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July 11, 2011

Mr. Gary K. Van Meter
Acting Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Mr. Alfred M. Pollard
General Counsel
Attention: Comments/RIN 2590-AA43
Federal Housing Financing Agency
1700 G Street, N.W., Fourth Floor
Washington, D.C. 20552

Ms. Jennifer J. Johnson
Secretary
Federal Reserve Board
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Ms. Mary J. Miller
Assistant Secretary for Financial Markets
United States Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: Margin and Capital Requirements for Covered Swap Entities

Ladies and Gentlemen:

The Investment Company Institute[1] welcomes the opportunity to provide comments to the Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Farm Credit Administration ("FCA") and Federal Housing Finance Agency ("FHFA;" together "banking regulators") regarding their proposed margin and capital requirements for

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs) (collectively "funds"). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13.41 trillion and serve over 90 million shareholders.

swaps and security-based swaps that are not cleared.[2] Pursuant to Sections 731 and 764 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), the banking regulators have proposed a risk-based approach to impose capital and margin requirements on swap entities[3] within the scope of their oversight ("covered swap entity"). As participants in the swaps markets, ICI members have a strong interest in the fair and orderly operation of these markets and the safety and soundness of their counterparties to swap transactions and these markets generally.

We are concerned, therefore, that the proposed rules' margin requirements generally apply only to the collection of minimum margin amounts by a covered swap entity from its counterparties instead of also including specific requirements that a covered swap entity must post margin to its counterparties. To truly minimize risk to the financial system and market participants, margin requirements, when imposed, should be bilateral between a swap entity and its counterparty. ICI recommends that the banking regulators modify the proposal to eliminate any regulatory gap by requiring covered swap entities to post margin at the same levels and in the same manner as would be required under the proposal for the counterparty.

In addition, as discussed below, ICI recommends various amendments to the proposed definition of financial end-user, the margin calculations and the categories of eligible collateral. We also encourage the banking regulators to coordinate and harmonize, to the extent possible, the proposed rules with their fellow regulators in the United States and abroad to minimize disruption to, and preserve the safety and soundness of, the swaps markets.

I. Background

The stated purpose of the proposed rules is to "offset the greater risk to the swap entity and financial system arising from the use of swaps and security-based swaps that are not cleared." However, the proposal goes significantly beyond current over-the-counter swap practices. In addition to requiring that the counterparties post larger amounts of margin than for cleared contracts, the proposal would require initial margin collected by most covered swap entities from their counterparties to be held by independent, third-party custodians with restrictions on rehypothecation and reinvestment. Instead of the relatively infrequent use of "independent amounts,"[4] the proposal would impose initial margin for all uncleared swaps exposure, except certain low-risk counterparties. It also would restrict eligible margin collateral to cash, U.S. Treasuries and, for initial margin only, certain government

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[2] *See* Margin and Capital Requirements for Covered Swap Entities, 76 FR 27563 (May 11 2011) ("proposal"), available at http://frwebgate3.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=o7MBDC/0/1/0&WAISaction=retrieve. For purposes of this letter, the term "swap" will refer to both swaps and security-based swaps.

[3] For purposes of this letter, the term "swap entity" will refer to swap dealers, security-based swap dealers, major swap participants and security-based major swap participants required to register as such under the Dodd-Frank Act.

[4] "Independent amounts," as used in International Swaps and Derivatives Association (*i.e.*, ISDA) and other master agreements, generally correspond to the concept of initial margin.

securities, compared to the current use of collateral including letters of credit, equity pledges and asset pledges.

II. Margin Requirements

ICI recommends that the banking regulators modify the proposal to require corresponding two-way margin requirements between covered swap entities and non-swap entity counterparties. Notwithstanding the proposed heightened requirements regarding margin, the proposal would not require covered swap entities to post margin to their non-swap entity counterparties in those instances when their counterparties were required to post margin. The proposal only would include requirements regarding the amount of margin that a covered swap entity must collect from its counterparties. The proposal states that "the posting of initial margin by a covered swap entity to a counterparty is generally left to the mutual agreement of the covered swap entity and its counterparty." Similarly, for variation margin, the proposal states that "consistent with current practice, covered swap entities and their counterparties would remain free to negotiate the extent to which a covered swap entity may be required to post margin to a counterparty."

A. Two-Way Margin

Two-way margin is an essential component to managing risk for swaps transactions. The collection of two-way margin helps to protect the individual counterparties to a swap transaction as well as the swaps and other derivatives markets more broadly. The premise behind collecting margin is to cover exposures by ensuring that counterparties can meet their financial obligations.[5] It is not surprising, therefore, that the proposal emphasizes the importance of imposing minimum margin requirements for uncleared swaps, stating that such requirements are a "critical aspect of offsetting the greater risk to the covered swap entity and the financial system…and helps ensure the safety and soundness of the covered swap entity."

On a daily basis, the collection of variation margin serves to remove current exposure from the market for all products and all participants, so that exposures do not accumulate at any level – the counterparty, the swap entity, or the clearing organization.[6] The accumulation of such exposures threatens systemic stability. In fact, the uncertainty about this accumulation of exposure played a significant role in the most recent financial crisis. As identified in the proposal, the lack of transparency in the swaps markets fueled uncertainty about the exposure market participants faced from potential defaults by their swap counterparties.

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[5] Initial margin is an amount calculated based on anticipated exposure to future changes in the value of a swap. Variation margin is an amount calculated to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.

[6] For cleared swaps, derivatives clearing organizations currently use variation margin to manage risk for all clearing parties, including swap dealers and end-users, as a mechanism to limit exposure and provide protection to the swaps markets and other derivatives markets.

The financial crisis demonstrated that the premise of one-way margin for covered swap entities is flawed. Before the financial crisis, financial regulators were concerned that swap dealers needed protection from risky buy-side counterparties, prompting the development and increasing use of initial margin.[7] Swap dealers, on the other hand, were not expected either to fail, or to take on excessive risks through swaps without sufficient financial resources to cover those contracts, and certainly not in a rapid and extensive fashion. The financial crisis established that the exposures of the swap dealer were real and should be accounted for in managing the dealer's risk and the risk to the dealer's counterparty and the financial system.

The need for two-way margin is reinforced by the focus in the proposal on the "interconnectedness and large presences" of swap entities in the market. The proposal specifically states that transactions in uncleared swaps between swap entities "pose risk to the financial system because swap entities are large players in swap and security-based swap markets and therefore have the potential to generate systemic risk through their swap activities." It logically follows that (1) the counterparty to the credit risk and exposures of these swap entities likewise should have the protection afforded by minimum margin requirements and (2) the financial system should be protected from the same risks and exposures of these swap entities when they undertake uncleared swap transactions with counterparties other than another swap entity.

In reviewing counterparty risk and appropriate controls for such risk, it bears asking why certain counterparties that are subject to comprehensive regulatory regimes by either the Banking regulators, the Commodity Futures Trading Commission ("CFTC") or the Securities and Exchange Commission ("SEC") are treated differently under the proposal. A registered investment company ("fund"), for example, is subject to extensive and rigorous regulation under the Investment Company Act of 1940 ("Investment Company Act") as enforced by the SEC, including stringent limits on leverage.[8] Yet a fund, as a financial end-user counterparty, would be required to post margin and a covered swap entity would not. Both are regulated entities, subject to various regulatory controls to limit and mitigate their risk exposure, and both should be treated similarly under the proposal.[9]

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[7] *See supra* note 4.

[8] Under Section 18 of the Investment Company Act and subsequent SEC and staff guidance, a fund is prohibited from taking on a future obligation to pay unless it "covers" the obligation by setting aside, or earmarking, assets sufficient to satisfy the potential exposure from the derivatives transaction. The assets used for "covering" such obligation must be liquid, marked to market daily, and held in custody. These limitations ensure that a fund can neither cause nor contribute to systemic risk through its use of derivatives. *See* Dreyfus Strategic Investing and Dreyfus Strategic Income, SEC No-Action Letter, Fed. Sec. L. Rep. (CCH) 48,525 (June 22, 1987) and Merrill Lynch Asset Management, L.P., SEC No-Action Letter, 1996 WL 429027 (July 2, 1996) and Investment Company Act Release No. 10666, Securities Trading Practices of Registered Investment Companies, 44 FR 25128 (April 27, 1979).

[9] In fact, the Dodd-Frank Act directs the banking regulators, the SEC, and the CFTC to jointly adopt margin rules for covered swap entities. This mandate would seem to indicate recognition by Congress that the financial regulators may have different, albeit equivalent, regulatory regimes for the entities subject to their respective jurisdictions, and that these regulatory regimes should be given due accord and harmonized to the extent practicable.

Further, the proposal raises a concern that requiring a covered swap entity to post collateral with a non-swap entity counterparty would result in the transfer of assets from a regulated entity that is subject to capital requirements to an unregulated entity. We believe this concern is unfounded. First, the collateral could be required to be held by an independent, third-party custodian. The proposal would require such treatment for transactions between covered swap entities and would allow such treatment for transactions between covered swap entities and their non-swap entity counterparties.[10] Second, the proposal could create an artificial distinction based on whether a counterparty is subject to the jurisdiction of a banking regulator or the jurisdiction of the CFTC or SEC. As discussed above, most counterparties to a swap transaction would be subject to a comparable regulatory regime, minimizing their ability to impair the safety and soundness of the covered swap entity.

Ultimately, two-way margin requirements would aid safety and soundness by helping a covered swap entity and its counterparty to offset their exposures and prevent them from building up exposures that they cannot fulfill. Two-way variation margin also would minimize the liquidity risk of uncleared swaps by removing current exposures prior to any efforts by a swap entity to mitigate losses from a default by a counterparty.[11] Specifically, the low levels of liquidity associated with an uncleared swap could hamper efforts or increase costs to liquidate these swaps, particularly in distressed market conditions. In addition, requiring a covered swap entity to post initial margin to a non-swap entity counterparty would remove one or more incentives for a covered swap entity to choose, where possible, to structure a transaction so that it need not be cleared in order to avoid pledging initial margin. Finally, it would eliminate any perception concerns that a swap entity subject to oversight by the banking regulators, and consequently not required to post margin, is more creditworthy than other potential swap counterparties.

For these many reasons, ICI urges the banking regulators to impose two-way margin requirements – requiring covered swap entities to post margin at the same levels and in the same manner as would be required under the proposal for the counterparty. Accordingly, a covered swap entity should ensure that any initial margin that it is required to post is segregated at a third-party custodian.[12] Such margin also would be subject to the same requirements in the proposal for the corresponding non-swap entity counterparty with respect to the use of thresholds and netting. Further, to the extent initial and variation margin levels remain subject to negotiation by the parties to the swap transaction, under the banking regulators' final margin rules, such negotiation also should apply to the posting of margin collateral by covered swap entities.

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[10] ICI strongly supports the proposed requirement that swap counterparties be given the opportunity to select a custodian that is not affiliated with the swap entity. In the case of funds, this flexibility allows a fund to determine which custodian best satisfies its needs to safeguard customer collateral posted as margin.

[11] Uncleared swaps are likely to be customized and therefore trade in a less liquid market.

[12] We believe it would be appropriate for the covered swap entity to post the required margin at the same independent, third-party custodian that holds the counterparty's margin.

B. Statutory Construction

Sections 731 and 764 of the Dodd-Frank Act require that the margin requirements offset the greater risk to the swap entity and financial system arising from the use of swaps that are not cleared. To offset the risk, the margin requirements must help ensure the safety and soundness of the swap entity and be appropriate for the risks associated with uncleared swaps. We recognize that the statutory language regarding the "standards for capital and margin" speaks to the protection of the swap entity only. We also recognize that the effect of the proposed rules would be to require collection of margin by both parties to a swap transaction when swap entities transact with one another. Collection of margin from covered swap entities only for transactions between such entities, however, leaves a noteworthy gap in the regulatory framework.

Meaningful protection of the safety and soundness of the financial system is explicit in the Dodd-Frank Act provisions and requires risk management of all swap counterparties to a transaction, including a covered swap entity. The Dodd-Frank Act specifically provides that covered swap entities shall meet minimum margin requirements as prescribed by the banking regulators and that the banking regulators shall adopt rules imposing margin requirements on all swaps that are not cleared by a derivatives clearing organization.[13] These provisions provide the banking regulators with ample authority to require swap entities to post margin in transactions with financial end-user counterparties.

III. Modify Definition of End-User

The proposal divides financial end-users into two categories: high risk and low risk. A low-risk financial end-user would be defined to include an end-user that: is subject to capital requirements established by a prudential regulator or a state insurance regulator; predominantly uses swaps to hedge or mitigate the risks of its business activities; and does not have significant swaps exposure. All other financial end-users would be high-risk financial end-users. Funds would not qualify as low-risk end-users under this definition because they are not subject to capital requirements established by a prudential regulator or a state insurance regulator. As highly regulated, financially sound swap counterparties, however, funds are not "high-risk" financial end-users. ICI recommends that the banking regulators modify the proposal to include funds in the category of low-risk financial end-users. Further, covered swap entities should be permitted to establish an initial margin threshold for funds below which they are not required to collect collateral, similar to the threshold for non-financial end-users.

As discussed above, funds are registered under the Investment Company Act, which imposes stringent regulation on funds that is not imposed on other financial institutions or products under the federal securities laws. This oversight prevents excessive speculation and contributes to the stability of funds, ensuring that they do not contribute to system risk. In particular, funds have stringent leverage restrictions that reduce the chances of funds losing collateral and limitations on exposure to certain

[13] Section 731 of the Dodd-Frank Act, which adds new Sections 4s(e)(1)(A) and e(2)(A)(ii) to the Commodity Exchange Act.

counterparties – *i.e.*, securities-related businesses. In addition to regulating their disclosures to investors and regulating their daily operations, the federal securities laws subject funds and their advisers to antifraud standards, and provide the SEC with inspection authority over funds and their investment advisers, principal underwriters, distributing broker-dealers and transfer agents. The Financial Industry Regulatory Authority also has oversight authority with regard to funds' principal underwriters and distributing broker-dealers. Each of these measures contributes to the low-risk nature of funds as swap counterparties.

Under the proposal, non-financial end-users and low-risk financial end-users would not be required to post margin under certain thresholds. The threshold amount would be based on the relative risk of the counterparty. For example, the threshold for a low-risk financial end-user would be the lower of (1) a range of $15 to $45 million or (2) a range of 0.1 to 0.3 percent of the covered swap entity's tier 1 capital.[14] Regardless of whether the banking regulators classify funds as low-risk financial end-users, ICI recommends that funds, and other creditworthy counterparties, be eligible for an initial margin threshold instead of the zero thresholds proposed for high-risk financial entities. The threshold should reflect the counterparty's creditworthiness. For funds, for example, creditworthiness could be determined as a percent of assets under management.[15]

IV. Calculation of Margin

A. Use of Models

The proposal presents two alternatives that a covered swap entity may use to calculate its initial margin requirements. A covered swap entity would be permitted to calculate its initial margin requirements using the standardized table that specifies minimum initial margin as a percentage of the notional amount of a swap or security-based swap, with percentage ranges assigned to broad asset classes. Alternatively, a covered swap entity would be permitted to calculate its minimum initial margin requirements using a proprietary model that meets certain criteria and has been approved by the relevant banking regulator.

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[14] The proposal notes that tier 1 capital is not a concept that is applicable to covered swap entities for which FHFA or the FCA is the prudential regulator and provides alternative references.

[15] ICI also would support the recommendation in the Asset Management Group's letter that the maximum uncollateralized threshold for low-risk financial end users be set at $100 million. *See* Letter from Timothy W. Cameron, Managing Director, Asset Management Group, Securities Industry and Financial Markets Association, to Gary K. Van Meter, Acting Director, Office of Regulatory Policy, Farm Credit Administration, Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, Alfred M. Pollard, General Counsel, Federal Housing Financing Agency, Jennifer Johnson, Secretary, Board of Governors of the Federal Reserve System, Mary J. Miller, Assistant Secretary for Financial Markets, U.S. Department of the Treasury, and David A. Stawick, Secretary, Commodity Futures Trading Commission, dated July 11, 2011.

ICI generally supports the banking regulators' proposed approach for calculating initial margin for uncleared swaps.[16] ICI recommends, however, that the banking regulators adopt a system of calculating initial margin that would permit the counterparty to choose between the amount generated by a covered swap entity's model and the standardized minimum initial requirements set forth in Appendix A of the proposal. We believe that such a framework for calculation of initial margin will promote greater uniformity and transparency for market participants, and be easier to administer operationally. This system would permit covered swap entities to develop initial margin calculations using their own models in the first instance if they wish to, but would provide that a counterparty could always choose the standardized minimum initial requirements. ICI will file a comment letter with the CFTC containing a suggestion that it adopt a similar system in its regulations to govern margin requirements for uncleared swaps.[17]

In addition, we have concerns with at least one of the proposed modeling standards for covered swap entities' proprietary initial margin models. In particular, ICI is concerned that the standard for initial margin requirements requiring a 10-day liquidation period is too long. As proposed, an initial margin model for uncleared swaps would need to set initial margin at a level to cover 99 percent of price changes by product and portfolio over at least a 10-day liquidation horizon. ICI believes that initial margin should be set at a level that reflects a close-out, offset or other risk mitigation that occurs more or less simultaneously with the default. In light of the relatively high 99 percent confidence interval, we recommend that a 5-day liquidation period is appropriate for uncleared swap transactions.

B. Effective Date

The banking regulators are proposing to provide that the margin requirements not become effective until 180 days following publication of final rules in the *Federal Register*. The banking regulators note that covered swap entities will need time to make changes to current business practices to come into compliance with the new requirements, including sufficient time to develop internal margin models and obtain regulatory approval for their use. The ICI applauds the banking regulators' recognition that it will take longer than the normal effective date period for federal regulations, which is 60 days following *Federal Register* publication, for covered swap entities to come into compliance with the margin requirements for uncleared swaps. The ICI recommends that, if the banking regulators adopt the proposals to require that covered swap entities file their models with the appropriate banking regulator and that such regulator approve such models, a mechanism be established so that the margin regulations would not become effective until the prudential regulators have reviewed all submissions made by a certain cut-off date. Accordingly, the effective date provision should be modified so that the margin requirements do not become effective until the banking regulators have reviewed all of the

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[16] ICI also generally supports the banking regulators' proposal to permit a covered swap entity to calculate variation margin requirements on an aggregate basis across all swap transactions with a counterparty that are executed under the same qualifying master netting agreement.

[17] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 FR 23732 (April 28, 2011), available at http://www.cftc.gov/LawRegulation/FederalRegister/ProposedRules/2011-9598.html.

margin models submitted within 180 days following publication of final rules in the Federal Register. Such a procedure should serve to assure that some covered swap entities do not gain a competitive advantage over others by being able to enter into uncleared swaps using initial margin calculated under a proprietary model when others cannot lawfully do so because they are waiting for the prudential regulator to process their margin model applications.

V. Forms of Margin

The proposal would limit the categories of eligible collateral to cash, U.S. Treasuries and, for initial margin only, certain government securities. Consistent with current swaps market practice, the banking regulators should expand the proposed list of eligible collateral to allow counterparties to a swap transaction the flexibility to agree upon the appropriate collateral arrangements for a particular swap.[18] The absence of a range of acceptable collateral may result in a drag in performance as well as divergence from the benchmark of a portfolio. In other words, a fund's performance may be stifled because the fund may be forced to hold low-yielding securities unnecessarily in relation to the transactions hedged by the swaps. With respect to the benchmark, a fund may be forced to hold margin that does not correspond with the fund's benchmark, thereby causing a fund to run counter to its desire to match the benchmark composition. Neither a municipal fund nor an equity fund, for example, would otherwise, or be able, to hold many of the eligible types of collateral.

If the banking regulators are unwilling to provide that degree of flexibility, ICI recommends that the banking regulators permit the use of fixed-income securities issued by a well-known, seasoned issuer that have a high credit standing, are unsubordinated, historically display low volatility, are traded in highly liquid markets, and have valuations that are readily calculable. This would include, for example, sovereign debt securities and pre-refunded municipal securities.

To avoid reference to credit ratings, the concept of a "high credit standing" could be defined using option-adjusted spread ("OAS"). OAS generally measures a debt instrument's risk premium over benchmark rates covering a variety of risks and net of any embedded options in the instrument. For a particular fixed-income instrument, the OAS reflects the credit and liquidity risk net of any spread due to option features in the instrument and associated option risk. Because OAS can be calculated in a consistent manner for any fixed-income instrument relative to its benchmark rates, it allows for comparison of fixed income instruments across asset classes.[19] The threshold for high-grade fixed-income instruments can be determined by setting a threshold OAS calculated in accordance with an approved method.

VI. Regulatory Coordination

The swaps markets and swap market participants operate in a global marketplace. Therefore, it is critical that the banking regulators have consistent and harmonized regulation domestically and

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[18] In support of this position, it is important to recognize that swap dealers did not have any difficulties during the financial crisis accessing segregated swap customer assets set aside at custodians through bilateral agreements to meet their obligations.

[19] *See* Frank J. Fabozzi, Fixed Income Analysis for the Chartered Financial Analyst Program (2000).

internationally with respect to its margin proposal. Where harmonization is not possible, regulators should work to coordinate their proposals to the greatest extent possible. To mitigate systemic and counterparty risk, the proposed margin requirements place important, but burdensome, obligations on market participants. These obligations will influence market participants' decisions on whether and how to trade in the swaps markets, affecting the liquidity and stability of these markets. Meaningful inconsistencies and differences between the regulators' proposals may result in several unintended consequences including fragmentation of markets and regulatory arbitrage. Further, as a practical matter, the regulators should ensure that the proposed margin rules do not create overlapping and potentially conflicting rules for swap market participants. The related uncertainty regarding these swap entities could reduce the confidence of market participants seeking to hedge their risks in the swaps markets.

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If you have any questions on our comment letter, please feel free to contact me directly at (202) 326-5815 or Heather Traeger at (202) 326-5920.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan
General Counsel

cc: The Honorable Mary L. Schapiro
The Honorable Kathleen L. Casey
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes
U.S. Securities and Exchange Commission

Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott D. O' Malia, Commissioner
U.S. Commodity Futures Trading Commission