

**WARREN N. DAVIS**  
DIRECT LINE: 202.383.0133  
E-mail: warren.davis@sutherland.com

January 3, 2011

Mr. David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Center  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581

**RE: Proposed Rule – Process for Review of Swaps for Mandatory Clearing  
(RIN 3038-AD00)**

Dear Mr. Stawick:

On behalf of the Federal Home Loan Banks (the “FHLBanks”), we appreciate this opportunity to comment on the above-referenced proposed rule. Specifically, we believe that the proposed rule should enumerate certain factors that the Commodity Futures Trading Commission (the “CFTC”) will consider (i) when determining whether to grant a stay of the clearing requirement under subsection (d) of new Regulation 39.5 and (ii) when determining whether the clearing requirement will ultimately apply to a swap under the same subsection of the regulation.

I. Background

Clearing Requirements in the Dodd-Frank Act. Section 723(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) amends the Commodity Exchange Act (the “CEA”) to provide that “it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization (a “DCO”) that is registered under the CEA or a DCO that is exempt from registration under the CEA if the swap is required to be cleared.” If the CFTC determines pursuant to new Regulation 39.5 that a DCO is eligible to clear a swap, then, subject to certain exceptions, that swap (or group, category, type or class of swaps) must be cleared. Therefore, which swaps are required to be cleared will in large part depend on the determinations that the CFTC makes pursuant to Regulation 39.5.

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New Regulation 39.5(d) allows a counterparty to a swap to request a stay and ultimately a waiver of the clearing requirement. When a counterparty to a swap requests a stay of the clearing requirement, new Regulation 39.5(d)(2)(v) requires the counterparty to provide a “statement explaining why the swap should not be subject to a clearing requirement.” While we can think of numerous reasons why a swap should not be subject to the Dodd-Frank Act’s new clearing requirements (and we share some of these reasons below), we think that the important right to request a stay under Regulation 39.5(d)(2)(v) would be more meaningful for market participants if the regulation enumerated certain factors that CFTC will consider in granting such a stay or an exemption from the Dodd-Frank Act’s clearing requirements. Providing this clarity in new Regulation 39.5(d)(2)(v) will allow market participants to more efficiently request stays of and exemptions from the new clearing requirements and will allow the CFTC to more efficiently review such requests.

The FHLBanks. The 12 FHLBanks are government-sponsored enterprises of the United States, organized under the authority of the Federal Home Loan Bank Act of 1932, as amended, and structured as cooperatives. The FHLBanks serve the general public interest by providing liquidity to their financial institution members, thereby increasing the availability of credit for residential mortgages, community investments, and other services for housing and community development. Specifically, the FHLBanks provide readily available, low-cost sources of funds to their members.

The FHLBanks enter into swap transactions with the traditional swap dealers to mitigate financial risk, primarily interest rate risk. The FHLBanks currently do not clear any of their swap transactions.

## II. Rationale for Waiving Clearing Requirements With Respect to Certain Swaps

The rationale behind the Dodd-Frank Act’s new clearing requirement is that central clearing will mitigate the systemic risk that occurred during the recent financial crisis because of concerns over counterparty credit risk. While we agree with this rationale, it is recognized that not all swaps should be subject to mandatory clearing and it is our view that there are circumstances where swaps that are viewed as eligible for mandatory clearing should similarly not be subject to those requirements. The CFTC’s proposed rule allowing requests for a stay and exemption implicitly recognizes this as well.

The following is a list of factors that we believe the CFTC should consider when determining whether to exempt a certain swap from the new clearing requirements. This is not intended to be a comprehensive list. Although we think that the CFTC should include these and perhaps additional criteria for its review of swaps under new Regulation 39.5(d), we also think that the CFTC should allow market participants to request a stay of and exemption from the

clearing requirements for other reasons that may not be specifically enumerated in a final regulation.

DCO Credit Risk. In the current OTC market, market participants generally choose the counterparty with which they enter into swap transactions. Market participants therefore have the opportunity to conduct diligence and credit analysis on their potential counterparties. If a market participant is not satisfied with the amount of risk to which it would be exposed by entering into a swap transaction with a certain counterparty, then the market participant can choose a different counterparty. Under the Dodd-Frank Act's new clearing requirements, if the CFTC determines that only one DCO is eligible to clear a certain type of swap, then any market participant who wants to enter into that type of swap will be required to clear the swap with that DCO. This will be the case regardless of whether the market participant is satisfied with the credit risk to which it will be exposed by transacting with the particular DCO.

We realize that before the CFTC determines that a DCO is eligible to clear swaps, the DCO will have to demonstrate that it has sufficient financial resources and that it is able to manage risks associated with clearing a particular type of swap. However, this will be a one-size-fits all determination and what may be an appropriate level of risk for one market participant may not be an appropriate level of risk for all market participants and all transactions of the type mandated for clearing. We believe there may be circumstances where the financial resources of the DCO and the size of the proposed transaction are such that clearing the transaction through the DCO would pose an unacceptable credit risk. The financial resources of the DCO and its individual clearing members could be less than those of an OTC counterparty. (Our concern in this regard is heightened by the regulatory proposals discussed at the CFTC's open meeting on December 16, 2010, which would materially reduce the capital requirements for membership in DCOs.) In such case, the market participant should be able to request a stay of and exemption from the Dodd-Frank Act's clearing requirements.

Lack of Relationships with DCO Clearing Members. In order to clear swaps, market participants will have to enter into an agreement(s) with one or more clearing members. Choosing a clearing member or clearing members and entering into agreements with it or them will involve due diligence and credit analysis as well as document negotiation. Additionally, because of reduced collateral requirements resulting from having trades with offsetting market exposures at the same DCO, market participants will likely seek to concentrate their trades with a particular DCO. For the same reason, market participants will want to limit the number of clearing members with which they transact business. We assume that clearing members will have relationships with multiple, but not necessarily all, clearinghouses. If a type of swap is required to be cleared because the CFTC determines that one DCO is eligible to clear the swap, then market participants will have to clear that type of swap on that DCO, regardless of whether they have entered into agreements with any of that DCO's clearing members. To the extent that

a market participant does not have a relationship with any of the DCO's clearing members, this may be unreasonable.

In addition to the cost and expense of establishing a new clearing member relationship and potentially greater collateral requirements, the financial resources of the potential clearing members and the terms under which those potential clearing member will agree to transact business may be unreasonable and thus unacceptable to the market participant. Accordingly, if a market participant would be required to establish a relationship with a new DCO and therefore a new clearing member in order to comply with the Dodd-Frank Act's clearing requirements, the market participant should be permitted to request a stay of, and exemption from, the clearing requirements. (We recognize that there could well be circumstances in which the stay would be temporary, allowing a limited period of time for the market participant to enter into appropriate relationships with one or more clearing members of the DCO.)

Unique/Special Characteristic Transactions. We assume that certain highly structured swap transactions will not be subject to the Dodd-Frank Act's mandatory clearing requirements because DCOs will not be able to clear these transactions. However, we also think that certain one-off swap transactions (or transactions with special characteristics) that may be clearable should nevertheless be eligible for exemption from mandatory clearing requirements. For example, there may be situations in which Party X desires to hedge a commercial risk by entering into a swap eligible for clearing with Party Y. After giving effect to the Dodd-Frank Act's clearing requirements, this may not be possible if liquidity or legal constraints preclude Party X from posting the type of collateral required by the relevant DCO. Assuming that Party X would be in a position to fully secure its obligations to Party Y with other property, it may be appropriate for the parties to seek an exemption from the clearing requirement. Without such an exemption the parties may have no option but to forego what would have been a responsible, risk reducing transaction. Again, we believe that market participants should be able to request a stay of and exemption from the Dodd-Frank Act's mandatory clearing requirements for transactions that are unique or reflect special characteristics that they believe render mandatory clearing inappropriate. Articulation of this as a basis for exemption should also discourage financial institutions from making unnecessary or inappropriate swap modifications solely to avoid mandatory clearing requirements. Such regulatory arbitrage would contradict the intent and purpose of the Dodd-Frank Act and its clearing requirements.

In summary, we agree with the provision of the proposed regulation that allows market participants to request a stay and ultimately a waiver of the clearing requirement. We believe that the value of the regulation for market participants will be strengthened if the Commission articulates a number of non-exclusive factors that could support such a request for a stay and potential exemption. These factors might include: DCO Credit Risk, Lack of Relationship with DCO Clearing Members, and Unique/Special Characteristic Transactions.

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We appreciate the opportunity to comment. Please contact Warren Davis at 202.383.0133 or [Warren.Davis@sutherland.com](mailto:Warren.Davis@sutherland.com) with any questions you may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Warren Davis", written in a cursive style.

Warren Davis

CC: FHLBank Presidents  
FHLBank General Counsel

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