



B&F CAPITAL MARKETS, INC.

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June 1, 2011

David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: “Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant” and “Eligible Contract Participant” 75 *Fed. Reg.* 80173 (December 21, 2010).

Dear Mr. Stawick:

The Commodity Futures Trading Commission (“CFTC” or “Commission”) recently reopened the comment period¹ on a number of proposed rules in order to provide the public with an opportunity to comment on the mosaic of proposed rules implementing Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) in its entirety.² B&F Capital Markets, Inc. (“B&F”) appreciates the Commission inviting comment on the rules as a complete package.

B&F is taking this opportunity to supplement its previously filed comment letter³ to the Commission on the proposed rules entitled, “Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant” and “Eligible Contract Participant,”” 75 *Fed.*

¹ 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).

² See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010).

³ See Letter from Alistair Fyfe, President, B&F Capital Markets, Inc. to David A. Stawick, Secretary, Commodity Futures Trading Commission (Feb. 18, 2011) (“B&F Comment Letter”).

Reg. 80173 (December 21, 2010) (“Proposed Rules”). The proposal, which further defines the terms “Swap Dealer” and “Eligible Contract Participant” was issued jointly with the Securities and Exchange Commission.”⁴

B&F Capital Markets, Inc.

As noted in the B&F Comment Letter, B&F provides regional and community banks with technical and management assistance in offering interest rate swaps to the banks’ commercial clients. B&F’s services enable regional and community banks to offer interest rate swaps to commercial clients using appropriate risk management techniques and the necessary technical and operational systems. This permits regional and community banks to lend funds to their commercial borrowers at long-term fixed rates. B&F, which is headquartered in Cleveland, OH, has relationships with over 20 regional and community banks and has assisted regional and community banks since 2003 in offering interest rate swap transactions in connection with the banks’ origination of commercial loans.

B&F Comment Letter

The B&F Comment Letter addresses two important issues in enabling community banks to continue entering into loans with commercial borrowers. B&F noted in its comment that the definition of “Swap Dealer” excludes an insured depository institution (“IDI”) “to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.”⁵ The Commissions asked for comment as to whether the IDI exclusion should be restricted to only swaps that are entered into contemporaneously with the IDI’s origination of the loan, or whether this exclusion should also apply to swaps entered into during the duration of the loan. As the B&F Comment Letter explained,

Having the flexibility to offer a swap to fix the interest rate on a commercial loan at times other than loan closing is also important to the competitiveness of regional and community banks. As noted above, the interest rate swap is the primary tool for regional and community banks to provide long-term fixed rate loans to their commercial borrowers. If regional and community banks are unable to offer a swap in connection with their origination of a loan at times other than at loan closing, customers may choose to borrow from larger banks that have affiliated swap dealers. Such a result is contrary to the public interest in maintaining strong regional and community banks.

The B&F Comment Letter offered an alternative to requiring that the swap be entered into simultaneously with the loan which would address any possible abuse of the IDI exclusion. This would provide that swaps qualifying for the IDI exclusion must be:

- 1) entered in connection with a bona fide loan;
- 2) for a notional amount that is equal to or less than the associated loan;
- 3) for a tenor no greater than the term of the loan; and

⁴ B&F’s comments concern the definitions as they relate to trading in swaps and not to security-based swaps.

⁵ B&F Comment Letter, at 2-3.

4) based on a swap index and for payment dates that match those of the loan.⁶

B&F also raised the issue in its comment letter that regional and community bank borrowers are typically smaller corporations or partnerships which would not qualify as Eligible Contract Participants (“ECPs”). Rather, they rely upon the Commission’s 1989 Policy Statement to qualify as “appropriate persons.” B&F urged the Commission to include within the definition of “appropriate person” such commercial borrowers as long as the customer enters into the swap in connection with its line of business, that the swap be in connection with a bona fide loan, that the swap be no greater than the amount or tenor of the loan, that the swap index and payments match those of the loan, and that if the customer does not have sufficient assets or net worth to meet the ECP definition, then the transaction would have to be guaranteed by any entity or individual who is an owner and such guarantor meets the \$10,000,000 total asset test of section 1(a)(18)(A)(v)(I) of the Act or the \$1,000,000 net worth test of section 1(a)(18)(A)(v)(III) of the Act.

The Commission, in its most recent, May 23, 2011, proposed rulemaking on definitions, including the definition of “Swap Dealer,”⁷ did not further address these issues. B&F reiterates that providing clarity with respect to the scope and breadth of the IDI exclusion from the definition of “Swap Dealer,” including the IDI’s ability to enter into swap agreements throughout the loan period and to offer such services to the broadest range of its current commercial customers is critical to the long-term success of the regional economies that they support.

Definition of Futures Commission Merchant

B&F notes that a similar issue to the definition of “Swap Dealer” arises in connection with the definition of “Futures Commission Merchant” (“FCM”). As amended by section 721 of Dodd-Frank, section 1(a)(28)(A) of the Act defines “FCM” as:

an individual, association, partnership, corporation, or trust—(i) that—(I) is engaged in soliciting or in accepting orders for—(aa) the purchase or sale of a commodity for future delivery; . . . a swap; in connection with the activities described in subclause (i) or (ii), accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom

This definition raises an ambiguity when applied to IDIs. B&F’s bank clients use interest rate swaps as the primary vehicle to provide long-term fixed rates to their commercial borrowers. Swaps provide these borrowers with access to longer-term fixed rates than banks would otherwise offer due to the increased interest rate risk associated with traditional fixed rate loans. Swaps also provide rate structuring flexibility which is beneficial to both the banks and their borrowers. Swaps are not mass marketed to the retail market or to non-qualifying entities, but are targeted to specific commercial loan borrowers. Community banks arrange for commercial borrowers to enter into swaps with the bank in conjunction with its commercial loans. The IDI will cross-collateralize the swap obligations with the loan collateral (i.e. through any Mortgage,

⁶ B&F Comment Letter, at 3.

⁷ “Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,” 76 *Fed. Reg.* 29818 (May 23, 2011).

Security or Guaranty Agreements). The IDI typically will not collect any ongoing margin from the borrower to secure the swap.

It is possible that some might read the definition of FCM, on its face, as applying to such IDI activities.⁸ Requiring registration of IDIs as an FCM would potentially affect hundreds of banks whose transactions are limited to providing effective fixed rates and which are supervised by their prudential bank regulators.

However, such a reading of the definition of “FCM” would be contrary to the explicit intent of Congress to exclude IDIs from registration under the Act for their swap activities which are entered into in connection with their lending business. Congress determined explicitly to exclude IDIs from registration as Swap Dealers. It would be contrary to the intended regulatory framework to subject IDIs to registration as an FCM for the same activities for which they are excluded from registration as a Swap Dealer.

Accordingly, the Commission should clarify that IDIs, by virtue of the same activities for which they are excluded from the definition of Swap Dealer, are also not included within the definition of FCM. Because none of the IDIs currently are registered as FCMs, without clarification by the Commission, participation by the IDIs in the commercial loan market will be severely chilled. This clarification could either be formal, by rulemaking, or informal in the Commission’s explanation of the rules in its adopting release. In this regard, it should be noted that Section 1a(28)(b) of the Act provides the Commission with the authority to, by rule or regulation, exclude “from, the term 'futures commission merchant' any person . . . if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”

Permitting IDIs to enter into interest rate swaps with commercial borrowers throughout the life of the loan, clarifying the scope of the ECP definition by including as appropriate persons small corporations and partnerships, and clarifying that IDIs are not required to register in any capacity under the Act for activities under the IDI exclusion will ensure that community banks will continue to offer effective fixed interest commercial loans benefitting their small business customers and their local communities. As B&F noted in its comment letter, B&F shares the goals of the Commission in ensuring transparent markets, providing for customer protection and reducing systemic risk and believes that Congress recognized that IDIs’ swap activities in connection with their commercial lending activities further these goals as well.⁹ B&F believes that these clarifications by the Commission will further this Congressional intent.

⁸ The definition of “Introducing Broker” under section 1a(31) of the Act may raise similar issues as the definition of “Futures Commission Merchant.” “Introducing broker” is defined as including any person “who is engaged in soliciting or in accepting orders for . . . any swap, and does not accept any money, securities or property to margin, guarantee or secure any trades or contracts that result therefrom.” It is possible that a transaction by an IDI involving its hedge with a Swap Dealer of an uncollateralized swap that it enters into with a commercial borrower might be construed as soliciting or accepting an order for a swap. The Commission should make clear that an IDI’s swap activities that are intrinsic to its commercial lending would not be within the definition of “Introducing Broker.”

⁹ B&F Comment Letter, at 5.

We would be glad to make ourselves available should you have any questions or concerns about the above request.

Sincerely,



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