CPP INVESTMENT BOARD

Canada Pension Plan Investment Board
One Queen Street East, Suite 2600
P.O. Box 101
Toronto, Ontario M5C 2W5
Toll Free 1 866-557-9510
Telephone 416-868-4075
Web site www.cppib.ca

June 24, 2011

Via Electronic Submission: http://www.regulations.gov;
http://www.fdic.gov/regulations/laws/federal/propose.html

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

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

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

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 2-3
Washington, DC 20219

Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Alfred M. Pollard, General Counsel
Federal Housing Finance Agency
1700 G Street, NW
Fourth Floor
Washington, DC 20552

Re: Proposed Rules Relating to "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants" (RIN No. 3038-AC97) and "Margin and Capital Requirements for Covered Swap Entities" (RIN Nos. 1557-AD43; 7100 AD74; 3064-AD79; 3052-AC69 and 2590-AA45).

Dear Ms. Johnson and Messrs. Feldman, Pollard, Stawick and Van Meter:

The Canada Pension Plan Investment Board (the "**CPPIB**") appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "**CFTC**") and the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Farm Credit Administration and Federal Housing Finance Agency (the "**Prudential Regulators**" and, together with the CFTC, the "**Agencies**") with respect to the definition of "financial entity" as set forth in the CFTC's proposed rule on

"Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants"[1] and the definition of "financial end user" as set forth in the Prudential Regulators' proposed rule on "Margin and Capital Requirements for Covered Swap Entities",[2] each under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**").[3] We look forward to working closely with the Agencies to ensure that the final promulgated rules appropriately define these terms.

I. CPPIB

The CPPIB is a professional investment management organization based in Toronto whose purpose is to invest the assets of the Canada Pension Plan (the "**CPP**") in a way that maximizes returns without undue risk of loss.[4] The CPPIB was incorporated as a federal Crown corporation pursuant to the *Canada Pension Plan Investment Board Act* in December 1997.[5] The CPPIB Act governs the activities of the CPPIB. As a fiduciary, the CPPIB is required to serve the best interests of CPP contributors and beneficiaries,[6] and does not invest funds on behalf of any person or entity besides the CPP.[7] The CPPIB holds shares in 2,900 companies globally, and, as of December 31, 2010, had assets of $140.1 billion.

II. Proposed Rules

Section 23.150 of the CFTC Proposed Rule defines "financial entity" as: "a counterparty that is not [a swap dealer ("**SD**")] or [major swap participant ("**MSP**")] and that is either: (1) a commodity pool as defined in Section 1a(5) of the [Commodity Exchange] Act; (2) a private fund as defined in Section 202(a) of the Investment Advisors Act of 1940; (3) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 [("**ERISA**")]; (4) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in Section 4(k) of the Bank Holding Company Act of 1956; (5) a person that would be a financial entity described in (1) or (2) if it were organized under the laws of the United States or any State thereof; (6) the government of any foreign country or a political subdivision, agency, or instrumentality thereof; or (7) any other person the [CFTC] may designate."

Section __.2(h)[8] of the Prudential Regulators' Proposed Rule provides an almost identical definition for "financial end user," particularly as it relates to ERISA ("an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of [ERISA]").[9]

---

1 76 Fed. Reg. 23,732 (April 28, 2011) (the "**CFTC Proposed Rule**").

2 76 Fed. Reg. 27,564 (May 11, 2011) (the "**Prudential Regulators' Proposed Rule**" and, together with the CFTC Rule, the "**Proposed Rules**").

3 Pub. L. No. 111-203.

4 Canada Pension Plan Investment Board Act, 1997 S.C., ch. 40, at §5 (Can.) (the "**CPPIB Act**").

5 *Id.* at §3.

6 *Id.* at §5.

7 *See* the CPPIB Act (setting forth the scope of the CPPIB's activities).

8 Please note the Prudential Regulators' Proposed Rule has not yet assigned numbers to sections.

III. Definition Clarification

Summary: The Agencies should make it explicit that foreign employee benefit plans such as foreign pension plans are not "financial entities" or "financial end users."

The Agencies have requested comment on whether the entities designated as "financial entities" and "financial end users" in the Proposed Rules are appropriate.[10] As further explained below, we believe that prong (3) of these definitions should be limited to plans subject to regulation under ERISA so that it does not extend to foreign employee benefit plans.

As currently drafted, the definitions of "financial entity" and "financial end user" include, in part, any "employee benefit plan, as defined in paragraphs (3) and (32) of section 3 of [ERISA]." As defined in Section 3 of ERISA, an employee benefit plan includes *any* retirement plan, including foreign plans. In its operation, however, ERISA does not apply to plans maintained outside the U.S. primarily for non-U.S. persons—but this limitation of scope is found in Section 4 of ERISA, and not in the Section 3 definition.[11] We believe the final rules should clarify that foreign benefit plans are not included in the definitions of "financial entity" and "financial end user." Accordingly, we suggest revising the final rules so that these definitions are limited to only those employee benefit plans "subject to regulation under" ERISA, and we believe this could be accomplished by revising the language in prong (3) of the definitions to the following:

(3) an employee benefit plan **subject to regulation under** the Employee Retirement Income Security Act of 1974 **(29 U.S.C. 1003), as set forth in Section 4 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1003)**.

Along the same lines, please see CPPIB's letter, dated February 22, 2011 (the "**February 22 Letter**"), to the CFTC regarding RIN No. 3038-AD25: Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties. The February 22 Letter also argues that "employee benefit plan" should be limited to plans subject to regulation under ERISA and suggests the same language change.

---

[9] Section __.2(h) of the Prudential Regulators' Proposed Rule defines a "financial end user" as: any counterparty, other than [an SD or MSP], that is: "(1) a commodity pool as defined in section 1a(5) of the Commodity Exchange Act (7 U.S.C. 1a(5)); (2) a private fund as defined in section 202(a) of the Investment Advisors Act of 1940 (15 U.S.C. 80-b-2(a)); (3) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002); (4) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k) of the Bank Holding Company of 1956 (12 U.S.C. 1843(k)); (5) a person that would be a financial end user described in paragraph (h)(1) or (h)(2) of this section, if it were organized under the laws of the United States or any State thereof; (6) a government of any foreign country or a political subdivision, agency, or instrumentality thereof; or (7) any other person that [Agency] may designate."

[10] This section of the letter is not in response to a specific question listed in the Prudential Regulators' Proposed Rule. Rather, it is in response to a general solicitation for comment on whether "the proposed rule's categorization of various types of counterparties by risk, and the key definitions used to implement this risk-based approach, are appropriate, or whether alternative approaches or definitions would better reflect the purposes of sections 731 and 764 of the Dodd-Frank Act."

[11] ERISA Section 4(b)(4) (29 U.S.C. §1003(b)(4)).

The Agencies have the authority to provide this clarification,[12] and this change should be made because excluding foreign employee benefit plans from these definitions is consistent with Congressional intent, judicial precedent and principles of international comity. Sections 722 and 772 of Dodd-Frank establish narrow standards for the extraterritorial application of Title VII,[13] and the Agencies will need to account for these limits in their definitions of "financial entity" and "financial end user." These sections evidence Congress' recognition that it and the Agencies' jurisdictions do not extend to the regulation of non-U.S. persons and non-U.S. markets. Title VII reflects an effort by Congress to strike a careful balance with respect to extraterritoriality by permitting the Agencies to reach entities and activities outside the United States only in order to prevent evasion of Title VII or in limited circumstances where there is a "direct and significant" connection with, or effect on, U.S. commerce. We believe it would be inconsistent with this intent to apply the margin requirements of the Proposed Rules to foreign employee benefit plans, which do not meet this standard. In addition, SDs will also be at a competitive disadvantage vis-à-vis their foreign counterparts when dealing with a foreign benefit plan in a jurisdiction that does not impose similar rules or obligations (*e.g.*, if the foreign rules do not mandate margin requirements in transactions with foreign employee benefit plans).

The jurisdictional limits of Title VII that are expressly stated in Sections 722 and 772 of Dodd-Frank must be interpreted in light of judicial precedent and the "long-standing principle of American law that legislation of Congress, 'unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869, 2877-78 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). The Supreme Court has stated that the judicial presumption against the extraterritorial application of Federal statutes "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. Thus, 'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.' . . . When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

The jurisdictional limits in Section 722 and 772 of Dodd-Frank reflect this presumption and do not express a contrary intent to apply Title VII extraterritorially except for their specifically articulated exceptions. Furthermore, these exceptions must be read narrowly in light of the *Morrison* decision.

In addition to the limits on extraterritorial application of Title VII discussed above, we believe that application of the Proposed Rules to foreign employee benefit plans is inappropriate based on principles of international comity.

---

12 *See* Sections 731 and 764 of the Dodd-Frank Act.

13 Under the Commodity Exchange Act, in order for Title VII to apply to swap activities outside the United States, the activities must (i) have a "direct and significant" connection with activities taking place in the United States, (ii) have a "direct and significant" effect on the commerce of the United States or (iii) contravene anti-evasion rules. The Securities Exchange Act of 1934 standard for extraterritorial application, as set forth under Section 772 of Dodd-Frank, is focused, by its terms, upon efforts to evade the applicable provisions of Title VII and permits extraterritorial application of Title VII only in those circumstances.

In light of the global financial crisis, a number of other countries and the European Union are promulgating derivatives legislation that may apply to the same persons that would be regulated by the Agencies under Title VII, and duplicative regulation could result in inconsistencies and unnecessary costs. Furthermore, it could create a strong incentive for counterparties to engage in swaps activities outside the U.S. rather than attempt to implement and comply with conflicting legal standards. Dodd-Frank, through its Section 752, explicitly addresses the problem of duplicative regulation and requires the Agencies, when they exercise jurisdiction over non-U.S. persons, to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of swaps and swap entities.[14] Such international harmonization of regulatory regimes is necessitated by the global nature of swaps trading and would work to eliminate arbitrage and counteract the attempted evasion of regulatory oversight.

In cases where two regulators may exert jurisdiction over the same non-U.S. person, deference should be given to the regulator with the greatest interest in regulating the swap transaction. Presumably this would be the local regulator, which is in a better position to effectively supervise and examine non-U.S. persons engaged in swap activities and thus also in a better position to set appropriate margin requirements for uncleared swaps. Such an approach is consistent with both Congressional intent and the Agencies' long-standing policies of international comity. Furthermore, in cases where the Agencies have legitimate concerns about the regulatory regime of a particular country, they may rely on prong (7) of these definitions, which permits the Agencies to designate *any* person as either a "financial entity" or "financial end user," as applicable, to exert jurisdiction over the non-U.S. persons involved in the swap transaction.

IV. Conclusion

We fully support the Agencies' efforts to increase transparency in the swap markets, reduce systemic risk in the financial markets and promote market integrity, and believe that these goals can be achieved in a manner that is consistent with the stated intent of Title VII that its provisions not be applied extraterritorially except in certain limited circumstances. The definitions of "financial entity" and "financial end user" should be formulated in a manner consistent with the Agencies' long-established policy of not asserting jurisdiction over transactions, or entities that engage in transactions, taking place or operating outside of the United States. This policy reflects, among other things, the fact that such transactions and entities already are subject to local foreign regulation and that duplicative regulation will burden these entities with unnecessary costs and make them less competitive. Furthermore, limiting the reach of Title VII will enable swap transactions of non-U.S. counterparties to be regulated by the country with the greatest interest in them.

---

[14] *See* Dodd-Frank § 752. *See also* Dodd-Frank § 715 (permitting the Agencies to prohibit a foreign-domiciled entity from participating in swap activities in the United States if the regulation of swap markets in the foreign country undermines the stability of the U.S. financial system); Dodd-Frank §§ 113(f) and 175(c) (requiring the Financial Stability Oversight Council to consult with foreign regulatory authorities with respect to foreign entities).

For the reasons set forth above, we respectfully urge the Agencies to clarify that foreign employee benefit plans are not included in the definitions of "financial entity" and "financial end user" by limiting prong (3) of those definitions to only those plans "subject to regulation under ERISA."

* * *

CPPIB thanks the Agencies for the opportunity to provide comments regarding the definitions of "financial entity" and "financial end user." Please do not hesitate to call me at (416) 874-5278 or Eleanor Farrell, Director, Corporate Governance and Legal, at (416) 868-6377 with any questions regarding this letter.

Respectfully,

Ed Cass
Vice President, Global Corporate Securities

cc: The Hon. Gary Gensler, Chairman
The Hon. Michael Dunn, Commissioner
The Hon. Bart Chilton, Commissioner
The Hon. Jill E. Sommers, Commissioner
The Hon. Scott D. O'Malia, Commissioner