American Bankers Association

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SUBMITTED ELECTRONICALLY

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

RE: Capital Requirements of Swap Dealers and Major Swap Participants; 76 Federal Register 27802, May 12, 2011; RIN 3038–AD54

Dear Mr. Stawick:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Commodity Futures Trading Commission's (Commission) notice of proposed rulemaking (proposal)[2] implementing Sections 731 and 764 of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding the capital requirements of swap dealers and major swap participants (together "swap entities"). ABA generally supports those aspects of the proposal that incorporate the Commission's existing regulations and the existing regulations of the Federal Reserve Board. By doing so, the Commission avoids duplicative capital regulations and ensures consistent treatment across complex financial institutions. However, ABA encourages the Commission to reconsider or clarify several aspects of the proposal described below.

The Commission's Proposal

The Commission's proposal would require swap entities that are not futures commission merchants (FCMs) and are non-bank subsidiaries of U.S. bank holding companies (BHCs) to comply with the same capital requirements that are applied to U.S. BHCs. The Commission has also proposed to permit these swap entities to utilize internal models that have been reviewed, and are subject to regular assessment, by the Federal Reserve Board to compute credit and market risk capital for its swap and related hedging positions. However, the proposal does deviate from the existing BHC rules in several respects. Notably, the proposal specifies a minimum fixed dollar amount of at least

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than $165 million in assets. Learn more at www.aba.com.
[2] 76 Fed. Reg. 27802 (May 12, 2011) (the proposal).

$20 million of Tier 1 capital. Also, the Commission sets reporting requirements to the CFTC 17 days after each month, whereas BHCs typically file their reports 40 days after each quarter.[3]

Finally, while the Commission is not proposing to impose capital requirements on registered swap entities that are subject to prudential regulation, the Commission is proposing to require such entities to file capital information with the Commission upon request.

Comment

Swap entities that are not futures commission merchants and are nonbank subsidiaries of U.S. bank holding companies

Under the proposal swap entities that are not FCMs and are nonbank subsidiaries of U.S. BHCs would be required to meet the same capital requirements that U.S. banking regulations apply to the BHC. Generally, such banking regulations require a minimum ratio of qualifying total capital to risk-weighted assets of 8 percent, of which at least half, i.e., 4 percent, should be in the form of Tier 1 capital. However, the proposed rules also specify a minimum fixed dollar amount of at least $20 million of Tier 1 capital.

Generally ABA broadly supports the provision that would apply BHC-like capital requirements to these swap entities. However, the association opposes the $20 million Tier 1 capital floor. This proposal is in marked contrast to the prudential regulators' proposal which does not establish a floor. ABA is particularly concerned that if the $20 million Tier 1 capital floor remains part of the Commission's minimum capital standards for nonbank subsidiaries of BHCs, very few regional banks will have portfolios of equity, energy, or other commodity swaps that are large enough to justify establishing and maintaining the entity on a capital efficient basis. Accordingly, we urge the Commission to eliminate the $20 million Tier 1 capital floor from the minimum regulatory capital requirement.

ABA is also concerned about the Commission's reporting requirements. Under the proposal a swap entity that is a nonbank subsidiary of a U.S. BHC will need to file its report 17 days after the end of each month. In contrast, BHCs file their capital reports on a quarterly basis. Typically, a BHC has 40 days to file the report after the end of each quarter. While we support the proposal that nonbank subsidiaries of BHCs can meet CFTC capital requirements by fulfilling the Basel requirements, the Basel requirements are complex, and 17 days is too short a period to comply. Moreover, reporting monthly instead of quarterly will impose a significant burden. Therefore, we urge the Commission to align the timing of the reporting requirements for swap entities that are nonbank subsidiaries of a U.S. BHC with the timing of the reporting requirements for BHCs.

ABA would appreciate greater clarity around the treatment of non-bank subsidiaries of U.S. BHCs that are based in foreign jurisdictions that may register as swap entities. We have serious concerns about the potential extra-territorial reach of the Commission's proposal for these entities, particularly if these entities are subject to alternate capital requirement calculations.

[3] The submission date for BHCs is 40 calendar days after the March 31, June 30, and September 30 as of dates unless that day falls on a weekend or holiday (subject to timely filing provisions). The submission date for bank holding companies is 45 calendar days after the December 31 as of date.

In this regard, if a subsidiary is subject to a Basel-based regulatory capital regime within the jurisdiction in which it operates, ABA recommends that the Commission review the relevant capital framework and issue an equivalency determination.[4] An equivalency determination would accomplish the Commission's objective of cross-jurisdictional internal models approval, while at the same time addressing the broader issues regarding harmonizing global capital and risk management frameworks. An equivalency determination would decrease relative competitive disadvantage arising from non-U.S. clients moving away from U.S. entities and help control escalating transaction costs arising from managing complex, multi-jurisdictional capital requirements.

Swap entities that are subject to prudential regulation

While the Commission is not proposing to impose capital requirements on a registered swap entity that is subject to prudential regulation, the Commission is proposing to require such an entity to file capital information with the Commission upon request. Proposed Section 23.105 provides that, upon the request of the Commission, each swap entity subject to prudential supervision must provide the Commission with copies of its capital computations and accompanying schedules and other supporting documentation. The capital computations must be in accordance with the regulations of the applicable prudential regulator with jurisdiction over the swap entity.

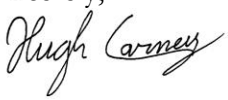
ABA concurs with the comment letter filed by the OCC on this point. Whether intentional or not, this element of the proposal seems to insert the Commission into an area of bank regulation that Congress reserved for prudential regulators. The Dodd-Frank Act does not provide the Commission with jurisdiction to exercise supervisory authority over the capital levels of swap entities that are banks.

Implementation date

Finally, it is vitally important that when the Commission adopts its requirements sufficient lead time is given so that BHCs can reprogram their reporting to create standalone reporting for various swap entities. We urge the Commission to establish an effective date for the regulation of at least 1 year following the issuance of the final rule.

Thank you for the opportunity to comment. If you have any questions or need additional information, please contact the undersigned at 202.663.5324 or via email at hcarney@aba.com.

Sincerely,



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[4] If the Commission is unable to make an equivalency determination, we would welcome the Commission's willingness to revert to the FRB's equivalence test for foreign banking entities, as in Part 225, Regulation Y, Subpart A, 225.2, paragraph (r) 3, A and B. This states that "a foreign banking organization whose home country supervisor, as defined in 211.21 of the Board's Regulation K, has adopted capital standards consistent in all respects with the Capital Accord of the Basel Committee on Banking Supervision (Basel Accord) may calculate its capital ratios under the home country standard." This equivalency test would determine whether a "foreign banking entity" would qualify as "well-capitalized."