National Grain and Feed Association

1250 Eye St., N.W., Suite 1003, Washington, D.C. 20005-3922, Phone: (202) 289-0873, FAX: (202) 289-5388, Web Site: www.ngfa.org

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Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

RE: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" (Federal Register, Vol. 75, No. 244; Tuesday, December 21, 2010)

Dear Mr. Secretary:

The National Grain and Feed Association (NGFA) appreciates the opportunity to provide input to the Commodity Futures Trading Commission (CFTC) on this very important proposed rule. The eventual outcome of this rulemaking could have a profound effect on the availability of certain risk management tools to producers, processors and agribusiness firms.

The NGFA is the national non-profit trade association representing more than 1,000 companies that operate an estimated 7,000 facilities nationwide in the grain, feed and processing industry. Member firms range from quite small to very large; privately owned, publicly traded and cooperative; and handle or process well in excess of 70% of all U.S. grains and oilseeds annually. Companies include grain elevators, feed mills, flour mills, oilseed processors, biofuels producers/co-product merchandisers, futures commission merchants and brokers, and related commercial businesses.

A common thread for NGFA-member firms is that they rely on efficient markets and access to a range of risk management tools to provide price discovery and risk management for their commercial businesses and their producer-customers.

<u>"Swap Dealer" Definition</u>

In the context of this particular rulemaking, the NGFA will focus its comments on the Commission's definition of the term "swap dealer." The NGFA believes strongly that Congress did not intend for grain elevators and other agribusiness firms that provide risk management

products to U.S. agricultural producers, and that use risk management tools like over-the-counter swaps to hedge their physical commodity risk, to be labeled as "swap dealers." At a time of significant volatility in agricultural markets, producers and agribusiness need a range of risk management tools to optimize income from the marketplace and to hedge their risk. Calling the firms that provide these services "swap dealers" very well could have the perverse and unintended effect of limiting risk management activities and tools. These markets pose no systemic risk to the U.S. financial system.

Today, the majority of risk management activity in which producers and agribusiness engage utilizes cash forward contracts that then are hedged with futures contracts traded on regulated exchanges. However, due to changes in today's volatile markets, a growing share of such risk management activity now is moving toward use of swaps. New tools now are available to producers and bona fide commercial hedgers that efficiently and effectively hedge their risk and, at the same time, relieve hedgers of a portion of their huge financial exposure due to exchange margining requirements brought about by high commodity values. This is a healthy process that broadens the range of tools for participants and poses no systemic risks.

The sector of agribusiness that stands to be most adversely affected by improper application of the swap dealer definition includes thousands of small to medium-sized businesses that are the first purchasers of grains and oilseeds from producers. Traditionally, most producers have relied on their local elevator to assist in marketing their crops and managing risk, as an alternative to the producer going directly to futures markets. Whether organized as a cooperative or as a privately held company, these first purchasers of farmers' grain serve an invaluable purpose. Saddling them with registration, recordkeeping, reporting and other requirements with which swap dealers will be required to comply would only increase costs and constrict or eliminate the availability of important risk management services.

The NGFA urges strongly that CFTC apply the "swap dealer" definition to financial firms as we believe Congress intended and not to bona fide commercial hedgers who are end-users of swaps or offer them as risk management tools to customers who have a physical exposure to the pricing for commodities through their business operations.

<u>Application of the core tests to "swap dealers" and "security-based swap dealers"</u>

The proposed rule "…suggests that the definitions should not be interpreted in a constrained or overly technical manner." The NGFA agrees with that point. A wide range of companies, with very different functions or goals as they engage in swaps, must be considered – and one size definitely does not fit all.

However, the NGFA also believes that the distinguishing characteristics cited by CFTC that may denote swap dealers also must be viewed flexibly. A local grain elevator offering a swap as a risk management tool to local farmers could meet some of the characteristics detailed in the proposed rule. However, the elevator's function is very different than the swap dealer role contemplated by Congress or the Commission in the proposed rule. In this instance, the swap simply is a tool to help the producer and elevator hedge physical commodity risk – not

some notional, financial instrument. Certainly, the elevator wouldn't be "…holding oneself out as, and being commonly known in the trade as a swap dealer."

De minimis exemption

The Commission proposes to establish a de minimis level of swap activity that would exempt a party from registration requirements. While this is an intuitively appealing notion, the concept does not hold up when applied to agricultural risk management activities.

For some cooperative and privately owned hedgers, the proposed $100 million threshold below which a swap dealer label would not be applied might provide some relief. However, an elevator that enters into swaps with its producer-customers likely would exceed the fifteen counterparty threshold and the twenty swap transaction threshold quickly. Such elevators may purchase grain through cash forward contracts or engage in swaps with hundreds of farmers in their local area. Here again, the proposed rule seems to consider the "swap dealer" definition through a prism of financial firms rather than as might reasonably apply to agricultural producers and agribusinesses. That interpretation likely would cause hedgers like grain elevators to limit or simply not offer certain risk management products to avoid being labeled a swap dealer. Clearly, that outcome is not desirable for producers, hedgers or the broader agricultural economy. The effect would be to increase risk to producers, processors and the overall U.S. agriculture industry, rather than to provide more tools to help manage market risk.

The proposed rule poses a question about whether the statutory de minimis exemption was intended by Congress to specifically address dealing activity as an accommodation to an entity's customers. This would seem an apt parallel with some of the risk management activities of bona fide agricultural hedgers like elevators for their producer-customers. This may be a potential avenue for the Commission to provide not just a de minimis exemption, but a broader exemption that would address the needs of U.S. businesses that have a real physical exposure to the pricing for agricultural commodities.

Aggregators

The NGFA is aware of a relatively small number of firms that serve an important function in providing risk management services to agricultural producers and firms by enhancing their ability to utilize agricultural swaps. They do so by serving as an aggregator or bundler of swaps written by smaller organizations and, in turn, laying off the risk to third parties.

As an example, a local cooperative or privately held elevator may enter into cash forward contracts or swaps with local producers to help market their crops and manage their market risk. The local elevator, whose volume may not be large enough to interest a financial swap dealer, then may offset its risk by entering into a swap with a regional cooperative or another larger privately held firm – which, in turn, can enter into a swap with a dealer or other commercial counterparty.

In this sequence of events, the regional entity provides a means for the local hedger to manage its physical commodity risk, with the ultimate benefit being to the producer. The

aggregator should not be considered a swap dealer, as it is merely facilitating hedging of that physical commodity risk.

Conclusion

As first-purchasers, processors and marketers of agricultural commodities, bona fide hedgers like elevators serve a critically important risk management role for U.S. agriculture. Increasingly, swaps are providing firms with the ability to offer customized products to producers that best fit their risk profile and return expectations.

Increasing the costs and limiting the availability of these products – by imposing costly new registration, reporting, recordkeeping and other requirements intended for large financial institutions – does not best serve the interests of U.S. agriculture or the general economy. Nor does it serve any purpose to reduce the kinds of systemic risks that led to the U.S. financial crisis.

In other rulemakings before the Commission, the intent seems to be that non-financial firms who are bona fide hedgers or end-users likely will be exempt from mandated clearing, capital requirements and margining on swaps. We urge the Commission to adopt the same kind of common-sense approach with regard to the "swap dealer" definition contained in this proposed rule.

The NGFA appreciates the opportunity to provide input to the Commission. We would be glad to provide additional information about our industry's structure and role in the swaps market as a final rule is developed.

Sincerely,

Matt Bruns, Chair
Risk Management Committee