



# THE FARM CREDIT COUNCIL

March 5, 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: End-User Exception to Mandatory  
Clearing of Swaps (RIN 3038-AD10)

Dear Mr. Stawick:

As the Commodity Futures Trading Commission finalizes rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”),<sup>1</sup> the Farm Credit Council appreciates the opportunity to submit these further comments concerning the proposed end-user exception rulemaking. To update our prior comments on the topic, we provide in this letter more detail on a proposed risk-based test for determining a small financial institution’s status as a “financial entity” for purposes of the end-user exception to mandatory clearing of swaps.<sup>2</sup>

As you know, Dodd-Frank makes it unlawful for any person to engage in a swap unless that person submits the swap for clearing to a designated clearing organization if the swap is required to be cleared.<sup>3</sup> Dodd-Frank then exempts from this clearing requirement counterparties that are not financial entities, are using swaps to hedge or mitigate commercial risk, and properly notify the Commission.<sup>4</sup> In setting forth the definition of “financial entity,” Congress required the Commission to consider exempting, among others, Farm Credit System

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<sup>1</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> See End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pt. 39) (hereinafter, “Notice”).

<sup>3</sup> See Commodity Exchange Act (“CEA”) Section 2(h)(1)(A) (codified at 7 U.S.C. § 2(h)(1)(A)).

<sup>4</sup> See CEA Section 2(h)(7) (codified at 7 U.S.C. § 2(h)(7)).

Mr. David A. Stawick  
March 5, 2012

institutions, including such institutions with total assets of \$10 billion or less.<sup>5</sup> In December 2010, the Commission requested comments informing its consideration of whether, and which, such entities to exempt.<sup>6</sup>

In response to the Commission's request, the Farm Credit Council submitted comments last February. In those comments, the Farm Credit Council explained that Farm Credit System institutions should be exempt from mandatory clearing of swaps and proposed several tests designed to focus the Commission's regulatory resources on those institutions that present risk to the United States financial system and therefore should be subject to mandatory clearing. Among other proposals, the Farm Credit Council urged the Commission to adopt a risk-based approach to mandatory clearing, similar to the proposed definition of major swap participant, that would exempt small financial institutions whose current uncollateralized exposure and potential future exposure to swaps fall below certain thresholds. As for appropriate thresholds, the Farm Credit Council suggested exempting from the "financial entity" definition entities with current uncollateralized exposure and potential future exposure of \$3 billion in rate swaps and \$1 billion in the other major swap categories proposed by the Commission.

As you may know, the House Agriculture Committee recently approved the Small Business Credit Availability Act (H.R. 3336) by a voice vote. Similar to the Farm Credit Council's proposal of last February, this bill would provide an exemption to the definition of "financial entity" for:

an entity that is a small bank, savings association, farm credit system institution, non-profit cooperative lender controlled by electric cooperatives, or credit union if the aggregate uncollateralized outward exposure plus aggregate potential outward exposure of the entity with respect to its swaps does not exceed \$1,000,000,000.<sup>7</sup>

The Farm Credit Council wishes to make clear that it fully supports the Small Business Credit Availability Act's approach to the definition of "financial entity." For the reasons stated in our February letter, the Farm Credit Council continues to believe that, with respect to small financial institutions, a risk-based approach, such as that approved by the House Agriculture Committee, is more consistent with Congress's intent and Dodd-Frank's goal of protecting our financial system than an asset-based approach.

Further, a risk-based approach would be consistent with the totality of the statutory and proposed regulatory regime. The Commission has already proposed to require a counterparty electing the end-user exception to provide information relevant to confirming the electing counterparty's eligibility for the exemption.<sup>8</sup> Consistent with this notification

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<sup>5</sup> See CEA Section 2(h)(7)(c)(ii) (codified at § 2(h)(7)(c)(ii)).

<sup>6</sup> See Notice, 75 Fed. Reg. at 80,753-54.

<sup>7</sup> Small Business Credit Availability Act, H.R. 3336, 112th Cong. § 3 (as amended by Lucas Amendment in the Nature of Substitute and advanced out of committee by voice vote on January 25, 2012).

<sup>8</sup> See Notice, 75 Fed. Reg. at 80,750.

Mr. David A. Stawick  
March 5, 2012

requirement, end users, including Farm Credit System institutions, could be required to confirm their status as a non-financial entity, with reference to the risk-based swaps exposure test when electing the end-user exception. We believe that incorporating this risk-based approach into the end-user notification requirements would not raise compliance concerns, as Dodd-Frank provides significant penalties for any person that abuses the end-user exception.<sup>9</sup> For these reasons, in addition to the reasons set forth in the Farm Credit Council's previous comments, we urge the Commission to consider this more detailed risk-based test when it finalizes regulations concerning the end-user exception.

Again, the Farm Credit Council appreciates 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

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<sup>9</sup> See CEA Section 9(a)(6) (codified at 7 U.S.C. § 13(a)(6)).