

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy



By Electronic Mail (rule-comments@sec.gov)

July 13, 2012

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Regarding: Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act

Release No. 34-67177; File No. S7-05-12

Dear Ms. Murphy:

The Financial Services Roundtable (“the Roundtable”)¹ respectfully submits these comments in response to the request for comment by the Securities and Exchange Commission (the “Commission”) with respect to its proposed policy statement in the above-captioned release (the “Proposed Policy Statement”)² regarding the appropriate sequencing of new regulations regarding security-based swaps. We thank the Commission for proposing a clear and predictable sequencing schedule and welcome the opportunity to comment on the Proposed Policy Statement. For purposes of this letter, in the interest of time, we comment at this point **only on the effective date** of the new definition of “eligible contract participant,” as set forth in the Proposed Policy Statement.³ In brief, we recommend that the Commission extend its current exemptive relief regarding security-based swaps transactions with counterparties that meet the pre-Dodd-Frank definition of eligible contract participant until the official effective date of the final Title VII product definition rules. Should we have additional comments concerning other matters outlined in the Proposed Policy Statement, we will provide them to the Commission in a subsequent letter.

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 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 77 Fed. Reg. 35625 (June 14, 2012).

³ *Id.* at 35631.

The Commission has generally recognized the importance of the definitional rules in establishing the regulatory framework for the new swaps regime. There are two critical sets of definitional rules: the “entity definitions,” which were published in final form in the Federal Register on May 23, 2012,⁴ and the “product definitions,” which were approved by the Commission and the Commodity Futures Trading Commission (“CFTC”) on July 9 and July 10, respectively. The entity definitions identify the persons to whom swaps regulations apply and the acceptable counterparties to a swaps transaction. The product definitions identify the transactions to which the swap regulations apply, and will clarify the meanings of the critical terms “swap” and “security-based swap.” In most circumstances, key provisions of Title VII, and the regulations thereunder, will not take effect until the effective date of the entity definitions and the product definitions, which is still unknown but expected to occur this fall.⁵

The Commission’s approach to the eligible contract participant (“ECP”) definition, however, seems to conflict with the Commission’s overall Title VII implementation strategy. In almost all instances, the Commission has indicated that the exemptions it has granted will expire following the effective date of rules further defining the terms “swap” and “security-based swap.”⁶ However, the Commission has indicated that the revised definition of “eligible contract participant” in Title VII of the Dodd-Frank Act, as supplemented by the Entity Definitions Adopting Release, will become effective for purposes of Section 6(l) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), on July 23, 2012, which is 60 days after publication of the Entity Definitions Adopting Release in the Federal Register. Section 6(l) makes it unlawful for any person to transact a security-based swap with any person that is not an ECP, unless such security-based swap is executed on a national securities exchange. In a previous release, Exemption for Security-Based Swaps,⁷ the Commission permitted market participants to continue to enter into off-exchange transactions with entities meeting the conditions of ECP status as they existed prior to the effective date of Title VII, if such transactions constituted “security-based swap agreements” under Section 2A of the Securities Act and Section 3A of the Exchange Act. By terminating this exemptive relief on July 23, the Commission’s proposed plan effectively shortens, by several months, the time available for market participants to review the requirements and implement the systems necessary to conform to the newly finalized definition of ECP. Consequently, the Roundtable respectfully requests continued recognition of the exemptive relief granted by the Commission with respect to ECP transactions until the effective date of the Title VII product definitions.

⁴ Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, 77 FR 30596 (May 23, 2012) (“Entity Definitions Adopting Release”).

⁵ As of this writing the final product definitions have not been published in the Federal Register. While the official effective date of the rule will be 60 days after publication, the Commission has also stated that other interim relief granted by the Commission will not expire until 180 days after the publication date.

⁶ See, e.g., Proposed Policy Statement at 35630.

⁷ Order Pursuant to Sections 15F(b)(6) and 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, and Request for Comment, 76 FR 36287 (June 22, 2011).

As the Commission has noted, the changes resulting from Title VII are extensive. Market participants will need considerable amounts of time to understand and implement such changes fully. This is especially true in the case of the newly adopted entity definitions, where the Commission, along with CFTC, have noted that future interpretive guidance with respect to the definition of ECP may be required.⁸ Supplemental guidance is especially needed for market participants that conduct transactions with individual investors who rely on the “amounts invested on a discretionary basis” prong of the ECP definition.

Because the effectiveness of so many provisions under the new regulatory framework is tied to the effective date of the final product definitions rule, many smaller participants in the swaps market have anticipated consolidating documentation changes related to new criteria at or around that date, which is still unknown but expected to occur this fall, rather than by July 23, 2012. For example, the change in the definition of ECP will require that any party to a security-based swap agreement obtain new representations from its counterparty as to the counterparty’s ECP status. Thus, market participants will be required to update swaps documentation at least twice – first in July with regard to ECP matters and again once the other new provisions take effect. Such inefficiency could be avoided by continuing to recognize the exemptive relief previously granted to ECP transactions until the new products definitions become effective.

We also note that the CFTC, likely as a result of the detailed interpretational issues involved in implementing the new ECP definition, has proposed to extend its Part 35 ECP relief until December 31, 2012 or to an alternative date that has not yet been determined.⁹ This will allow off-exchange swaps to continue to be entered into with entities that meet the definition of “eligible contract participant” as it existed prior to the effective date of Title VII. As the ECP definitional changes will not become effective for purposes of the Commodity Exchange Act until later in the year, we believe that the importance of maintaining regulatory harmonization, as envisioned by the text of Title VII,¹⁰ justifies the Commission taking a comparable approach.

In sum, the Roundtable believes that implementing a change to the ECP definition by July 23, 2012 will be an extremely difficult challenge for many market participants and will create inefficiencies in the process of implementing the new regulations.

⁸ See footnote 596 of the Entity Definitions Rule at 77 Fed. Reg. at 30647. These issues include: (i) the ECP status of jointly and severally liable borrowers and counterparties, non-ECPs guaranteed by ECPs, and non-ECP swap collateral providers; (ii) whether bond proceeds count toward the “owns and invests on a discretionary basis \$50,000,000 or more in investments” element of the governmental ECP prong; (iii) the relationship between the ECP and eligible commercial entity definitions for purposes of CEA section 1a(18)(A)(vii); (iv) the scope of the “proprietorship” element of the entity prong of the ECP definition in CEA section 1a(18)(A)(v); (v) the meaning of the new “amounts invested on a discretionary basis” element of the individual prong of the ECP definition; (vi) whether persons can be ECPs in anticipation of receiving, but before they have, the necessary assets; and (vii) that swap dealers are not among the entities listed in CEA section 2(c)(2)(B)(i)(II) as acceptable counterparties to non-ECPs engaging in retail forex transactions.

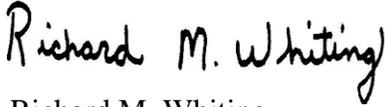
⁹ Second Amendment to July 14, 2011 Order for Swap Regulation, 77 Fed. Reg. 28819 (May 16, 2012).

¹⁰ Dodd Frank Act, Pub. L. No. 111-203, § 712(d)(2)(D), 124 Stat. 1376, 1645 (2010).

Accordingly, we request that the Commission extend its previous relief in this area until the effective date of the final product definitions rules.

We appreciate your consideration of our comments. If you have any questions about this letter, or any of the issues raised by our views, please do not hesitate to call me or Richard Foster, the Roundtable's Senior Regulatory Counsel, at (202) 589-2424.

Sincerely,

A handwritten signature in black ink that reads "Richard M. Whiting". The signature is written in a cursive, slightly slanted style.

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