112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
112–390

SMALL BUSINESS CREDIT AVAILABILITY ACT

FEBRUARY 8, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. LUCAS, from the Committee on Agriculture, submitted the following

R E P O R T

[To accompany H.R. 3336]

[Including cost estimate of the Congressional Budget Office]

The Committee on Agriculture, to whom was referred the bill (H.R. 3336) to ensure the exclusion of small lenders from certain regulations of the Dodd-Frank Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Small Business Credit Availability Act".

SEC. 2. CLARIFICATION OF SWAP DEALER DEFINITION.

Section 1a(49)(A) of the Commodity Exchange Act (7 U.S.C. 1a(49)(A)) is amended by striking all that follows clause (iv) and inserting the following flush language:

> "provided however, in no event shall an insured depository institution or an institution chartered and operating under the Farm Credit Act of 1971 be considered to be a swap dealer to the extent that it enters into a swap—
>
> "(I) with a customer that is seeking to manage risk in connection with an extension of credit by the institution to, on behalf of, or for the benefit of, the customer; or
>
> "(II) to offset the risks arising from a swap that meets the requirement of subclause (I).".

SEC. 3. EXCLUSIONS FROM FINANCIAL ENTITY DEFINITION.

Section 2(h)(7)(C)(ii) of the Commodity Exchange Act (7 U.S.C. 2(h)(7)(C)(ii)) is amended to read as follows:

> "(ii) EXCLUSION.—Such definition shall not include an entity that is a small bank, savings association, farm credit system institution, nonprofit cooperative lender controlled by electric cooperatives, or credit union if the aggregate uncollateralized outward exposure plus aggregate potential outward exposure of the entity with respect to its swaps does not exceed $1,000,000,000.".

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act shall take effect as if they had been included in subtitle A of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

SEC. 5. IMPLEMENTATION.

The amendments made by this Act shall be implemented—

(1) without regard to—

(A) chapter 35 of title 44, United States Code; and

(B) the notice and comment provisions of section 553 of title 5, United States Code; and

(2) through the promulgation of an interim final rule.

BRIEF EXPLANATION

H.R. 3336 amends Section 1a(49)(A) of the Commodity Exchange Act (CEA) to clarify the "swaps in connection with loans" exemption included in the definition of "swap dealer." The bill clarifies that farm credit system institutions, in addition to insured depository institutions, may qualify for exemption. In addition, it clarifies that the exemption applies when a swap is done in connection with an extension of credit, and that any swaps the farm credit system institution or insured depository institution enters into to offset the risks associated with the swaps provided in connection with an extension of credit, will not be considered swap dealing. In addition, H.R. 3336 amends Section 2(h)(7)(C)(ii) to direct the Commodity Futures Trading Commission (CFTC) to exempt from the definition of "financial entity" small banks, savings associations, farm credit system institutions, non-profit cooperative lenders controlled by electric cooperatives and credit unions if their aggregate uncollateralized outward exposure plus aggregate potential outward exposure with respect to their swaps does not exceed $1,000,000,000.

PURPOSE AND NEED

Section 1a(49)(A)(iv) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111–203) (the Dodd-Frank Act) provides that "in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer." It is common for banks, for example, to lend at variable rates to commercial customers, and in connection with that loan, provide an interest rate swap so that the customer is able to achieve a fixed rate on the loan. The "swaps in connection with loans" exemption included in the swap dealer definition was intended to permit banks to continue providing this service to their customers without being designated as swap dealers. Congress recognized that the efficiency created by pairing these transactions facilitates the flow of credit.

H.R. 3336 extends the exemption to farm credit institutions that provide similar services to their customers but that do not fall within the definition of "insured depository institution." In addition, the bill clarifies that the exemption is to be applied when the institutions enter into swaps in connection with an extension of credit, and that it is not limited to a swap that is provided exactly at the point of origination and only when the credit extended to the customer is a loan. This clarification is intended to accommodate common transactions between small and mid-size banks and farm

credit institutions and their customers whereby the swap may be provided before or after the credit is originated, and when the credit may be in the form of a guarantee, or letter of credit, for example, rather than just a traditional loan.

The second provision modifies the exemption for small financial institutions from the definition of financial entity for the purpose of the clearing exemption in Section 723(a)(7)(C)(ii). Financial entities are prohibited from qualifying for the end-user exception. Congress authorized the regulators to provide an exemption from the definition of "financial entity" for small banks, credit unions and farm credit institutions, including those with $10 billion or less in assets. The $10 billion asset test is not an explicit requirement, but a test for the regulators to consider. Congress provided for this exemption in recognition that many community banks and farm credit system institutions enter into simple derivative transactions to manage the interest rate risk inherent to the business of banking—taking deposits and making commercial loans. The bank's ability to hedge its exposure to interest rate risk enhances the stability of the bank, and ensures that it can continue to provide credit to businesses at rates that are competitive with their much larger bank competitors. It is important to note that because this exemption only avails a small financial institution from designation as a "financial entity," there are still criteria that they will need to meet in order to qualify for the clearing exception—most importantly, they must be hedging commercial risk and they cannot be speculating or engaging in any non-hedging swaps activity. In addition, a small financial institution would need to notify the CFTC how it will satisfy its financial obligations to its counterparties for uncleared swaps, and if a publicly traded institution, it would need the approval of its Board.

In the CFTC's proposed rule "End-User Exception to Mandatory Clearing of Swaps," the CFTC did not propose to provide an exemption as authorized by Congress. In order to ensure that small financial institutions are afforded the relief that Congress intended, H.R. 3336 requires the CFTC to exempt small financial institutions that have exposure that is less than $1 billion in current uncollateralized exposure plus potential future exposure. Collectively, small banks engage in only a fraction of the swaps activity in the U.S. banking system. In fact, 25 of the largest bank holding companies hold 99.86% of the total notional held by all banks in the U.S., leaving only .14% of the total notional spread across the remaining 1,046 banks.

In addition, the exposure metric is the same metric the CFTC proposed to use in designating Major Swap Participants (MSPs), except that the CFTC proposed that a Major Swap Participant would not be designated as such unless they reach $2 billion in each applicable category of swaps, and $6 billion in interest rate swaps for non-hedges. For all categories of swaps, including hedges, a Major Swap Participant would not be designated as such unless they reach $5 billion in current uncollateralized exposure or $8 billion in current uncollateralized exposure plus potential future exposure. The exposure test in the discussion draft would apply to all categories of swaps cumulatively.

This bill is necessary to ensure that small and mid-size financial institutions can continue to provide important hedging tools to

small businesses, and that the banks themselves can continue to use swaps to hedge their own interest rate risk. The bill acknowledges and upholds the important relationship between risk management tools and the flow of credit in the economy. At the same time, there are important safeguards in place to prevent any small financial institution from engaging in speculative or highly risky activity, or to engaging in swaps to a level that their positions could pose a threat to the financial system.

SECTION-BY-SECTION

Section 1 is the short title, "Small Business Credit Availability Act".

Section 2 amends the Commodity Exchange Act to clarify that insured depository institutions and Farm Credit institutions shall not be swap dealers to the extent the institution enter into swaps with customers seeking to manage risk in connection with an extension of credit by the institution.

Section 3 amends the Commodity Exchange Act to exclude from the definition of financial entity small banks, savings associations, farm credit system institutions, non-profit cooperative lender controlled by electric cooperatives and credit unions with aggregate uncollateralized outward exposure plus potential outward swap exposure less than $1 billion.

Section 4 is the effective date of the amendments made by this bill.

Section 5 excludes the amendments made by this bill from the requirements of the Paperwork Reduction Act and from notice and comment requirements of the Administrative Procedure Act.

COMMITTEE CONSIDERATION

I. HEARINGS

In the 112th Congress, the Committee has held seven hearings, four Full Committee and two General Farm Commodities and Risk Management Subcommittee hearings to examine the implementation of Title VII of the Dodd-Frank Act and one Full Committee hearing to examine legislative proposals related thereto, including a discussion draft of H.R. 3336. The Committee took testimony from witnesses that represented a broad spectrum of participants in the derivatives markets.

In the following hearings, witnesses testified to the importance of ensuring that smaller financial institutions can continue to provide and use risk management tools that facilitate the flow of credit throughout the economy:

Defining the Market: Entity and Product Classifications Under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act: March 31, 2011

Derivatives Reform: The View from Main Street: July 21, 2011

To review legislative proposals amending Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act: October 12, 2011

For example, on March 31st, Mr. Mark Cvrkel, Chief Financial Officer of Susquehanna Bank in Pennsylvania testified:

> "Several community and regional banks have expressed concern that the swap dealer definition in the CFTC's proposed rule could capture hundreds of community and regional banks that offer risk management products to commercial customers. This would hamper the ability for many smaller banks to compete with larger financial institutions without any appreciable benefit in terms of enhanced market oversight or reduction in systemic risk . . . Community and regional banks are essential to support the job creation at small and middlemarket businesses that forms the foundation of any economic recovery. . . . We urge caution against finalizing rules that would place undue burdens on small banks that had nothing to do with the financial crisis, do not pose systemic risk and collectively engage in a fraction of the derivatives traded by the large dealers."

On July 21st, 2011, Ms. Denise Hall, Senior Vice President for Webster Bank in Connecticut testified:

> "Congress recognized the low risk posed to the system by small banks when it granted regulators authority to exempt them from clearing requirements. It is important that the Commission exercise this authority. Subjecting small banks to such requirements will be costly and will offer little or no risk-reducing benefit to the financial system. The time and expense associated with clearing for small banks could serve to deter some community and regional banks from using swaps to hedge risk. . . . Webster Bank shares concerns expressed by a wide range of community and regional banks that the swap dealer definition in the CFTC's proposed rule could inadvertently encompass hundreds of community and regional banks that offer risk management products to commercial customers. Such a broad swap dealer definition would result in many small banks ceasing to offer derivatives products to customers. . . . Such an outcome could significantly harm community and regional banks, by making it more difficult for them to compete with larger banks for loans. The diminished competition that would result from smaller banks' withdrawals from the swaps market would ultimately result in customers paying more."

On October 12, 2011, Mr. Douglass Williams, President and Chief Executive Officer of Atlantic Capital Bank testified:

"While large buy-side firms and hedge funds may do enough trading per year to justify these costs, smaller banks may have no choice but to stop using derivatives. If so, these banks would no longer be able to offer customers the risk management products they need and would have a more difficult time managing the basic risks that are inherent in banking. These would be unfortunate and entirely avoidable outcomes that would have the effect of weakening the banking system and the economy. We urge the Committee to prevent such outcomes by passing the Small Business Credit Availability Act."

II. FULL COMMITTEE

The Committee on Agriculture met, pursuant to notice, with a quorum present, on January 25, 2012, to consider H.R. 3336, to ensure the exclusion of small lenders from certain regulations of the Dodd-Frank Act, and other pending business. Chairman Lucas offered an opening statement, as did Ranking Member Peterson and Mrs. Hartzler.

By unanimous consent, the Subcommittee on General Farm Commodities and Risk Management was discharged from further consideration and the bill, H.R. 3336 was placed before the Committee for consideration and without objection a first reading of the bill was waived and it was opened for amendment at any point. The Chairman offered an Amendment in the Nature of a Substitute to the bill, and counsel provided a brief explanation of the amendment.

Mr. Peterson was recognized to offer and explain an amendment to expedite implementation by excluding the amendments made by the bill from the requirements of the Paperwork Reduction Act and from notice and comment requirements of the Administrative Procedure Act. By a voice vote the Peterson amendment was adopted.

There being no further amendments, the Peterson motion to approve the Amendment in the Nature of a Substitute to H.R. 3336, as amended was adopted by a voice vote.

By a voice vote, the Peterson motion to report the bill favorably to the House with the recommendation that it do pass was adopted.

The Committee then moved onto other pending business, where at the conclusion of the meeting, Chairman Lucas advised Members that pursuant to the rules of the House of Representatives that Members have 2 calendar days to file such views with the Committee.

Without objection, staff was given permission to make any necessary clerical, technical or conforming changes to reflect the intent of the Committee.

Chairman Lucas thanked all the Members and adjourned the meeting.

REPORTING THE BILL—ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the House of Representatives, H.R. 3336 was reported by voice vote with a majority quorum present. There was no request for a recorded vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Agriculture's oversight findings and recommendations are reflected in the body of this report.

BUDGET ACT COMPLIANCE (SECTIONS 308, 402, AND 423)

The provisions of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a)(1) of the Congressional Budget Act of 1974 (relating to estimates of new budget authority, new spending authority, new credit authority, or increased or decreased revenues or tax expenditures) are not considered applicable. The estimate and comparison required to be prepared by the Director of the Congressional Budget Office under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and sections 402 and 423 of the Congressional Budget Act of 1974 submitted to the Committee prior to the filing of this report are as follows:

FEBRUARY 6, 2012.

Hon. FRANK D. LUCAS,
Chairman, Committee on Agriculture,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3336, the Small Business Credit Availability Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 3336—Small Business Credit Availability Act

H.R. 3336 would amend the definition of a swap dealer in the Commodity Exchange Act to exclude banks and farm credit institutions when they enter into a swap with a customer that is managing or seeking to offset risk in connection with credit issued by the institution. (A swap is a contract that calls for an exchange of cash between two participants based on an underlying rate or index, or on the performance of an asset.) The bill also would exempt certain banking and lending institutions from requirements that swaps be submitted for clearing through a derivatives clearing organization that is registered with the Commodity Futures Trading Commission (CFTC). Under current law, the CFTC has the authority to decide whether or not to subject those institutions to clearing requirements when entering into swap transactions.

The CFTC has not finalized regulations regarding swap dealers and clearing requirements for swap transactions. Based on information from the CFTC, CBO expects that incorporating the provisions of H.R. 3336 at this point in the regulatory process would not require a significant increase in the agency's workload. Therefore, CBO estimates that any change in discretionary spending to implement the legislation, which would be subject to the availability of appropriated funds, would not be significant. Enacting H.R. 3336 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 3336 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to ensure the exclusion of certain regulations of the Dodd-Frank Act.

CONSTITUTIONAL AUTHORITY STATEMENT

The Committee finds the Constitutional authority for this legislation in Article I, section 8, clause 18, that grants Congress the power to make all laws necessary and proper for carrying out the powers vested in Congress by the Constitution of the United States or in any department or officer thereof.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee report incorporates the cost estimate prepared by the Director of the Congressional Budget Office pursuant to sections 402 and 423 of the Congressional Budget Act of 1974.

ADVISORY COMMITTEE STATEMENT

No advisory committee within the meaning of section 5(b) of the Federal Advisory Committee Act was created by this legislation.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

FEDERAL MANDATES STATEMENT

The Committee adopted as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

EARMARK STATEMENT REQUIRED BY CLAUSE 9 OF RULE XXI OF THE RULES OF HOUSE OF REPRESENTATIVES

H.R. 3336 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI of the Rules of the House Representatives.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill,

as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMODITY EXCHANGE ACT

* * * * * * *

SEC. 1a. DEFINITIONS.

As used in this Act:

(1) * * *

* * * * * * *

(49) SWAP DEALER.—

(A) IN GENERAL.—The term "swap dealer" means any person who—

(i) * * *

* * * * * * *

[provided however, in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.**]**

provided however, in no event shall an insured depository institution or an institution chartered and operating under the Farm Credit Act of 1971 be considered to be a swap dealer to the extent that it enters into a swap—

(I) with a customer that is seeking to manage risk in connection with an extension of credit by the institution to, on behalf of, or for the benefit of, the customer; or

(II) to offset the risks arising from a swap that meets the requirement of subclause (I).

* * * * * * *

SEC. 2. JURISDICTION OF COMMISSION; LIABILITY OF PRINCIPAL FOR ACT OF AGENT; COMMODITY FUTURES TRADING COMMISSION; TRANSACTION IN INTERSTATE COMMERCE.

(a) * * *

* * * * * * *

(h) CLEARING REQUIREMENT.—

(1) * * *

* * * * * * *

(7) EXCEPTIONS.—

(A) * * *

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(C) FINANCIAL ENTITY DEFINITION.—

(i) * * *

[(ii) EXCLUSION.—The Commission shall consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions, including—

[(I) depository institutions with total assets of $10,000,000,000 or less;

[(II) farm credit system institutions with total assets of $10,000,000,000 or less; or

[(III) credit unions with total assets of $10,000,000,000 or less.]

(ii) EXCLUSION.—Such definition shall not include an entity that is a small bank, savings association, farm credit system institution, non-profit cooperative lender controlled by electric cooperatives, or credit union if the aggregate uncollateralized outward exposure plus aggregate potential outward exposure of the entity with respect to its swaps does not exceed $1,000,000,000.

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