American Bankers Association
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SUBMITTED ELECTRONICALLY

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

RE: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"; CFTC RIN number 3235-AK65; SEC Release No. 34-63452; File No. S7-39-10; 75 Federal Register 80174, December 21, 2010

Dear Mr. Stawick:

The American Bankers Association (ABA)[1] appreciates the opportunity to provide additional comments on the joint rules and proposed interpretations by the Commodity Futures Trading Commission (CFTC or Commission) and the Securities and Exchange Commission (SEC) to define further the terms "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant." We have previously provided extensive comments on the exemption from the swap dealer definition for swaps entered into by insured depository institutions insured depository institutions in connection with originating loans (IDI exemption).[2] This letter is intended to supplement our previous comments in that letter in order to document discussions about the federal Farm Credit System that the ABA has had with CFTC staff.

I. The IDI Exemption and the Farm Credit System

The IDI exemption in the Dodd-Frank Act is available only to an insured depository institution (IDI).[3] The Dodd-Frank Act incorporates the definition of insured depository institution from the

[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. Learn more at www.aba.com.
[2] ABA Comment Letter on the Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" (CFTC RIN number 3235-AK65; SEC Release No. 34-63452; File No. S7-39-10) dated November 3, 2011.
[3] Commodity Exchange Act ("CEA") Section 1a(49)(A).

Federal Deposit Insurance Act, which only includes banks or savings associations that are insured by the Federal Deposit Insurance Corporation.[4]

The Farm Credit Council has argued the Farm Credit System (FCS) institutions should be treated the same as insured depository institutions for purposes of the IDI exemption. We disagree.

In its comments, the Farm Credit Council, the trade association for the FCS, claimed that "Congress intended to exclude swaps offered in connection with loans, not to confer a peculiar market advantage on commercial banks." [5] However, the only information cited to support this claim of Congressional intent is a statement of former Senator Lincoln and her comments are only about banks.[6] The statutory language is the best evidence of Congressional intent and in this case it is unequivocal that the IDI exemption is limited to insured depository institutions.

The Farm Credit System is a taxpayer funded government sponsored enterprise (GSE) like Fannie Mae and Freddie Mac and presents the same kind of potential liability to U.S. taxpayers that other GSEs do. It is a large and complex financial services business with more than $200 billion in assets. It is tax-advantaged and enjoyed a combined local, state, and federal tax rate of 5.9% in 2010. It already enjoys a significant competitive advantage over private sector lenders and should not be given additional competitive advantages through exemptions from swap dealer definition.

Over the course of fifty years, the ABA has repeatedly and consistently testified before both the Senate and House Committees with jurisdiction over the federal Farm Credit System (FCS) about its impact on the agricultural lending market. As ABA Chairman-Elect Matthew H. Williams stated in testimony before the House Agriculture Committee last year:

> [T]he market for agricultural credit is very competitive. I compete with several other banks in my service area, finance companies from all of the major farm equipment manufacturers, several international banks, credit unions, life insurance companies, and finance companies owned by seed and other supply companies to name a few. However, the most troublesome competitor I face is the taxpayer-backed and tax-advantaged federal Farm Credit System (FCS). The FCS was chartered by Congress in 1916 as a borrower-owned cooperative farm lender at a time when banks did not have the legal authority to make farm real estate loans. Over the ensuing 95 years the FCS has received numerous charter enhancements, and it continues to pursue increased authorities from Congress and from its regulator.

Mr. Williams is the Chairman and President of Gothenburg State Bank, which is a community bank headquartered in Gothenburg, Nebraska. The statement that he made about the competitive impact that FCS has is not particular to his bank, but rather articulates the competitive impact for all banks competing for agricultural loan business.

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[4] Dodd-Frank Act Section 2(18)(A) and Federal Deposit Insurance Act 12 U.S.C. § 1813(c)(2).
[5] Farm Credit Council Letter on Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" dated February 22, 2011.
[6] Id. at fn. 5.

II. Cost-Benefit Analysis and Public Notice and Comment Requirement

The CFTC is required to consider the costs and benefits of each rule that it promulgates[7] and the burden is on the government to provide a realistic cost-benefit analysis.[8] For the reasons stated above, the ABA believes that any legitimate cost-benefit analysis would demonstrate the harm of extending the IDI exemption to FCS since banks already have to compete against a tax-advantaged, taxpayer-funded GSE.

Furthermore, the Administrative Procedures Act requires agencies to provide public notice of proposed rulemaking and opportunity to comment.[9] Although an agency may make changes to the proposed rule based on public comments, any changes in the final rule must be a logical outgrowth of the proposed regulation. Otherwise, the agency is required to re-propose the rule before finalizing it. Extending the IDI exemption to the FCS would not be a logical outgrowth of the rule proposal and would, therefore, require another opportunity for notice and comment.

Conclusion

ABA appreciates the opportunity to supplement its comments on the proposed swap dealer definition and formally document its opposition to extending the IDI exemption to the FCS. We urge the Commission not to extend the IDI exemption to the FCS. Doing so would exceed the statutory authority provided by the Dodd-Frank Act, would not be a logical outgrowth from the proposed rule, and would cause competitive harm to banks that originate loans with customers.

Thank you for your consideration of our comments.

Sincerely,

/s/

Diana L. Preston
Vice President and Senior Counsel
Center for Securities, Trust & Investments
American Bankers Association

cc: Elizabeth M. Murphy
Secretary
Securities and Exchange Commission

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[7] CEA Section 15(a).
[8] Business Roundtable and Chamber of Commerce v. S.E.C., No. 10-1305, p. 7 (D.C. Circuit) (July 22, 2011) (vacating proposed SEC rule finding that the SEC acted "arbitrarily and capriciously" in not performing an adequate cost-benefit analysis).
[9] Federal Administrative Procedure Act, 5.U.S.C § 553.