

MEMO# 25910

February 14, 2012

ICI Files Comment Letter on CFTC Proposal to Make a Swap Available to Trade

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 9-12
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 8-12
SEC RULES MEMBERS No. 13-12 RE: ICI FILES COMMENT LETTER ON CFTC PROPOSAL TO MAKE A SWAP AVAILABLE TO TRADE

On February 13, 2012, ICI filed a comment letter with the Commodity Futures Trading Commission ("Commission") on the CFTC's proposal that would establish a process for a designated contract market ("DCM") or swap execution facility ("SEF") to make a swap "available to trade" for purposes of Section 2(h)(8) of the Commodity Exchange Act ("Proposed Rules"). The letter expresses concern that the Proposed Rules fail to provide the Commission with a significant enough role in the process for making a swap available to trade so as to protect against the incentives faced by DCMs and SEFs to prematurely mandate trading of swaps on their platforms. The comment letter is attached, and is summarized below.

The comment letter first explains that it is important to clarify that the "make available to trade" ("MAT") determination is the determination of whether a swap will be subject to mandatory execution; if a swap is deemed "available to trade," it can only be traded on a DCM or SEF, and all bilateral trading in that swap must cease. The letter explains that, given the importance of that determination, and the differences between the clearing and trading execution requirements, we believe it is essential that the MAT determination process be separate and distinct from the mandatory clearing process. Only those swaps that are the most liquid should be subject to mandatory execution.

To address the incentives a DCM or SEF may have to make a swap "available to trade" prematurely, the letter recommends that the factors the Commission require DCMs and SEFs to consider as part of the MAT determination process include objective standards or thresholds, and that consideration of each factor be mandatory. We also recommend that the MAT determination process incorporate a 60-day public comment period.

The comment letter acknowledges that, until the Commission is able to obtain a sufficient

amount of data from swap data repositories, it may be difficult for the Commission to establish objective thresholds for the MAT determination process that reflect the trading characteristics of particular swaps. Until then, the letter supports, in concept, a one-year “pilot program” to determine those swaps subject to mandatory execution.

The letter recommends that the Commission increase to quarterly the frequency of the proposed review required by DCMs and SEFs regarding their MAT determinations, with the ability for the Commission or market participants to request more frequent reviews if it appears a swap may no longer meet the MAT criteria. The letter also recommends that the Commission incorporate into the final rules a process for determining that a swap is no longer available to trade in order to ensure sufficient liquidity in swaps that have been made available to trade, and provide certainty to the swaps markets.

The comment letter expresses concern that the proposed definition of “economically equivalent swap,” like the proposed MAT determination process itself, gives too much discretion to a DCM or SEF without providing objective standards, and would create uncertainty regarding which swaps are subject to a MAT determination. We recommend that the concept be eliminated and that, instead, all swaps that will be made available for trading be analyzed according to the same objective factors under the MAT determination process.

The letter states that it is important for all market participants to have adequate time following a final MAT determination to prepare their systems and procedures before that determination is made effective. Accordingly, we recommend a period of 90 days after a MAT determination is final before it is made effective. We also recommend that the Commission notify industry participants of final MAT determinations in a central location on its website.

Sarah A. Bessin
Senior Counsel

[Attachment](#)