



August 13, 2018

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Submitted via <https://comments.cftc.gov>

Re: Proposed Rulemaking - De Minimis Exception to the Swap Dealer Definition – RIN 3038-AE68

Ladies and Gentlemen:

This letter is submitted by Frost Bank in response to the notice of proposed rulemaking (the “Proposal”) issued by the Commodity Futures Trading Commission (“CFTC” or “Commission”) concerning the de minimis exception to the “swap dealer” definition.¹ We commend the Commission and its staff for their continuing efforts to clarify, refine and improve the CFTC’s de minimis exception from swap dealer registration.

About Frost Bank

Frost Bank is a Texas state bank and a member of both the Federal Reserve System and the Federal Deposit Insurance Corporation. Frost Bank is a wholly-owned subsidiary of Cullen/Frost Bankers, Inc. (NYSE: CFR), a financial holding company headquartered in San Antonio, Texas with \$30.7 billion in assets at June 30, 2018. One of the 50 largest U.S. banks, Frost Bank and its affiliates provide a wide range of banking, investment and insurance services to businesses and individuals across Texas in the Austin, Corpus Christi, Dallas, Fort Worth, Houston, Permian Basin, Rio Grande Valley and San Antonio regions. Founded in 1868, Frost Bank has helped clients with their financial needs during three centuries. Additional information is available at www.frostbank.com.

Frost Bank provides a variety of interest rate, currency and commodity derivative products to its customers. Those customers use derivative products to hedge their interest rate, currency and commodity risks on various assets and liabilities. By enabling its customers to hedge their commercial risks, Frost Bank reduces the risks it bears as a lender to those customers, and Frost Bank also facilitates the growth and success of its customers in the communities it serves. In addition, Frost Bank uses a variety of derivative products to hedge risk arising from its own assets and liabilities, especially the interest rate and currency risk arising from its large loan and investment portfolios and funding sources. The use of derivatives to hedge its own assets and liabilities is essential to prudent risk management. Frost Bank typically executes its derivative hedges with large swap dealers registered with the CFTC or in the cleared derivative product markets.

¹ “*De Minimis Exception to the Swap Dealer Definition*”, RIN 3038-AE68, 83 C.F.R. 27444 (June 12, 2018) (the “Proposal Release”). The “swap dealer” definition is found at §1a(49) of the Commodity Exchange Act, as amended (the “CEA”) and related CFTC regulations.

Comments

\$8 Billion De Minimis Exception Threshold

Frost Bank supports the Commission’s proposal to set the de minimis exception threshold at \$8 billion.² Fixing the de minimis exception threshold at \$8 billion provides regulatory certainty to all participants in the U.S. swap markets. In the Proposal, the Commission provides a thorough analysis of the policy considerations relevant to the specific level of the de minimis exception threshold. The Commission has demonstrated that setting the de minimis exception threshold below \$8 billion would not materially expand the volume or number swaps that would be executed by registered swap dealers, but could well have adverse impacts on the liquidity and resiliency of swap markets.³ The Commission also recognized the very substantial legal and regulatory cost that would be imposed on entities with limited swap dealing activity were they forced to register as swap dealers. On a related note, Frost Bank believes that the de minimis exception calculation should continue to be based primarily (if not exclusively) on a rolling 12-month test of the aggregate gross notional amount of swap dealing activity. This is a relatively simple test to administer, and the 12-month testing period helps to smooth out any short-term lumpiness in swap dealing activity and allow for moderation of future swap dealing activity to avoid inadvertently triggering a swap dealer registration requirement.

Addition of Expanded IDI De Minimis Provision

Frost Bank supports the Commission’s proposed addition of an expanded provision to exclude certain swaps entered into by an insured depository institution (an “IDI”) with a loan customer from counting against the de minimis exception threshold (the “IDI De Minimis Provision”).⁴ As the Commission noted, the existing (and related) exclusion from swap dealing activity for certain IDI swaps with loan customers⁵ is overly restrictive in various respects, particularly given the CEA’s sweeping mandate to exclude all IDI swaps “with a customer in connection with originating a loan with that customer.”⁶ Expanding the range of IDI swaps with loan customers that are not counted against the de minimis exception threshold provides a number of benefits to those loan customers, including better loan pricing and terms, reduced risk, and more efficient use of loan collateral.

Swaps Entered into to Hedge Physical or Financial Positions

- Frost Bank appreciates the Commission’s clarification in the Proposal that, under existing law, hedging activities with respect to financial positions, which are unrelated to swap dealing activity, should not count against the de minimis exception threshold.⁷ As the Commission noted, this

² See Proposal Release at 27448.

³ For example, the CFTC previously concluded that the existing \$8 billion de minimis exception threshold already results in more than 99% of interest rate and currency swaps involving at least one CFTC registered swap dealer. See Proposal Release at 27451.

⁴ With respect to proposed new paragraph (4)(i)(C)(1) of the IDI De Minimis Provision, Frost Bank respectfully requests that the Commission consider clarifying that an “executed commitment or forward agreement” for a loan, for which the 90 day pre-hedging period does not apply, would be interpreted in a manner akin to a “bona fide loan commitment” as discussed in CFTC Letter No. 12-17 (Oct. 12, 2017). Specifically, Frost Bank believes that the 90 day pre-hedging period requirement should not apply to an executed commitment or forward agreement for a loan that (A) is in writing, (B) is subject to the satisfaction of commercially reasonable conditions to closing or funding, and (C) was entered into for business purposes unrelated to qualification for the IDI De Minimis Provision.

⁵ See CFTC Reg. 1.3, *Swap Dealer*, at paragraph (5).

⁶ See CEA § 1a(49)(A).

⁷ See Proposal Release at footnotes 138 and 143 and related text. Of course, Frost Bank understands that “such hedging activity should . . . be considered in light of all the other relevant facts and circumstances to determine

topic was subject to some uncertainty in the marketplace because of the existence of a specific exclusion from swap dealing activity for the hedging of physical positions under current law, and the absence of a comparable specific exclusion from swap dealing activity for the hedging of financial positions.⁸

- Frost Bank endorses the CFTC’s proposal to definitively eliminate this uncertainty by explicitly excluding certain swaps used to hedge either physical or financial positions from counting against the de minimis exception threshold where (A) the primary purpose of the hedging swap is to reduce risks on physical or financial positions and (B) the hedging party is a price taker on the hedging swap (i.e., does not receive or collect a bid/ask spread, fee, or commission for entering into that swap or receive other compensation separate from the contractual terms of that swap in exchange for entering into that swap).⁹

Methodology for Calculating Notional Amounts

Frost Bank supports the expanded ability of the Commission, and, through delegation, the Director of the Division of Swap Dealer and Intermediary Oversight or others, to determine the methodology to be used in calculating the notional amount for any group, type or class of swaps (e.g., commodity swaps or swaps with varying or contingent notional amounts). Ultimately, application of the de minimis exception from swap dealer registration requires clarity on the “notional amount” of those swaps that count against the related de minimis exception threshold, particularly in circumstances where industry standard practices do not provide reasonably conclusive guidance.

Exception from De Minimis Calculation for Exchange-Traded and/or Cleared Swaps

In general, Frost Bank supports the Commission’s proposed exception for exchange-traded and/or cleared swaps to not count against the de minimis exception threshold. In the Proposal, the Commission clearly identified the primary reasons for considering such an exception, including (i) exchange-traded swaps have either no (or much reduced) need for counterparty protections when executed in anonymous or multiple-bidder markets, (ii) cleared swaps result in parties facing highly-regulated and well-capitalized clearinghouses, while subjecting participants to rigorous initial and variation margin requirements orchestrated through licensed clearing members, and (iii) the potential for the exception to encourage parties to execute swaps on exchanges and subject to clearing, each a key policy goal of prior swaps regulatory reform. Frost Bank’s position on this topic is undoubtedly influenced by the typical reasons that it executes such swaps (i.e., to hedge customer-facing swaps related to loans or to hedge Frost Bank’s risks arising from loans, other portfolio investments and funding sources).

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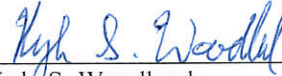
whether the person is engaging in activity (e.g., market making, accommodating demand)” that rightly falls within the CEA’s swap dealer definition. See Proposal Release at 27463.

⁸ See Proposal Release at 27462; see also “Further Definition of ‘Swap Dealer,’ ‘Security-Based Swap Dealer,’ ‘Major Swap Participant,’ ‘Major Security-Based Swap Participant’ and ‘Eligible Contract Participant’”, RIN 3038–AD06, 77 C.F.R. 30596, 30623 (May 23, 2012) (arguably implying that a swap hedging an IDI’s risks arising from a loan to its customer might have to be counted toward the de minimis exception threshold).

⁹ See Proposal Release at 27463; Proposed new paragraph (4)(i)(D) to CFTC Reg. 1.3, *Swap Dealer*.

Frost Bank appreciates the efforts of the Commission and CFTC staff in issuing the Proposal for consideration and is thankful for this opportunity to comment on the same. Any questions concerning the foregoing may be directed to the undersigned.

Sincerely,



Kyle S. Woodland
Senior Vice President

cc: William L. Perotti, Jr. - Group Executive Vice President
Howard L. Kasanoff – Executive Vice President
Mark A. Brell – Executive Vice President