

By Electronic Mail

February 22, 2011

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

Re: Notice of Proposed Rulemaking, RIN number 3038-AD10, End-User Exception to Mandatory Clearing of Swaps

Dear Mr. Stawick:

The undersigned group of companies¹ is pleased to respond to the notice of proposed rulemaking (the “NPR”) from the Commodity Futures Trading Commission (the “Commission”) regarding the end-user exception to the mandatory clearing of swaps under Commodity Exchange Act (“CEA”) Section 2(h)(7)(A) (the “End-User Exception”). Specifically, we would like to address the question that the Commission posed in the NPR of whether it needs to provide additional clarity to the terms used in CEA Section 2(h)(7)(C)(iii) (the “Captive Finance Provision”) in proposed Section 39.6 for captive finance affiliates using the End-User Exception. We would also like to ask that any regulation that the Commission promulgates to clarify the terms used in the Captive Finance Provision be used to clarify the terms used in the exception to the definition of Major Swap Participant that is included in CEA Section 1a (33) (the “Major Swap Participant Exception”) since the language of the two provisions is identical.

Introduction

The undersigned companies are either captive finance companies or affiliates of captive finance companies. Captive finance companies are different from many other finance companies in both the mission and in the manner in which they use derivatives. Their primary mission is to provide financial products that promote and facilitate the sale of products by their respective parent companies and their other subsidiaries (such products being referred to herein as “Affiliate Products”). The financing that captive finance companies provide is essential to the success of their affiliated manufacturing entities and directly contribute to the creation of thousands of U.S. manufacturing jobs. Captive finance companies are also an important source of liquidity for thousands of small, medium, and large businesses seeking to acquire capital equipment to help operate and grow their businesses and to American consumers seeking to finance the purchase of cars, trucks, equipment, and other products that their affiliates manufacture or sell.

¹ American Honda Finance Corporation; John Deere Financial Services, Inc.; Nissan North America, Inc.; Toyota Financial Services; and Caterpillar Financial Services Corporation;

Captive finance companies use derivatives solely as a tool to manage the commercial risks that are inherent in their respective businesses such as interest rate and foreign exchange risks. Unlike commercial banks, or other organizations that may have started off as captive finance companies, the captive finance companies represented by or through the undersigned companies do not use derivatives for speculative purposes. In fact, most have express contractual provisions or strict company policies that prevent them from using derivatives for speculative purposes. This sound use of derivatives enables each of them to continue to support their mission of facilitating the sale of affiliate products.

Congress recognized the distinction between captive finance companies and other financial entities when it added the Captive Finance Provision to the CEA. The End-User Exception clearly excludes “financial entities”. However, Congress created the Captive Finance Provision that distinguishes captive finance companies and provides that they will not be considered a “financial entity” for purposes of the End-User Exception if they meet the requirements set forth in the Captive Finance Provision.

Our concern with the Captive Finance Provision is that without further interpretation it lacks the necessary clarity to ensure that the Congressional intent to create an exemption for captive finance companies is realized. Specifically, we are concerned that the language not be applied in an unduly restrictive manner and that the Captive Finance Provision properly reflects how captive finance companies operate in practice. We would like for the Commission to add guidance that clarifies the application of the Captive Finance Provision and also ensures that the Captive Finance Provision reflects the operating realities of captive finance companies. This will enable captive finance companies to have greater regulatory certainty and, more importantly, will ensure that only true captive finance companies, such as those represented by the undersigned, are able to utilize the Captive Finance Provision.

1. The Commission should create a simple test to determine whether an entity qualifies for the exception provided in the Captive Finance Provision.

The Captive Finance Provision states that an entity whose primary business is providing financing is not considered a financial entity for purposes of the End-User Exception if it uses derivatives to hedge “underlying commercial risks related to interest rate and foreign exchange exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.” We do not have a clear understanding of how this provision works in practice. We know there are two 90 percent prongs. It is not clear to us whether they should be read separately or together. Since this provision is so critical to us, we would ask the Commission to provide captive finance companies with a test that is easily understandable and applicable.

We would ask the Commission to provide a test that has a numerator that includes “qualifying financings”, i.e. financing and leasing that is intended to facilitate the sale of

the companies' products, and a denominator that includes all of the financings offered by the entity. This way, if done correctly, we can "run the numbers" and determine whether we qualify for the exemption provided by the Captive Finance Provision. This will minimize any confusion and allow for greater regulatory clarity. We have attached language that clarifies the statutory language and reflects the test we propose as Exhibit A attached hereto.

2. The Commission should apply the test to an entity on a consolidated basis.

The first question is whether an entity's "qualifying financings" should be measured on a single entity or a consolidated basis that includes the entity's consolidated subsidiaries. We believe that it is better to measure on a consolidated basis. First, this will prevent an entity that is part of a larger group of entities from using corporate structures to manipulate the outcome. Second, this is the way that most entities manage the reporting of their finance and leasing portfolios. Therefore, it will be easier for a captive finance company to run a calculation to determine whether it has the requisite number of qualifying financings.

3. The Test should reflect how most captive finance companies operate.

a. The test should include products that are sold by the parent company and its other subsidiaries.

The express language of the Captive Finance Provision includes products that are "manufactured by the parent company or another subsidiary of the parent company". This language must be interpreted in the context of how a captive finance company operates. Most end-users sell products that do not include components that are all manufactured by the end-user. For example, a product that is sold may have attachments or other additions that are manufactured by a third party who is independent of the end-user. We would ask the Commission to avoid using a test that would require a product to have 90 percent or more of its components manufactured by the parent company or another subsidiary. This would render the test impractical. A captive finance company would have to try and break down the origins of the components in an individual product to try and determine whether 90 percent or more come from the parent company or another subsidiary. This is impractical for companies that may sell tens of thousands of products. The test that the Commission develops should reflect the reality that captive finance companies promote or facilitate the sale of all products sold by the parent company and its distributors or dealers, not just those that are actually manufactured by the parent or another subsidiary. This would not alter the Congressional intent that only a captive finance company should benefit from the Captive Finance Provision. It would also help to create a useable test.

b. A financing should be a qualifying financing as long as it includes a parent company product.

The Captive Finance Provision states that 90 percent or more of an entity's financings must "facilitate" the sale or lease of Affiliate Products. One of the ways that a captive

finance company uses financial products to facilitate the sale of Affiliate Products is by financing one or more Affiliate Products. For example, a customer might purchase a piece of machinery and the captive will finance that purchase. That is the simplest, most basic captive financing.

However, a captive finance company may provide financing that includes non-Affiliate Products in order to facilitate the sale of Affiliate Products. For example, some of the undersigned companies manufacture and sell stationary source engines that are used for power generation, irrigation water pumping and marine propulsion. The captive finance subsidiary of those manufacturers will agree to finance entire power generation units, boats or irrigation systems on the condition that the owner of the power generation unit, boat or irrigation system includes the manufacturer's engines. Clearly, these types of financings are intended to facilitate the sale of Affiliate Products. The Commission should make it clear that any financing that includes an Affiliate Product is deemed to be a "financing that facilitates the purchase" of Affiliate Products.

We would ask the Commission to avoid the "counting" issue by specifying that the financing needs to include 90 percent or more of Affiliate Products. This would raise the same issues as noted above. First, it would not reflect the reality that captive finance companies finance more than their respective Affiliate Products in order to support or facilitate sales of Affiliate Products. Second, it would make the application of the test impractical by asking captive finance companies to analyze each of its tens of thousands financings to determine whether it has the requisite number of financings.

c. A qualifying financing should include financings to the dealers and distributors of the Affiliated Products and their customers.

Another factor that needs to be considered in determining what constitutes a qualifying financing is the relationship between a captive finance company and a dealer or distributor of Affiliated Products. A number of manufacturers sell their products through dealers or distributors. These dealers are an essential part of the manufacturer's distribution network. In order to successfully sell the company's products, both the dealer and the dealer's customers must receive adequate financing from the company's captive finance company. For example, the captive finance company will frequently provide working capital and related financing to the dealer and may also finance trade-ins and other products bought or sold by the dealer. While this financing is not always a direct product-specific financing, it is clear that it helps facilitate sales of Affiliate Products since it is imperative for those dealers to be well-capitalized and have adequate sources of liquidity.

d. A qualifying financing should include financings by a captive finance company to an affiliate.

Frequently, a captive finance company will provide financings to its affiliates. This makes sense since the captive finance company has greater access to credit and also generally maintains a higher debt-to-equity or leverage ratio than a manufacturing

company. The captive finance company will often purchase receivables that are generated by sales of Affiliated Products. A captive finance company may also provide working capital loans to its affiliates. These financings should be considered qualifying financings.

Conclusion

We thank the Commission for the opportunity to comment on these important issues. The undersigned companies look forward to working with the Commission to help implement a regulation for the Captive Finance Provision that will allow captive finance companies, and only true captive finance companies, to utilize the end-user exception through the Captive Finance Provision with a great deal more certainty than is currently available now through the language in the CEA, as amended by the Dodd Frank Act. We are available to meet with the Commission to discuss these issues in more detail.

Sincerely,

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EXHIBIT A

An entity (a) shall not be considered a “Financial Entity” for purposes of Section 2(h)(7)(C) of the Act, and (b) shall not be considered a Major Swap Participant, if, in either case, at least 90% of the amount of such entity’s consolidated financing and leasing portfolio (including, without limitation, loans, notes, installment sales contracts, receivables, and operating and finance leases) at the end of the immediately preceding fiscal year is from Qualifying Financings.

The following definitions shall apply to the foregoing:

“Qualifying Financing” shall include (a) any financing or lease of, or that includes, a Product, or (b) any financing to or for the benefit of an Affiliate or a Distribution Entity or any customer or Affiliate of such Distribution Entity.

“Product” is (a) any good that is manufactured or sold by any Affiliate of the entity, (b) any service that is provided by any Affiliate of the entity.

“Distribution Entity” is a Person that sells, leases, or services Products.

“Affiliate” means, with respect to a specified Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified.

“Control” means (a) the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise, or (b) the ownership of more than fifty percent (50%) of the equity interests of a Person.

“Person” means an individual, partnership, corporation (including a business trust), limited liability company, joint stock company, trust, unincorporated association, joint venture or other entity, or a government or any political subdivision or agency thereof.