M B C A

MID-SIZE BANK COALITION OF AMERICA

February 15, 2011

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

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

Regarding: Release No. 34-63452; File No. S7-39-10; RIN 3235-AK65: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"

Dear Secretaries Stawick and Murphy,

This comment letter is being submitted pursuant to Release No. 34-63452; File No. S7-39-10; RIN 3235-AK65: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" ("Release"). We appreciate the opportunity to comment on the Release and have several suggestions which we believe deserve consideration.

The Midsize Bank Coalition of America (MBCA) is a group of 22 US banks formed for the purpose of providing the perspectives of midsize banks on financial regulatory reform to regulators and legislators. The 22 institutions that comprise the MBCA operate more than 3,300 branches in 41 states, Washington D.C. and three U.S. territories. Our combined assets exceed $322 billion (ranging in size from $7 to $25 billion) and, together, we employ approximately 60,000 people. Member institutions hold nearly $241 billion in deposits and total loans of more than $195 billion.

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1. "De Minimis Exemption from the Definition of Swap Dealer"

We understand that certain regulations are necessary following the recent financial crisis and we appreciate the CFTC's efforts to implement rules interpreting the statutory language of Section 721 and 761 of the Dodd-Frank Act. In many cases, we believe that the CFTC has struck the right balance in its proposed rules, taking into account the costs to market participants while at the same time affording appropriate protections to the stability of the financial system. However, we believe that the proposed criteria for the de minimis exemption from the definition of "Swap Dealer" should be modified so as to better align with the intent of the Act and so as not to impose a comprehensive regulatory framework on small dealers who already prudently manage their risks. Small dealers, by virtue of their low-risk business models (i.e., plain-vanilla products with offsetting back-to-back trades and mutual collateral margining), do not pose systemic risk to the financial system, yet the proposed rules, given the regulatory burdens imposed on Swap Dealers, would likely cause such firms to exit this line of business. We strongly urge the SEC and CFTC to closely examine and understand the low-risk nature of small dealers' businesses in connection with establishing the criteria for the de minimis exemption.

The SEC and CFTC propose that in order to qualify for the de minimis exemption from the definition of a Swap Dealer, an entity must meet the following criteria in connection with its dealing activities:

- A maximum aggregate gross notional amount of $100 million over the last 12 months;
- A maximum of 20 swaps over the last 12 months, including hedging transactions for offsetting the risk of swaps with customers;
- A maximum aggregate notional amount of $25 million with special entities (as defined in the CEA Section 4s(h)(2)(C) and Exchange Act Section 15F(h)(2)(C)) over the past 12 months; and
- A maximum of 15 counterparties over the last 12 months, excluding swap dealers.

We believe that these criteria are too narrow; most, if not all, small dealers will fail to meet these criteria effectively eliminating the usefulness of the de minimis exemption and disregarding the legislative intent for including such an exemption. If small dealers are unable to get an exemption then many will be forced to exit the business because they will not be able to meet the regulatory burden imposed on Swap Dealers. It is important to preserve the role of small dealers in the economy because they facilitate the use of interest rate risk management products by an end-user segment not served by large dealers. A loss of this important part of the dealer community will

curtail economic development going forward and would leave end-users less options for hedging risks with community and smaller regional dealers. We agree with the view of other financial industry trade associations that a limit on the notional amount of swaps is not a useful metric for the de minimis exemption from the Swap Dealer definition. Alternatively, we believe that a limit on the net uncollateralized exposure of uncleared swap positions is a better metric because it reflects the risk of the underlying swap positions. We also support increasing the limits on the number of transactions and the number of counterparties for the de minimis exemption test. An entity should be permitted to rely on the de minimis exemption if over the last 12 months it has no more than 75 counterparties other than swap dealers and no more than 200 customer-facing transactions. We believe that a limit on net uncollateralized exposure of uncleared swaps coupled with restrictions on the number of transactions and counterparties is a sound approach that will allow small dealers to continue to operate their businesses in a low risk manner without posing systemic risk to the financial system.

2. "Eligible Contract Participant"

Section 1a(18) of the Commodity Exchange Act, as re-designated and amended by Sections 721(a)(9) of the Dodd-Frank Act states that in order to qualify as an Eligible Contract Participant ("ECP"), a customer must meet one of several qualifications (including, but not limited to, being a corporation, partnership, proprietorship, organization, trust or other entity with: (a) total assets exceeding $10 million, or (b) at least $1 million in net worth and where such entity is engaged in business related hedging). We strongly urge the SEC and CFTC to allow for continued use of the "line of business" exception promulgated by the CFTC under its 1989 Policy Statement by using its discretion to incorporate such criteria into the modified definition of ECP set forth in the rules implementing the Act. This exception permits an entity that does not meet the quantitative qualification requirements to enter into a swap provided that the swap is being used in connection with a line of business (i.e. being used truly for risk management and not for speculative purposes).

This exception is especially important to various special purpose entities which are formed for the purpose of developing commercial properties and other similar ventures. These entities may not meet the quantitative criteria required to be designated as an ECP, but should be able to enter into to swaps in conjunction with the financing of their developments.

Since the purpose of the Act and its regulations is to reduce and monitor systemic risk - especially risk associated with various derivatives used for non-hedging purposes - leaving this exception in place would have the benefit of continuing to allow the use of swaps for appropriate hedging purposes by those who are spurring economic growth. We do not believe

that allowing the line of business exception to continue to exist would add material risk to the system; however, eliminating this exception would likely curtail economic development going forward by unnecessarily restricting access to important and effective interest rate risk management tools.

In the event that the CFTC and the SEC do not reinstate the line of business exception, we request that the CFTC and the SEC consider promulgating a new regulation for these special purpose entities which provides for a "look-through" ECP assessment of the owners of the special purpose entity. If the owner of the entity is a legal entity, then the currently proposed quantitative criteria would be applied to such parent entity if not already met by the special purpose entity itself. If the special purpose entity is owned by an individual, then we recommend that the currently proposed quantitative criteria be replaced with the criteria which currently exist for "accredited investors" found under Rule 501 of Regulation D under the Securities Act of 1933, as amended. Specifically, Rule 501 defines an "accredited investor", in part, as:

- Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000; or

- Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.

If the corporate or natural person owners of an entity meet these look-through ECP assessment criteria, the entity should be able to enter into a swap for the purpose of hedging business risk.

For example, a limited liability corporation ("LLC") owns a piece of commercial real estate as its sole asset with a value of $4,000,000. The LLC has $800,000 in equity and a $3,200,000 floating rate loan. The LLC is owned by an individual with a $3,000,000 net worth. The LLC would not qualify as an ECP under the Dodd-Frank Act (without the line of business exception), and as a result would not be able to enter into a swap to hedge the risk of rising rates on the floating rate loan. Using the "accredited investor" approach discussed above, the LLC would qualify as an ECP based on the owner's net worth.

Moreover, we also believe it is appropriate to look-through to any party that acts as a guarantor of an entity's swap obligations to determine the ECP eligibility of such entity. Under the current rules, the look-through to a guarantor only may occur with respect to satisfying the $10 million total

asset test and not the $1 million net worth test. However, if such a guarantor has agreed to be liable on the underlying swap obligations of the entity and such guarantor otherwise qualifies as an ECP because it meets *either* the $10 million total asset test or because such guarantor has at least $1 million in net worth, then such status, based on the consolidated enterprise's overall sophistication, should be imputed to the entity itself.

Utilizing this "look-through" approach would allow many entities which themselves do not meet the quantitative ECP criteria to continue to utilize swaps while giving regulators comfort that swap participants possess the necessary degree of sophistication. This is especially important for a special or limited purpose entity which is utilizing a swap with uniquely tailored terms for hedging and funding purposes and not for speculation or investment. The absence of such a regulation likely would increase funding costs for smaller developers and reduce potential economic growth in the coming years.

3. Appendix of Additional Comments in Executive Summary Form

In addition to the foregoing comments which address concerns of unique importance to the Midsize Bank Coalition of America, we have set forth on Appendix 1 attached hereto additional comments, in executive summary form, to the proposed rules regarding the definitions of "Swap Dealer" and "Security-Based Swap Dealer," most of which have been presented to the CFTC by other institutions and industry organizations.[1]

We thank you again for the opportunity to comment on the Release and appreciate your willingness to consider our suggestions.

Yours Truly,

Russell Goldsmith
Chairman, Midsize Bank Coalition of America
Chairman and CEO, City National Bank

[1] In particular, we endorse the comments made by the Financial Services Roundtable in their comment letter on this subject, from which the executive summary on Appendix I was largely derived.

cc: Mr. Jack Barnes, People's United Bank
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APPENDIX I

I. Additional Comments to the definitions of "Swap Dealer" and "Security-Based Swap Dealer"

1. We support the CFTC's proposed interpretation of "regular business," as such term is referenced in clause (C) of the definition of swap dealer. We believe that such an interpretation, as stated in the preamble to the proposed rules, will help distinguish between end-users who actively participate in the swap markets to hedge or mitigate risks arising from their business and those entities more appropriately characterized as dealers because they accommodate demand for swaps from other parties. In addition to including such language in the preamble, we encourage the CFTC to codify such language in the rules themselves.

2. While we agree with some of the five nonexclusive factors that the CFTC lists as indicative of whether an entity is holding itself out as a swap dealer or is commonly known as a swap dealer, we believe that limiting language should be included with respect to two of the factors. The first proposed factor, contacting potential counterparties to solicit interest in swaps, is a common activity of end-users as part of their normal hedging activities. We believe that solicitations of proposed swap transactions by a customer of the entity it solicits, and which are intended to hedge exposures and mitigate risks related to a non-swap business, should be distinguished from the activity of true swap dealers who solicit expressions of interest from a range of market participants. The second proposed factor, developing new types of swaps or security-based swaps, is also a possible end-user activity. Certain sophisticated end-users may design a bespoke swap structure to meet particular hedging needs, and then bring such structure to a counterparty for a trade. We believe this is different, however, from the more classic structuring and offering of new derivatives products, which we agree is indicative of an entity's status as a swap dealer.

3. Further clarification to the definition of market maker in the context of swap transactions is needed. The CFTC rejected the idea that market making in the swap context needs to involve maintaining a continuous two-sided market or standing ready to buy or sell, but did not offer more specifics regarding how to interpret such term. To provide regulatory certainty for swap market participants, we believe the CFTC should more specifically define the term "making a market" as referenced in clause (A)(ii) of the definition of swap dealer.

4. Swaps entered into in a fiduciary capacity should not count toward an entity's de minimis exemption, nor should they otherwise be treated as indicative of swap dealing. This interpretation is especially appropriate given that a fiduciary may not have discretion to enter into swaps, as the decision may be made by a trust beneficiary or other party with authority over the relevant assets.

5. The exemption for insured depository institutions (IDIs) in connection with loans should (i) be expanded to include all extensions of credit by such institutions, including, for example, leases, financings documented as sales of financial assets, loan participations, letters of credit, bank qualified transactions, etc., (ii) include anticipatory hedging in connection with an extension of credit (for instance to lock in an interest rate), (iii) include swaps entered into after execution of a credit extension, but related to such earlier credit extension, (iv) be clarified to include those situations where some, but not all, of the underlying credit risk is hedged, (v) include situations where a special purpose vehicle formed by the IDI is the entity making the credit extension and entering into the associated swap, and (vi) generally look to the credit as a whole rather than one or more particular financial terms.

6. Given the CFTC's interpretation of "regular business," we believe that the exemption for IDIs entering into swaps in connection with loans should also include swaps entered into by the IDIs to hedge the risks of such underlying swaps. The exemption for IDIs that enter into swaps tied to credit extensions will have limited utility, and may lead to inappropriate risk-taking, if the exemption is not interpreted to include those swaps the IDI then enters into (effectively as an end-user) to hedge the risk of the loan-related swap. While we believe the foregoing is the intended interpretation of the current proposed rules, we believe explicit confirmation that offsetting swaps are included in the exemption is appropriate.

7. The CFTC should clarify that a swap entered into in connection with a loan continues to be excluded from the swap dealer determination even if the loan is subsequently transferred away from the IDI, so long as there was no expressed intent to separate the loan from the swap at the time of the transaction. For purposes of determining such intent, we believe that the existence of provisions in the loan documentation permitting loan assignments or participations should not be interpreted, in and of themselves, to indicate the IDI's intent to separate the loan and the swap from the outset.

8. The CFTC should clarify that an IDI that does not have to register as a swap dealer as a result of its swap activity in connection with loans and extensions of credit likewise does not have to register as a futures commissions merchant (FCM). This clarification is especially important given that the collateral securing the underlying loan or extension of credit by the IDI also often secures the end-user's swap obligations. This traditional cross-collateralization with respect to swap and loan obligations owed to the IDI should not be equated to the acceptance of cash collateral by a FCM under a credit support annex to margin a trade or contract.

9. The CFTC should make clear that the de minimis exemption is in addition to the exception allowing IDIs to enter into swaps in connection with loans and extensions of credit.

10. The CFTC should work with the federal banking regulators to ensure that provisions implementing the permitted activities provisions of the Volcker rule, as such rule relates to proprietary trading, are consistent with the types of swap activities that are permitted to be undertaken by IDIs under the CFTC's proposed definitions and rules. Specifically, we encourage the CFTC to recommend that the Volcker rule regulations clarify that swap activities by an IDI that would not require it to register as a swap dealer should also not be subject to "push-out" under the Volcker rule.

11. Swaps among affiliated members of a corporate group should be excluded from any evaluation of whether an entity is a swap dealer. Intercompany swaps are often aggregated with one affiliate who then enters into a "back-to-back" swap with an unaffiliated entity to lay off the risk. This structure, often entered into for purposes of risk management and administrative convenience, should not require the entity in which the affiliated swaps are consolidated to register as a swap dealer. There simply is no regulatory benefit to having such an entity register as a swap dealer when it is essentially acting as an end-user.