to the full regulatory requirements of Dodd Frank. To the extent a non-commercial company might seek to use the trader/dealer distinction to evade reasonable regulation, IECA submits that the Commission can limit application of the trader/dealer distinction only to persons that are not a “financial entity” as defined in 2(j)(7)(C)(i) of the CEA. By restricting the trader/dealer guidance to truly commercial firms the Commission can avoid the danger that a bank-related company that doesn’t rise to the level of Major Swap Participant could escape oversight by the Commission.

Conclusion

IECA applauds the CFTC’s efforts to ensure the derivatives markets, both on-and-off exchange, remain fair, open and transparent. IECA’s members rely on these markets to help them create jobs and economic growth. In order to ensure IECA’s non-financial company members can continue to access these markets, we respectfully ask the CFTC to explicitly endorse the SEC’s view that the “dealer/trader” concept from the 1934 Act will likewise be applicable to the swap markets. We believe this will both further Congress’ intent and the purposes of the Act, as well as ensure our companies can continue to use derivatives in an economically beneficial and cost effective manner.

Thank you for considering our views.