JONES DAY

222 EAST 41ST STREET • NEW YORK, NEW YORK 10017
TELEPHONE: (212) 326-3939 • FACSIMILE: (212) 755-7306

Direct Number: (212) 326-3663
jstelpner@jonesday.com

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By Electronic Submission

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

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

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" (RIN 3030-AD06) (SEC File No. S7-39-10)

Dear Mr. Stawick and Ms. Murphy:

This comment letter is submitted on behalf of Canadian special purpose vehicles, Master Asset Vehicle I and Master Asset Vehicle II (collectively, the "Canadian MAVs") and at the request of investors holding significant investments in the Canadian MAVs regarding the joint proposed rules promulgated by the Commodity Futures Trading Commission (the "CFTC") and the Securities Exchange Commission (the "SEC," and together with the CFTC, the "Commissions") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") regarding Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," Release No. 34-63452 which were published in the Federal Register on December 21, 2010 (the "Proposed Rules").

The Canadian MAVs appreciate the opportunity to comment on certain aspects of the Proposed Rules, particularly, with respect to an exclusion from the Major Swap Participant (an "MSP") and Major Security-Based Swap Participant (except where otherwise indicated,

collectively, "Major Participant") definitions for legacy portfolios. While the Canadian MAVs are unique structures for which the requirements of the Proposed Rules pose some particularized difficulties, our comments to the Proposed Rules also address issues of extraterritorial effect and collateral treatment for the purpose of the "substantial position" tests that we expect to be issues of wider concern and interest to swap market participants generally.

I. Introduction

The Canadian MAVs were established as part of the restructuring of certain Canadian third-party asset-backed commercial paper ("ABCP") trusts under the so-called Montréal Accord. In August 2007, the Canadian non-bank ABCP market froze in the wake of extreme volatility in the credit markets. The ABCP trusts were extensive protection sellers under leveraged bespoke portfolio and index credit default swaps ("CDS"). The CDS counterparties required the ABCP trusts to post additional collateral in order to back the increased CDS exposure due to large mark-to-market moves. Liquidity providers to the ABCP trusts refused to provide short-term financing. As a consequence, many of the trusts were unable to roll over maturing commercial paper. The failures to post collateral resulted in defaults under the CDS, giving the CDS counterparties the right to liquidate transactions.

The Canadian MAVs were created through an extraordinarily complex restructuring (comparable to a U.S. Chapter 11 reorganization) of Canada's non-bank sponsored ABCP market. This restructuring took 17 months to complete and was approved by Canadian courts. Although the Canadian MAVs are not government entities, the investors include Canada's largest pension fund managers and a substantial portion of the investor dollars in the Canadian MAVs is public sector retirement and similar funds. The governments of Canada, Alberta, Ontario and Quebec were involved in the restructuring negotiations and provided temporary substantial backstop financial commitments to the Canadian MAVs for their first 19 months of existence.

The Canadian MAVs inherited the outstanding derivatives positions of the former ABCP trusts in which the Canadian MAVs are sellers of protection. Under the restructuring, investors relinquished old short-term ABCP and received new long-term Canadian MAV-issued notes, whose maturity now matches the collateral held by the Canadian MAVs. If the restructuring had not occurred, ABCP investors and CDS counterparties would likely have experienced sizeable losses that could have further destabilized the Canadian financial markets.

The Canadian MAVs are liquidating trusts, prohibited from raising new capital, entering into new CDS or increasing exposure under existing CDS. The Canadian MAVs are not participants in derivatives markets (other than with respect to limited hedging activities through interest rate and currency swaps for managing assets) and are only passive holders of CDS. The Canadian MAVs' activities are limited to managing the orderly unwind and liquidation or run-

off of their remaining CDS and amortizing cash assets. Unless unwound earlier, all CDS mature over the next few years, and no swaps will be outstanding as of December 2016.

CDS counterparties include both U.S. and non-U.S. financial institutions. The payment obligations of the Canadian MAVs to the CDS counterparties are supported by pools of collateral pledged to the CDS counterparties and by margin funding facilities. The CDS counterparties affirmatively and actively negotiated and agreed to the restructuring to avoid significant losses that would have arisen from terminating trades due to the collapse of Canada's ABCP conduits. CDS counterparties not only retained existing collateral but are now better secured with a much lower probability of suffering losses. As of the date of this letter, the combined value of the collateral pools and margin facilities exceed the mark-to-market exposure of the CDS by approximately 5.6 times.

If the Canadian MAVs fall within the definition of Major Participant they are very likely to be unable to comply with a number of the contemplated Major Participant regulations and such noncompliance could trigger defaults under the CDS held by the Canadian MAVs. Canadian MAV noteholders and other creditors could once again be facing substantial losses. Triggering defaults and losses upon market participants by imposing Major Participant regulatory requirements on entities that cannot and should not have to comply with such regulations is contrary to one of the primary goals of Dodd-Frank of reducing systemic risk.

II. Exception for Legacy Portfolios

The Commissions have requested comment on whether the Proposed Rules further defining Major Swap Participant and major-security-based swap participant should exclude such entities from the Major Participant definitions if their swap and security-based swap positions (collectively, "swap positions") are limited to legacy positions. The discussion in the Proposed Rules describes legacy positions as portfolios of credit default swaps previously entered into in connection with the activities of monoline insurers and credit derivative product companies.

The Canadian MAVs support the position that the creation of an exclusion from Major Participant treatment is appropriate for entities whose swap positions consist of legacy portfolios of swap positions (i) that are being run off until their natural expiration or unwound in an orderly fashion, (ii) who are not engaged in the business of entering into new swap positions (except for the limited purpose of directly hedging or mitigating risk in the legacy portfolio) and (iii) who do not engage in any other ongoing business activities unrelated to the run-off and termination of

their remaining swap positions and the liquidation or amortization of remaining cash assets (such entities shall be referred to herein as "Legacy Portfolio Entities").[1]

In that regard, the Canadian MAVs note that Primus Financial Products, LLC, Quadrant Structured Investment Advisers, LLC and Invicta Advisors LLC have submitted a comment letter to the CFTC and SEC, dated as of January 31, 2011 (the "Legacy Portfolio Letter"), expressing support for an exclusion from the definition of Major Participant for legacy portfolios. The Legacy Portfolio Letter proposes that "an entity whose activities are limited to prudently managing the run-off of one or more portfolios of credit default swaps upon enactment of the Dodd-Frank Act and which was not required to post collateral under its current contractual swap agreements" (which is defined in the Legacy Portfolio Letter as a "Run-Off Entity") should be expressly excluded from being considered a Major Participant. The Legacy Portfolio Letter also proposes that a Run-Off Entity would not be permitted to enter into any new credit default swap transactions post-enactment other than specific risk reducing restructuring or hedging of its existing swap portfolio."

The Canadian MAVs generally support the proposal set forth in the Legacy Portfolio Letter. However, we emphasize that an exclusion from the Major Participant definitions for Legacy Portfolio Entities should not be limited to those positions entered into by monoline insurers and credit derivative product companies. There are no policy or regulatory objectives served by such limitations. Further, whether or not an entity at the time it was actively engaged in swap activities had a requirement to post collateral under its swap agreements, has no relevance to Legacy Portfolio Entity status. Instead, a Legacy Portfolio Entity exemption should be available to any entity that, as set forth above, holds a legacy portfolio of swap positions and engages in no other business activities unrelated to managing and closing out such legacy swap portfolio positions and remaining cash assets, if any.

The Canadian MAVs are liquidating trusts with a limited duration, with no employees, no operating businesses, no access to capital and no ability to enter into new credit default swaps. In the Proposed Rules, the Commissions noted that the Major Participant definitions "denote a focus on entities that pose a high degree of risk through their swap and security-based swap activities." Because Legacy Portfolio Entities, such as the Canadian MAVs are not engaged in any ongoing swap or security-based swap activities, they are not "generators" of the type of activities which are the focus of the Dodd-Frank Act.

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[1] We would also request that the Proposed Rules be clarified to reflect that Legacy Portfolio Entities would be permitted to (i) execute new swap positions solely for the limited purpose of hedging and mitigating the risks of existing legacy portfolio positions and (ii) make amendments to existing swaps so long as such amendments do not increase the notional exposure or leverage of any position.

Other provisions of the Dodd-Frank Act further support a Congressional intent not to regulate Legacy Portfolio Entities. The Dodd-Frank Act sets forth prescriptive requirements for the ongoing comprehensive regulation of Major Participants. These conduct and compliance requirements imposed on Major Participants by the provisions of the Dodd-Frank Act and the proposed rules thereunder include duties to: (1) register with the CFTC or SEC, as appropriate; (2) comply with recordkeeping and reporting requirements; (3) monitor trading to prevent position limit violations; (4) establish risk management procedures for managing day-to-day business; (5) provide disclosures of general information relating to swaps trading, practices, and financial integrity; (6) establish and enforce internal systems and procedures to obtain information needed to perform all of the duties prescribed by Commission regulations; (7) implement conflict-of-interest systems and procedures; (8) appoint a compliance officer; (9) establish documentation standards and (10) refrain from taking any action that would result in an unreasonable restraint of trade or impose a material anticompetitive burden on trading or clearing. These requirements serve no useful purpose for a Legacy Portfolio Entity not engaged in an ongoing swaps business.

Section 731 of the Dodd-Frank Act provides that "[i]t shall be unlawful for any person to act as a Major Swap Participant unless the person is registered as a Major Swap Participant with the Commission." That is, the focus of Section 731 is on the ongoing activities of a participant in the swaps markets. It simply would not be possible for most Legacy Portfolio Entities to comply with or implement many of the proposed conduct and compliance rules – in particular, the expected requirements relating to margin and capital. If a Legacy Portfolio Entity is subjected to regulatory requirements with which it cannot comply, the likely unintended outcome could be to place the Legacy Portfolio Entity in a position of noncompliance with the registration and compliance requirements to which Major Participants are subject and to potentially create events of default under its legacy swap portfolio, which would not advance, and could potentially undermine, the legislative intent and which could adversely affect investors, counterparties and other creditors of the Legacy Portfolio Entity.

The Canadian MAVs support the concept in the Legacy Portfolio Letter that, in order to avoid abuse, an entity seeking to avail itself of a Legacy Portfolio Entity exclusion should provide the Commissions with confirmation as to its eligibility for a Legacy Portfolio Entity exclusion. We propose that a Legacy Portfolio Entity would be required to confirm that (i) it is in run-off mode, (ii) it does not engage in any business activities not related to the wind-up and close-out of its remaining swap positions and liquidation or amortization of any other remaining assets, and (iii) it will not enter into any new swap transactions (except for the limited purpose of directly hedging or mitigating risk in the legacy swap portfolio).[2]

[2] The Canadian MAVs request that for the purpose of the proposed exclusion for Legacy Portfolio Entities, the Commissions confirm that novations of existing swap positions to a new counterparty would not be treated as a new transaction.

The Canadian MAVs also support a requirement proposed in the Legacy Portfolio Letter that, as a condition to availing itself of the exclusion, a Legacy Portfolio Entity would be required to provide, on a periodic basis and for so long as its swap positions outstanding exceed the "substantial position" threshold for a category of swaps or security-based swaps, applicable position information to the appropriate regulator, similar to that required of registered Major Participants. The Canadian MAVs recognize the interest of and the utility to the Commissions in obtaining ongoing position reports from the largest participants in the swaps markets, including certain Legacy Portfolio Entities. Such periodic position reporting will likely aid in and serve the interest of the Commissions in obtaining a complete view of the positions and risk profile of the overall swap market, and otherwise alleviate the need to impose on Legacy Portfolio Entities any additional Major Participant regulatory requirements.

Whether achieved by exempting Legacy Portfolio Entities from the Major Participant definitions or by treating Legacy Portfolio Entities as Major Participants but providing exemptions from the regulatory compliance requirements imposed on Major Participants that are inapplicable to or unfeasible for Legacy Portfolio Entities (other than with respect to certain reporting requirements), exempting holders of legacy portfolios from the full extent of the Major Participant compliance requirements with respect to such legacy portfolios is an appropriate action that (a) avoids placing an unnecessary and undue burden on these entities that serves no useful purpose and (b) avoids the disruptions and defaults that may be incurred by Legacy Portfolio Entities subjected to the full extent of the regulatory compliance requirements imposed on Major Participants.

III. Limit on Extraterritorial Application of Dodd-Frank for Purposes of Major Swap Participant Qualification

It is of utmost importance that the Commissions adopt clear guidelines for the jurisdictional reach of the provisions of Title VII of the Dodd Frank Act. Sections 721 and 761 of the Dodd-Frank Act define "Major Swap Participant" and "Major Security-Based Swap Participant," respectively, to include persons who maintain substantial positions in swaps or security based swaps or "whose outstanding [security-based] swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets." The Proposed Rules do not specify inclusion or exclusion of positions with non-U.S. entities for purpose of "substantial position" calculations.

Section 722(d)(i)(1) of the Dodd-Frank Act provides that the provisions of the Dodd-Frank Act shall not apply to activities outside the United States unless those activities "have a direct and significant connection with activities in, or effect on, commerce of the United States" or if such swap activities contravene the rules or regulations promulgated by the CFTC as are

necessary or appropriate to prevent the evasion of the Dodd-Frank Act. In its proposed rule on the registration of swap dealers and Major Swap Participants(the "Proposed Registration Rules"), the CFTC states that the definition of Major Participant "specifically focuses on the degree of risk that an entity's swaps pose to U.S. counterparties and the U.S. market."[3] Accordingly, the CFTC also states that "the analysis of whether a non-U.S. entity should register as an MSP would turn upon, among other things, swap positions with U.S. counterparties (including the use of a U.S. clearing agency or swap execution facility) or that involve U.S. mails or any means or instrumentality of interstate commerce."

Non-U.S. persons who have swap positions with both U.S. and non-U.S. counterparties, such as the Canadian MAVs, are presently in an untenable situation of substantial uncertainty with regard to the extent to which its swap positions with other non-U.S. persons will be deemed by the CFTC and/or SEC to "have a direct and significant connection with activities in, or effect on, commerce of the United States" and thus be subject to inclusion for the purpose of calculating and determining if an entity holds a "substantial position" in a category of swaps or security-based swaps. Accordingly, the Canadian MAVs believe that exclusion of positions in swap transactions executed between two non-U.S. counterparties is consistent with Section 722(d)(i)(1) of the Dodd-Frank Act and the Proposed Registration Rules.[4]

The Proposed Registration Rules state that "the analysis of whether a non-U.S. entity should register as an MSP would turn upon, among other things, swap positions with U.S. counterparties (including the use of a U.S. clearing agency or swap execution facility) or that involve U.S. mails or any means or instrumentality of interstate commerce." The Canadian MAVs support the positions set forth (i) by the Securities Industry and Financial Markets Association in its comment letter submitted to the Commissions and dated February 3, 2011 (the "SIFMA Letter") and (ii) by the International Swaps and Derivatives Association, Inc. in its comment letter submitted to the CFTC dated January 24, 2011 (the "ISDA Letter") regarding the Proposed Registration Rules. As the SIFMA Letter and the ISDA Letter both discuss, the jurisdictional limits imposed on the CFTC in Section 722 of the Dodd-Frank Act and on the SEC by SEC 772 of the Dodd-Frank Act should be interpreted narrowly in a manner consistent with the Supreme Court decision in *Morrison v. National Australia Bank Ltd.*[5] In particular, adoption of a bright line rule excluding swaps executed between two non-U.S. persons for the purpose of

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[3] Proposed Rule "Registration of Swap Dealers and Major Swap Participants," (RIN 3038-AC95) published November 23, 2010.

[4] Even if positions with non-U.S. persons were required to be included in the calculation of an entity's substantial position for reporting purposes, such positions should nevertheless be excluded for purposes of determining whether such entity's positions exceeded the substantial position thresholds which would require the entity to register as a Major Participant.

[5] 130 S. Ct. 2869 (2010).

the Major Participant registration requirements is appropriate as such transactions are presumptively "outside the United States" (for the purposes of Section 722 of the Dodd-Frank Act) and "without the jurisdiction of the United States" (for the purposes of Section 771 of the Dodd-Frank Act), and such transactions are likely not subject to U.S. jurisdiction under the test set forth in *Morrison*.[6]

Foreign swap transactions not involving a U.S. counterparty, *i.e.*, between two foreign counterparties are more appropriately the province of the supervisory authorities in the relevant non-U.S. jurisdiction and should, therefore, be excluded from calculations of substantial swap positions. Limiting substantial position calculations for purposes of determining applicability of the Major Participant registration requirements to a calculation of an entity's substantial position in swap transactions with U.S. persons serves to resolve the uncertainty regarding the extraterritorial application of the provisions of the Dodd-Frank Act. Moreover, such clarification would be consistent with prior statements by the CFTC to the effect that, even where it may have jurisdiction, considerations of international comity should play an important role in determining the appropriate scope for its oversight of extraterritorial activities under federal statutes.[7] Forcing non-U.S. persons to include within their substantial positions calculations those swap transactions with non-U.S. counterparties, if the result would cause such non-U.S. persons to become subject to the Major Participant registration requirements, would be inconsistent with these statements.

Resolving this matter of substantial uncertainty is critical to allowing market participants to understand the application of the regulatory requirements of Dodd-Frank to their market conduct. If the Commissions decline to adopt this bright-line for purposes of calculating substantial swap positions, the Canadian MAVs request that the Commissions offer some fashion of additional guidance to clarify the extent to which the provisions of the Dodd-Frank Act apply to swap transactions taking place outside the United States between two non-U.S. persons.

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[6] The decisions of the U.S. District Court for the Southern District of New York, in *Elliott Associates, L.P., et al. v. Porsche Automobil Holding SE*, et al., 10 Civ. 0532 (HB) and in *Black Diamond Offshore Ltd., et al. v. Porsche Automobil Holding SE*, et al., 10 Civ. 4155 (HB) (December 20, 2010), apply the *Morrison* transaction test in the context of securities-based swap agreements and confirmed a narrow interpretation of extraterritorial jurisdiction. The *Porsche* decision quotes *Morrison* in noting that "the probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application it would have addressed the subject of conflicts with foreign laws and procedures."

[7] See Proposed Registration Rules at 71382.

IV. Treatment of Collateral Marked Less Frequently Than Daily for the Purpose of Calculating Potential Future Exposure

The proposed rules provide that for the purpose of the potential future exposure calculation, mark-to-market positions are discounted such that the potential future exposure of these positions is equal to 20 percent of what the potential future exposure of the position would be otherwise. No discount is provided for uncleared positions or for positions supported by collateral if collateral is exchanged to reflect changes in the current exposure arising from the underlying swap less frequently than daily. Giving no weight to posted collateral for uncleared swaps or for swaps not marked to market on a daily basis, while discounting exposures backed by daily-marked collateral by 80%, produces figures that unintentionally amplify the future risk perception of such swaps.

Swap positions backed by collateral that is subject to periodic but not daily mark-to-market adjustment should be measured in a way that reflects an incrementally higher risk than a position backed by collateral that is subject to a daily mark to market adjustment, but the Proposed Rules treat positions backed by collateral marked-to-market on a less frequent than daily basis as creating five times the potential future exposure over that of a position backed by collateral marked on a daily basis. The Canadian MAVs propose that the solution to this issue is to account for and provide a similar (incrementally smaller) discount for positions supported by collateral that is not subject to daily mark-to-market adjustments.

Appropriate recognition should be given to exposure that is supported by collateral constituting an Independent Amount. Equally, swap positions that are substantially overcollateralized, including by the use of required Independent Amounts, should not require daily mark-to-market adjustment in order to receive the collateralization discount because the overcollateralization of a swap position addresses the same concern that daily marking-to-market is intended to alleviate. That is, the posting of Independent Amounts, as well as any overcollateralization, reduces the risk that a position will become undercollateralized (thus increasing counterparty risk), as a result of movements in the mark on the underlying swap position. Therefore, the fact that exposure for such swaps is not calculated on a daily basis becomes much less relevant in assessing the potential future risk arising from those swap positions.

As drafted, the Proposed Rules do not serve one of the intended purposes of Major Participant status, which is to help regulators obtain an accurate picture of the overall market and risk exposures going forward. The disparity in the treatment between swap positions backed by collateral marked-to-market on a daily basis and swap positions backed by collateral subject to less frequent adjustment produces results that (i) may cause entities with substantially similar swap portfolios to be subject to disparate regulatory requirements and (ii) reduce the usefulness

of the substantial position calculations as an indicator of overall risk in the market and, particularly, of the relative amount of risk taken by a participant in the market.

In addition, the use of credit spreads and credit spread volatility to trigger collateral posting requirements should receive the same credit as daily mark-to-market adjustments for the purpose of measuring future exposure. Such credit spread triggers track changes to market indices, mid-market spreads or swap curve pricing as a barometer of market sentiment regarding the future payment obligations arising from the underlying swap position. Collateral posting requirements that are triggered by widening credit spreads provide a risk amelioration benefit comparable to requirements to post collateral that are triggered by daily exposure marks. Ignoring collateral that is subject to adjustment based upon credit spreads would produce disparate treatment of similarly positioned swap portfolios and reduce the usefulness of substantial position calculations as an indicator of risk posed by a market participant.

The Canadian MAVs appreciate the opportunity to provide their comments on the Proposed Rules, and look forward to continued dialogue moving forward.

Respectfully submitted,

Joel S. Telpner
Partner
Jones Day