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

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help them manage interest rate risk and offer competitively priced loan and deposit products to their customers.

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 Commodity Futures Trading Commission’s (“CFTC’s”) and the Securities and Exchange Commission’s (“SEC’s”) efforts to implement rules interpreting the statutory language of Section 721 and 761 of the Dodd-Frank Act (“Act”). In many cases, we believe that the CFTC and SEC have struck the right balance in their 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 CFTC and SEC 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 CFTC and SEC 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 banks 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 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 CFTC and SEC 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.

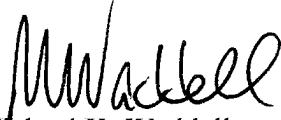
For example, a limited liability corporation (“LLC”) owns a piece of commercial real estate as its sole asset with a value of \$4,000,000. The LLC has \$800,000 in equity and a \$3,200,000 floating rate loan. The LLC is owned by an individual with a \$3,000,000 net worth. The LLC would not qualify as an ECP under the 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.

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

Sincerely,



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