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*On Your Side®*

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**Via: Federal eRulemaking Portal**  
<http://www.regulations.gov>

Commodity Futures Trading Commission  
Attn: David A. Stanwick, Secretary  
Three Lafayette Centre  
1155 21<sup>st</sup> St NW  
Washington, D.C. 20581

Securities Exchange Commission  
Elizabeth M. Murphy, Secretary  
100 F Street, NE  
Washington, D.C. 20549-1090

**Re: Further Definition of “Swap”, “Security-Based Swap”, and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement and Recordkeeping; File No. S7-16-11**

Ladies and Gentlemen:

Nationwide Mutual Insurance Company and its affiliated companies (collectively, “Nationwide”), appreciate this opportunity to comment on the Commissions’ proposed rule on the Further Definition of “Swap”, “Security-Based Swap”, and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement and Recordkeeping. Nationwide supports the underlying goals of the Dodd Frank Wall Street Reform and Consumer Protection Act (“the Dodd Frank Act”), including the goal of increasing transparency with respect to the use of derivatives. Nationwide also believes that the appropriate and prudent use of derivatives can help protect consumer choice of financial products, and can help companies like Nationwide honor the promises made to their customers.

As the Commissions work to synthesize the public comments and develop a final rule, Nationwide encourages the Commissions:

- To carefully consider the input of insurance industry representatives;
- To appropriately recognize in the final rule that swaps and insurance are very different from each other, and that existing definitions and guidance already capture state-regulated insurance and related products;

- To adopt a three-part test for the definition of swap and security-based swap for the purpose of excluding insurance products; or
- In the alternative, to adopt a definition that reflects the comments of the insurance industry and achieves the congressional intent to exclude insurance products from the definitions of swap and security-based swap.

Nationwide is confident that the Commissions, with the critical input of the insurance industry, can craft definitions that support the Dodd Frank Act's objectives of risk reduction, transparency, and market integrity, while preserving the existing, time-tested insurance regulatory constructs.

### **The insurance industry's input should be carefully considered**

Nationwide is aware that many groups submitted comment letters during the advanced notice of proposed rulemaking regarding this subject<sup>1</sup> and many groups will likely submit comment letters that address historical regulation of insurance by the states, congressional intent, the role that credit default swaps play in the definition of swap, the technical difficulties of the proposed rules, and the tension between the actual text of the proposed rules and the language of the interpretive guidance. Nationwide supports the comments made by those other commentators that represent the insurance industry and reflect a deep understanding of insurance products and regulation.

For example, the American Council of Life Insurers (ACLI) and Committee of Annuity Insurers (CAI) have each submitted detailed and well-reasoned comment letters regarding the definition of swap under the Dodd Frank Act. Nationwide is in agreement with the analysis, reasoning, and conclusions of each of these industry groups and will not repeat those points here. Instead, Nationwide will focus this letter on recommendations for improving the proposed rules and definitions of swap.

### **Swaps and insurance are very different from each other<sup>2</sup>**

Nationwide understands and supports the Commissions' goal to cast a broad net to pull in swaps that may be masquerading as insurance or related products. Nonetheless, Nationwide is concerned that the Commissions appear to begin their rulemaking process from the assumption that certain insurance, retirement, and financial products common in the insurance industry are in fact swaps and therefore need to be carved out from the definition. This approach results in the Commissions then attempting to define what type of insurance products are not subject to regulation under the proposed rules. We believe this is not the most appropriate approach.

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<sup>1</sup> See ACLI comment letter dated 12 NOVEMBER 2010 to the CFTC.

<sup>2</sup> For clarity's sake, the term "swap" as used in this letter includes "security-based swap", unless the context requires otherwise. Insurance and related products, such as annuities or individual retirement products, are neither "swaps" nor "security-based swaps", and accordingly are excluded from the meaning of each of them.

## **Existing definitions and guidance already capture state regulated insurance and related products**

The Commissions commentary clearly indicates their recognition that swaps and insurance products are fundamentally different contracts and are regulated through different frameworks.

Nationwide believes the Commissions' rules and definitions should reflect the understanding in the commentary. An abundance of existing federal laws, regulatory guidance, and judicial decisions clearly define products, complete with mechanisms for identifying new products, under the jurisdiction of state insurance regulators. Instead of trying to craft a new definition of properly excluded insurance products, annuities, and retirement products, etc., Nationwide recommends that the Commissions look to current federal law to differentiate between swaps and state-regulated insurance and related products.

Nationwide agrees with previous recommendations of the ACLI and the CAI.<sup>3</sup> As a starting point, then, because the Dodd Frank Act does not intend to regulate insurance products as swaps,<sup>4</sup> Nationwide believes that any proposed rule should provide for non-exclusive "safe-harbors" for products that currently fit the three-part preferred approach we lay out below.

### *Nationwide's preferred approach*

Nationwide supports a three-part test to differentiate insurance products from swaps: (1) the product must be issued by an insurance company that is subject to state regulation;<sup>5</sup> (2) the product must be of a type issued by state-regulated insurance companies; and (3) for products that are not excluded by the two above prongs because they are not insurance products, the Commission should use its discretion as to whether the product is a swap. Nationwide believes this approach addresses the Commissions' concerns about unregulated swaps entering the marketplace, while not inadvertently pulling in bona fide insurance products.

The first prong of the test we propose requires an insurance company regulated by a state insurance regulator to issue the product. Starting up and capitalizing an insurance company is no simple task. State insurance regulators have broad oversight powers over insurance companies and require stringent capital reserves and surplus. In our view, a company is highly unlikely to go through the rigorous process of forming an insurance company with the sole objective of eluding federal regulation of swaps.

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<sup>3</sup> See the ACLI letter dated November 12, 2010 and the CAI letter dated December 3, 2010.

<sup>4</sup> By way of example, under the Dodd Frank Act Title V the Federal Office of Insurance does not have regulatory authority over the business of insurance; Dodd Frank Act § 722(b) preempts the authority of states to regulate swaps as insurance (likely as a result of moves by some states to regulate credit default swaps as insurance).

<sup>5</sup> See Appendix B of the ACLI's September 20, 2010 letter regarding "core" definitions under the advanced notice of proposed rulemaking for an excellent discussion of the robust state regulation of insurance.

The second prong of the test requires that the product itself must be the type of product issued by a state-regulated insurer. Of course, there is a tradition of certain product types issued by insurance companies, and undoubtedly there will be new products introduced; however, the regulatory oversight and approvals needed for the issuance of new products by state and Federal regulators is not a simple matter. Nationwide believes this is a significant safeguard against bad apples intent on gaming the system.

The third prong of the test would apply to products that are not excluded by the first two prongs. For such products, we believe that, in a manner consistent with the congressional intent to exclude insurance products, the Commission should exercise discretion as to which remaining products should be considered swaps.

Nationwide believes this three part test for a safe harbor effectively captures current and future insurance products, while granting the Commissions discretion with respect to products that do not clearly meet the first two prongs, consistent with Congressional intent not to include insurance products. Nationwide strongly encourages the Commissions to consider this straight-forward approach.<sup>6</sup>

#### *A second approach consistent with the preferred approach*

Short of adopting the above approach whole cloth, and in accordance with other commentators, Nationwide suggests the Commissions revise their proposed rule by crafting a definition that:

- Reiterates that an insurance product that does not meet the statutory language of swap or security-based swap is excluded from the proposed rule and the regulatory definition of swap and security-based swap;
- Provides a safe harbor for insurance products from the regulatory definition of swap and security-based swap;
- Makes clear that insurance and annuity products are neither swaps nor security-based swap;
- Includes an exclusion for products that meet the requirements of section 3(a)(8) of the Securities Act of 1933;
- Includes a non-exclusive list of insurance products that are not swaps or security-based swaps ; and
- Includes reinsurance in the exclusion of excluded insurance products.

#### **Conclusion**

Nationwide appreciates the opportunity to comment on the proposed regulations. Nationwide is acutely aware of the tremendous amount of labor the Commissions and their staffs have put in to craft the rules and regulations required under the Dodd Frank Act. It is indeed a

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<sup>6</sup> The ACLI letter of November 12, 2010 includes suggested language.

monumental undertaking. We look forward to working constructively with the Commissions to design and implement practical and workable rules that maintain a functioning insurance marketplace while meeting the overarching goals of Title VII of the Dodd Frank Act to regulate the over-the-counter derivatives market.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark R. Thresher', with a long horizontal flourish extending to the right.

Mark R. Thresher  
Executive Vice President and Chief Financial Officer  
Nationwide