CPP INVESTMENT BOARD

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Via Electronic Submission: http://comments.cftc.gov

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

Re: RIN No. 3038-AD25: Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties.

Dear Mr. Stawick:

The Canada Pension Plan Investment Board (the "**CPPIB**") appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "**Commission**") with respect to the definition of "special entity" as set forth in the proposed rules on "Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties",[1] under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**").[2] We look forward to working closely with the Commission to ensure that the final promulgated rule appropriately defines special entity.

I. CPPIB

The CPPIB is a professional investment management organization based in Toronto whose purpose is to invest the assets of the Canada Pension Plan (the "**CPP**") in a way that maximizes returns without undue risk of loss.[3] The CPPIB was incorporated as a federal Crown corporation pursuant to the *Canada Pension Plan Investment Board Act* in December 1997.[4] The CPPIB Act governs the activities of the CPPIB. As a fiduciary, the CPPIB is required to serve the best interests of CPP contributors and beneficiaries,[5] and does not invest funds on

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1 75 Fed. Reg. 80,638 (Dec. 22, 2010) (the "**Proposed Rule**").

2 Pub. L. No. 111-203.

3 Canada Pension Plan Investment Board Act, 1997 S.C., ch. 40, at §5 (Can.) (the "**CPPIB Act**").

4 *Id.* at §3.

5 *Id.* at §5.

behalf of any person or entity besides the CPP.[6] The CPPIB holds shares in 2,900 companies globally, and, as at December 31, 2010, had assets of $140.1 billion.

II. Proposed Rule

Section 23.401 of the Proposed Rule[7] defines "special entity" as: "(1) A Federal agency; (2) A State, State agency, city, county, municipality, or other political subdivision of a State or [sic]; (3) Any employee benefit plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) [("**ERISA**")]; (4) Any governmental plan, as defined in Section 3 of [ERISA]; or (5) Any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3))."

III. Special Entity Definition Clarification

Summary: The Commission should make it explicit that foreign employee benefit plans such as foreign pension plans are not "special entities."

The Commission has requested comment on whether the definition "employee benefit plans, as defined in Section 3 of ERISA", should be limited to plans "subject to regulation under ERISA". As further explained below, we believe that prong (3) of the definition should be limited to plans subject to regulation under ERISA so that it does not extend to foreign special entities.

As currently drafted, "special entity" is defined, in part, as any "employee benefit plan, as defined in Section 3 of [ERISA]". As defined in Section 3 of ERISA, an employee benefit plan includes any retirement plan, including foreign plans. In its operation, however, ERISA does not apply to plans maintained outside the U.S. primarily for non-U.S. persons—but this limitation of scope is found in Section 4 of ERISA, and not the Section 3 definition.[8] We believe the final rule should clarify that foreign benefit plans are not included in the definition of "special entity." Accordingly, we suggest revising the final rule so that the definition is limited to only those employee benefit plans "subject to regulation under" ERISA, and we believe this could be accomplished by revising the language in prong (3) of the definition set forth in Section 23.401 of the Proposed Rule to the following:

(3) Any employee benefit plan **subject to regulation under** the Employee Retirement Income Security Act of 1974 (29 U.S.C. **1003), as set forth in Section 4 of the Employee Employee Retirement Income Security Act of 1974 (29 U.S.C. 1003)**.

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[6] *See* the CPPIB Act (setting forth the scope of the CPPIB's activities).

[7] The Proposed Rule was promulgated pursuant to the rulemaking authority set forth in Section 731 of the Dodd-Frank Act. Section 731 amends the Commodity Exchange Act by adding Section 4s(h), which provides the Commission with authority to impose business conduct requirements on swap dealers ("**SDs**") and major swap participants in their dealings with counterparties, including "special entities."

[8] ERISA Section 4(b)(4) (29 U.S.C. §1003(b)(4)).

The Commission has the authority to provide this clarification,[9] and this change should be made for the following reasons.

First, excluding foreign pension plans is consistent with Congressional intent. The definition as written primarily applies only to U.S. entities and organizations—namely, U.S. agencies, plans and governmental plans. It would be odd if Congress had intended to include foreign governmental plans in prong (3) of the definition, while specifically excluding such plans in prong (4)—the portion of the definition that applies specifically to governmental plans.[10] Amending prong (3) to apply only to benefit plans subject to regulation under ERISA would reconcile this inconsistency.

Second, we believe that Congress intended to protect United States citizens and interests, and manifested no intent to impose special entity protections on non-U.S. beneficiaries of non-U.S. plans.[11] Yet, as presently written, the definition of "special entity" would impose a fiduciary duty on SDs advising foreign pension plans (including foreign governmental plans). Without a clear expression of Congressional intent to protect these foreign interests, it is difficult to conclude that the CFTC should expand its regulatory oversight to foreign special entities.

Third, it is likely that including foreign pension plans in the definition of "special entity" would result in the application of standards of care and duties that are inconsistent with Canadian standards and the standards of other countries. For example, when an SD transacts with a foreign special entity, that foreign special entity typically would expect fair treatment, but may not expect to be treated with the same fiduciary standards applicable under U.S. law. Rather, the foreign special entity would expect to be protected by its home country rules and regulations. Application of the special entity rules that arise out of the Dodd-Frank Act to such a transaction could conflict with local laws and create legal uncertainty for all parties involved. In addition, SDs also will be at a competitive disadvantage vis-à-vis their foreign counterparts when dealing with a foreign benefit plan in a jurisdiction that does not impose similar rules or obligations (*e.g.*, if the foreign rules do not mandate margin requirements for non-cleared swaps).

IV. Conclusion

For the reasons set forth above, we respectfully request the Commissions to clarify that foreign pension plans are not included in the definition of "special entity" by limiting prong (3) of that definition to only those plans "subject to regulation under ERISA."

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[9] *See* Section 731 of the Dodd-Frank Act.

[10] "Governmental plan", as defined in ERISA, only reaches plans established for the U.S. and state governments, and does not extend to foreign governments or agencies and instrumentalities thereof.

[11] Senator Blanche Lincoln stated in a floor colloquy, after discussing particular problems with certain municipalities in the U.S., that the fiduciary duty which SDs must meet when advising special entities "should help protect both tax payers and plan beneficiaries." 156 Cong. Rec. S5293 (daily ed. Jul. 15, 2010).

CPPIB thanks the Commission for the opportunity to provide comments regarding the definition of "special entity." Please do not hesitate to call me at (416) 874-5278 or Andrea Jeffery, Corporate Governance and Legal Associate, at (416) 868-8559 with any questions the Commission or its staff might have regarding this letter.

Respectfully,

Ed Cass
Vice President – Global Capital Markets

cc: The Hon. Gary Gensler, Chairman
The Hon. Michael Dunn, Commissioner
The Hon. Bart Chilton, Commissioner
The Hon. Jill E. Sommers, Commissioner
The Hon. Scott D. O'Malia, Commissioner