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August 15, 2011

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

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.W.
Washington, DC 20549

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant" and "Eligible Contract Participant," RIN 3038-AD06 and RIN 3235-AK65.

Dear Mr. Stawick, Ms. Murphy, and Ms. Johnson:

In a letter dated May 11, 2011, Wells Fargo Bank, N.A. ("Wells Fargo") and several other banks[1] submitted comments to the CFTC, the SEC (jointly with the CFTC, the "Commissions"), and the Board of Governors of the Federal Reserve System, in response to the above-referenced proposed rules (the "Proposed Rules"),[2] which comments focused on the definition of the term "Eligible Contract Participant" ("ECP Comment Letter"). In the weeks following the ECP Comment Letter as Wells Fargo prepared for the July 16, 2011 effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), additional issues surfaced relating to the definition of Eligible Contract Participant ("ECP") in connection with loan commitments and other transactions involving swaps with our borrowers that were expected to close after July 16.

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1 The signatories to the joint comment letter were Branch Banking and Trust Company, East West Bank, Fifth Third Bank, The PrivateBank and Trust Company, Regions Bank, SunTrust Bank, U.S. Bank National Association and Wells Fargo Bank, N.A.

2 Notice of Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant." 75 Fed. Reg. 80178 (December 21, 2010).

In many cases, it was unclear how the definition should be interpreted or how it was meant to be applied to specific circumstances, with the result that loan officers did not know whether certain borrowers could hedge or manage their risks to protect cash flows needed to repay their Wells Fargo loans. Fortunately, the urgency of addressing these issues abated for CFTC-regulated swaps with the issuance of the CFTC's Final Order on the Effective Date for Swap Regulation ("Final Order")[3] granting certain temporary relief, including a temporary exemption for qualifying swaps with counterparties that will not be included within the new ECP definition. However, while the Final Order deferred the need to address these issues, they still will need to be resolved, and we respectfully request that the CFTC provide clarification or confirmation in its final rules on the points raised below, which are of great concern to commercial lenders and borrowers.

In view of these additional issues, and in response to a meeting with CFTC staff on June 15 to discuss the ECP definition, Wells Fargo is pleased to provide the following supplemental comments to those discussed in the ECP Comment Letter.[4]

I. Summary of issues raised in the ECP Comment Letter

A. Related obligors

The ECP Comment Letter urges the Commissions to clarify the ECP definition to address situations in which:

> (1) loans or other extensions of credit are made to related parties[5] that are jointly and severally liable for the credit,
>
> (2) the credit (whether to a single borrower or multiple borrowers) is secured by collateral owned jointly by the related parties, or
>
> (3) the credit is guaranteed by one or more of the related parties.

To manage the interest rate risk of these extensions of credit, borrowers would like to enter into swaps based on the strength of the same obligors and assets that support the underlying credit. Otherwise, if non-ECP obligors must be excluded, or if their obligations for swaps (as co-counterparty, co-owner of collateral or guarantor) are potentially unenforceable, this could discourage banks from financing these businesses or offering them swaps to manage their interest rate risk exposure. This could have the unintended consequence of discriminating against businesses that have these organizational structures, by denying them hedging opportunities, or changing how they borrow money to fit the ECP swap rules (essentially, the "hedging tail wagging the financing dog").

Because the ECP definition generally does not address credits involving related obligors, the ECP Comment Letter urges the Commissions, in transactions where at least one of the related obligors is an ECP, to confer ECP status on the remaining related obligors solely for purposes of the particular

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3 76 Fed. Reg. 42508 (July 19, 2011).

4 Our comments are in addition to those provided in a Wells Fargo comment letter dated June 3, 2011 urging the Commissions to address an error related to the definition of the term ECP in Section 1(a)(18)(vii) of the Commodity Exchange Act.

5 For example, borrowers may include a parent, its subsidiaries or other affiliates, or associated persons in the case of a partnership).

financing transactions and related security arrangements. To qualify, the transaction must be entered into to manage risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by a business with which such obligor is affiliated or in which such obligor has an economic or financial interest.

B. Amounts invested on a discretionary basis

In addition, the ECP Comment Letter urges the Commissions to provide interpretive guidance on the portion of the ECP definition that applies an "amounts invested on a discretionary basis" test to individuals,[6] and to find that any assets owned by an individual in order to conduct a business or otherwise for investment purposes with a view toward making a profit (excluding property held for personal use such as an individual's private residence, automobile or boat) are investments made on a discretionary basis.

Wells Fargo's individual customers have a variety of investments we believe should qualify, including but not limited to investments in privately-held businesses, commercial real estate properties, residential properties purchased for investment purposes (such as rental properties), bank deposits, foreign currency deposits, brokerage accounts, money market accounts or mutual funds, collective investment funds as defined in 12 C.F.R. 9.18, investments held in revocable trust accounts managed in accordance with the customer's stated investment goals, and investments held in an IRA, Keogh, 401(k) or similar retirement account. Without guidance from the Commissions, however, we cannot be certain of the scope of the phrase "amounts invested on a discretionary basis", and it will be difficult for banks and their individual customers to have certainty that their swaps are legally enforceable.

C. Proprietorships

The ECP Comment letter urged the Commissions to provide guidance on the term "proprietorship" and clarify that businesses owned and operated by individuals as proprietorships, including sole proprietorships, are included in Section 1a(18)(A)(5). That provision clearly includes "proprietorships," which we believe must encompass sole proprietors (although they typically are not separate legal entities), but we also believe that greater clarity on this point is needed.

Wells Fargo is the largest lender to agricultural businesses in the United States, and therefore we are particularly interested in having this issue addressed in favor of our agricultural customers. Since their assets comprise land, buildings, livestock, crops or other illiquid property, sole proprietorships wish to qualify as ECPs under the asset or net worth test applicable to proprietorships, not the "amounts invested on a discretionary basis" test applied to individuals (unless of course such illiquid forms of property qualify under that test, as requested above). In fact, family farms would be disproportionately adversely impacted by the discretionary investments test, since many Midwestern states prohibit corporations, limited liability companies and other corporate enterprises from owning farms.

The Commissions should clarify in final rules that businesses owned and operated as proprietorships by individuals fall within that term, including sole proprietorships composed of one or more

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[6] Unless their swaps are conducted with U.S. financial institutions or certain other regulated entities, this may also be an issue for governmental entities under CEA Section 1a(18)(A)(vii), which uses the phrase "owns and invests on a discretionary basis".

individuals operating their assets as a business, and that state law should govern as to whether organizational documents are required to constitute a proprietorship.

II. Additional issues raised during implementation

In addition to the issues raised in the ECP Comment Letter, the following are additional areas of concern where we believe clarifications and relief will be needed with respect to the ECP definition. Without such clarifications and relief, many commercial entities and individuals will be required to forego necessary hedging transactions, which will serve only to subject them to greater risk, with no additional protection to financial, commodities or securities markets or market participants.

A. Purchase money loans, construction loans and other financings of assets

Banks regularly make loans to borrowers to acquire commercial real estate properties. Since income from the property to service the debt will be limited, a bank may require the borrower to hedge the loan's interest expense to avoid a default on its debt service if interest rates rise. The bank might therefore be unwilling to make the loan unless the borrower enters into the hedging transaction. Since these are purchase money loans where borrowers will be acquiring the assets with the loan proceeds, borrowers may be unable to qualify as ECPs until after the loan closes and title to the property has passed.

Banks also make construction loans to borrowers where the loan is funded incrementally as construction progresses and progress payments are made to pay the costs of construction as a building or other capital improvement is being built. Here again, banks often require the borrower to hedge against rising interest rates as part of the loan commitment. Unlike in the case of purchase money loans, however, construction borrowers frequently will be unable to qualify as ECPs at or near loan closing, and the wait could be substantial. The completed project may be an asset that exceeds $10 million, but until the project is completed, these borrowers may be unable to qualify as ECPs under the asset test.

Unless they can qualify using the net worth test (which often they cannot since these are typically single asset entities), or unless there exists an eligible guarantor, these borrowers will likely be unable to hedge during at least part of the construction phase. In the meantime, both the bank and the borrower would be exposed to the risk of rising interest rates, and as a result the bank might be unwilling to lend. This inability to hedge potentially could undermine the viability of the project and the borrower's ability to service the debt. This issue is of particular concern to Wells Fargo, not only for our regular construction lending business, but also for financing projects subsidized by the Federal government through tax credits.[7]

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[7] For example, the Low Income Housing Tax Credit program provides tax credits to increase the supply of affordable housing in communities across America. This program accounts for the majority of all affordable housing development in the United States today. Wells Fargo provides construction and permanent financing for qualified LIHTC projects. Many of these projects are established as single asset entities, and the construction loan is typically guaranteed by the project sponsor, either an individual or a business entity. Due to the limited initial equity investment, combined with low asset values during construction and high loan to value financing needed, many LIHTC projects would not qualify as ECPs during the initial phase of the construction loan. Their ability to lock in rates on a forward basis for the permanent financing period would also be constrained. By our estimates, 10-15% of LIHTC projects undertaken in 2010 would not have qualified for hedging during the initial

Of course, another issue arises under the Proposed Rules in the context of these purchase money or construction loans. For banks originating these loans where they wish to fall under the exception from the "swap dealer" definition for loans originated by an insured depository institution, they may be unable to qualify for the exception under the Proposed Rules if a contemporaneous execution standard is adopted, or the swap must be entered into for the full duration of the loan (questions on which the Commissions requested comment in the Proposed Rules).[8]

Whether the issue is the inability of a bank to qualify for the exception (to the extent it is drawn narrowly), or the inability of a borrower to hedge these loans at closing, the potential effect could be the same — limiting credit availability to American businesses. This could have a more pronounced effect at times when markets are expecting higher interest rates or increased inflation.

To avoid exposing borrowers and banks to the risks of fluctuating interest rates between the date a commitment is issued for a purchase money loan, construction loan or other financing of assets and the date the borrower qualifies as an ECP, the Commissions should use their respective authority under Dodd-Frank and the Commodity Exchange Act to determine that any counterparty will qualify as an ECP by virtue of a financing commitment issued by a financial institution or any of its affiliates if the proceeds of the financing are to be used to acquire or construct assets that can reasonably be expected to have a fair market value in excess of $10 million and the swap is for hedging or mitigating the commercial risk of that financing.

B. Eligibility conferred on counterparties by eligible guarantors

Under the ECP definition, corporations, partnerships, proprietorships, organizations and trusts will qualify as ECPs if their swaps are guarantied or supported by certain ECPs, such as financial institutions and companies with over $10 million in assets ("Eligible Credit Support Providers").

A threshold question is whether the guaranty or credit support from an Eligible Credit Support Provider can be capped at a stated amount and still qualify under this definition. This issue is particularly relevant for bank-issued letters of credit, which must be limited to a stated amount to comply with Federal banking regulations. Since bank-issued letters of credit were clearly meant to qualify swap counterparties as ECPs, we believe that corporations, partnerships, proprietorships, organizations and trusts should qualify as ECPs when their obligations are guarantied or otherwise supported by Eligible Credit Support Providers even though the guaranty or other instrument is capped

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construction phase, except their swaps qualified under the "line of business" test of the CFTC's 1989 Swap Policy Statement.

Similarly, the New Market Tax Credit program provides tax credit incentives to investors in certified Community Development Entities, which invest in low income communities. In 2010, the Federal government allocated $3.5 billion to the NMTC program to stimulate investment in underserved communities. The program has received $29.5 billion in allocation since inception in 2001. Many of the projects are 100% financed by bank loans supported by these tax credits. By our estimates, about one half of NMTC deals would not have qualified as ECPs in 2010.

8 75 Fed. Reg. at 80182.

at a stated amount,[9] provided that the swap is entered into to hedge or mitigate commercial risk and not for speculation.

Of course, we recognize that the Commissions may be concerned about the theoretical possibility of counterparties attempting to qualify as ECPs on the basis of guaranties, letters of credit or other credit support arrangements in nominal amounts. To avoid the possibility of abuse, and to provide market participants with legal certainty, we encourage the Commissions to clarify that guaranties, letters of credit and other credit support provided by Eligible Credit Support Providers to swap dealers, security-based swap dealers and financial institutions will be sufficient for purposes of qualifying their swap counterparties as ECPs when the swap will be entered into to hedge or mitigate commercial risk and:

(i) the stated amount covers the amount of the reasonably anticipated potential future exposure of the swap or security-based swap approved by the swap dealer or financial institution, determined in accordance with its models or methods of measuring such exposure for credit approval purposes, or

(ii) if the stated amount is less than such approved amount, the corporation, partnership, proprietorship, organization or trust will be contractually obligated to top up the guaranty or credit support with additional guaranties, letters of credit or credit support from Eligible Credit Support Providers when the aggregate net unsecured market value of the swaps and security-based swaps to the swap dealer, security-based swap dealer or financial institution exceeds the total amount of such credit support having a stated amount.[10]

C. Eligibility based on assets owned directly <u>or indirectly</u> by parent companies

We would also draw the Commissions' attention to companies that may be operating under an organizational structure where assets are divided among one or more of its subsidiaries. For example, a parent company may have $6 million in assets (not counting those of its subsidiaries) with a subsidiary having $5 million in assets. On a combined basis, they would have over $10 million in assets. In cases like this, we believe the purposes of the ECP's financial requirements would be served if ECP status were conferred on the parent and each subsidiary that the parent guaranties and controls directly or indirectly, since the parent guarantor would have an ownership or controlling interest in over $10 million in assets.

Accordingly, we urge the Commissions to use their rulemaking authority to expand the ECP definition for corporations, partnerships, proprietorships, organizations and trusts such that an entity will qualify

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9 As used herein, "stated amount" may be either the face amount of the guaranty or other instrument (such as the maximum amount that may be drawn under a letter of credit), or the amount of the limit on liability of the Eligible Credit Support Provider under the instrument (such as in a limited liability guaranty).

10 For example, this is how many commodity swap transactions work where bank-issued letters of credit are a form of eligible credit support that would be delivered under a security agreement, including a credit support annex to an ISDA Master Agreement that encompasses a mark-to-market collateral arrangement. Before the market value of the transaction exceeds the amount of the letter of credit, the counterparty would be required to post an additional letter of credit or other form of eligible credit support.

as an ECP if it is entering into the swap to hedge or mitigate commercial risk and either (i) it owns directly or indirectly assets in excess of $10 million, or (ii) such swap is guarantied by such an entity. This would be particularly helpful to commercial real estate borrowers, since often they need to qualify under the asset test as noted above.

D. Amounts invested on a discretionary basis: spouses with joint accounts

In addition to the need to give definitional meaning to the phrase "amounts invested on a discretionary basis" as discussed in the ECP Comment Letter, it is also important to banks and their customers that the Commissions provide guidance with respect to spouses with a joint investment account.

For example, if a husband and wife are co-borrowers and are executing the swap to hedge their bank loan, will it be sufficient if their joint investment account has over $5 million in discretionary investments, or must it be over $10 million because there are two individuals? Further complicating the situation would be the existence of a prenuptial agreement providing that upon divorce the couple's property or investments would go disproportionately to one spouse or the other. Or suppose one spouse wants to enter into the swap by himself or herself in reliance on a joint account with over $5 million but less than $10 million in discretionary investments, and the couple is domiciled in a community property state?

Although Congress adopted an ECP definition that does not take into account the complexities of these joint arrangements, we urge the Commissions to provide investors and the financial community with legal certainty by adopting a simple, easy to administer rule that treats an individual as an ECP if the total amount of discretionary investments held jointly with a spouse, together with the amount of discretionary investments held by the individual in his or her own name (if any), exceeds $5 million (if the swap is entered into for the purpose of managing the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, whether or not owned or incurred jointly with the spouse) or otherwise $10 million, provided that the spouse has consented to the individual entering into the swap.

We believe that this approach is consistent with the purposes, terms and history of the ECP definition, and that the definition should be interpreted and applied to include assets held jointly, without regard to the issues noted above with respect to prenuptial agreements, divorces, etc. The ECP definition, and the exemptions on which it is based, have always focused on a party's status at the time a transaction is entered into. Therefore it should not make a difference if an individual or couple qualifying as an ECP at the time of the transaction later experiences a change in circumstances (such as a divorce) that would change that status. This is no different from a corporation with $10 million in assets at the time a transaction is entered into that subsequently experiences a $1 million loss.

III. Helping middle market customers qualify as ECPs

A primary purpose of the ECP requirement is to prevent unsophisticated persons from trading swaps for speculative purposes unless that activity is conducted on a regulated exchange. An unintended consequence of the ECP requirement, however, is its impact on small middle market customers — taking away an important hedging and risk management tool and putting them at a disadvantage relative to larger businesses that can hedge their commercial risks more efficiently in the swap market in reliance on the strength of commercial properties and assets that are less liquid than exchange-style margining arrangements.

To help these customers, we urge the Commissions to include in the ECP definition any corporation, partnership, proprietorship, organization or trust that is entering into the swap for the purpose of hedging or mitigating commercial risk of such party, or is providing a guaranty, collateral or other credit support for such commercial hedging or risk mitigating swap, provided that the swap is entered into with either a registered swap dealer or an insured depository institution that is exempt from such registration to the extent it offers to enter into the swap in connection with originating a loan. As discussed above, if there are related obligors, the rule should confer ECP status on each related obligor to the extent the obligor is an affiliate, or has an economic or financial interest in the business, of the party hedging or mitigating commercial risk. Of course, such ECP status should be conferred solely for purposes of the particular swap that would be hedging or mitigating commercial risk.

This would not only help small businesses hedge their risks, but it would also ensure that they do so within a regulated environment under Commission jurisdiction or that of bank regulators in the case of insured depository institutions that are not swap dealers.[11] The proposed definition also would be consistent with the clearing exemption for end users, so long as the customer provides the CFTC with the requisite notice of how it will meet its financial obligations associated with entering into non-cleared swaps.

IV. Providing Legal Certainty on Counterparty ECP Status

We also believe that a swap dealer or security-based swap dealer that complies with the ECP verification requirements set forth in the Commissions' respective business conduct rules with respect to a swap or security-based swap should be afforded legal certainty with respect to such transaction.

Market participants have long entered into transactions with persons they believe in good faith to be ECPs, or "eligible swap participants ("ESPs") under Part 35 of the CFTC's rules, based on information available to them, or on representations provided to them, by their counterparties, regarding the counterparties' status as ECPs or ESPs. The CFTC and Congress have recognized in the past that a market participant should have the benefit of the relevant exemption if it has a reasonable basis to believe that its counterparty is an ECP or ESP. Thus, when the CFTC adopted Part 35 in 1993, it stated that "it is sufficient that the parties have a reasonable basis to believe that the other party is an eligible swap participant at such time [of entering into the transaction]. . . . An eligible swap participant that has a reasonable basis to believe that its counterparty is also an eligible swap participant when it enters into a master agreement may rely on such representation continuing, absent information to the contrary."[12] Similarly, when Congress adopted the Commodity Futures Modernization Act in 2000, it included a provision regarding Exempt Commercial Markets that such a

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11 The proposed definition would be narrower than the "line of business" provision in the CFTC's 1989 Swap Policy Statement in two important respects: (i) the requirement that the swap be conducted to hedge or mitigate commercial risk would preclude a small business from conducting swaps for speculation, and (ii) the condition that the swap be entered into with a regulated swap dealer or insured depository institution would be consistent with the framework of the ECP definition with respect to local governmental entities that are too small to qualify under a financial metrics test (see CEA Section 1(a)(18)(vii) and Wells Fargo comment letter cited at footnote 4 above urging the Commissions to remedy the broken cross reference in that Section).

12 Exemption for Certain Swap Agreements, 58 Fed. Reg. 5587, 5589 (Jan. 22, 1993).

market must "have a reasonable basis to for believing that participants authorized to conduct transactions on the facility in reliance on the exemption . . . are eligible commercial entities."

We believe that this same approach should be followed with respect to the ECP definition under the CEA, as amended by Dodd-Frank. Specifically, we respectfully urge the CFTC to use its definitional rulemaking authority to define an ECP as any individual or entity (including a governmental body) that the other party has a reasonable basis to believe is an ECP at the time the swap or security-based swap is entered into. We also recommend that the CFTC confirm that receipt of a written representation from the individual or entity (including a representation in a master agreement that is deemed repeated at the time of each transaction) that it meets the requisite asset, net worth or discretionary investment test of the ECP definition would be sufficient to establish a reasonable basis.[13] This would be consistent with the SEC's definition of "accredited investor", which is defined in pertinent part as "any person who comes within any of the following categories, *or who the issuer reasonably believes comes within any of the following categories*, at the time of the sale of the securities to that person:..." [italics added].[14] Without this legal certainty, market participants will be exposed, throughout the term of each transaction it enters into, to the risk that its counterparty will later be found not to have been an ECP based on information that is later discovered or provided to the market participant.

Wells Fargo appreciates the opportunity to provide our comments and suggestions to the Commissions on these important issues and welcomes the opportunity to discuss any questions, which may be directed to the undersigned at (704) 383-0606.

Sincerely,
Wells Fargo Bank, N.A.

By: _____
Name: Barry Taylor-Brill
Title: Managing Counsel

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13 To avoid the possibility of abuse, the Commissions could also provide in their respective business conduct rules that associated persons of a swap dealer or security-based swap dealer that has complied with the ECP verification requirements of such rules with respect to an individual or entity would be entitled to solicit and accept transactions with such individual or entity in reliance on such ECP representation absent actual notice of contrary facts (or facts that reasonably should have put them on notice), which would trigger a duty of further inquiry by the swap dealer or security-based swap dealer.

14 See Rule 501 under the Securities Act of 1933, 17 C.F.R. 230.501.