



February 22, 2011

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

Re: Definitions

Dear Secretary Stawick:

Cargill, Incorporated ("Cargill") is an international provider of food and agricultural products and services. As a merchandiser, processor and exporter of agricultural commodities, Cargill relies heavily upon efficient and well-functioning methods of risk management, including forward contracts, futures, options and swaps. Cargill also provides risk management products to other businesses, and thereby assists those businesses in obtaining the benefits of Cargill's expertise in risk management. Cargill appreciates the opportunity to provide comments to the Commodity Futures Trading Commission ("Commission" or "CFTC") on its proposed rules regarding the further definition of swap dealer in 75 Fed. Reg. 80174 (Dec. 21, 2010) ("the Definitions Proposal").

### **Background**

The Commodity Exchange Act, as amended by the Dodd-Frank Act (collectively the "Act"), imposes certain duties on swap dealers, and requires the Commission to adopt regulations governing these duties. Cargill anticipates that it may be required to register as a swap dealer based on the activities of one or more of its risk management divisions, known within Cargill as business units, which offer customized risk management products to external customers. Other divisions within Cargill use

swaps as end-users to hedge and manage the risks of their businesses, but these other divisions do not engage in swap dealing activities. On a relative basis, the divisions of Cargill providing risk management services to others are a very small part of the company's overall business activities.

Section 1a (49) (B) of the Act provides that a person may be designated as a swap dealer for a single category of activities and not considered a swap dealer for its other activities involving swaps. In the Definitions Proposal, the Commission has proposed new Reg. 1.3(ppp)(3), which would govern applications for limited designation as a swap dealer.

### **Comments**

#### **Limited Designation Should be Presumptively Available**

The Definitions Proposal does not fully carry out Congressional intent to provide for a limited designation as a swap dealer. By providing for the limited designation, Congress expressed its intent that this designation be readily available in appropriate circumstances. In the Definitions Proposal, however, the Commission adopts the opposite presumption: that limited designation is not available other than in exceptional cases where an applicant makes an individualized showing that it should be granted an exception.

In addition to failing to carry out Congressional intent, the Commission's proposed presumption of non-availability is contrary to the policy supporting the limited designation. The limited designation promotes the important policy of encouraging non-financial firms, such as Cargill, which are primarily engaged in businesses other than swap dealing, to continue to conduct limited swap dealing activities. These firms have risk management expertise to offer swap counterparties, and because they are not financial firms, they do not present the potential systemic risks of financial firms. As a result they provide an alternative source for risk management products supported by balance sheets that are not

leveraged or structured like those of financial firms. If such firms were *not* permitted to obtain a limited designation as a swap dealer, and all of their swaps (including non-dealer swaps) were subjected to the full range of swap dealer regulation, they would be discouraged from continuing to provide their valuable risk management products to others. Swap counterparties would then be limited to dealing with financial firms or less-well capitalized subsidiaries of the non-financial firms, and would be deprived of the balance sheets and expertise that non-financial firms such as Cargill can provide. Rather than providing for a presumption against limited designation, therefore, the Commission should identify the factors that would support limited designation and provide for a presumption that any firm satisfying those factors is eligible for the limited designation.

In the Definitions Proposal, the Commission has already identified some of the characteristics that would be appropriate for a firm to obtain a limited swap dealer designation. The Commission described these firms as follows in the Definitions Proposal at p. 80182:

The CFTC understands that there may potentially be *non-financial entities, such as physical commodity firms*, that *conduct swap dealing activity through a division of the entity*, and not a separately incorporated subsidiary. In these instances, the entity's swap dealing activity would *not be a core component of the entity's overall business*. If this type of entity registered as a swap dealer, the CFTC anticipates that certain swap dealer requirements would apply to the swap dealing activities of the division, but not necessarily to the swap dealing activities of other parts of the entity. *(Emphasis added)*

The Commission should use this description as the basis for the factors that a firm would need to satisfy in order to obtain a limited designation as a swap dealer. Thus if a firm satisfies the following factors, it should presumptively be entitled to a limited designation: (a) the firm must be a non-financial company, (b) the activities of the firm, other than swap dealing, must include (but need not be limited to) production, merchandising or processing of physical commodities, (c) the swap dealing activities of

the firm must take place in a separately identifiable division or business unit within the firm that has its own management, and (d) revenues from the swap dealing must have been less than 30% of the firm's total revenues in the firm's most recently completed fiscal year.

An applicant which meets these criteria should not be required to make an individualized showing to obtain a limited designation. Rather, if these criteria and other registration requirements applicable to all swap dealers are satisfied, the applicant should be granted the limited designation unless the Commission makes a determination that it would not be in the public interest for the firm to have a limited designation.

In order to provide for an orderly transition from the current unregulated environment for swap dealing to the registered status of a swap dealer, the limited designation should apply provisionally to an applicant whose application on its face shows that the applicant meets the criteria for limited designation. This procedure, which would be subject to the Commission's right to show that limited designation is not in the public interest, would prevent disruption of the firm's swap dealing activities, as well as its other swap transactions, while the application is pending.

**Except for Capital, Swap Dealer Regulatory Requirements Should Apply Only to the Swap Dealing Division**

The Definitions Proposal requests comment on which requirements would apply to swap dealing activities of the division but not to the swap activities of other parts of the entity. With the exception of capital, regulatory requirements for swap dealing activities should apply only to the division undertaking those limited activities.

The capital requirement should be calculated based only on the swap activities of the division designated as a swap dealer. However, the capital must be held by the entity as a whole, because there

is no feasible method to limit the liability of an entity to the assets associated with a particular division. As Cargill has commented in detail in its comment relating to capital and margin requirements,<sup>1</sup> swap dealers with limited designations should be permitted to use GAAP rather than regulatory accounting to measure capital, and the capital requirement should be based on the risk margin only for the swaps associated with the swap dealing activities of the division that is designated as a swap dealer.

Apart from capital requirements, the other requirements for a swap dealer, such as registration status, principal and chief compliance officer designations, business conduct rules and reporting and record-keeping requirements, should apply only to the division or business unit to which the limited designation applies.

#### **Additional Swap Reporting is not Necessary for Non-Dealing Swap Activities**

The Commission has also requested comment on whether limited designation should be conditioned on providing information concerning swaps done in the entity as a whole, other than those for which the entity is designated as a swap dealer. Cargill believes that such additional reporting is unnecessary, and that it would make limited designation more onerous without achieving any valid regulatory objective. The swap dealing division of a limited designation swap dealer will have the reporting duties of every other swap dealer. Moreover, the swaps done in other parts of the entity as a whole will be subject to the reporting requirements applicable to all swaps. There is therefore no need for another required report. Nevertheless, Cargill has no objection to a requirement that additional information concerning the swaps that are outside its swap dealing division must be provided to the Commission if the Commission makes a special call to the swap dealer for this information.

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<sup>1</sup> See comment letter dated January 21, 2011 from Jayme D. Olson, Cargill Corporate Vice President and Treasurer, submitted to the Commission in response to the request for comments on capital and margin for non-bank dealers.

**Conclusion**

Cargill appreciates the opportunity to comment on the criteria to be used by the Commission in providing for a limited designation of a swap dealer. Cargill believes that limited designation swap dealers can perform an important function in providing risk management expertise and products to commercial counterparties based on a diversified balance sheet, and without systemic risk. The Commission should therefore encourage these firms to continue to provide their services and products, by establishing reasonable and clear factors to be satisfied in order for a firm to obtain a limited swap dealer designation

Sincerely,



Linda L. Cutler  
Vice President, Deputy General  
Counsel and Assistant Corporate  
Secretary