February 22, 2011

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

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant" – File No. S7-39-10

Dear Ms. Murphy:

Better Markets, Inc.[1] appreciates the opportunity to comment on the above-captioned joint proposed rules (the "Proposed Rules") of the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC"). The purpose of the Proposed Rules is to further define the terms swap dealer ("SD"), security-based swap dealer ("SBSD"), major swap participant ("MSP"), major security-based swap participant ("MSBSP"), and eligible contract participant ("ECP"), in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). This letter focuses on those portions of the Proposed Rules that relate to the SEC.

Introduction

The Proposed Rules define five major categories of market participant involved in the swaps and securities-based swaps ("SBS") markets. The definitions are critically important, as they will determine who is subject to the new regulatory regime for swaps and SBS established by the Dodd-Frank Act. Entities that fall within those definitions will be held to regulatory standards governing registration, margin, capital, and business conduct, all designed to limit risk and make the swaps markets more transparent, efficient, and fair.

Not surprisingly, these definitions have attracted the attention of multiple commenters, many of whom are concerned that they will be needlessly or inappropriately

[1] Better Markets, Inc. is a nonprofit organization that promotes the public interest in the capital and commodity markets, including in particular the rulemaking process associated with the Dodd-Frank Act.

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covered by the new regulatory regime established by the CFTC and/or the SEC (together, the "Commissions") as required by the Dodd-Frank Act.

Contrary to those fears, the Proposed Rules do not establish overly-broad definitions. In fact, as strengthened by the suggestions below, they adhere to the letter and the spirit of the Dodd-Frank Act, and they incorporate an appropriate mix of flexible standards and bright-line tests. The staffs of the Commissions should be commended for their work on these exceedingly complex issues in the face of considerable pressure from interested parties.

Summary of Comments

To ensure that the definitions are sufficiently broad to cover all of the SBSDs and MSBSPs that should be subject to regulation, and to ensure that the exceptions in the definitions are narrowly tailored, the Propose Rules must:

- Narrow the de minimis exception in the SBSD definition, so that it only applies with respect to "transactions with or on behalf of customers," and so that it never applies with respect to transactions with special entities;

- Expand the "substantial position" test in the MSBSP definition to measure the size of aggregate positions in the SBS market without regard to collateral, so that the definition captures a wider range of SBSDs and addresses other risks they pose in addition to risk of default;

- Mandate use of a strong and uniform test for measuring **current** exposures under the "substantial position" test, and require use of more accurate methodologies for measuring **potential** exposures, including value-at-risk calculations, disaggregation of SBS with multiple risks, and reference to listed hedge equivalents for valuation of illiquid SBS;

- Limit use of the hedging exclusion for "substantial position" calculations to genuinely commercial risks, and require strict congruence between an SBS hedge position and the risk hedged; and

- Adopt a more appropriate leverage ratio of no more than 8 to 1 for purposes of identifying financial entities that are "highly leveraged" under the MSBSP definition.

Discussion of the SBS Dealer Definition

The Statutory Language

The Dodd-Frank Act defines "security-based swap dealer" in terms of the SBS activities that a market participant engages in. The statutory definition covers four basic categories, encompassing any person who:

- Holds themself out as a dealer in SBS;
- Makes a market in SBS;
- Regularly enters into SBS with counterparties as an ordinary course of business for its own account; or
- Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in SBS.

Section 761(a) of the Dodd-Frank Act.

General Approach to Implementation Under the Proposed Rules

The Proposed Rules adopt an appropriately flexible approach to implementation of the statutory definition of an SBSD. The Proposed Rules track the statutory language without elaborating on the core definition. The proposing Release[2] explains the rationale for this approach by observing that the statutory definitions must not be interpreted in a "constrained or overly technical manner." The Release adds that "rigid standards would not provide the necessary flexibility to respond to evolution" in the ways that dealers enter into SBS or to "cover appropriate persons as the swap market evolves." Release at 80176, 80179.

Mirroring the statutory language without adding detailed formulations is appropriate in this context. It will help ensure that now and in the future, the definition captures all entities that are acting as SBSDs and must therefore be subject to regulation.

[2] Exchange Act Release No. 34-63452, Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Security-Based Major Swap Participant" and "Eligible Contract Participant," 75 FR 80174 (Dec. 21, 2010).

Interpretive Guidance in the Release

To provide guidance in the absence of detailed rule requirements, the Release identifies a variety of factors that the SEC would consider when applying the rule and determining whether a market participant is an SBSD. Release at 80177-78.

For example, the Release identifies some of the general characteristics that distinguish SBSDs from other market participants:

- Dealers tend to accommodate demand for SBS from other parties;
- Dealers are generally available to enter into SBS to facilitate other parties' interest in entering into those instruments;
- Dealers tend not to request that other parties propose the terms of SBS; rather, dealers tend to enter into those instruments on their own standard terms or on terms they arrange in response to other parties' interest; and
- Dealers tend to be able to arrange customized terms for SBS upon request, or to create new types of SBS at the dealer's own initiative.

Release at 80176.

The Release also establishes that the same factors relevant to identifying a "dealer" under the Securities Exchange Act of 1934 would also be relevant to an analysis of whether a person is an SBSD. Release at 80177. Those factors include:

- Having a regular clientele;
- Providing liquidity services in transactions with investors or professional market participants;
- Receiving customer property; and
- Furnishing incidental advice in connection with transactions.

Similarly, the Release provides guidance regarding the factors indicating that a person is "holding itself out as a dealer" or is "commonly known in the trade as a dealer." Release at 80178. Those factors include:

- Contacting potential counterparties to solicit interest in SBS;
- Developing new types of SBS and informing potential counterparties of the availability of such SBS;

- Holding membership in a swap association in a category reserved for dealers;
- Providing marketing materials that describe the types of SBS that one is willing to enter into; and
- Generally expressing a willingness to offer or provide a range of financial products that would include SBS.

By setting forth all of these factors, the Release provides necessary guidance to market participants who must determine whether they satisfy the definition of an SBSD.

Factors That Should Not Be Incorporated into the Definition

Commenters have urged the SEC to incorporate a number of tests in the definition of an SBSD that would dramatically narrow its scope. The SEC has rightly rejected those arguments and it should adhere to that position as it finalizes the Proposed Rules.

Continuous Market Making. For example, the SEC has correctly rejected the notion that "making a market" in SBS should be defined to mean that the activity is performed "consistently or at all times." Release at 80178. That would not be consistent with the statutory text or the legislative history of the Dodd-Frank Act. There is no basis to claim that Congress intended to restrict the definition in this manner.

Such a proposal also conflicts with market realities. Market making activity that falls well short of being "continuous" can nevertheless be very substantial in volume and frequency. **Incorporating a "continuous" element into the definition of SBSD would therefore allow an enormous amount of dealing activity to escape regulation**, and the SEC must steadfastly refuse to adopt this approach.

Sole or Predominant Business. Some commenters have suggested that "regularly entering into SBS transactions as an ordinary course of business" should be defined to require that the SBS activity is the person's "sole or predominant business." Release at 80178. The SEC also rightly rejected this argument. Like the "continuous market making" requirement, there is no support in the text or legislative history of the Dodd-Frank Act for such a constricted definition.

Incorporating a "sole or predominant business" test into the definition of an SBSD would also create a huge loophole for large firms that engage in a variety of business activities. **Under the posited test, such firms might conduct a substantial amount of SBS dealing activity but escape regulation if their other business activities happened to outweigh their SBS dealing**. No credible definition of an SBSD would permit such a

large volume of SBS activity to fall outside its scope, and the SEC should continue to resist it.

The SEC's approach to the definition of SBSD is correct. It is consistent with the letter and spirit of the Dodd-Frank Act. Claims to the contrary have no basis and would merely create loopholes to be exploited by financial market participants seeking to dodge transparency, oversight, and accountability.

The De Minimis Exception

As directed by Congress, the SEC has established a test in the Proposed Rules for applying the de minimis exception. The test has four parts, which provide that dealer activity is de minimis if, over a 12-month period, a market participant (including affiliates) engages in SBS transactions involving:

- No more than $100 million in notional amount of SBS;
- No more than $25 million in notional amount of SBS with special entities;
- No more than 15 counterparties other than SBSDs; and
- No more than 20 SBS in total.

Section 240.3a71-2 of the Proposed Rules.

These standards generally constitute an appropriate measure of what is de minimis dealing activity, but they must be strengthened in two respects. In addition, the SEC must stand firm in rejecting a number of other proposals that would expand the de minimis exception well beyond Congress's intended limits.

Nexus to Customers. First, **the Proposed Rules should make clear that the exception is only available with respect to "transactions with or on behalf of customers."** This limitation appears in the Dodd-Frank Act itself and it was clearly intended to narrow the scope of the exception. It means that no dealing activity, no matter how infrequent, is eligible for the de minimis exception unless it is conducted "in connection with transactions with or on behalf of customers" of the dealing entity.

To fulfill Congress's obvious intent, the Proposed Rules must adhere to this threshold limitation on the de minimis exception.

Special Entities. Second, **the Proposed Rules must eliminate the de minimis exception entirely for SBS transactions with special entities**, such as municipalities and employee benefit plans. History has shown that special entities are extremely vulnerable to abuse. They need the protections of the capital, collateral, and business conduct

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regulations as much or more than any other category of market participant. This judgment is reflected in other provisions of the Dodd-Frank Act that impose extraordinary duties on SBSDs and MSBSPs when they are dealing with special entities. Section 764(a) of the Dodd-Frank Act.

There is no justification for allowing a party to act in the role of an SBSD with respect to a special entity without the safeguards applicable to SBSDs under the Dodd-Frank Act.

The Risk-Based Test. The SEC has properly declined to follow the suggestion by commenters that the de minimis exception be tied to levels of risk to the financial system or to market participants or their counterparties. If adopted, these standards would gut the definition of SBSD. The SEC has correctly focused instead on levels of dealing activity that are so limited that regulation as an SBSD with respect to capital, margin, and business conduct requirements is not warranted.

The Proportional Test. Finally, the SEC has also rightly rejected the argument from commenters that the de minimis exception should be measured in relation to the level of a person's other business activities. Release at 80180. This suggestion is fundamentally wrong for two reasons. It would allow large companies engaged in substantial dealing activities to escape regulation as SBSDs, since their dealing activities might be voluminous in absolute terms but modest in **proportion** to their other business endeavors. In addition, such a test would be unworkable since it would require measuring all of the business activities of an enterprise for comparison purposes, a needlessly complex task.

The SEC should maintain its resolve to adhere to the letter and spirit of the Dodd-Frank Act and keep these inappropriate tests out of the Proposed Rules.

Discussion of the MSBSP Definition

Statutory Provision

The definition of MSBSP in the Dodd-Frank Act focuses primarily on a participant's **positions** in the SBS market, in contrast with the definition of SBSD, which is framed in terms of a participant's **activities** in the SBS market. The statutory definition of an MSBSP covers three basic categories of SBS market participant:

- Those with "substantial" SBS positions (excluding hedges);
- Those with SBS positions that create substantial counterparty exposure and pose systemic risk; and

- Highly leveraged financial institutions that are not subject to federal banking agency capital requirements and that maintain large positions in SBS (regardless of the purpose for which they are maintained).

Section 761(a) of the Dodd-Frank Act.

Because all of these definitional elements involved quantitative standards, the Proposed Rules necessarily and appropriately adopt a more prescriptive and detailed approach than the Proposed Rules governing SBSD.

Substantial Position in Any Major Category of SBS

The first test in the definition encompasses market participants who maintain a "substantial position" in any major category of SBS. The Proposed Rules adopt a two-part test to define "substantial position." One test focuses on an entity's current uncollateralized exposure, while the other test supplements that figure with an additional measure of potential future exposure. A position satisfying either test would constitute a "substantial position" under the Propose Rule. The basic structure of the rule is appropriate, but it must be strengthened in several respects.

Incorporating a Test Without Regard to Collateral. **The definition of "substantial position" is focused too narrowly on controlling the risk of default presented by large SBS positions**. For example, the test for measuring current exposure is limited to "uncollateralized" SBS, and the test for measuring potential future exposure incorporates risk-mitigating factors such as central clearing, mark-to-market margining, and master netting agreements. Release at 80192.

The Dodd-Frank Act unquestionably intended the SEC to account for such risk factors when defining the "substantial positions" that trigger MSBSP status. The statute expressly provides that "[i]n setting the definition under this subparagraph, the Commission shall consider the person's relative position in uncleared as opposed to cleared swaps and may take into consideration the value and quality of collateral held against counterparty exposures." Section 761(a) of the Dodd-Frank Act.

However, it is equally clear that Congress intended the definition of MSBSP to encompass more than just market participants posing significant default risk. **Congress also intended the definition to encompass market participants whose conduct must be regulated to maintain the fairness, transparency, and integrity of the SBS marketplace**. The Dodd-Frank Act reflects this intent in the section quoted above: **the SEC is required** to set the substantial position thresholds at levels that are:

> "prudent for the effective monitoring, management, and effective oversight of entities that are systemically important or that can significantly impact the financial system of the United States."

Other provisions in the Dodd-Frank Act confirm the point. Entities that satisfy the MSBSP definition are subject not only to requirements aimed at risk mitigation, but also to a host of business conduct standards, including provisions regulating disclosure, fraud, supervision, conflicts of interest, and anti-competitive behavior. Section 764(a) of the Dodd-Frank Act. The definition of MSBSP, and specifically the "substantial position" test, must also reflect these important regulatory objectives that go beyond risk mitigation.

The Release also recognizes the importance of these considerations by inviting comment on whether "the substantial position analysis should encompass a test that does not account for the collateral posted in connection with an entity's exposure." Release at 80191. The Release further asks whether the Proposed Rules should capture entities with very large positions, regardless of whether the positions are collateralized, in light of "the potential market disruptions"—and, we would submit, other harms—that such entities could cause. *Id.*

Given the intended breadth of the MSBSP definition, **the Proposed Rules must include a threshold of aggregate market positions without regard to the uncollateralized risk associated with those positions.** This test must function as a separate, alternative standard to the risk-based criteria in the Proposed Rules. Any market participant with a presence at this level must be subject to the business conduct regulations aimed at promoting fairness, as well as the margin and capital rules aimed at controlling the risk of default.

Improving the Formula for Measuring Current Exposure. Under the Proposed Rules, the measurement of current exposure would have two components: (1) the dollar value of aggregate current exposure arising from a party's SBS positions, minus (2) the aggregate value of the collateral the party has posted with respect to those positions. The Proposed Rules do not prescribe any particular methodology for measuring either current exposure or the value of posted collateral. Instead, they simply provide that the method chosen must reflect "industry standard practices." Release at 80189.

This approach leaves too much discretion to market participants with respect to the key components of the "substantial position" definition, and it will create an array of problems. At a minimum, the failure to stipulate a valuation methodology will invite abuse by market participants who will deliberately choose lax formulae to minimize their exposures and avoid designation as a MSBSP. This approach will also undermine uniformity, as market participants will apply different methodologies, giving rise to anomalies as to who is and is not registered as an MSBSP. These uncertainties surrounding the accuracy of "substantial position" calculations will erode confidence in the registration regime.

To address these problems, **the Proposed Rules must require market participants to calculate their exposures and collateral values using a single, uniform, and—above all—accurate methodology.**

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Improving Measurement of Potential Exposure. The method specified in the Proposed Rules for calculating aggregate **potential** exposure must also be changed. The test put forth in the Proposed Rules is based on bank capital standards used by the Comptroller of the Currency. According to the Release, this method was adopted, instead of value-at-risk ("VaR") calculations, to achieve reproducible results at less expense to market participants. However, these considerations do not justify the method chosen, which is inferior to the **more accurate VaR approach.**

With respect to cost, any market participant that is sufficiently large to need to make the calculation undoubtedly employs VaR already and on an aggregate basis. Reproducibility can also be achieved with VaR. VaR results are driven overwhelmingly by two factors: volatility and the holding period assumed necessary for liquidation on default.

There are clear standards for calculating volatility. A confidence interval of 99 percent is most often used by clearing entities and the SEC must adopt this standard and require its use. Similarly, holding periods can be prescribed. We propose, for example, 3 days for equity based SBS; 5 days for indexed credit default swaps ("CDS"); and 10 days for name CDS.

Regardless of the technique employed, two types of SBS will pose additional measurement challenges, and the Proposed Rules should address them as well.

- SBS that are composites of derivatives risk are superficially difficult to measure for risk. However, market participants actually view these as individual risks. **The SEC must require disaggregation of these SBS into component positions** to measure the exposures, in accordance with industry practices.

- The prices of some SBS are based on infrequently traded instruments. Again, industry practice provides an answer. More liquid hedge equivalent positions are routinely used to measure risk for these less liquid instruments. **Use of hedge equivalents with accepted spread adjustments should be required,** as they will allow a more accurate measure of risk to be captured in the calculation.

Reduction of Measured Exposures. The Proposed Rules allow a reduction of potential exposure for SBS that are cleared or "are subject to daily mark-to-market margining." Section 240.3a67-3(c) of the Proposed Rules. A reduction for cleared SBS makes sense because they are subject to initial margin.

However, the reduction for SBS subject to mark-to-market margining (which is the same as clearing maintenance margin) is not appropriate. Potential exposure measures risk in excess of marks-to-market. The factors derived from the Comptroller of the Currency are applied directly to notional amounts and have nothing to do with current mark-to-market exposures that have built up over the life of the SBS. **There should be no such reduction.**

Hedging or Mitigating Commercial Risk

In accordance with the Dodd-Frank Act, the Proposed Rules exclude positions held for hedging or mitigating commercial risk from the definition of "substantial position." Section 240.3a67-1(a)(2)(i) of the Proposed Rules. As noted in the Release, this hedging provision is virtually the same as the one used to identify end-users who are exempt from the mandatory clearing requirement. Release at 80194.

Because the hedging concept will be used to limit the universe of market participants subject to registration as MSBSPs, it must be carefully and narrowly defined. The Proposed Rules provide useful guidance, but the language is either too vague or too weak in several important areas.

Commercial Risk. The Proposed Rules exclude positions held for the purpose of hedging risk "associated with the . . . conduct and management of a commercial enterprise." Section 240.3a67-4(a) of the Proposed Rules. This formulation is too broad and will allow market participants to treat many SBS transactions as hedging positions even though they manage commercial risk only indirectly.

For example, interest rate risk could be said to meet this test, yet such risk arises out of the funding and financing of commercial activity or the management of a balance sheet, not the commercial activity that constitutes the business. Similarly, exchange rate risk could also be said to meet this test, but the fact that a foreign affiliate's revenues and expenses may be denominated in local currency is not a risk that arises out of the commercial activity of a business; rather it arises out of a decision to locate the commercial activity outside of the United States.

To address this problem, **the Proposed Rules must apply a more rigorous standard, one that requires hedged risk to arise directly from the core activity of the business enterprise.**

Congruence of Hedge and Commercial Risk. The Proposed Rules provide that the hedge position must be "economically appropriate" to the reduction of commercial risk. *Id.* This standard is also too broad. An SBS transaction may hedge a commercial risk but may also include elements of speculation, trading, or investing.

For example, an exposure to the credit risk of Corporation X could be "hedged" by entering into an indexed credit default swap ("CDS") that covers Corporation X along with a number of other corporations. Such a CDS would expose the end-user to the credit values of the other corporations in the CDS market basket, which are speculative and not eligible for the exception. Similarly, a risk could be hedged by an SBS with a duration longer than the risk or in a quantity greater than the risk.

Nevertheless, some market participants might claim that those transactions are "economically appropriate" to the reduction of commercial risk.

To avoid the potential of evasion of the provision, **the Proposed Rules must include a requirement that the position be specifically congruent (i.e. an exact match) with the risk that is purported to be hedged.** The concepts of "economically appropriate," as set forth in the Proposed Rules, and "highly effective" or "reasonably effective," as discussed in the Release, are inadequate to prevent abuse.

The Proposed Rules should also require those claiming the hedge exclusion to document this congruence.

Hedge of a Pre-existing Hedge. The Proposed Rules would permit an SBS transaction to be considered a hedge position if it were entered to hedge another position that was itself initiated to hedge or mitigate commercial risk. Section 240.3a67-4(b)(2) of the Proposed Rules. This provision would, in effect, allow speculative transactions to be treated as hedging activity and inappropriately excluded from the calculation of "substantial position."

Once a commercial risk is properly hedged by a position, the reversal of the original hedge, in whole or in part, is inherently speculative for trading or investment purposes. If the original hedge left some exposure, that exposure was presumably not related to commercial risk. **The concept of tying hedge positions together in a chain is therefore inappropriate.**

Lapsed Hedge Relationships. The Release requests comments as to the treatment of a position that ceases to be a hedge of a commercial risk. Clearly, such a position must cease to be excluded from the "substantial position" calculation.

Substantial Counterparty Exposure

The second test in the definition of MSBSP encompasses entities whose SBS "create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets." Section 240.3a67-1(a)(2)(ii) of the Proposed Rules. Unlike the "substantial position" test, this prong of the definition does not focus on positions in specific major categories of SBS, nor does it exclude hedging positions or certain ERISA plan positions.

Methodology. The Proposed Rules provide that the SBS position levels constituting "substantial counterparty exposure" shall be calculated using the same methodologies that are used to calculate "substantial positions" under the first definitional test. Section 240.3a67-5 of the Proposed Rules. The concerns about that methodology, set forth above, apply with equal force to calculations of "substantial counterparty exposure."

Hedging. The Release invites comment on whether this second definitional test should exclude hedging positions in the same way that the "substantial position" test does. Release at 80198. **Excluding hedging positions in the context of measuring substantial counterparty exposure would be clearly inappropriate** for two reasons.

First and foremost, the Dodd-Frank Act did not provide for such an exclusion with respect to substantial counterparty exposure, whereas it did so with respect to the substantial position analysis. The inescapable inference is that Congress did not intend to exclude hedging positions from the calculation of substantial counterparty exposure. Under standard rules of statutory construction, this is the only permissible conclusion.

Second, there is no rationale for entirely excluding hedge positions as suggested in the Release, **since hedge positions may still contribute to counterparty exposure**. Moreover, the dollar thresholds for defining "substantial counterparty exposure" set forth in the Proposed Rules have already been adjusted to reflect the somewhat lower level of risk that hedge positions present to counterparties. Release at 80198.

Highly Leveraged Financial Entities

The third test of the MSBSP definition covers financial entities that are:

- Highly leveraged;
- Not subject to capital requirements set by an appropriate federal banking agency; and
- Holding a substantial position in a major category of SBS, without excluding positions held for hedging.

Section 761(a) of the Dodd-Frank Act.

The principal focus in the Release is on the meaning of "highly leveraged." The Proposed Rules include two alternative formulations. One defines the term to mean a ratio of liabilities to equity in excess of 8 to 1, while the other would set the ratio at 15 to 1 or greater. Section 240.3167-6(b) of the Proposed Rules.

The 8 to 1 ratio is more appropriate. It will better serve the underlying purposes of the Dodd-Frank Act by ensuring that more, rather than fewer, financial entities are covered by the risk mitigation and business conduct standards that Congress established for participants in the SBS market.

In addition, reliance on the 15 to 1 leverage formula borrowed from Title I of the Dodd-Frank Act is inappropriate. That higher leverage ratio is used for the relatively draconian purpose of imposing leverage ratios on large, supervised institutions that pose a "grave threat" to financial stability. In contrast, the leverage ratio in the Proposed Rules will be used for the more modest purpose of imposing registration requirements. In the context of a registration regime, the lower ratio will serve the goals of the Dodd-Frank Act without imposing unreasonable burdens.

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Conclusion

The Proposed Rules represent a commendable effort in an area of critical importance to the implementation of the Dodd-Frank Act. If strengthened as suggested above, they will help ensure that the new regulatory regime governing SBS covers an appropriately broad spectrum of market participants as required by the Dodd-Frank Act.

We hope these comments are helpful as you proceed to finalize the Proposed Rules.

Sincerely,

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