

Via Electronic Submission

February 13, 2012

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

Re: Process for a Designated Contract Market or a Swap Execution Facility to Make a Swap Available To Trade, 76 FR 77728 (December 14, 2011)

Dear Mr. Stawick:

Bloomberg L.P. ("Bloomberg") appreciates the opportunity to provide the Commodity Futures Trading Commission ("Commission") with our comments on the proposed rule identified in the above-referenced release ("Release"). The Release and the underlying rule proposal relate to the Commission's effort to implement the "made available to trade" ("MAT") provision of the Commodity Exchange Act ("CEA") as amended by Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").

Bloomberg Background

Bloomberg intends to register its affiliate as a swap execution facility ("SEF") in order to continue to facilitate trading in the swap markets under the new regulatory regime. Bloomberg is an operator of a leading, privately-held independent platform for electronic trading and processing of over-the-counter ("OTC") derivatives. Bloomberg's core business is the delivery of analytics and data on approximately 5 million financial instruments, as well as information and news on almost every publicly traded company through the Bloomberg Professional service.¹

Virtually all major central banks and virtually all investment institutions, commercial banks, government agencies and money managers with a regional or global presence are users of the Bloomberg Professional service, giving Bloomberg extraordinary global reach to all relevant financial institutions that might be involved in swap trading.²

¹ Bloomberg employs over 12,900 employees around the world, including more than 2,300 news and multimedia professionals at 146 bureaus in 72 countries, making up one of the world's largest news organizations.

² The Bloomberg Professional service provides comprehensive coverage on all major asset classes and currencies, including all varieties of mortgage-related securities. More than 300,000 professionals in the business and financial community around the world are connected via Bloomberg's proprietary network.

I. MAT Determinations and Proposed Prescriptive SEF Trading Protocols

It is important to note the significance of the interplay between MAT determinations and any proposed prescriptive SEF trading protocols.³ As we have commented previously, mandating restrictive SEF quote and trading protocols has the potential to adversely affect trading in swaps.⁴ This adverse affect would be compounded if a SEF seeking a first mover advantage or perhaps an anti-competitive objective can force a swap with insufficient trading into a prescriptive trading protocol. For example, if only the SEF making the MAT submission had five liquidity providers for the swap (subject to a MAT determination), and its competitors could only gather less than five liquidity providers, such competing SEFs may not be able to offer the swap for trading. The SEF that submitted the MAT determination would have a de-facto monopoly with respect to such swap and economically equivalent swaps to the extent the instrument was executed primarily via RFQ. Proposed restrictive SEF trading protocols combined with unchecked MAT determinations have the potential to adversely affect liquidity, increase risk or, worse, force trading in markets outside the Commission's jurisdictional reach. It is critical for the Commission to tailor its final rules for MAT determination to correspond with trading protocols.

II. MAT Determinations: Commission Role and Process

The MAT determination process is an important variable in defining the SEF landscape. We believe it is essential that the final MAT rule provides for a level playing field so that no individual SEF can prematurely "force" a swap into mandatory trading status in order to gain a competitive advantage. Given the significance of a MAT determination in the Dodd-Frank construct we believe that the Commission should play a greater role in determining when a swap should be made available to trade. Specifically, as with its role in determining whether a swap should be required to be cleared⁵, the Commission should determine whether a swap should be made available to trade either on its own initiative or based on a submission from a SEF. Under the latter approach, a SEF would submit to the Commission a MAT determination based upon the factors proposed in Rule 37.10(b). The Commission would then make a quantitative and qualitative determination as to whether the swap has been made available to trade.⁶ Having the Commission make the determination as to when a swap has been made

³ Swaps subject to the clearing requirement under Section 2(h)(1) of the CEA must be traded on a SEF or a designated contract market ("DCM") unless no SEF or DCM makes the swap "available for trading." Under the proposed rules all SEFs are required to treat a swap made available for trading if at least one SEF or DCM has made the same or an economically equivalent swap available for trading. See Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1241 (January 7, 2011) ("SEF Release").

⁴ We noted that the "minimum of five" transmission requirement proposed in Rule 37.9 will result in "information leakage" leading to increased bid/ask spreads for a liquidity provider seeking to "lay-off" risk. This ultimately will result in increased cost to end-user customers. See Comment letter filed by Bloomberg in response to SEF Release, dated March 8, 2011. The comment letter is available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=31272&SearchText=Bloomberg>.

⁵ Process for Review of Swaps for Mandatory Clearing, 76 FR 44464 (July 26, 2011).

⁶ As with Rule 39.5 the Commission could make the MAT determination submission available to the public and post it on the Commission's Web site for a 30-day public comment period. The Commission would have a 90-day review period upon posting the MAT determination.

available to trade will help to ameliorate concerns that self-interested SEFs may abuse the MAT determination process to gain a competitive advantage. As it is the case for mandatory clearing determinations, MAT determinations should be available for public comment.⁷

Should the Commission decline to take a greater role in the MAT determination process, we believe that an effective MAT determination rule must provide for public notice, Commission review and approval and a reasonable waiting period before imposing the trade execution requirement. In particular, we believe the Commission should require a notice and comment period for all MAT determinations, not just for those MAT self-certifications for which the agency determines to issue a stay beyond the initial 10-day review period.⁸ A robust opportunity for public comment will be especially important and valuable in the early stages of the implementation of these MAT rules and the related mandatory trade execution requirement.⁹ A notice and comment period will benefit the markets as a whole as the industry and the Commission together work through the factors that justify MAT determinations and assemble a reservoir of common understanding about how these rules should be properly applied.¹⁰ Following the notice and comment period the Commission could either confirm or reject a SEF's MAT determination if, among other reasons, there is insufficient evidence of liquidity or other factors justifying mandatory trading on a SEF.

The provisions of the CEA and corresponding rules allow for the Commission to reject a MAT determination if it is "inconsistent with" the CEA or the Commission's regulations.¹¹ Given the prospect that public comments may be in accord or at odds with one another and with the applicant submitting its MAT determination, it would be valuable to know in advance what the Commission understands the term "inconsistent with" means regarding its authority to reject a MAT determination filing. Knowing what the "inconsistent with" standard for the new rule procedure means would be important both for SEFs submitting MAT determinations and for interested market participants who might provide comments on such determinations.

⁷ Section 2(h)(2) of the CEA provides for 30 days public comment period for mandatory clearing determinations by the Commission.

⁸ The Commission views a MAT determination as being subject to the "new rule" review process. 76 FR 77730, See also Rules 40.5 and 40.6 and Provision Common to Registered Entities, 76 FR 44776 (July 27, 2011). If a SEF self-certifies its MAT determination the Commission has 10 business days to review the determination before it is deemed certified. The Commission may stay a MAT self-certification for an additional 90 days from the date of notification.

⁹ We believe it is critical for the Commission to post all SEF MAT determination filings on the Commission's Web site. In addition to providing notice for comment it is essential that the Commission act as a central point of information for MAT determination approvals so that other SEFs that also want to list or offer the same or economically equivalent swaps can file their own swap product certification or approval prior to the trade execution requirement becoming effective.

¹⁰ Our comment in this regard is limited to product listings for SEFs. We are not recommending any changes to Rules 40.5 and 40.6 as they relate DCMs given the maturity and experience in the futures markets. We think that MAT determinations should not be included in Rules 40.5 and 40.6 and should be addressed in a standalone rule.

¹¹ CEA Section 5c(c).

Bloomberg's goal is to assure that our customers are able to meet their liquidity objectives. We hope to see a level playing field, with a system of checks and balances that discourages market disruption and anti-competitive behavior. The public fairly needs to know whether the Commission's authority to find a proposed MAT determination for "inconsistency with" the CEA is a broad or narrow standard of review since the power of a single SEF to bind the entire market based on its proposed MAT determination hangs in the balance.

III. MAT "Factors To Consider"

We believe the Commission identified the appropriate factors that should be considered as part of a MAT determination.¹² Each of the seven enumerated factors are pertinent indicators of an actual trading market. However, as proposed, a SEF can consider one or any combination of the factors and assign whatever weight it wants to any one or group of factors in making a MAT determination. In light of the competing motivations and trading implications associated with a MAT determination we believe SEFs must consider all seven factors and include a quantitative analysis that supports a baseline threshold for each factor. For example, a SEF would need to explain how, within a given period, a minimum number of transactions represents an appropriate level of liquidity justifying a MAT determination. MAT determinations must be based on all the proposed factors and must be something more than an instrument is simply "traded" on a SEF. The MAT determination must demonstrate an actual trading market supported by some baseline or benchmark analysis.

IV. Duplicative Requirements, MAT Determinations and Product Certifications

We are concerned about potentially burdensome and duplicative requirements associated with MAT determinations and product approvals. Ideally, we would desire a process that maximizes efficiency in determining whether a particular product is subject to both mandatory clearing and the mandatory trade execution requirement. To the extent that these two determinations can be resolved in a single process it would increase efficiency, noting of course that care must be taken to respect both the analytical elements the two determinations have in common as well as the extent to which they necessarily demand idiosyncratic considerations reflecting the clearing and trading functions. We recognize, however, that conflating the two processes into one is not necessarily the only way to achieve greater efficiency.

A. MAT Determinations

We believe that a SEF making a MAT determination should be able to incorporate by reference information and analysis already done by a derivative clearing organization ("DCO") and the Commission

¹² Under proposed Rule 37.10(b) a SEF must consider the following seven enumerated factors as well as "any other factor" that the SEF may "consider relevant" in its MAT determination: (1) Whether there are ready and willing buyers and sellers; (2) The frequency or size of transactions on SEFs, DCMs, or of bilateral transactions; (4) The number and types of market participants; (5) The bid/ask spread; (6) The usual number of resting firm or indicative bids and offers; (7) Whether a SEF's trading system or platform or a DCM's trading facility will support trading in the swap; or (8) Any other factor that the SEF or DCM may consider relevant. See Release at 77732.

as part of the mandatory clearing process.¹³ A SEF seeking to make a MAT determination must consider criteria that necessarily subsume some of the same factors (i.e., trading liquidity and pricing) required to be considered in the Commission's review of swaps for mandatory clearing.¹⁴ Being able to incorporate by reference data or analysis already provided in another context will not only greatly reduce the burden on the SEFs submitting MAT determinations but also the burden on the Commission staff responsible for reviewing such submissions.

Additionally, we believe that allowing each SEF to determine which swap is "economically equivalent" with another swap is a fatally flawed approach.¹⁵ Providing each SEF with the unilateral discretion to determine which swaps are economically equivalent with another swap will lead to disparate assessments and inconsistent determinations resulting in the same or similar instruments being either subject to SEF trading protocols or not depending on the trading venue. The obvious result would be regulatory arbitrage with market participants forum shopping for venues that allow trading in instruments unencumbered by prescriptive trading protocols. We believe the Commission should determine which swaps are "economically equivalent" to another swap. As part of the MAT determination process the Commission should determine which swaps are in the same general swap category as a swap that is the focus of a MAT determination. In addition, as with MAT determinations, an "economically equivalent" determination (done by either a SEF or the Commission) should be subject to a public notice and comment period as discussed above.

Finally, we note that several commenters suggested that the Commission suspend the mandatory trade execution requirement for a swap subject to an MAT determination for an extended period, such as a year, so that market participants are able ensure the infrastructure and connectivity is in place for a fair start on a given date.¹⁶ We are sympathetic to the notion of fair play and appreciate the realities imposed by the need to acquire, install and test connectivity before any entity can commence trading in a product. We believe that the Commission should extend the trade execution requirement waiting period after an

¹³ The Commission has already supported this approach in the product certification process. The Commission revised Rule 40.2 to eliminate the "supporting documentation" requirement and instead only required a "concise explanation and analysis" of the product. In doing so the Commission stated that registered entities "could incorporate a summarized record in the product explanation and analysis with reference to a Web Site link containing the information relied upon to establish compliance with applicable law." 76 FR 44780, fn. 11.

¹⁴ The Commission's review of swaps for mandatory clearing is largely based on information submitted by a DCO. In its review of swaps for mandatory clearing the Commission is required to consider, among other variables, "[t]he existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data." CEA section 2(h)(2)(D)(ii) and Commission Rule 39.5(b)(3)(ii)(A).

¹⁵ It is unclear as to whether Rule 37.10 would require a SEF to file its own MAT determination (and corresponding product certification) on a swap or group of swaps that it determines are economically equivalent to a swap made available for trading by another SEF. Without further guidance it appears that each SEF would make its own assessment and based on that assessment it may submit a product certification and subject the economically equivalent swaps to the trade execution requirement.

¹⁶ Under proposed Rule 37.12 the effective date for a swap to be subject to the SEF trade execution requirement (after a MAT determination certification) is the later date of the following: (1) the applicable deadline established under the compliance schedule for the clearing requirement or (2) 30 days after the swap is first made available to trade on either a SEF or DCM (i.e., 30 days after the effective date of the MAT determination).

MAT determination becomes effective to at least 90 days so to provide all SEFs who desire to trade the product sufficient time to facilitate trading of the product on their platforms.

B. Product Certifications

The proposed MAT rules would appear to require that a SEF seeking to list the same or economically equivalent swaps because of another SEF's MAT determination will be required to submit to the Commission the same swap for product certification or approval.¹⁷ In that case, for obvious competitive reasons SEFs that also want to list or offer the same or economically equivalent swaps will be compelled to file their own swap product certification or approval prior to the trade execution requirement becomes effective.¹⁸ This appears to us to be a completely unnecessary burden and an excessive amount of process. During this critical period the Commission and SEFs should not be burdened by duplicative filing requirements or a short waiting period that would provide an unfair competitive advantage to a "first mover." We believe that Commission approval of a swap product should be treated as an approval of the same and economically equivalent swaps for all SEFs.

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We appreciate the opportunity to provide our comments on the proposed rules, and would be pleased to discuss any questions that the Commission may have with respect to this letter.

Very Truly Yours,



Ben Macdonald
Global Head Fixed Income
Bloomberg L.P.

¹⁷ This statement presumes the swap is subject to the mandatory clearing requirement. See Sections 40.2 and 40.3 and Provision Common to Registered Entities, 76 FR 44776 (July 27, 2011).

¹⁸ Additionally, we ask the Commission to provide clarity on whether a MAT determination can be done for "a class of swaps" as recognized in the product certification process. These provisions should be reconciled to address perceived differences between "class of swaps" and "economically equivalent" language in the respective rules.