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November 25, 2014

VIA ONLINE SUBMISSION: http//comments.cftc.gov
http//www.regulations.gov

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218,
Mail Stop 9W-11
Washington, D.C. 20219

Mr. Alfred M. Pollard
General Counsel
Attention: Comments/RIN 2590-AA45
Federal Housing Finance Agency
Constitution Center (OGH Eighth Floor)
400 7th Street, SW
Washington, D.C. 20024

Mr. Robert deV. Frierson
Secretary, Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

Mr. Barry F. Murdock
Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22101-5090

Re: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (CFTC RIN: 3038-AC97; OCC RIN: 1557-AD43; FRB RIN: 7100-AD74; FDIC RIN: 3064-AE21; FHFA RIN: 2590-AA45; FCA RIN: 3952-AC69)

Ladies and Gentlemen:

We are submitting this letter in response to the request of the Commodity Futures Trading Commission (the "CFTC") and the request of the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Farm Credit Administration and Federal Housing Finance Agency (the "Agencies") for comments on your respective proposed regulations which

will establish mandatory margin requirements for uncleared swaps for swap dealers ("SDs") and major swap participants ("MSPs"). We appreciate the opportunity to comment on such proposed regulations.

We request that the CFTC and the Agencies in promulgating final regulations confirm that their respective mandatory initial and variation margin requirements do not apply to an "eligible treasury affiliate", as defined in CFTC Letter No. 13-22 (June 4, 2013) (the "No-Action Letter"), that complies with the General Conditions set forth in the No-Action Letter.

The CFTC's Proposed Margin Requirements for Uncleared Swaps for SDs and MSPs

Section 4s(e) of the Commodity Exchange Act requires the Agencies and the CFTC to adopt initial and variation margin requirements for uncleared swaps for SDs and MSPs. The CFTC's proposed Regulation 23.152(a) would require a covered swap entity to collect initial margin from a covered counterparty. The term "covered swap entity" is defined in the CFTC's proposed Regulation 23.151 to mean an SD or MSP for which there is no prudential regulator. The term "covered counterparty" is defined in CFTC proposed Regulation 23.151 to mean a financial entity with material swaps exposure, an SD or an MSP that enters into a swap with a covered swap entity. The term "financial entity" is not defined in the CFTC's proposed Regulation 23.151 but is defined in Section 2(h)(7)(C) of the Commodity Exchange Act for purposes of Section 2(h)(7) (the definition of "financial entity" is discussed below). The term "material swaps exposure" is defined in the CFTC's proposed Regulation 23.151 to mean, for an entity, that the entity and its affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards and foreign exchange swaps with all counterparties for June, July and August of the previous calendar year that exceeds $3 billion where such amount is calculated only for business days.

The CFTC's proposed Regulations 23.153(a) and (b) would require a covered swap entity to collect variation margin from a counterparty that is a swap entity or a financial end user. The term "swap entity" is defined in the CFTC's proposed Regulation 23.151 to mean an SD or MSP. The term "financial end user" is defined in the CFTC's proposed Regulation 23.151 (the definition of "financial end user" is discussed below).

Section 2(h)(1) of the Commodity Exchange Act requires certain swaps to be cleared by a derivatives clearing organization. Section 2(h)(7) of the Commodity Exchange Act and CFTC Regulation 50.50 contain the "end-user exemption", providing that the clearing requirement does not apply if one of the counterparties to the swap is not a financial entity, is using the swap to hedge or mitigate commercial risk and notifies a swap data repository or the CFTC how it generally meets its financial obligations associated with entering into uncleared swaps. The term "financial entity" is defined in Section 2(h)(7)(C)(i) to mean, with specified exceptions, an SD or MSP, a security-based swap dealer or major security-based swap participant, a commodity pool or a private fund as defined in Section 202(a) of the Investment Advisers Act of 1940, an ERISA plan or, in Section 2(h)(7)(C)(i)(VIII), a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956.

Companies which are not financial entities often form treasury affiliates to enter into outward-facing swaps with SDs and inter-affiliate swaps with their respective affiliated non-financial companies in order to facilitate hedging of commercial risk by the affiliated non-financial companies. A concern arose that by entering into such outward-facing swaps with SDs, such treasury affiliates would be predominantly engaged in activities that are financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956 and, solely on that basis, would be financial entities that were ineligible to use the end-user exemption. The Division of Clearing and Risk of the CFTC (the "Division") addressed that concern in

the No-Action Letter stating that the Division would not recommend that the CFTC commence an enforcement action against an "eligible treasury affiliate" if the "eligible treasury affiliate" complied with the General Conditions set forth in the No-Action Letter in respect of uncleared swaps entered into with unaffiliated counterparties.

The Division noted:

> Market participants also have described that, in addition to the general benefits of concentrating expertise and reducing redundancy within the corporate group, treasury affiliates may provide benefits specifically for risk management. The treasury affiliate can aggregate similar risks from swaps entered into with different non-financial affiliates and enter into one outward-facing swap rather than having each affiliate establish its own trading relationship with third parties and enter into its own outward-facing swaps. In addition, the treasury affiliate may first net affiliate transactions internally before entering into third-party hedging transactions thereby reducing the total notional amount of outward-facing swaps as compared to the notional amount that would result from having each affiliate enter into its own outward-facing swap directly.
>
> The Division recognizes the benefits that arise from the use of treasury affiliates within corporate groups and has determined to provide the . . . no-action relief.

The Division recognized the risk-reducing benefits of treasury affiliates. Had the Division failed to provide no-action relief, an outward-facing swap entered into by an "eligible treasury affiliate" and an SD would have been ineligible for the end-user exemption. In such case, companies that are not financial entities and which hedged their commercial exposures by means of a treasury affiliate entering into outward-facing swaps with SDs and inter-affiliate swaps with the affiliated non-financial companies would be at a disadvantage in relation to a company that is not a financial entity and which enters into outward-facing swaps with SDs directly. The Division provided the no-action relief to encourage the use of "eligible treasury affiliates".

We request that the CFTC confirm that an "eligible treasury affiliate" which complies with the General Conditions set forth in the No-Action Letter will not be subject to mandatory initial margin requirements for uncleared swaps entered into with SDs and MSPs, for the same reasons and purposes cited by the Division in the No-Action Letter.

The CFTC's proposed Regulations 23.153(a) and (b) would require a covered swap entity to collect variation margin from a counterparty that is a swap entity or a financial end user. The definition of the term "financial end user" in the CFTC's proposed Regulation 23.151 does not include a clause similar to Section 2(h)(7)(C)(i)(VIII) of the Commodity Exchange Act, under which an entity is a "financial entity" as defined in Section 2(h)(7)(C)(i) and, therefore, ineligible to use the end-user exemption from clearing, if the entity is a person predominantly engaged in activities that are financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956. That omission in the proposed definition of "financial end user" suggests that the CFTC does not intend that an "eligible treasury affiliate" is to be treated as a financial end user subject to initial and variation margin requirements. However, the definition of "financial end user" includes any other entity that the Commission determines should be treated as a financial end user. As the CFTC stated in its Advanced Notice of Proposed Rulemaking on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 F.R. 59897, 59903 (October 3, 2014) (the "CFTC's ANPR"), the CFTC is concerned that one or more types of financial entities might escape classification under the federal and state regulatory regimes included in the proposed definition of "financial end user". The CFTC, out of an abundance of caution, included this

provision to act as a safety mechanism in the event that an entity did not fall squarely within one of the categories listed in the definition of "financial end user" but effectively was acting as a financial end user.

We request that the CFTC confirm that an "eligible treasury affiliate" which complies with the General Conditions set forth in the No-Action Letter will not be treated as a "financial end user", as defined in the CFTC's proposed Regulation 23.151, and will not be subject to the variation margin requirements for uncleared swaps entered into with SDs and MSPs imposed by the CFTC's proposed regulations 23.153(a) and (b), for the same reasons and purposes cited by the Division in providing no-action relief.

The CFTC's ANPR uses the terms "financial entity" and "financial end user" interchangeably. The discussion of initial margin requirements refers to a "financial end user" (79 FR at 59907), whereas the CFTC's proposed Regulation 23.152(a) imposing initial margin requirements uses the term "financial entity" instead. In all likelihood, the definition of "covered counterparty" in the CFTC's proposed regulation 23.151 is meant to refer to a "financial end user" instead of a "financial entity". If that is the case, the definition should be so revised. Regardless of whether the term "financial entity" or "financial end user" is used, an "eligible treasury affiliate" which complies with the General Conditions set forth in the No-Action Letter should not be subject to the initial margin requirements of the CFTC's proposed regulation 23.152(a) for the same reasons and purposes cited by the Division in providing no-action relief.

The Agencies' Proposed Margin Requirements for Uncleared Swaps for Covered Swap Entities

The Agencies' proposed regulation requiring covered swap entities to collect margin are substantially similar to the CFTC's proposed regulations.

The Agencies' proposed Regulation ___.3 would require a covered swap entity to collect initial margin with respect to an uncleared swap or security-based swap from a counterparty that is a financial end user with material swaps exposure or that is a swap entity.

The term "covered swap entities" is not defined in the Agencies' proposed Regulation ___.2, though such omission would seem an oversight. The term "swap entities" is defined to mean SDs, MSPs, security-based swap dealers, and major security-based swap participants in the Agencies' proposed Regulation ___.2 and in the Agencies' joint advance notice of proposed rulemaking, Margin and Capital Requirements for Covered Swap Entities, 79 FR 57348, 57350 (September 24, 2014) (the "Agencies' ANPR"). The Agencies' ANPR defines the term "covered swap entities" to mean swap entities that are prudentially regulated by one of the prudential regulators. 79 FR at 57350.

The Agencies' proposed regulation ___.3 would require a covered swap entity to collect initial margin from a financial end user with material swaps exposure. The definition of "financial end user" in the Agencies' proposed Regulation ___.2 is nearly identical to the definition of the term "financial end user" in the CFTC's proposed Regulation 23.151, except that the definition of "financial end user" in the Agencies' prposed Regulation ___.2 includes any entity of a type other than the types of the entities specified in the definition that any Agency, instead of the CFTC, has determined should be treated as a financial end user. As explained in the Agencies' ANPR, the definition of "financial end user" does not require a covered swap entity to determine whether its counterparty is predominantly engaged in activities that are financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956, as amended. 79 FR at 57360. However, the Agencies' ANPR notes that in case the list of financial end users in the definition of the term "financial end user" does not capture a particular entity, the last part of the definition of "financial end user" would allow an Agency to require a covered swap entity to treat a counterparty as a financial end user for margin purposes, where appropriate for safety and soundness purposes or to address systemic risk. 79 FR at 57361.

The definition of the term "material swaps exposure" in the Agencies' proposed Regulation ___.2 is substantially the same as the definition of the term in the CFTC's Proposed Regulation 23.151.

The Agencies' proposed Regulation ___.4 would require a covered swap entity to collect variation margin from a counterparty that was a swap entity or a financial end user.

For the same reasons discussed above, we believe it would be appropriate and therefore request that the Agencies confirm that an "eligible treasury affiliate" which complies with the General Conditions set forth in the No-Action Letter will not be treated as a "financial end user", as defined in the Agencies' proposed Regulation ___.2, and will not be subject to the mandatory initial and variation margin requirements for uncleared swaps entered into with covered swap entities imposed by the Agencies' proposed Regulations ___.3 and ___.4.

The Agencies noted in the Agencies' ANPR that the application of margin requirements to non-cleared swaps with nonfinancial end users could be viewed as lessening the effectiveness of the clearing requirement exemption for these nonfinancial end users. 79 FR at 57358. The Agencies also noted that statements in the legislative history of the sections of the Dodd-Frank Act imposing margin requirements on uncleared swaps suggest that at least some members of Congress did not intend, in enacting these sections, to impose margin requirements on nonfinancial end users engaged in hedging activities, even in cases where they entered into swaps with swap entities. 79 FR at note 59.

Imposing the margin requirements on "eligible treasury affiliates" which satisfy the General Conditions set forth in the No-Action Letter would lessen the effectiveness of the clearing requirement exemption for "eligible treasury affiliates" which comply with the General Conditions set forth in the No-Action Letter. This would put nonfinancial end users which use an "eligible treasury affiliate" to enter into outward facing swaps with SDs and inter-affiliate swaps with affiliated non-financial entities in order to hedge the commercial risk of the affiliated non-financial entities at a competitive disadvantage to nonfinancial end users which enter into outward-facing swaps with SDs and MSPs directly, and would discourage rather than encourage the use of "eligible treasury affiliates". The Division recognized the risk-reducing benefits of "eligible treasury affiliates" in the No-Action Letter and granted no-action relief to encourage their use.

As stated in the Agencies' ANPR, the Dodd-Frank Act requires the CFTC, the SEC and the Agencies to establish and maintain, to the maximum extent practicable, capital and margin requirements that are comparable. 79 FR at 57350. Accordingly, we request that the treatment of "eligible treasury affiliates" which comply with the General Conditions in the No-Action Letter by the CFTC and the Agencies be consistent.

We thank you for the opportunity to submit this comment letter. Please contact Steven K. Ross, at the telephone number or email address written above, if you would like to discuss these matters further.

Very truly yours,

White & Case LLP

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