

February 22, 2011

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

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

**RE: Proposed Rule Making Further Definition of “Eligible Contract Participant”
Under Title VII of the Dodd-Frank Act [Release 34-63452]**

Dear Ms. Murphy and Mr. Stawick:

This letter is in response to Release No. 34-63452 (the Proposing Release) in which the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) propose further definition of key terms in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) and solicit public comment. This comment letter is specifically focused on the proposed definition of the term “Eligible Contract Participant” (ECP), and the Commissions’ request for comment if an additional category should be added to this definition for “commercial real estate developers.”

The undersigned real estate trade associations believe that the Commissions are correct to establish standards to ensure that only sophisticated participants are able to access the over-the-counter (OTC) derivatives market. However, we strongly encourage the Commissions to take special account of common business structures utilized by owners, operators and developers of commercial and multi-family property when determining whether these entities will be ECPs. Otherwise, it is possible that property owners – including major property companies whose shares trade on the New York Stock Exchange – will not be able to access the OTC derivatives market to hedge risks, such as interest rate risk, related to their investments in smaller properties in communities across the country.

Background

In the past, real estate entities – regardless of size – were able to rely upon the 1989 CFTC Policy Statement Concerning Swaps Transactions (the “Policy Statement”) that allowed for certain OTC swap transactions to be executed on a bilateral basis, provided the transactions met specified criteria.¹ Specifically, the Policy Statement required that such swaps, among other things, be entered into in connection with the parties’ lines of business. Reliance upon this “line-

¹ CFTC Policy Statement Concerning Swap Transactions, 54 Fed. Reg. 30694 (July 21, 1989)

of-business exemption” afforded smaller real estate entities with the ability to efficiently manage their risk using OTC derivatives. Their ability to rely on this exemption was affirmed by a 2005 CFTC decision in *Khorram Properties v. McDonald Investments, Inc.*²

However, it is not currently clear if the Policy Statement will remain in effect after the full implementation of Title VII of Dodd-Frank. Section 723 of the new law states that, “It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5.” Real estate companies are thus concerned that, absent affirmative guidance from the Commissions, their ability to manage certain risks will be impaired.

In particular, real estate companies are concerned that they may be unable to utilize OTC derivatives when they fail to meet the specifications of the eligible contract participant (“ECP”) definition.³ In such cases, real estate companies would be limited to the use of standardized, exchange-traded derivatives for risk management purposes. Such contracts are ill-suited for use by real estate companies because they require the posting of substantial amounts of liquid collateral and because they cannot be customized. Though real estate entities have collateral available in the form of illiquid assets, such as real property, that have traditionally been used as collateral for OTC derivatives, they often do not have ready access to liquid collateral such as cash and, if they do, posting such additional collateral would unnecessarily raise the companies’ cost of capital that could otherwise be deployed to productive use.

Assessing the Impact on Real Estate Companies

For risk management and other business purposes, owners of commercial and multi-family real estate often establish separate legal entities for each individual property or for a portfolio of properties. These property-level subsidiaries are generally the parties to any debt that finances the property and any swaps that may be utilized to manage the interest rate risk associated with the loan. In many cases, real estate owners are required to utilize swaps so that their lenders can be certain that sharply rising interest rates will not jeopardize the owner’s ability to meet payment obligations. Even when not required, real estate companies often utilize OTC swaps to ensure they are not subject to risks that are beyond their control.

If the Commissions do not reaffirm the Policy Statement, even the largest property companies may be unable to effectively utilize OTC derivatives to manage the interest rate risk associated with their borrowings. Specifically, a company’s property-level subsidiaries whose assets or net worth fall below the specific thresholds set for ECPs may not be able to enter into OTC derivatives to efficiently manage their risks. This would be the case even if the parent of the real estate subsidiary is sophisticated and has assets and net worth exceeding the thresholds prescribed in the ECP definition.

² CFTC Docket No. 04264 (<http://www.cftc.gov/files/ogc/oporders05/ogckhorram10132005.pdf>)

³ For business entities like corporations, partnerships and trusts to be considered ECPs, the Commodity Exchange Act, as amended by the Dodd-Frank Act, requires that the entity either have total assets exceeding \$10 million, or have a net worth in excess of \$1 million and be engaged in business-related hedging.

The Proposing Release acknowledges that the Commissions have heard concerns from some real estate end-users that additional accommodation should be made for “commercial real estate developers” within the ECP definition. The undersigned trade associations commend the Commissions for considering this question.

At a time when there remains concern that additional turmoil in commercial and multi-family real estate markets could have profound implications for the ongoing economic recovery, we urge the Commissions to utilize their authority to provide any such accommodation for all business entities that own, develop, redevelop, lease, or otherwise operate or manage commercial or multi-family property.⁴ Continued access to customized and low cost risk management strategies through the OTC swaps market will be critical for companies engaged in these commercial activities at a time when over \$1 trillion in real estate loans must be refinanced in an already challenging environment of reduced property values and constrained credit.

Furthermore, property values vary by property type, size and location. Without additional certainty for real estate owners, the Commissions could unintentionally create otherwise arbitrary distinctions between properties and real estate owners in different market sectors, or in different geographic regions, when determining which are able to continue to access the OTC market as ECPs.

Proposed Solutions

The undersigned trade associations believe that the most direct way to address the concerns of property owners, operators and developers would be to affirm that a firm meeting the criteria laid forth in the “Policy Statement” would be permitted to enter into OTC swaps. This would allow end-users of all sizes and engaged in any business to remain confident that they will be eligible to participate in the OTC market to the extent they are otherwise permitted to do so under Dodd-Frank.

If the Commissions choose not to reaffirm the Policy Statement at this time, we would urge the Commissions to exercise the authority given to them by Dodd-Frank to expand the definition of ECP to include any entity which, as its primary business, owns, develops, redevelops, leases, or otherwise operates or manages commercial or multi-family property. We believe that an extension to this class of real estate businesses does not require any further test of financial sophistication. However, if the Commissions deem that an additional measure is necessary, we urge them to establish a framework by which they can look-through to the sophistication of the majority owner or controlling entity of any subsidiary engaged in these real estate businesses.

⁴ Many participants in the commercial and multi-family real estate industries utilize swaps to manage risk. As such, any accommodation provided for the real estate sector should not be limited to developers.

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Conclusion

We welcome the opportunity to comment on this important matter that will directly impact the ability of real estate companies to effectively and appropriately manage risk. We stand ready to meet or speak with members of the Commissions or their staff, if they wish to discuss our comments further. If you have any questions related to this submission, please contact Kirk Freeman, Senior Director, Government Relations, at the National Association of Real Estate Investment Trusts at (202) 739-9415.

Sincerely,

American Seniors Housing Association
Building Owners and Managers Association International
International Council of Shopping Centers
NAIOP, the Commercial Real Estate Development Association
National Apartment Association
National Association of Real Estate Investment Trusts
National Multi Housing Council
The Real Estate Roundtable