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February 22, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

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

Re: Rulemaking on Definitions (RIN 3235-AK65) and the End-User Exemption (RIN 3038-AD10) under the Dodd-Frank Act

Dear Mr. Stawick and Ms. Murphy:

As a law firm representing a number of clients actively involved in markets for swaps and securities-based swaps, we appreciate the opportunity to comment on selected issues raise by the proposed rules issued by the Commodity Futures Trading Commission (the "CFTC") and the Securities and Exchange Commission (the "SEC," and, together with the CFTC, the "Commissions") that define key terms used and exemptions provided for in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Title VII").[1] For ease

[1] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," Proposed Rule, 75 Fed. Reg. 80174 (December 21, 2010) and "End-User Exception to Mandatory Clearing of Swaps," Proposed Rule, 75 Fed. Reg. 80747 (December 23, 2010).

of discussion, our comments below refer to the proposed rules issued by the CFTC, except where otherwise noted. They apply, however, equally to those proposed by the SEC with respect to securities-based swaps and the participants in markets for those instruments. Our comments relate primarily to the manner in which the proposed rules apply to our clients that are non-U.S. participants in the swaps markets.

1. Non-U.S. Governments and their Agencies Should be Excluded or Exempted.

The Commissions' final rules should exempt or exclude non-U.S. governments and their agencies from the definition of "swap dealer" and "major swap participant." Many such entities enter into interest-rate, currency and credit default swaps to manage their currency reserves and domestic mortgage and related securities portfolios. Agencies potentially affected include central banks, treasury ministries, export agencies and housing finance authorities. The volume of such transactions is substantial and may well exceed the levels proposed in the Commissions' definition of "major swap participant."

We do not believe that Congress intended the requirements of Title VII to apply to these entities, many of which are active participants in the swaps markets for legitimate governmental purposes. To require non-U.S. agencies to register with the Commissions as swap dealers and major swap participants would produce an incongruous result and would represent both an unwarranted extraterritorial application of U.S. law and an unacceptable intrusion on the sovereignty of foreign nations.

While it may be unlikely that any non-U.S. government or any of its agencies would meet the definition of swap dealer, they are unquestionably significant participants in the swap markets. Under the proposed rules, they could face the prospect of registration with the Commissions, reporting sensitive financial data to a foreign, i.e. U.S., government regulatory authority, and business conduct rules designed for commercial entities.

Congress made clear its intention to exempt U.S. government agencies from regulation under the Commodity Exchange Act (the "CEA") when it defined "eligible contract participant" to include those agencies.[2] We assume the Commissions will similarly exempt U.S. government agencies from the definitions of "swap dealer" and "major swap participant." The same underlying policy considerations and basic principles of comity should lead the Commissions to extend the same exemption to their non-U.S. counterparts.[3]

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[2] Commodity Exchange Act. § 1a(18).

[3] The Commissions requested comment on whether exemptions from these definitions should be provided to "sovereign wealth funds or other entities linked to foreign governments" and whether the answer "in part should be determined based on whether the entity's obligations are backed by the full faith and credit of the foreign government." 75 Fed. Reg. 80174, 80203. The rationale for such an exemption applies even more forcefully to those governments themselves and the agencies through which they carry out their functions.

2. Non-U.S. Governments and their Agencies Should be Excluded from the Definition of "Financial Entity."

Non-U.S. governments and their agencies should be excluded from the definition of "financial entity" for purposes of the definition of "major swap participant" and the end-user exemption from Title VII's clearing requirement. A non-U.S. central bank, for example, might be viewed as engaged in activities that are "financial in nature" as defined by section 4(k) of the Bank Holding Company Act of 1956 (the "BHCA").

The policy underlying section 4 of the BHCA is to separate banking from commerce by preventing private-sector banking institutions from engaging in non-financial commercial activities. It has no application to governments or to government agencies even when those agencies are engaged in financial activities. A non-U.S. central bank or housing finance agency may be engaged in a "financial activity" but it is not engaged in the kind of financial activity contemplated by Congress when it enacted section 4(k) of the BHCA.

3. How the Major Swap Participant Thresholds are Calculated Needs to be Clarified.

The Commissions requested comment on whether a non-U.S. swap participant should apply the volume thresholds in the proposed rules only to swap transactions entered into with U.S. counterparties or to a broader range of transactions that could have "a direct and significant connection with activities in, or effect on, commerce" in the United States.

Clearly, the thresholds should not be applied to a non-U.S. participant's transactions with all of its counterparties. Equally, all transactions with U.S. counterparties can reasonably be included. To take account of transactions with non-U.S. counterparties that might meet the "direct and significant connection" standard, we suggest the Commissions consider including only those transactions by a potential non-U.S. major swap participant that are with non-U.S. registered swap dealers or non-U.S. registered major swap participants. The Commissions might also consider including counterparties that are entities that the Financial Stability Oversight Council has designated as "systemically significant financial institutions." However, to go beyond these limited classes of non-U.S. counterparties would represent an impermissible extraterritorial application of U.S. law.

4. The Definition of "Major Swap Participant" Should Include Only Those Participants that are Acting as Principal.

The Commissions should make clear that the reference to "positions" in the proposed definition of "major swap participant" refer only to positions held by participants acting as principal for their own account and would not include trades by non-U.S. futures commission merchants and non-U.S. securities brokers that act only as agents for customers. It should not,

for example, include transactions by non-U.S. central banks that act as agent for their non-U.S. governments in entering into swap transactions for that government's account. Were the definition to include these intermediaries, which act only on the instructions of their customers, and the customers themselves, the transactions would be double-counted in assessing the impact they might have on the U.S. financial system.

5. The Definition of "Commercial Risk" Should be Broadly Defined.

If non-U.S. governments and their agencies are not to be excluded from the definitions of "swap dealer" and "major swap participant," it is critical that their use of swaps to manage their interest-rate, currency, credit and other risks be considered the management of "commercial" risk despite their non-commercial purpose. Governments and their agencies are not themselves commercial enterprises yet their need to protect themselves from market risks are just as compelling as for their private-sector counterparts.

6. Exemptions for Non-U.S. Dealers and other Participants Should be Provided on Basis Similar to that Under Current Law.

The Commissions should exempt non-U.S. swap dealers and major swap participants from the requirements of Title VII in a manner similar to that in which they currently exempt non-U.S. futures commission merchants and non-U.S. broker dealers. Existing regulations of the Commissions provide a well considered framework for the exemption of these entities that strikes a workable balance between the protection of U.S. markets and the extraterritorial application of U.S. law. These exemptions have been in place for years and the framework and policies on which they are based have the virtue of being familiar to market participants. The CFTC's Part 30 exempts non-U.S. futures commission merchants that are members of non-U.S. boards of trade that have applied for and received an exemption from the CFTC for their members. The SEC's Rule 15a-6 exempts non-U.S. broker-dealers that either limit their U.S. counterparties to limited categories of counterparties, including SEC-registered broker-dealers, or to U.S. institutional investors under conditions that ensure the involvement of an SEC-registered broker-dealer in the transaction.[4]

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[4] We also support the frameworks suggested by eight non-U.S. swap dealers and swap participants in their comment letter to the Commissions dated January 11, 2011 and by the Institute of International Bankers in its letter to the Commissions dated January 10, 2011, in each case on the Commissions' proposed rule on registration requirements under Title VII. 75 Fed. Reg. 71379 (November 23, 2010).

If we can provide any further background to any of our comments, please feel free to call or write me at the address or number above.

Sincerely,

Winthrop N. Brown

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