

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy



By Electronic Mail

July 23, 2012

Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20219
Attention: David A. Stawick, Secretary

**Regarding: Interim Final Rule on Hedging of Physical Positions
(CFTC regulation at 17 CFTC 1.3(ggg)(6)(iii))**

Release No. 34-66868; File No. S7-39-10

Dear Mr. Stawick:

The Financial Services Roundtable (“the Roundtable”)¹ respectfully submits these comments in response to the request for comment by the Commodity Futures Trading Commission (the “Commission”) regarding hedging exclusions from the calculation of the *de minimis* exception from swap dealer status in the release it jointly adopted with the Securities and Exchange Commission regarding entity definitions.²

We appreciate the Commission’s responsiveness to comments from the Roundtable and our members in connection with the entity definitions, and in particular with respect to the scope of the exemption for insured depository institutions entering into swaps in connection with loans (the “IDI Loan Exemption”), the *de minimis* exception, and their relationship to each other. We welcome the opportunity to comment further on the interim final rule excluding hedges of physical commodities from the calculation of the *de minimis* exception and the questions the Commission has raised regarding a broader hedging exclusion.

We support the exclusion from the swap dealer determination of swaps that are hedging physical commodities to which the entity has exposure. Such swaps clearly constitute trades made on the entity’s own behalf rather than on behalf of third parties, and thus are trading activity rather than dealing activity. We also urge the Commission to

¹ The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America’s economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

² Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, 77 FR 30596 (May 23, 2012) (“Entity Definitions Adopting Release”).

consider expanding the safe harbor contemplated in the interim final rule to include other hedging transactions which clearly mitigate the risk of other outstanding swaps transactions.

The Commission, in the Entity Definitions Adopting Release, acknowledged that the dealer/trader distinction historically recognized by the Securities and Exchange Commission for purposes of its broker-dealer regulations would provide a useful basis to also distinguish swap dealing activity from swap trading activity. We believe swaps for hedging purposes fall definitively on the trading side of that line, as they are done for the purpose of managing the entity's exposure rather than to facilitate the needs of customers or other third parties.

The Commission expressed some concern about the ability to distinguish a hedging purpose from a hedging consequence. In many circumstances, however, the hedging purpose of the transaction is transparent. Examples include hedges that meet the very rigorous standards for hedge accounting treatment and hedges that represent a 1 to 1 match of another exposure (e.g., an issuance of corporate debt by the hedging entity, a back-to-back swap of a customer-facing swap or the purchase of protection under a credit default swap where the purchasing entity has long exposure to the underlying obligor's debt). Where this is the case, market participants would benefit from a bright line test.

In addition, the Commission has acknowledged in other regulations that hedging on a portfolio basis is consistent with hedge treatment of transactions. For example, in the Commission's final release on position limits, it specifically noted that portfolio hedging was acceptable, stating "The Commission intends to allow market participants either to hedge their cash market risk on a one-to-one transactional basis or to combine the risk associated with a number of enumerated cash market transactions in establishing a bona fide hedge, provided that the hedge is economically appropriate to the reduction of risk in the conduct and management of a commercial enterprise."³ We believe that the same analysis should lead to a conclusion that the Commission and market participants are capable of identifying a hedging purpose even when the hedging is done on a portfolio basis.

We are concerned that if the circumstances under which the hedging exclusion may be used are ambiguous, market participants may avoid appropriate hedging transactions to protect their *de minimis* exception. We do not believe it is consistent with the reduction of systemic risk to provide a strong incentive to preserve the *de minimis* exception by failing to hedge risk in the portfolio.

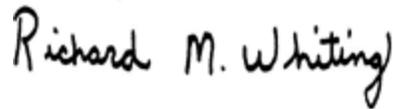
Consistent with that concern, we continue to believe that, even where the hedge relates to an entity's exposures from non-excluded swap dealing activity, the hedge should be excluded from the *de minimis* calculation. To count both the dealing activity and the hedge of that activity would effectively double-count a single transaction and

³ See, e.g., Position Limits for Futures and Swaps, 76 Fed. Reg. 71626, 71649 (Nov. 18, 2011).

thus increase the cost of providing customer-facing swaps.⁴ We believe market participants relying on the *de minimis* exception will make better determinations about hedging if they do not have to count these transactions (which are for their own behalf) in the swap dealer analysis.

We appreciate your consideration of our comments. If you have any questions about this letter, or any of the issues raised by our views, please do not hesitate to call me or Richard Foster, the Roundtable's Senior Regulatory Counsel, at (202) 589-2424.

Sincerely,

A handwritten signature in black ink that reads "Richard M. Whiting". The signature is written in a cursive, slightly slanted style.

Richard M. Whiting
Executive Director and General Counsel
Financial Services Roundtable

⁴ We recognize that this is not a concern with respect to hedges of transactions under the IDI Loan Exemption, given the Commission's explicit acknowledgement that hedges of such excluded swaps do not constitute dealing activity.