THE FARM CREDIT COUNCIL

February 17, 2012

By Electronic Submission

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

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" (RIN 3038-AD06)

Dear Mr. Stawick:

As the Commodity Futures Trading Commission finalizes rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[1] the Farm Credit Council appreciates the opportunity to submit these additional comments concerning the further definition of "swap dealer."[2]

We filed comments on this rulemaking almost one year ago, on February 22, 2011. Among the issues presented in those comments was a request that the Commission exclude Farm Credit System institutions from the definition of "swap dealer" to the extent they offer swaps in connection with the origination of loans. We indicated that the lending business engaged in by Farm Credit System institutions is functionally equivalent to that conducted by insured depository institutions. We are aware that, on February 14, the American Bankers Association ("ABA") submitted a comment letter suggesting that Farm Credit System institutions should be treated differently from other regulated lending institutions, specifically commercial banks, that offer swaps in connection with originating loans. We find it is

[1] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[2] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174 (Dec. 21, 2010).

unfortunate that the ABA has apparently sought to use the rulemaking process to advance its own goals of obtaining a competitive advantage and frustrating the Farm Credit System's Congressionally established mission of being "a permanent system of credit for agriculture which will be responsive to the credit needs of all types of agricultural producers having a basis for credit."[3]

We believe there is ample support in the legislative history and existing administrative record to justify application of the "swaps in connection with loans" exemption to Farm Credit System institutions. We continue to encourage the Commission to treat all regulated financial institutions the same in this regard. Because of the nature of the ABA letter, we feel compelled to add some perspective regarding their comment.

I. The "Swaps in Connection with Loans" Exemption Should Apply to All Regulated Financial Institutions

As the Commission is aware, the definition of "swap dealer" provides that "in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer."[4] As we argued in our February 22, 2011 letter, this exemption reflects Congress's intent to exclude swaps offered in connection with loans, not to confer a peculiar market advantage on insured depository institutions. In viewing Title VII (as well as the rest of Dodd-Frank), it is clear that Congress sought to distinguish banks operating with a specific level of federal oversight (for example, from the FDIC) from those that are not subject to oversight. Farm Credit System institutions do not take deposits, but as noted in Title VII and throughout Dodd-Frank, they operate with their own federal prudential, safety and soundness regulator: the Farm Credit Administration.

Dodd-Frank gives specific authority to the Commission "to further define the term[] . . . 'swap dealer.'"[5] And, we believe, the Commission separately has broad authority to exempt persons and transactions from provisions of the CEA "[i]n order to promote . . . fair competition."[6] Adopting the approach outlined by the ABA would be inconsistent with the concept of fair competition. Nevertheless, because of the Commission's existing interpretive authority we previously cited and the longstanding policy of promoting competition, additional legislation is not required to effectuate Congress's intent that regulated financial institutions engaged in lending, including Farm Credit System institutions, should not be treated as swap dealers.

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[3] 12 U.S.C. § 2001(b).

[4] Commodity Exchange Act ("CEA") Section 1a(49)(A).

[5] Dodd-Frank Section 721(c).

[6] *See* CEA Section 4(c).

II. The Commission's Action Should Treat Lenders Consistently

The ABA letter primarily reflects the fact that Farm Credit System institutions and commercial banks are competitors in the agricultural marketplace. We believe their claims of being disadvantaged in the marketplace are misplaced and assertions regarding Farm Credit's advantages are inaccurate. The Farm Credit System is not "taxpayer funded." By contrast, many commercial banks receive explicit government support in the form of federal deposit insurance, and many have benefited from more direct taxpayer support in recent years. Further, many agricultural banks are organized as Sub S entities that enjoy tax benefits extending to profits derived from all of their lending and non-lending activity. In fact, studies completed by entities including the Government Accountability Office and the Federal Reserve Bank of Kansas City have questioned whether Farm Credit institutions really do enjoy much advantage at all. Finally, there are certain limitations on Farm Credit System institutions, including the limited nature of the System's operating authorities, the System's requirements for programs to serve young, beginning, and small farmers, and the extensive borrower rights requirements that exist in the Farm Credit Act.

We believe the important public policy issue is how to ensure rural America and agriculture have access to the maximum level of benefits and the most competitive lending environment possible so that the rural economy can thrive.

Congress did not construct Dodd-Frank to pick winners or losers in the agricultural lending market. Accordingly, we urge the Commission, through its rulemakings, to preserve competition in the agricultural lending market. As we have previously indicated, if our members do not qualify for either the "swaps in connection with loans" exemption or the *de minimis* exception to the swap dealer definition, compliance risks and new regulation would force at least some of our members to cease the activity that would cause them to be considered as swap dealers. This would, in turn, decrease access to certain loan products for farmers, ranchers, and cooperatives and rural America.

III. The ABA's Procedural Questions Lack Merit

The ABA raised two procedural questions that we will address.

First, the ABA suggests that in order to be legitimate any cost-benefit analysis of this issue would have to demonstrate how commercial banks are harmed due to competition with Farm Credit System institutions. We submit that by adopting our approach the actions of the Commission would treat existing competitors exactly the same, so that there would no change at all to the existing competitive situation.

Second, the ABA asserts that the Commission cannot now clarify that the "swaps in connection with loans" exemption applies to Farm Credit System institutions because doing so would not be a "logical outgrowth" of the proposed rules. That is incorrect. The final rule need not "exactly coincide with the proposed rule" if commenters "should have anticipated" that the agency might issue the final rule it did issue.[7] In addressing this question, courts consider,

[7] *City of Portland, Oregon v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007).

among other things, whether the agency sought comment, and whether the public did comment, on the issue.[8] Here, in the proposing release, the Commission "emphasize[d]" its view that the exclusion "is available only to IDIs" and then proceeded to "request[] comment on the proposed rule relating to the statutory exclusion for swaps in connection with originating a loan."[9] In response, the Farm Credit Council did comment on the very issue of whether the exemption should be available only to insured depository institutions.

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For these reasons, and the reasons stated in our February 22, 2011 letter, the Farm Credit Council urges the Commission to clarify that the "swaps in connection with loans" exemption will apply equally to Farm Credit System institutions and commercial banks.

We appreciate the opportunity to provide these further comments. If you have any questions or we can provide any additional information, please do not hesitate to contact us.

Sincerely,

Robert P. Boone, III
Vice President, Government Affairs
Farm Credit Council

cc: Honorable Gary Gensler, Chairman
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott D. O'Malia, Commissioner
Honorable Mark P. Wetjen, Commissioner

[8] *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011).

[9] 75 Fed. Reg. at 80,182.