THE FINANCIAL SERVICES ROUNDTABLE
Financing America's Economy

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September 20, 2010

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

Re: Key Definitions in Title VII of the Dodd-Frank Act; SEC File Number S7-16-10

Dear Ms. Murphy and Mr. Stawick:

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act) provides for the comprehensive regulation of swaps and security-based swaps and includes definitions of several key terms, including swap dealer, security-based swap dealer, major swap participant and securities-based major swap participant.[1] The Act also directs the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), in consultation with the Federal Reserve Board (Board), to further define these key terms.[2] The Financial Services Roundtable (Roundtable) appreciates the opportunity to comment on these key definitions.[3]

The Roundtable supports the goals of Title VII to increase regulation and transparency in the over-the-counter (OTC) derivatives market and to reduce the risks in the market. At the same time, we believe it is important to ensure that products and activities that already are subject to regulation or that do not pose systemic risk are not inadvertently captured by the

[1] Public Law 111-203.
[2] Section 712(d) of the Act.
[3] The Roundtable is a trade association for 100 of the nation's largest financial services firms. Our members include banks, insurance companies and securities firms.

provisions in Title VII. Overlapping or unneeded regulation would impose unnecessary costs on financial transactions and inhibit the efficiency of financial markets.

In drafting Title VII, it is clear that Congress also was concerned about an overly broad application of the Title. This is reflected in a number of exceptions and exclusions to the definitions and other provisions in the Title. As discussed further below, we urge your agencies to incorporate, expressly, these various exceptions and exclusions in the definitions in order to avoid any confusion and to ensure consistency with the statute. We also have several additional recommendations designed to ensure that these key terms are clearly defined and not over broad.

The Definitions of Swap and Securities-Based Swap should be Clarified

We recommend that the definitions of swap and security-based swap expressly exclude transactions in which lenders enter into a swap with a customer of the institution or of one of its affiliates in connection with originating a loan for that customer by the institution or by its affiliate. We further recommend that the definitions of swap and security-based swap expressly exclude "identified banking products." Title VII provides for the exclusion of these products, and the definitions should incorporate the exclusion.[4]

We also recommend that the description of a "swap" that is required to clear and trade centrally be expressed so as to exclude inter-affiliated transactions between commonly owned financial affiliates. We believe that it is an unintended consequence of Section 723 of Dodd-Frank that an affiliate (i.e., a conduit) engaged in channeling its affiliates' swaps to street-side counterparties might be deemed a "financial entity" and therefore be compelled to clear and trade-centrally *both* its external trades with the street (as to which we have no objection to the extent mandated by the Act) *and* its internal trades with affiliates that are likewise financial entities – thus defeating the purpose of having the conduit and losing its beneficial financial and risk management functions for its enterprise.[5] Our concern in this regard (i.e., that the Act should not be read to defeat the efficacy of employing a conduit between its commonly-controlled affiliates and the street) was shared by one of the principal architects of Dodd-Frank, Senate Agriculture Committee Chairman Blanche Lincoln, who also believes that such an outcome is not an intended consequence of the Act. She noted in a floor colloquy during consideration of the Act, "it would appropriate for regulators to exempt from mandatory clearing and trading inter-affiliate swap transactions which are between wholly owned affiliates of a financial entity." [6]

Greater Clarity is Needed in the Definitions of Swap Dealer and Securities-Based Swap Dealer

Title VII defines the terms swap dealer and securities-based swap dealer to include a person who: (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; … or (iv)

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[4] Section 725(g) of the Act.

[5] Sec. 723 of Dodd-Frank excludes from the clearing requirement transactions where one side is not a "financial entity." But because the conduit engages in an activity that qualifies it as a "financial entity," it cannot qualify for the clearing exception when it faces another financial entity – whether internally among its affiliates or externally to the street.

[6] 156 Cong. Rec. S5921, July 15, 2010.

engages in any activity that causes the person to be "commonly known" in the trade as a dealer in swaps. We urge the agencies to clarify the meaning of these provisions to ensure that the definitions capture only institutions that are engaged as true dealers in the swaps market. For example, the phrase "commonly known in the trade" should be clarified to mean widely known by other swap dealers. Additionally, what constitutes "holds itself out" as a dealer?; what is the "making a market"?; and does making a market require a firm to meet a certain activity threshold? Clarifying the meaning of these phrases can avoid confusion over the scope of these definitions.

Additionally, consistent with the terms of Title VII, we recommend that the definition of the term swap dealer expressly exclude (i) lenders, including insured depository institutions, that offer to enter into a swap with a customer in connection with originating a loan with that customer; (ii) persons engaged in swaps for their own or their affiliate's account, either individually or in a fiduciary capacity; and (iii) "de minimis" swap activities. Each of these exceptions is consistent with the intent of this term.[7] Likewise, we recommend that the definition of security-based swap dealer include the exceptions for loan origination and de minimis activities, be consistent with the terms of Title VII.[8]

Key Phrases in the Definitions of Major Swap Participant and Major Securities-Based Swap Participant should be Clarified to Limit Number of Firms Subject to this Classification

The Act provides that a major swap participant or major securities-based swap participant must maintain a "substantial counterparty exposure" that could have "serious adverse effects on the financial stability of the United States banking system or financial markets." We urge the agencies to clearly define these criteria to ensure that only those firms intended to be regulated by Congress fall within the definition of a major swap participant or major securities-based swap participant for purposes of Title VII.

To ensure that these definitions are properly focused, we recommend that the phrase "substantial counterparty exposure" not only be focused on large or significant market positions, but also be calculated on a net basis. Under the Act, the Commission is directed to consider the person's relative position in uncleared as opposed to cleared swaps and may also consider the collateral held against counterparty exposures. Bilateral collateralization and proper segregation substantially reduces the potential for adverse effects on market stability. Additionally, we recommend that the definition identify factors that could contribute to "serious adverse effects." These factors should include the factors the Financial Stability Oversight Council must follow in identifying systemically significant non-bank financial companies (See section 113 of the Dodd-Frank Act)), but solely focused on the counterparty exposure that a person creates through its derivatives activity. Those factors would be a useful guide to assess whether a person's derivatives counterparty exposure "could have serious adverse effects on the financial stability of the United States banking system or financial markets." In addition, as recognized in a colloquy entered into the Congressional Record by Senate Agriculture Committee Chairwoman

[7] Section 721 of the Act.
[8] Section 761 of the Act.

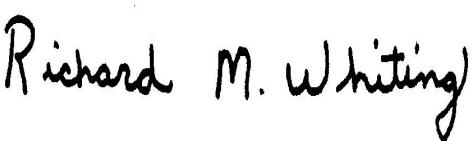
Blanche Lincoln and Senator Kay Hagan, the CFTC and SEC also may want to consider the nature and current regulation faced by the entity.

Additionally, the Act excludes from the definitions of major swap participants and major security-based swap participants firms that hold positions for hedging or commercial risk purposes. This exclusion should be incorporated into the definitions to ensure that captive finance affiliates and similar entities are not captured by the definitions. Furthermore, the term "commercial" should be defined broadly to mean hedging and derivative activities related to all types of traditional business risk, including life insurers' use of derivatives to manage commercial risks.

Finally, we recommend that the definitions of major swap participant and major security-based swap participant exclude firms that act solely as investors or end users. As noted above, Title VII of the Act is intended to apply to firms that are acting as intermediaries, not as investors or end users.

Please feel free to contact me or Brad Ipema at (202) 289-4322.

Sincerely,



Rich Whiting