

May 19, 2011

**Via Online Submission: <http://comments.cftc.gov>**

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

**Re: Global Comment - Registration for Introducing Brokers**

Dear Mr. Stawick:

Bingham McCutchen LLP respectfully submits this letter in response to the request by the Commodity Futures Trading Commission (the "Commission") for comment regarding the proposed regulatory framework implementing the provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act")<sup>1</sup>. Specifically, we write to address a gap in the proposed framework with respect to the registration of introducing brokers.

Title VII of Dodd-Frank has been the subject of voluminous rulemaking by the Commission. These rulemakings have included detailed and specific rules, as well as interpretive guidance, regarding the registration of swap dealers, major swap participants and other Commission registrants.<sup>2</sup> The Commission recently reopened and extended comment periods for certain of these proposed rulemakings, allowing swap market participants to fully consider the Commission's proposed regulatory framework for swaps under the Act.<sup>3</sup>

Despite these extensive rulemakings, including discussions of and proposals on registration of swap dealers, major swap participants and futures commission merchants, a review of the Commission's proposals makes it apparent that regulation of introducing brokers engaged in swap-related activities ("Swap IBs") is not adequately addressed, if it

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<sup>1</sup> Public Law 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> See, e.g., Registration of Intermediaries, RIN 3038-AD50, 76 Fed. Reg. 12888 (proposed Mar. 9, 2011) (to be codified at 17 CFR Part 3); Registration of Swap Dealers and Major Swap Participants, RIN 3038-AC95, 75 Fed. Reg. 71379 (proposed Nov. 23, 2010) (to be codified at 17 CFR Parts 3, 23 and 170).

<sup>3</sup> Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 25274 (May 4, 2011).

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has been addressed at all.<sup>4</sup> We believe there is a compelling need for clarity and guidance on Swap IB issues.

An “introducing broker” is defined in the Commodity Exchange Act as a person engaged in the business of soliciting or accepting orders for futures contracts who does not accept money or other assets from customers to support such orders (i.e., is not a futures commission merchant or an associated person of one).<sup>5</sup> Section 721 of the Act amends the definition to cover a person engaged in soliciting or accepting orders for swaps. None of the Commission’s proposed rules issued to date addresses registration requirements, or the timing of the effectiveness of such requirements, for Swap IBs. Nor do they cover how Swap IBs and the swaps market may differ from futures introducing brokers and the futures market. Accordingly, it is unclear what activities would constitute Swap IB business and what conduct will be expected of Swap IBs in this different market.<sup>6</sup>

Title VII of Dodd-Frank establishes an effective date of 360 days after the date of enactment of the Act (the “Effective Date”).<sup>7</sup> Under the architecture of Title VII and specifically because rulemaking is not required with respect to Swap IB registration, Swap IBs may technically be required to be registered as such by the Effective Date.<sup>8</sup> Consequently, it is possible that Swap IB registration may be required by that date, despite the fact that there is no regulatory guidance and the registration process has not yet been developed for Swap IBs. This result would be inconsistent with the well-considered and practical approach the Commission has taken with respect to implementation of Dodd-Frank. This oversight can be rectified by delaying for a reasonable period of time the implementation of Swap IB registration, which can be

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<sup>4</sup> We note that while a couple of the Commission’s rulemakings have referenced introducing brokers, none has provided guidance on the type of activities that would cause a market participant to be deemed a Swap IB or the mechanics of Swap IB registration. *See, e.g.*, Amendments to Adapt CFTC Regulations to the Dodd-Frank Act, RIN 3038-AD53, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister042711a.pdf>; Implementation of Conflicts of Interest Policies and Procedures by Futures Commission Merchants and Introducing Brokers, RIN 3038-AC96, 75 Fed. Reg. 70152 (proposed Nov. 17, 2010) (to be codified at 17 CFR Part 1).

<sup>5</sup> Commodity Exchange Act § 1a(23), 7 U.S.C. 1a(23) (*prior to amendment*).

<sup>6</sup> These same concerns likely apply to commodity trading advisors engaged in swap related activity and potentially with other registrants engaged solely in swap related activity.

<sup>7</sup> *See* Dodd-Frank § 754.

<sup>8</sup> In cases where the Act provides for rulemaking on a particular topic, the effective date will be not less than 60 days after the publication of final rules or regulations on such topic. *Id.*

accomplished through interim rulemaking providing for a temporary exclusion from registration.<sup>9</sup>

A hallmark of the Commission's and other regulators' approach to Dodd-Frank has been consistency and the avoidance of piecemeal implementation of regulation. Having Swap IBs register well in advance of the registration date required for swap dealers or futures commission merchants providing clearing services seems inconsistent with that approach. Swap dealers, who engage in direct transactions with counterparties, will not be required to register until full registration requirements have been proposed and finalized, and then will likely be given additional time before compliance is required. This is a sensible approach inasmuch as it allows the registrant sufficient time to prepare itself for registration and the requirements resulting from the Swap IB designation. A delay of the effective date for registration of Swap IBs should be sufficient to allow time for Swap IBs, like other swap registrants, to implement appropriate business and compliance measures.

Another reason the effective date of registration for Swap IBs should be delayed is to allow the National Futures Association (the "NFA") time to develop appropriate registration requirements and testing for Swap IBs and their associated persons. The NFA's existing registration requirements for introducing brokers are not appropriate for Swap IBs and imposing them without appropriate modification, or at least clarification and guidance as to how they should be applied, would be unfair to applicants and ineffective for both the NFA and the Commission. The NFA's proficiency testing requires individuals to pass a Series 3 examination based entirely on their knowledge of futures products and the futures industry. It is inappropriate to require applicants who engage in no futures-related activities to pass an exam based entirely on futures, and certainly would accomplish none of the purposes for which proficiency testing is designed. It would work additional unfairness on these applicants if they were required to take another exam when a Series 3 swap module has been prepared.

Delaying the date for registration of Swap IBs also would provide the Commission time to consider the differences between the swaps and futures markets as they apply to introducing brokers. This would enable the Commission to issue rules governing Swap IBs that are tailored to the way the swap market works and address the issues presented by operating as a Swap IB in that market. Such rules, and accompanying interpretive guidance, would in turn enable market participants to understand fully the activities that would require Swap IB registration and what would be required of them as Commission registrants. This would be consistent with Dodd-Frank's definition of introducing broker, which permits further definition of the term. Therefore, we request that the Commission consider proposing rules and/or interpretative guidance outlining the activities that would cause a market participant to be deemed a Swap IB.

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<sup>9</sup> See Dodd-Frank § 721(a)(15).

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We thank the Commission for the opportunity to comment on this issue. Please contact Kenneth A. Kopelman, Bingham McCutchen, at 212-705-7278 if you would like further information or wish to discuss the matters presented herein.

Very truly yours,

*Bingham McCutchen LLP*

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