THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

1001 PENNSYLVANIA AVE., NW
SUITE 500 SOUTH
WASHINGTON, DC 20004
TEL 202-289-4322
FAX 202-628-2507

RICHARD M. WHITING
EXECUTIVE DIRECTOR AND
GENERAL COUNSEL

August 18, 2011

COMMENT

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

Re: Adaptation of Regulations to Incorporate Swaps into the "Introducing Broker" Definition (RIN Number 3038–AD53)

Dear Mr. Stawick:

The Financial Services Roundtable[1] respectfully submits this letter in response to the request by the Commodity Futures Trading Commission (the "Commission") for comment regarding all aspects of the proposed rules included in its notice of proposed rulemaking, "Adaptation of Regulations to Incorporate Swaps".[2] We write to recommend clarification on the amended definition of "introducing broker" ("IB") contained in proposed Commission regulation 1.3(mm), which includes persons engaged in soliciting or accepting orders for "swaps."[3] Specifically, we ask the Commission to clarify that a lender (or one of its affiliates) ("Lender") that facilitates swap transactions solely in connection with its loan origination or syndication business will not be required to register as an IB under the new regulatory framework imposed by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act").[4]

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[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer ("CEO") and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $ 92.7 trillion in managed assets, $ 1.2 trillion in revenue and 2.3 million jobs.

[2] *See* Adaptation of Regulations to Incorporate Swaps, RIN 3038–AD53, 76 FED. REG. 33066 (proposed June 7, 2011) (to be codified at 17 CFR Parts 1, 5, 7, 8, 15, 18, 21, 36, 41, 140, 145, 155, and 166), *available at* http://cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-12270a.pdf ("Proposal").

[3] *See* Proposal, 76 FED. REG. at 33085 (updating the Commission's existing regulation 1.3 IB definition to conform with the Commodity Exchange Act (the "CEA") as amended by Dodd-Frank § 721(a)).

[4] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

The Act amends the IB definition by adding the word "swap", thus applying the traditional futures-related concept of an introducing broker to cover swaps activity.[5] While this may be appropriate in certain instances, it also requires careful consideration of the way the markets may differ in order to avoid unintended and unnecessary application of regulation that may impede important commercial transactions without providing a regulatory benefit.[6] Congress provided the Commission the authority to further define the term IB through rule or regulation.[7] We request that the Commission exercise its authority to avoid the unintended consequence of requiring IB registration for Lenders.

Corporate borrowers ("Borrowers") often enter into interest rate hedge contracts to protect against risks from fluctuations in interest rates over the life of a loan. This protection often is required by Lenders in order to ensure rising interest rates do not prevent a Borrower from meeting its payment obligations. However, in some cases a Lender may not provide the interest rate hedge contract itself because of its own resource limitations in servicing swap transactions (*e.g.*, small community banks) or because of other business reasons. In such cases, the Lender often will present the Borrower with the option of entering into a swap with one or more third-party swap providers (each, a "Swap Provider") while the Lender retains the Borrower's credit risk through a transaction that could take one of a number of forms. We have already explained in a previous comment letter our views that this type of risk participation arrangement should not be treated as a swap under the Commission's proposed product definitions.[8]

The Lender generally is willing to retain the Borrower's credit risk because the Lender is most familiar with the credit profile of the Borrower and already has collateral from the Borrower related to the loan. The potential obligation resulting from an interest rate hedge executed by the Borrower is usually secured on parity with principal repayments under a loan agreement, and typically only Lenders (or affiliates of Lenders) are secured. Consequently, the Borrower typically executes the hedge either with a Lender or a Swap Provider that has obtained credit enhancement from a Lender.

Lenders acting in this capacity should not be covered by the IB definition. Their activities in connection with their lending businesses are markedly different from those commonly associated with IBs in the futures market. Lenders are involved in the interest rate hedge *solely* in connection with loan origination or syndication and specifically to facilitate the completing of the transaction in accordance with its terms. These Lenders

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[5] *See* Dodd Frank § 721(a) (adding CEA section 1a(31)).

[6] No rules have yet been promulgated to provide further definitions for the term "introducing broker" or to clarify its application to swaps participants.

[7] *See* Dodd-Frank § 721 (a) (adding CEA section 1a(31)(B)).

[8] *See* Comment Letter of the Financial Services Roundtable, July 11, 2011, regarding Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, at note 5, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47914&SearchText=.

do not solicit potential customers on behalf of futures commission merchants ("FCMs") or swap dealers as a line of business, and do not hold themselves out to the public as swap arrangers. The line of business of these Lenders is loan origination and syndication, and the compensation they receive is in connection with lending and retaining risk and not in connection with introducing a Swap Provider.

Requiring IB registration of Lenders would be inconsistent with the purpose underlying IB registration and regulation. The IB definition was originally established to protect the public from the sales abuses of persons that scoured the public for futures customers on behalf of FCMs. In a no-action letter dated September 16, 2004, the Division of Clearing and Intermediary Oversight stated:

> *The Futures Trading Act of 1982, amended the Act to require persons known as "agents" of FCMs to register as IBs, so as to "resolve[ ] any existing uncertainty as to the status of [these] agents." In creating the separate IB registration category, Congress intended to "protect the public" from the "sales abuses" of such agents for which FCMs "frequently disavow[ed] any responsibility."*[9]

While participants of the swaps market may currently perform a similar role on behalf of a swap dealer, and IB registration and regulation would be appropriate for those entities, Lenders facilitating the completion of a lending transaction fall well outside the intended scope of this regulation.

Congress foresaw that the IB definition, with the inclusion of "swap," would require further refinement. The Act provides the Commission with the authority to "include within, or exclude from, the term 'introducing broker' any person who engages in soliciting or accepting orders for any agreement, contract, or transaction subject to this Act".[10] While we do not think the activities described herein meet this definition, providing a clear exception to the Lenders from the IB definition would be consistent with the intent of the Act's provision.

Lenders providing Borrowers with the services described above are engaging in standard commercial transactions, and these services would not benefit from registration or regulation. Indeed, registration and regulatory compliance requirements may prevent small entities that lack the compliance resources to engage actively in swaps transactions from being able to facilitate hedging by their lending customers. Accordingly, we respectfully request that the Commission further define the term "introducing broker" to exclude Lenders acting in the capacity described herein. In the alternative, we request

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[9] *See* CFTC No Action Letter, No. 04-34 at 3 (Sept. 16, 2004), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/04-34.pdf (citing H.R. REP. NO. 97-565, pt. 1 at 49 (1982)).

[10] *See* Dodd-Frank § 721 (a) (adding CEA section 1a(31)(B)).

that the Commission issue interpretive guidance to provide Lenders with certainty that IB registration will not be required.

We thank the Commission for the opportunity to comment on this issue. Please contact either me or Robert Hatch at 202-589-2424 if you would like further information on the issues presented in the letter.

Sincerely yours,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel
The Financial Services Roundtable