November 26, 2012

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Docket No. OCC-2011-0008
RIN: 1557-AD43

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Docket No. R-1415
RIN: 7100 AD74

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Re: Margin and Capital Requirements for Covered Swap Entities; Reopening of Comment Period/File Numbers RIN: 1557-AD43; RIN: 7100 AD74; RIN: 3064 –AC79; RIN: 3052-AC69; RIN: 2590-AA45

The undersigned group of companies[1] is pleased to provide additional comments to the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation ("FDIC"), the Farm Credit Administration ("FCA") and the Federal Housing Finance Agency ("FHFA," and collectively, the "Agencies") regarding their Notice of Proposed Rulemaking ("NPR") entitled, "Margin and Capital Requirements for Covered Swap Entities."[2] The NPR seeks to implement statutory requirements in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to "establish minimum margin and capital requirements for registered swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants for which one of the Agencies is the prudential regulator"[3] (collectively, "swap entities"). These requirements would apply to all non-cleared swaps and non-cleared security-based

[1] Boeing Capital Corporation, Caterpillar Financial Services Corporation, Deere & Company, Ford Motor Credit Company, American Honda Finance Corporation, Hyundai Capital America, Nissan Motor Acceptance Corporation, and Toyota Financial Services.
[2] See 76 *Federal Register* 27564-27596 (May 11, 2011).
[3] See *76 Federal Register* 27564.

swaps "in order to offset the greater risk to such entities and the financial system arising from the use of swaps and security-based swaps that are not cleared."[4]

This letter expands upon the information provided to the Agencies in the letter from a number of the undersigned companies dated June 23, 2011 ("2011 Letter"),[5] which is incorporated herein by reference. The 2011 Letter addressed a number of questions posed in the NPR, particularly: (1) whether nonfinancial end users, including captive finance companies, should be exempt from initial and variation margin requirements for non-cleared swaps and non-cleared security-based swaps in light of their exemption from mandatory clearing and other requirements of the Dodd-Frank Act,[6] and (2) whether the categorization of various types of counterparties by risk, and the key definitions used to implement the risk-based approach, should apply to captive finance companies.[7]

We continue to believe that clear Congressional intent indicates that entities exempt from clearing requirements should also be considered nonfinancial or commercial end users and exempt from margin requirements as well. Accordingly, we submit that the Agencies should clarify that end users, including captive finance companies that meet the 90/90 test and their securitization trusts, are not "financial end users" for the purpose of these margin rules.

Given the importance of securitization to many captive finance companies, it is critical that securitization trusts be excluded from margin requirements. We believe this is entirely consistent with Congressional intent given how securitization provides crucial support not only to captive finance companies, but ultimately to the vehicle and equipment sales and leases of their parent companies.

International Harmonization and the Basel and IOSCO Consultative Document

We are pleased that the Agencies have decided to reopen the comment period on the NPR to "allow interested persons additional time to analyze and comment on the Proposed Margin Rule in light of the consultative document on margin requirements for non-centrally-cleared derivatives recently published for comment by the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO)."[8],[9]

We would like to highlight that the Consultative Document states:

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[4] *Ibid*.
[5] See comment letter (June 23, 2011) available at: http://www.fca.gov/apps/regproj.nsf/e211b6dc2a9fbbba85256e5100541454/1d47c642b4f639368525786b006b61c2?OpenDocument.
[6] See questions 1(a) through 1(c) from the NPR, 76 *Federal Register* 27570.
[7] See questions 5, 9, and 10 from the NPR, 76 *Federal Register* 27572.
[8] See 77 *Federal Register* 60057 (October 2, 2012).
[9] Consultative Document (July 6, 2012) available at: http://www.bis.org/publ/bcbs226.pdf

> "There was broad consensus within the BCBS and IOSCO that the margin requirements need not apply to non-centrally-cleared derivatives to which non-financial entities that are not systemically-important are a party, given that (i) such transactions are viewed as posing little or no systemic risk and (ii) such transactions are exempt from central clearing mandates under most national regimes."[10]

We are extremely pleased the Consultative Document recognizes that transactions involving non-financial entities should not be subject to margin requirements because such transactions do not pose systemic risk and are generally not required to be centrally-cleared. We also note that the Commodity Futures Trading Commission (the "CFTC") essentially adopted the same position in its proposed rulemaking on this issue,[11],[12] and we urge the Agencies to adopt a similar position.

Like the Agencies' NPR, the Consultative Document also recognized that entities which are exempt from mandatory clearing should also be exempt from new margin requirements. Although neither the Consultative Document nor the current European Market Infrastructure Regulation ("EMIR") framework specifically addresses captive finance companies, a number of the undersigned companies urged BCBS and IOSCO to treat captive finance companies like other nonfinancial end users in a comment letter on the Consultative Document.[13] A contrary result would effectively nullify the clearing exemption and reduce the ability of nonfinancial end users to efficiently hedge their commercial risks. We also highlight that the current industry view is that securitization entities are likely to be considered non-financial counterparties and exempt from EMIR clearing requirements.

In order to help ensure the harmonization of regulations on this crucial issue – both internationally and within the United States – we strongly urge the Agencies to adopt the position articulated in the Consultative Document and adopted by the CFTC, and ensure that transactions entered into by nonfinancial end users are not subject to margin requirements. It would present tremendous difficulty if the Agencies were to adopt a final rule so diametrically opposed to the position taken by BCBS and IOSCO and the CFTC on the vital issue of margin requirements for nonfinancial end users. Such harmonization would help all end users and their counterparties, including captive finance companies, avoid a fragmented, incoherent regulatory scheme.

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[10] See page 9 of Consultative Document.
[11] "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants," 76 *Federal Register* 23732-73749 (April 28, 2011).
[12] CFTC Chairman Gary Gensler, in his statement that accompanied the proposed rule, said that, "The proposed rule would not require margin to be paid or collected on transactions involving non-financial end-users hedging or mitigating commercial risk. Congress recognized the different levels of risk posed by transactions between financial entities and those that involve non-financial entities, as reflected in the non-financial end-user exception to clearing. Transactions involving non-financial entities do not present the same risk to the financial system as those solely between financial entities," see *Ibid*, 23748-23749.
[13] A number of captive finance companies submitted comments on the Consultative Document on September 28, 2012, available at http://www.bis.org/publ/bcbs226/cfc.pdf.

Recent Legislative Activity

Recently, Congress has reaffirmed its intent to exempt nonfinancial end users from margin requirements and to treat captive finance companies as nonfinancial end users for the purpose of margin requirements. In March of this year, the House of Representatives overwhelmingly passed H.R. 2682 by a 370-24 vote.[14] This legislation confirms that margin requirements in the Dodd-Frank Act should not apply to swap transactions where one of the counterparties qualifies for an exception to the central clearing requirement of the Commodity Exchange Act ("CEA") Section 2(h)(7)(C).

A bipartisan group of Senators has introduced similar legislation, S.3480. While not yet law, these actions strongly demonstrate Congress' desire not to impose margin requirements on transactions by nonfinancial end users, such as captive finance companies.

Recent CFTC Rulemakings

In addition to recent Congressional activity, the CFTC and the Securities and Exchange Commission (the "SEC") have finalized regulations that support the position that captive finance companies should be treated like nonfinancial or commercial end users with respect to the derivatives provisions in the Dodd-Frank Act. In May of this year, the CFTC and the SEC issued a joint Final Rule on "entity definitions," which, among other things, defined and interpreted "major swap participant",[15] and explained that the captive finance company exemption from the "major swap participant" definition (otherwise referred to as the "90/90 language" and detailed further below) "should be construed (consistent with the statute) to provide practical relief to those captive finance companies whose "primary business" is financing and who uses swaps for the purpose of hedging named underlying commercial risks related to interest rate and foreign currency exposures."[16] Furthermore, the CFTC issued a Final Rule on the End User Exception to the Clearing Requirement for Swaps in July,[17] which enables nonfinancial end users, including captive finance companies, to avail themselves of the end-user exception to mandatory clearing. Both of these crucial rulemakings recognized and reaffirmed the importance of the captive finance company exemption (or "90/90 language") in a reasonable and fair manner, consistent with Congressional intent.

The 2011 Letter – Background on Captive Finance Companies

The 2011 Letter described the unique mission of captive finance companies, which is to provide financial products that promote and facilitate the sale or lease of products that

[14] See Roll Call Vote 128 of the 112th Congress (March 26, 2012).
[15] See 77 *Federal Register* 30596-30764 (May 23, 2012).
[16] *Ibid*, 30693.
[17] See 77 *Federal Register* 42560-42591 (July 19, 2012).

are manufactured by our parent companies. Unlike traditional financial entities, captive finance companies engage in swap transactions *solely* to hedge and mitigate underlying commercial risk related to interest rate or foreign currency exposures. In this regard, a captive finance company is analogous to the treasury department of a manufacturing company that is considered a nonfinancial end user.[18]

The 2011 Letter further described how margin requirements would significantly increase end user (and their captive finance companies) costs and liquidity requirements as well as divert capital that otherwise could be reinvested in business and job creation. Additionally, margin requirements could necessitate new and costly funding requirements on end users, who, unlike swap entities, do not have expedient and low-cost access to liquidity sources like the discount window or consumer deposits.

The 2011 Letter also noted that the imposition of margin requirements could create a disincentive for end users to hedge business risks – an outcome which is directly contrary to regulators' intent.

Clear Congressional Intent in the Dodd-Frank Act

The 2011 Letter highlighted what we believe is clear Congressional intent to exempt nonfinancial end users from many of the burdensome regulations of the Dodd-Frank Act, including the imposition of margin requirements on their swap transactions. As noted above, the CFTC chose not to impose margin requirements on nonfinancial end users in their proposed rulemaking on this issue, specifically in light of what they viewed as clear Congressional intent.[19]

In addition, the 2011 Letter explained how Congress intended to differentiate between captive finance companies and other financial entities. The 2011 Letter pointed out that Congress repeatedly recognized that captive finance companies pose little risk to major financial institutions or to the financial system as a whole. It also noted that Congress acknowledged the unique role that captive finance companies play in supporting the nation's manufacturing base and providing reliable and low-cost financing for the purchase and lease of capital intensive products.

For these reasons, Congress treated captive finance companies as nonfinancial end users by excluding them from the definition of a "financial entity" for purposes of the mandatory clearing requirement of Section 2(h)(7)(C) of the Commodity Exchange Act

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[18] Some captive finance companies trade swaps through a centralized treasury affiliate of their parent organization which may be exempt from clearing. In these cases, the central treasury affiliate should also be exempt from margin posting as it is helping mitigate the commercial risk between the captive and the end-user parent. Central treasury affiliate results in a more efficient risk management execution because of the potential to net offsetting positions.

[19] See 76 *Federal Register* 23732-23749, at 23746 "The proposal would not impose margin requirements on non-financial entities. . . . The Commission believes that such entities, which are using swaps to hedge commercials risk, pose less rise to [swap entities] than financial entities. *Consistent with Congressional intent*, the proposal would not impose margin requirements on such positions." (Emphasis added).

(CEA), as well as from the definition of "major swap participant." This was done via the captive finance company exemption, or the so-called 90/90 language. [20]

The 90/90 language in the Dodd-Frank Act provides a narrow and limited exemption for true captive finance companies, by stating that the definitions of a "financial entity" and "major swap participant" shall not include:

> "[A]n entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company."

Captive Finance Companies Should Not Be Considered "Financial End Users"

The 2011 Letter noted that on two separate occasions, the NPR stated that transactions that are exempt from mandatory clearing requirements should also be exempt from margin requirements. In footnote 35 of the NPR, the Agencies said that a "commercial end user" is "generally understood to mean a company that is eligible for the exception to the mandatory clearing requirement for swaps…under section 2(h)(7) of the [CEA]…"[21] Similarly, footnote 41 noted that the "definition of "financial end user" [in section_.2(h) of the NPR] is based upon, and substantially similar to, the definition of a "financial entity" that is ineligible to use the end user exemption from the mandatory clearing requirements of sections 723 and 763 of the Dodd-Frank Act."[22] Furthermore, the NPR defines a "nonfinancial end user" as "any counterparty that is an end user but is not a financial end user."[23]

Despite these acknowledgements in the NPR, the proposed definition of "financial end user" in section_.2(h) fails to exclude captive finance companies in the manner that the Dodd-Frank Act exempts them from the mandatory clearing requirement. Moreover, the definition of a "low-risk financial end user" excludes any entity that is not "subject to capital requirements established by a prudential regulator or state insurance regulator."[24] Thus, despite the fact that the Dodd-Frank Act exempts captive finance companies from the mandatory clearing requirement and the fact that captive finance companies use derivatives solely to hedge or mitigate legitimate commercial risks, the Agencies' NPR would not only categorize captive finance companies as "financial end users," it would categorize them as "*high risk* financial end users" under section __.2(i). This would subject captive finance companies to treatment similar to hedge funds and

[20] See 7 U.S.C. 2(h)(7)(C)(iii) and 7 U.S.C. 1a(33)(D), respectively.
[21] See 76 *Federal Register* 27569.
[22] *Ibid*, 27571.
[23] *Ibid*, 27587 (see NPR section __.2(r)).
[24] NPR Section ___.2(n)(3)

other entities that use derivatives for speculative purposes, as well as reduced counterparty exposure thresholds and higher margin requirements.

The 2011 Letter explained why, for the reasons set forth above, the NPR would both contravene clear Congressional intent and also negate the clearing exemption provided by the 90/90 test. Again, we urge the Agencies to exempt captive finance companies from margin requirements to effectuate Congressional intent.

Definition of "Low-risk financial end user"

As noted above, the Agencies' NPR limits the definition of a "low-risk financial end user" to financial end user counterparties that are "subject to capital requirements established by a prudential regulator or state insurance regulator." Such a limited definition would lump captive finance companies together with other financial entities that use swaps for speculative purposes. Congress exempted captive finance companies from mandatory clearing requirements and the definition of "major swap participant" because they firmly believed captive finance companies do not pose systemic risk. This notion supports the fact that captive finance companies use derivatives solely to hedge true business risks.

We, therefore, ask the Agencies to make clear that captive finance companies and their securitization entities are exempt from margin requirements, which we believe is consistent with Congressional intent.

Impact on Securitization

We would like to elaborate on the dramatic impact the imposition of margin requirements would have on the securitization process for many captive finance companies. Captive finance companies commonly use, and frequently rely on, securitization to fund their own operations and support their parent manufacturing companies. These securitizations are an extension of the financing process and play an important role in the ability of many of the undersigned companies to support their parent companies as well as consumers and dealers of their parents' products. As such, it is imperative that transactions entered into by securitization trusts – special purpose entities affiliated with a captive finance company – be exempted from both mandatory clearing and margin requirements. These trusts use derivatives to hedge interest rate risk and ensure investors receive timely payment of interest. These derivatives are crucial to achieving a high credit rating given the protection they provide investors.

Applying the margin requirements in the proposed uncleared swap margin rules to swap transactions by securitization trusts would have serious negative consequences for the asset-backed securities (ABS) market. Securitization trusts would not be able to comply with margin posting requirements as they are not presently structured to have access to cash and liquid securities. The source of repayment for securitization trusts is generally the cash flows from the securitized assets or receivables which are generated over time. Subjecting securitizations to margin posting would, at a minimum, make securitization transactions significantly less efficient, resulting in dramatically higher funding costs. Given potential difficulties associated with developing a methodology and attempting to quantify potential peak margin requirements over the life of a securitization, there are questions regarding whether ratings needed to access the ABS market are even achievable.

The application of a margin requirement will restrict a securitization trust's ability to use derivatives, and therefore, will render many securitizations uneconomic. Captive finance companies may limit or forgo securitizations, causing adverse effects on the functioning of this market and increasing captives' financing costs. This would, in turn, ultimately translate to higher financing costs for consumers and dealers on the purchase or lease of parent company products, impacting the parent's ability to reinvest in business and job creation. It would also significantly reduce the supply of high-quality auto ABS bonds to fixed income investors, many of whom have come to characterize auto ABS as a "Treasury surrogate."[25]

There is also clear Congressional intent that securitization trusts used by captive finance companies should benefit from the same exemptions from the clearing and margin requirements. Senators Debbie Stabenow (MI) and Blanche Lincoln (AR) stated in the *Congressional Record* that, "Derivatives are integral to the securitization funding process," and that the Dodd-Frank Act should exempt these entities from clearing and margin. [26]

In addition, we note that it is the current industry view that securitization entities are likely to be considered non-financial counterparties and therefore, their transactions are likely to be exempt from EMIR clearing and margin requirements. We, therefore, request that the Agencies and other U.S. regulators make clear that these entities and their transactions are also exempt in the United States. Such a position will both preserve the functioning of a market critical to the U.S. economy as it allows captive finance companies to continue to support retail customers and dealers and harmonize U.S. regulations with those in Europe.

Conclusion

Due to clear Congressional intent on the issue, the need for regulatory consistency as well as the role that captive finance companies play in the U.S. economy, we urge the Agencies to exempt captive finance companies and their securitization trusts from margin requirements. In its NPR, the Agencies correctly point out that entities exempt from the clearing requirements of Section 2(h)(7)(C) of the CEA should be considered nonfinancial or commercial end users. Accordingly, we submit that the Agencies should clarify that end users, including captive finance companies that meet the 90/90 test and their securitization trusts, are not "financial end users" for the purpose of these margin rules. We submit that undisputed Congressional intent and sound policy underlie the

[25] J.P. Morgan Research, September 21, 2012
[26] See 156 *Congressional Record* 105 (July 15, 2010), pg. S5905-S5906.

reasons why nonfinancial end users, including captive finance companies, should not be subject to margin requirements.

We thank you again for the opportunity to provide additional comment on the NPR.

Sincerely,

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