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February 22, 2011

Mr. David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington DC 20581

Ms. Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"; RIN Number 3038-AD06 & RIN Number 3235-AK65 (SEC File No. S7-39-10)

Dear Mr. Stawick and Ms. Murphy:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to comment on the Commodity Futures Trading Commission (the "CFTC") and the Securities Exchange Commission (the "SEC," and together with the CFTC, the "Commissions") joint proposed rules (the "Proposed Rules") further defining terms including "major swap participant" and "major security-based swap participant," which were published in the Federal Register on December 21, 2010 (the "Release").[2]

Fidelity acts as an investment manager to (i) registered investment companies, pension and ERISA funds (collectively, "funds") and (ii) separately managed accounts. Various Fidelity investment management clients from time to time enter into derivatives transactions constituting "swaps" under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

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[1] Fidelity Investments is one of the world's largest providers of financial services, with assets under administration of more than $3.5 trillion, including managed assets of $1.6 trillion. The firm is a leading provider of investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 20 million individuals and institutions, as well as through 5,000 financial intermediary firms.

[2] CFTC and SEC Joint Proposed Rule: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 75 Fed. Reg. 80174 (proposed Dec. 21, 2010) (17 C.F.R. pts. 1 and 240).

Fidelity generally supports the Proposed Rules, and applauds both the SEC and the CFTC for their efforts on this Release, which we believe have produced a thoughtful, comprehensive set of proposals. However, we have some suggestions regarding several aspects of the Proposed Rules. For example, although Fidelity supports the numerical thresholds that the Commissions have incorporated into the definitions of major swap participant and major security-based swap participant (collectively, "major participant"), we believe that the quantitative tests included in the Proposed Rules are overly complicated and that slightly simpler tests could be adopted to achieve the same desired results. In that connection, Fidelity agrees with and supports the comments and suggestions submitted to the Commissions by the Asset Management Group of the Securities Industry and Financial Markets Association in its February 22, 2011 comment letter on the Proposed Rules.

In addition, and as discussed in greater detail in the remainder of our letter, we ask that the Commissions' final rules incorporate the following recommendations:

- The final rules should explicitly provide that the major participant definitions should not be construed to aggregate funds and accounts managed by asset managers or investment advisers, and that a "substantial position" should be determined at the individual fund or separately managed account level;

- Registered investment companies, ERISA plans and governmental benefit plans, which are already subject to significant regulatory requirements, should be excluded from the major participant definition;

- The "substantial position" threshold amounts used for determining major participant status should be periodically adjusted; and

- For purposes of calculating potential future exposure under the final rules, all cleared swap positions and fully collateralized swap positions subject to daily mark-to-market adjustments should be fully excluded, and a partial exclusion should be provided for swap positions that are fully collateralized but not subject to daily mark-to-market adjustments.

Determination of Major Participant Status at the Individual Fund Level

Fidelity strongly agrees with the Commissions that the major participant definitions should not be construed to aggregate the accounts managed by asset managers or investment advisers.[3] We request that the Commissions explicitly include in the final rules, perhaps as an instruction to proposed Exchange Act Rule 3a67-1(a)[4] and proposed Commodity Exchange Act Rule

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[3] "Preliminarily, we do not believe that the major participant definitions should be construed to aggregate the accounts managed by asset managers or investment advisers to determine if the asset manager or investment adviser itself is a major participant." *Id.* at 80201.

[4] Proposed 17 C.F.R. § 240.3a67-1(a).

1.3(qqq),[5] that major participant determinations are to be made on an individual fund basis, not at the investment manager level. We believe this clarification is important, particularly in light of the questions raised in the Release regarding the treatment of separate accounts, including how and whether to aggregate separate accounts based on beneficial ownership. The Commissions included a helpful footnote in the Release that makes it clear that the discussion of aggregation based on beneficial ownership is limited to managed accounts,[6] but an explicit direction in the rule that this concept will not apply to investment funds will avoid potential regulatory uncertainty.

For example, if the Commissions were to apply the "beneficial owner" standards of Section 13 of the Securities Exchange Act of 1934 (the "Exchange Act") to cover managers of investment funds when determining major participant status, the swap positions of multiple funds managed by multiple affiliated investment advisers could be required to be aggregated. Fidelity believes that such a result would be inconsistent with the Proposed Rules' goal of capturing entities whose swap positions would create systemic risk, the Commissions' position set forth in the Release, and the legislative history of Title VII of the Dodd-Frank Act, which indicates that lawmakers intended major participant status to be considered on a fund-by-fund basis, without aggregation.[7] Broadening beneficial ownership requirements to investment funds through aggregation would impose the burdens of major participant compliance—capital and margin requirements, monitoring and reporting, business conduct standard compliance, and oversight— on entities whose market activity does not create the type or the level of market risk that major participant status is intended to address.[8]

Determination of Major Participant Status With Respect to Separately Managed Accounts

The Proposed Rules require aggregation of all positions across managed accounts with the same account holder for purposes of determining whether such account holder is a major participant.[9] Fidelity believes that a better approach would be to look only to a separate account managed by a single investment manager in determining the credit exposure created by swaps in cases where swap counterparties look solely to the credit and assets of the individual account when entering

[5] Proposed 17 C.F.R. § 1.3(qqq).

[6] This guidance relates only to the application of the major participant definitions to managed accounts. It is not intended to apply to the treatment of managed accounts with respect to any other rules promulgated by the CFTC or SEC to implement Title VII of the Dodd-Frank Act or to any other applicable rules or requirements. Release at 80201, n. 164.

[7] In discussions on the Senate floor prior to the passage of the Dodd-Frank Act, Senator Lincoln was asked, "when considering whether an entity maintains a substantial position in swaps, should the CFTC and the SEC look at the aggregate positions of funds managed by investment managers or at the individual fund level?" In response, she stated, "as a general rule, the CFTC and the SEC should look at each entity on an individual basis when determining its status as a major participant." *Id.* at 80201, n. 162 *quoting* 156 Cong. Rec. S5907 (daily ed. July 15, 2010).

[8] *See* Dodd-Frank Act §§ 721(a)(16), 761(a)(6).

[9] Release at 80201.

into a swap. In those cases, the actual risks to the counterparty are tied to, and limited by, the activities of the account. Similarly, only assets from such separately managed accounts are available to be posted as collateral for such transactions, and recourse is limited to such assets.

In addition to the policy considerations noted above, requiring aggregation of separate accounts based on beneficial ownership would be quite complicated, and potentially costly. Accountholders often maintain multiple managed accounts with multiple investment managers. Individual investment managers are not in a position to know whether accountholders have retained other investment managers, nor do they have access to the nature of investments being made by the other investment managers. For obvious reasons, investment managers view their investment processes and decisions as quite sensitive, and often they go to great lengths to protect the confidentiality of their clients' trades and holdings. Given the nature of these relationships, aggregating swap positions across multiple accounts will present substantial operational and legal complexities, including the sharing of information across managers and shifting responsibilities for monitoring and reporting.

For the reasons set forth above, Fidelity believes that the determination of whether the accountholder of a managed account is a major participant should be not be made by aggregating accounts across multiple investment managers, but instead on an account-by-account basis.[10]

Exclusion of Certain Entities

In the Proposed Rules, the Commissions solicit comments as to whether they should exclude, conditionally or unconditionally, certain types of entities from the major participant definitions, on the grounds that such entities do not present the risks that underpin the major participant definitions, or in order to avoid duplication of existing regulation. As noted in the Proposed Rules, the tests for major participant status indicate a focus on entities that pose a high degree of risk to the market through their swap and security-based swap activities.[11] Fidelity

[10] Fidelity also strongly agrees that it would be inappropriate to "look through" an investment fund to its beneficial owners in determining major participant status. In addition to many of the same complications that attend potential separate account aggregations, funds and their investors do not lend themselves to this type of analysis. Investors in a fund are not parties to the fund's swap positions and do not create or maintain the credit exposure on swaps that the fund enters into. The risk of a fund's swap positions and the contractual duty to satisfy obligations arising under its swap are those of the fund alone and the swap counterparty has no recourse to fund investors for obligations arising under a swap position. Furthermore, it would be impractical to attribute ownership to investors and monitor compliance at the investor level, particularly in the case of mutual funds whose interests are widely held by a large number of retail investors.

[11] Senator Lincoln, in discussion of the Dodd-Frank legislation on the Senate floor stated that, "it may be appropriate for the CFTC and the SEC to consider the nature and current regulation of the entity when designating an entity a major swap participant or major security-based swap participant. For instance, entities such as registered investment companies and employee benefit plans are already subject to extensive regulation relating to their usage of swaps under other titles of the U.S. Code. They typically post collateral, are not overly leveraged, and may not pose the same types of risks as unregulated major swap participants." Release at 80185, n. 69 *quoting* 156 Cong. Rec. S5907 (daily ed. July 15, 2010).

supports an explicit exclusion from the major participant definitions for registered investment companies and for ERISA and government benefit plans.

Registered investment companies are already subject to extensive regulation under the Investment Company Act of 1940 (together with the rules and regulations promulgated thereunder, the "1940 Act") as well as the Securities Act of 1933 and the Exchange Act, and investment managers of registered investment companies are regulated under the Investment Advisers Act of 1940. The existing rules and regulations promulgated under these Acts already govern numerous aspects of the proposed regulations for major participants, including maximum leverage requirements, margin and capital, registration, reporting and recordkeeping, and business conduct standards. In order to avoid (i) duplicative and/or inconsistent regulatory requirements being imposed on registered investment companies by multiple federal regulators and (ii) increased compliance costs that would be borne by investors, registered investment companies should be excluded from the major participant definition.

For example, registered investment companies are restricted from being highly leveraged as a result of coverage requirements under the 1940 Act and therefore do not engage in the type of high risk activities perceived by many to have contributed to the financial crisis. Treating funds as major participants would impose duplicative and unnecessary costs and burdens on funds and fund shareholders, such as requirements related to margin and capital, registration, trade monitoring, establishment of risk management procedures, implementation of conflict-of-interest systems and procedures, appointment of a compliance officer, and establishment of documentation standards.

Similarly, ERISA plans and government benefit plans are also subject to significant regulatory requirements addressing, among other things, governance and permitted investments. ERISA plans and government benefit plans are subject to an exclusion found in the first prong of the proposed major participant definitions under the Dodd-Frank Act, however, we request clarification from the Commissions that this exemption is a per se exemption from all of the requirements of major participant status. ERISA plans and government benefit plans are currently subject to stringent statutory and regulatory requirements, including prudence and diversification rules, professional management standards and on-going transparent reporting obligations which obviate the need for additional regulation. Additional and potentially inconsistent regulation of ERISA plans and government benefit plans as major participants will cause confusion in the industry and jeopardize the efficient management of assets for plan participants. Accordingly, we believe that ERISA plans and government benefit plans should also be excluded from the major participant definitions.

Ongoing Consideration of the "Substantial Position" Thresholds

Fidelity believes that the threshold amounts for determining whether an entity holds a "substantial position" in any category of swap or security-based swap on the basis of its aggregate uncollateralized exposure or its aggregate potential outward exposure are set at appropriate levels. However, the proposed levels should be subject to periodic adjustment, based on a regular, periodic review by the regulators using factors such as inflation, changes in the swap market resulting from the maturation of the new regulatory regime, the evolution of the types of swap market products and participants, the ability of market participants to absorb losses, and any other factors that the Commissions deem relevant.

Modification to the Exposure Tests

Fidelity believes that collateralized swaps that are marked-to-market on a daily basis and swaps that are cleared should be excluded entirely from the calculation of aggregate potential outward exposure, rather than including 20% of the risk-weighted swap notional amount as provided in the Proposed Rules. Excluding cleared swaps from the potential outward exposure test would incentivize market participants to embrace clearing, which would comport with both the Commissions' positions and legislators' support for clearing in the swaps market. Clearing should also be fully encouraged as it will ensure proper collateralization of swap trades.

Both the aggregate uncollateralized exposure test and the potential outward exposure test for "substantial position" are intended to identify market participants who pose systemic risk. Collateral plays the same risk-amelioration function for the purpose of both tests, and should be given the same credit in both tests. Therefore, Fidelity supports providing a full discount in the calculation of aggregate potential outward exposure for collateralized positions that are not cleared or not subject to daily mark-to-market collateral adjustment. Positions that are collateralized but subject to adjustment on a less frequent than daily basis should not be treated the same as uncollateralized positions; that is, 100% of those positions should not be included in the calculation of aggregate potential outward exposure, otherwise, the potential future risk posed by such collateralized positions is exaggerated. We believe this adjustment would provide a more accurate indicator of the systemic risk posed by a market participant.

All posted collateral should be accounted for in the aggregate potential outward exposure calculation, with the amount of the discount being appropriate and reflective of the relative risk reduction function served by such collateral. Overcollateralization or posted independent amounts should also be credited to further reduce the potential future exposure posed by a swap position, as such excess collateral and independent amounts further reduce the risk of uncollateralized exposure being created in the future by moves in the mark on the underlying swap. Providing no discount in the aggregate potential future outward exposure calculation for collateral for swap positions that are not cleared or not subject to daily mark-to-market adjustment unnecessarily disadvantages such trades and disregards the fact that the Dodd-Frank Act continues to allow, in appropriate circumstances, bilateral trades and market-based terms negotiated by the parties to such trades.

With regard to the calculation of both uncollateralized exposure and potential outward future exposure, adjustments are included to account for the existence of a master netting agreement between an entity and its counterparty. Such adjustments are appropriate to reflect the netting of offsetting positions involving free credit balances, net equity balances and fully paid securities, as permitted by such netting agreement. Fidelity requests that the Commissions provide further guidance as to the requirements of a master netting agreement for purposes of the uncollateralized exposure and potential outward future exposure calculations. In particular, Fidelity seeks confirmation from the Commissions that "master netting agreement" includes an ISDA Master Agreement, if the parties to such ISDA Master Agreement have elected to apply the Master Agreement's netting provisions to all transactions entered into under the Master Agreement.

Treatment of Collateral

Fidelity supports the positions of the Commissions set forth in the Proposed Rules regarding the treatment of permissible types of collateral and collateral valuation. Market practices, clearing requirements and privately negotiated contracts for bilaterally negotiated trades should continue to govern (i) the types of collateral that may be posted to satisfy margin requirements and (ii) how collateral is valued as well as discounted (i.e., the "haircuts" for particular types of collateral). Guidance or rulemaking from the Commissions in this area is unnecessary, because haircut and valuation terms negotiated by parties reflect the market's assessment of the collateral and are typically self-correcting as collateral requirements in swap transactions are typically bilateral.

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We appreciate the opportunity to comment on the Proposed Rules. Fidelity would be pleased to provide any further information or respond to any questions that the Commissions or the staff may have.

Sincerely,

Scott C Goebel

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott D. O'Malia, Commissioner
Mark Fajfar, Assistant General Counsel
Julian E. Hammar, Assistant General Counsel
David E. Aron, Counsel
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Honorable Mary L. Schapiro, Chairman
Honorable Luis A. Aguilar, Commissioner
Honorable Kathleen L. Casey, Commissioner
Honorable Troy A. Paredes, Commissioner

Honorable Elisse B. Walter, Commissioner
Eileen Rominger, Director, Division of Investment Management
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