



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and Risk

CFTC Letter No. 12-36
No-Action
November 28, 2012
Division of Clearing and Risk

RE: Time-Limited No-Action Relief from the Clearing Requirement for Swaps Entered Into By Cooperatives

Today the Commission is issuing its first clearing requirement determinations for credit default swaps (“CDS”) and interest rate swaps (“clearing requirement determination”). These clearing requirement determinations and attendant rules will become effective 60 days after publication in the Federal Register. Under section 2(h)(1)(A) of the Commodity Exchange Act (“CEA”), “it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization [DCO] that is registered under [the CEA] or a [DCO] that is exempt from registration under [the CEA] if the swap is required to be cleared.”

Without further action by the Commission, all persons not able to claim an exception from clearing pursuant to section 2(h)(7) would be required to clear all swaps subject to the clearing requirement determination pursuant to the compliance schedule outlined by the Commission. Subject to certain conditions, section 2(h)(7) permits non-financial entities and small financial institutions, as defined by the Commission, that are using swaps to hedge or mitigate commercial risk to elect not to clear swaps that are required to be cleared under section 2(h)(1)(A) of the CEA. No other exceptions are expressly provided for under the CEA, and accordingly, all other financial entities must clear swaps that are subject to the clearing requirement.

On July 17, 2012, the Commission published for public comment a notice of proposed rulemaking to exempt certain swaps entered into by qualifying cooperatives from required clearing, subject to certain conditions (the “proposed cooperative exemption”).¹ The Commission received 24 comment letters on its proposal. Many commenters noted the importance of exempting these swaps from the clearing requirement and expressed support for the proposal. The Commission has not yet finalized the proposed cooperative exemption.

Based on the information provided by these parties, the Division believes that time-limited no-action relief is warranted in order to alleviate the uncertainty for market participants

¹ See Clearing Exemption for Certain Swaps Entered Into by Cooperatives, 77 FR 41940, July 17, 2012.

during the period between when the clearing requirement becomes effective and when the Commission finalizes the proposed cooperative exemption.

In view of the foregoing, the Division is issuing this notice of no-action relief. The Division will not recommend that the Commission commence an enforcement action against either counterparty for failure to clear a CDS or interest rate swap under section 2(h)(1)(A) of the CEA and Part 50, provided that one of the counterparties and the swap meet the following conditions:

1. One of the counterparties is an “exempt cooperative,” which, for purposes of this no-action relief, means a cooperative:

- (a) That is formed and existing pursuant to Federal or state law as a cooperative;

- (b) That is a “financial entity,” as defined in section 2(h)(7)(C)(i) of the CEA, solely because of section 2(h)(7)(C)(i)(VIII) of the CEA; and

- (c) Each member of which is not a “financial entity,” as defined in section 2(h)(7)(C)(i) of the CEA, or if any member is a financial entity solely because of section 2(h)(7)(C)(i)(VIII) of the CEA, such member is: (i) Exempt from the definition of “financial entity” pursuant to § 50.50(d) (previously designated as § 39.6(d)) of the Commission’s regulations; or (ii) A cooperative formed under Federal or state law as a cooperative and each member thereof is either not a “financial entity,” as defined in section 2(h)(7)(C)(i) of the CEA, or is exempt from the definition of “financial entity” pursuant to § 50.50(d) of Commission regulations.

2. The swap:

- (a) Is entered into with a member of the exempt cooperative in connection with originating a loan or loans for the member, which means the requirements of § 1.3(ggg)(5)(i), (ii), and (iii) are satisfied; provided that, for this purpose, the term “insured depository institution” as used in those sections is replaced with the term “exempt cooperative” and the word “customer” is replaced with the word “member”; or

- (b) Hedges or mitigates commercial risk, in accordance with § 50.50(c) (previously designated as § 39.6(c)) of the Commission’s regulations, related to, or associated with, loans to members or arising from a swap or swaps that meet the requirements of paragraph (2)(a) above.

The conditions above are essentially the same as the requirements in the proposed cooperative exemption.²

This no-action relief will remain in effect until the earlier of April 1, 2013, or the effective date of a Commission rulemaking finalizing the proposed cooperative exemption.

This letter, and the positions taken herein, represent the view of the Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse the affected persons from compliance with any other applicable requirements contained in the CEA or in the Commission's regulations issued thereunder. Further, this letter, and the relief contained herein, is based upon the information available to the Division. Any different or changed material facts or circumstances might render this letter void.

If you have any questions, please do not hesitate to contact Erik Remmler, Associate Director, at 202-418-7630, or Sarah Josephson, Deputy Director, at 202-418-5684.

Sincerely,

Ananda Radhakrishnan
Director

² 77 FR 41940 (proposed as § 39.6).