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**By Email ([agswapsANPR@cftc.gov](mailto:agswapsANPR@cftc.gov))**

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

Re: Agricultural Swaps ANPRM

Dear Secretary Stawick:

The International Swaps and Derivatives Association, Inc. (“ISDA”) is writing to provide comments in response to the September 28, 2010 Advance Notice of Proposed Rulemaking issued by the Commodity Futures Trading Commission (“CFTC” or “Commission”) regarding Agricultural Swaps (75 Fed. Reg. 59666) (the “ANOPR”).

ISDA was chartered in 1985 and has over 830 member institutions from 57 countries on six continents. Our members include most of the world’s major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the risks inherent in their core economic activities.

Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business through documentation that is the

recognized standard throughout the global market, legal opinions that facilitate enforceability of agreements, the development of sound risk management practices, and advancing the understanding and treatment of derivatives and risk management from public policy and regulatory capital perspectives.

In order to provide comments on the ANOPR, ISDA established a working group of members that are actively involved in the trading of derivatives on agricultural products. The working group includes organizations whose primary business is focused on agricultural activities as well as diversified financial institutions that provide risk management and investment products.

ISDA appreciates the opportunity to provide comments to the Commission in response to the ANOPR. As discussed in more detail below, ISDA respectfully recommends the Commission adopt rules that place agricultural swaps, including agricultural options, on an even regulatory plane with swaps on other commodities.

Swaps and options on agricultural products are important instruments that enable parties to transfer risks. For example, agricultural swaps provide producers, processors and consumers of agricultural commodities with valuable tools to hedge their commodity price exposure. These types of risk transfer products are often offset by swaps and options entered into by other market participants that seek exposure to agricultural product prices.

Traditionally and even after the adoption of the Commodity Futures Modernization Act (the "CFMA"), swaps and options on agricultural commodities have been subject to restrictions under the Commodity Exchange Act ("CEA") and the Commission's

regulations that have not applied to swaps and options on other commodities. For example, unlike other commodities, agricultural commodities did not qualify as “exempt” or “excluded” commodities under the CEA as amended by the CFMA. As such, parties interested in entering into swaps on agricultural commodities were permitted to do so only in reliance on the Commission’s Part 35 Swap Exemption. Similarly, transactions in options on agricultural commodities were permitted to the extent allowed under Part 32 of the Commission’s regulations.

As the Commission indicates in its ANOPR, Title VII of the Dodd Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or the “Act”) establishes a comprehensive new regulatory framework for swaps and significant participants in the swaps markets. In particular, Dodd-Frank eliminates Sections 2(g) and 2(h) of the CEA which had exempted transactions (including swaps and options) on non-agricultural physical commodities from various provisions of the CEA, thereby removing a principal distinction between the treatment of transactions in non-agricultural commodities and transactions in agricultural commodities. In addition, Dodd-Frank imposes a host of other requirements on swaps including, among other things, reporting requirements, mandatory clearing and execution requirements, margin and capital requirements, business conduct standards, and other reforms that will strengthen the swap market. Although the Act permits the Commission to impose additional regulatory requirements on agricultural swaps, it does not mandate that the Commission do so.

We believe that the reforms to the swaps markets and its participants resulting from the adoption of Dodd-Frank are significant and provide a sufficient basis for the future conduct

of trading in swaps and options on agricultural commodities. Accordingly, we do not believe that it would be necessary to impose additional requirements on swaps and options on agricultural commodities and would be concerned that the imposition of such additional requirements would create a deterrent to parties that would otherwise be inclined to enter into risk transfer transactions that reduce risks inherent in their businesses.

We also urge the Commission to eliminate the disparate treatment of agricultural options and agricultural swaps. Agricultural options currently are subject to regulations that are different from those that apply to agricultural swaps. At the present time, options on the enumerated agricultural commodities, *i.e.*, the core U.S.-produced agricultural commodities listed in CFTC Reg. §32.2, are not limited to eligible contract participants ("ECPs"), but are subject to significant regulatory restrictions imposed by CFTC Reg. §32.13. There is an exemption from these requirements in CFTC Reg. §32.13(g) based on a participant's financial ability, but the financial requirements for this exemption are more restrictive than the ECP definition, and the option transactions that such exempt persons may enter into are limited to those where the offeree of the option is a producer, processor or user of the commodity or its by-products, and the option is entered into solely for business purposes.

The limitation on the availability of options on agricultural commodities to offerees that satisfy the commercial status requirement described above prevents a wide range of organizations that have a legitimate commercial or investment interest from being able to access these products. At the same time, these organizations are permitted to enter into swaps on agricultural commodities. In many instances, options may be a tool that is better

suited to achieve an organization's risk management or investment objectives than a swap. For example, an insurance company that issues a revenue crop insurance policy may be interested in hedging its potential exposure under the policy by purchasing a put in relation to the relevant underlying crop. Such a product would allow the insurance company to make a one-time upfront payment in exchange for an instrument that would provide protection against the risk of a decline in prices of the crop, which would be a basis for the policy holder to make a claim against the insurance company. We believe that the modifications to the CEA that result from the enactment of Dodd-Frank eliminate the basis for distinguishing the treatment of options on agricultural commodities from swaps on such commodities. In particular, Dodd-Frank incorporates into the CEA a definition of "swap" which specifically includes options on commodities. The definition also specifically includes "agricultural swaps" within the scope of swaps, which implies that all forms of agricultural swaps—including options—constitute a "swap" that is subject to the various restrictions and requirements under Dodd-Frank. In light of the restrictions and requirements that Dodd-Frank imposes on swaps generally, we believe that there is no longer a rationale for subjecting options to different treatment than swaps. In particular, Dodd-Frank prohibits parties other than ECPs from entering into swaps. This restriction, taken together with the other requirements applicable to swaps, provide an appropriate level of protection for entities that wish to enter into option transactions from the risk of abuse.

Lastly, ISDA would like to take this opportunity to highlight that absent Commission action, the full range of risk management tools for those with agricultural price risk may no

longer be available. Although Dodd-Frank permits agricultural swaps to continue to be transacted subject to Part 35 as long as that part is not rescinded, Part 35 precludes execution of swaps on multilateral transaction execution facilities, which are a feature of the Act's new regime for swaps. Moreover, to the extent that central trading of swaps is mandatory under the Act, there could be conflicts between Part 35 and the Act. With options, the need for action is even greater, as the exemption in CFTC Reg. §32.13(g) will no longer be available when the Act takes effect in July 2011, thereby depriving the marketplace of non-exchange traded agricultural options entirely if the Commission takes no action. The Commission should therefore replace Parts 32 and 35 with new regulations consistent with the requirements of Dodd-Frank, with agricultural swaps and options to be subject to the same regulatory treatment as swaps and options based on other commodities.

For these reasons, ISDA urges the Commission to adopt rules that permit agricultural swaps to be offered to ECPs on the same basis as other swaps, and to establish the same requirements for agricultural options as for other agricultural swaps.

ISDA appreciates the ability to comment on the ANOPR, and looks forward to working with the Commission as it continues the rulemaking process. Please feel free to contact me or ISDA's staff at your convenience.

Sincerely,



Robert Pickel  
Executive Vice Chairman