

July 22, 2011

Via Agency Web Site / E-mail

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Attention: Elizabeth M. Murphy
Secretary, Securities and Exchange Commission

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

Re: Release No. 33-9204, 34-64372, File No. S7-16-11; RIN 3038-AD46, RIN 3235-AK65; Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping — Transactions Involving Certain Foreign or Multinational Entities

Dear Ms. Murphy and Mr. Stawick:

We are submitting this comment letter in response to the May 23, 2011 Joint Proposed Rules issued by the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC," and together with the SEC, the "Commissions") in consultation with the Board of Governors of the Federal Reserve System, soliciting comments on the Commissions' proposed definitions of "swap," "security-based swap," and "security-based swap agreement". We appreciate the opportunity to comment on the proposed definitions set forth in the Joint Proposed Rules, pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").

This comment letter is submitted on behalf of the Council of Europe Development Bank (the "CEB"), and the views expressed herein are those of the CEB only. However, we believe that the analysis described herein extends to varying degrees to all multilateral development banks ("MDBs") and that all MDBs will be subject to substantially the same problems and risks if the Joint Proposed Rules are adopted in the form proposed. The CEB is a supranational organization formed and owned by its European sovereign member states. At its core, the mission of the CEB is to promote social development and social cohesion within

Europe. Specifically, the CEB seeks to achieve these goals by financing social projects and responding to emergency situations, thereby contributing to the improvement of living conditions in the least advantaged regions of Europe. The CEB is a key financial instrument of the Council of Europe's¹ solidarity policy in Europe and an integral part of post-World War II European social development.

For the reasons described herein, we believe that the use of derivatives by the CEB should continue to be regulated by its sovereign members on a collective basis, rather than through national legislation and regulation. Accordingly, we respectfully request that the Commissions use the definitional authority provided by Dodd-Frank to clarify that the definitions of "swap" and "security-based swap" as used in the Commodity Exchange Act and the Securities Exchange Act of 1934, respectively, exclude any agreement, contract or transaction a counterparty of which is the CEB.²

I. The Council of Europe Development Bank

The CEB is an MDB of which forty European states are currently members (the "Member States"). Established in 1956 by certain member states of the Council of Europe to finance social programs related to the resettlement of refugees migrating to and between European countries in the aftermath of World War II, the CEB has since expanded the scope of its activities to aid to victims of natural or ecological disasters, education and vocational training, health services, social housing, creation and preservation of viable jobs in small and medium-sized enterprises, improvement of living conditions in urban and rural areas, protection of the environment, preservation of historic and cultural heritage, and infrastructure for administrative and judicial public services.³ The CEB is governed by a Governing Board and an Administrative Council, each of which is comprised of representatives appointed by each Member State.

¹ Founded in 1949, the Council of Europe is a 47-member international organization that works to protect human rights, pluralist democracy and the rule of law; to promote awareness and encourage the development of Europe's cultural identity and diversity; to find common solutions to the challenges facing European society; and to consolidate democratic stability in Europe by backing political, legislative and constitutional reform. Most countries in Europe are members of the Council of Europe. Only two of the 27 member states of the European Union — Austria and the United Kingdom — are members of the Council of Europe but not of the CEB.

² As described below, we understand that the World Bank has submitted a comment letter to the Commissions on the topic we describe herein. We wish to provide our support for the position set forth in that letter for the reasons described therein, and request the Commissions extend that analysis as it applies to the CEB and other MDBs.

³ The CEB was established by eight Council of Europe member states pursuant to a Partial Agreement between those states, and its operations, acts and contracts are governed by the Third Protocol dated March 6, 1959 to the General Agreement on Privileges and Immunities of the Council of Europe of September 2, 1949, by its

To advance its objectives, the CEB grants or guarantees long-term loans to its Member States or to institutions approved by them. The CEB's loans and guarantees typically cover only part of the cost of any project, supplementing each borrower's own funds and credit from other sources. As of December 31, 2010, the CEB had the equivalent of €12.0 billion (approximately \$16.1 billion⁴) of loans outstanding.

The CEB funds its operations primarily through debt offerings in the international capital markets. As of December 31, 2010, the CEB had total outstanding funded debt (long-term debt securities) of €19.9 billion (approximately \$26.6 billion). To protect itself from the interest rate risk and currency risk inherent in its borrowing and lending operations, the CEB uses derivatives solely as an end user for hedging purposes.

II. The CEB and other MDBs should be exempt from Regulation under Title VII of the Dodd-Frank Act

As the World Bank pointed out in its April 5, 2011 letter to Commissioner Jill Sommers,⁵ interpreting Title VII of Dodd-Frank to impose United States regulations on the activities of MDBs would represent an unprecedented intrusion into the internal operations of these international, intergovernmental organizations.⁶ We agree with the World Bank that the most efficient and effective mechanism for dealing with this issue is for the Commissions to define the terms "swap" and "security-based swap" to exclude transactions with MDBs.

Articles of Agreement as amended (the "Articles") and by regulations issued pursuant to the Articles. The CEB falls under the supreme authority of the Council of Europe but is legally separate and financially autonomous from it.

⁴ All EUR/USD conversions in this document are based on the exchange rate as of December 31, 2010.

⁵ See Letter from International Bank for Reconstruction and Development and International Finance Corporation to Jill Sommers, Commissioner, Commodity Futures Trading Commission (April 5, 2011), available online at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission21_040511-twb.pdf (visited July 13, 2011).

⁶ See also Letter from the European Central Bank to the SEC and CFTC on the Relationship of Title VII of Dodd-Frank to the European Central Bank and Eurosystem (May 6, 2011), available online at www.ecb.int/pub/pdf/other/110601letter_cftcen.pdf (visited July 13, 2011); Comment from Cleary Gottlieb Steen & Hamilton LLP ("Cleary Comment") to the Secretaries of the SEC and CFTC relating to Release No. 34-62717, File No. S7-16-10 (September 21, 2010), available online at <http://www.sec.gov/comments/s7-16-10/s71610-63.pdf> (visited July 13, 2011). The European Central Bank has noted that, because it enters into "swap" transactions only in the furtherance of its public mandate, its swap transactions should not be interpreted or legally defined in the same way as otherwise similar transactions entered into by private commercial entities. This argument equally applies to MDBs like the CEB. The Cleary Comment, like the World Bank's letter, maintains that as a matter of comity the Commissions should exempt from their definitions of "swap" and "security-based swap" any transaction to which a foreign central bank, foreign sovereign or multi- or supranational organization is a party.

However, we believe that the arguments the World Bank set forth apply *mutatis mutandis* to the CEB and other MDBs in which the United States does not have an ownership interest. Indeed, this is precisely the approach currently favored by the European Parliament and Council, as these bodies' proposed rules specifically exempt certain MDBs — including the CEB — and their derivative transactions from regulation.⁷ Adopting the same approach would therefore be in line with international harmonization and the principles of international comity and legal reciprocity.

Should the Commissions ultimately determine that it is necessary for transactions involving the CEB and other MDBs to be subject to Dodd-Frank, we respectfully request that the Commissions adopt an alternative approach, pursuant to which CEB and the transaction to which the CEB is a party would be eligible for relief from certain provisions of Dodd-Frank, as follows: (i) the transaction would not be subject to the execution and clearing requirements of Dodd-Frank (unless the CEB voluntarily chooses to clear the transaction); (ii) the CEB would not be subject to the capital or margin requirements imposed under Dodd-Frank in connection with the transaction; (iii) the CEB would not be subject to the business conduct provisions of Dodd-Frank; and (iv) the CEB would not become subject to registration as a swap dealer or major swap participant. This approach would preserve the Commissions' jurisdiction over certain aspects of the transaction (including reporting requirements), while ensuring that the CEB does not itself become subject to Dodd-Frank.

Registration of the CEB is not necessary because the CEB, like other MDBs, operates under its Articles and the oversight of the Member States, rendering regulation by any single government unnecessary. It is of course for this reason that the CEB and other MDBs are not currently subject to any national regulation with respect to any other subject matter or regulatory regime. In addition, the CEB has never been subject to any execution, clearing or margin requirements, and subjecting it to such requirements would increase transaction costs but would not materially reduce the risk to which any counterparties or the financial system are exposed. The purposes of Dodd-Frank and the Commissions' regulations thereunder would therefore not be advanced. Further, requiring the CEB to comply with the business conduct requirements when its counterparties are themselves major dealers would similarly serve no purpose and provide no meaningful protections to any market participants. Under such circumstances, we believe that at least partial relief for the CEB from certain of the requirements of Dodd-Frank is warranted.

The CEB is wholly owned by sovereign shareholders: there are no CEB equity shares held by individuals or financial institutions, and there are no significant performance-

⁷ General Secretariat of the Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on Derivative Transactions, Central Counterparties and Trade Repositories (January 5, 2011), available online at <http://register.consilium.europa.eu/pdf/en/11/st05/st05059.en11.pdf> (visited July 13, 2011).

based bonuses or differential compensation arrangements paid to CEB employees. Thus, no individual within the CEB has any financial incentive for excessive risk-taking. The CEB has a risk management department that is independent from the CEB's operational activities and that sets and monitors commercial counterparty exposure. Finally, the CEB enjoys substantial privileges and immunities, such as the exemption of its assets from the direct taxation of Member States, freedom of its property and assets from governmental restrictions, regulations, controls and moratoria of any nature, immunity of its property and assets from search, requisition, confiscation, expropriation or any other form of restraint by executive or legislative action, and immunity of its property and assets from all forms of seizure, attachment or execution before the delivery against the CEB of a final enforceable judgment rendered by a court of competent jurisdiction.

The CEB does not currently engage in any proprietary or speculative trading, and it has no current plan or intention to do so. As mentioned before, it utilizes derivatives solely for hedging purposes. In particular, the CEB enters into swaps on interest rates and currencies in order to hedge the risks arising from borrowings, loans it has made in connection with its development programs or bonds bought as part of its available-for-sale portfolio. The CEB does not act as a dealer; to the contrary, it is a customer of major dealers.

Subjecting the CEB and its derivative transactions to the requirements of Dodd-Frank could have adverse effects on its ability to hedge the risks to which it is exposed. In particular, if the CEB were required to execute its derivative transactions with US-based counterparties on exchanges or swap execution facilities, and to clear such transactions through clearing houses, it could be unable to enter into such transactions with such counterparties, due to the increased costs associated with the transactions. Similarly, the imposition of margin requirements would prevent the CEB from entering into hedging transactions with US-based counterparties, given that it is not currently subject to margin requirements.

Moreover, imposing the requirements of Dodd-Frank on the CEB and its derivative transactions is unnecessary for the protection of counterparties and the markets. The CEB's hedging activities are conducted in accordance with the policy adopted by the CEB's Administrative Council and in accordance with best market practices. Under this policy, before entering into a derivatives transaction, and without limitation, credit clearance of the counterparty by the CEB's Risk Committee is required and a framework agreement (like the ISDA Master Agreement and a Credit Support Annex) must be signed. Swap transactions are valued at their net present value and the positions per counterparty are monitored daily so that additional collateral can be requested as per the relevant credit support arrangements. Other credit controls are imposed as well.

Further, as of December 31, 2010, all outstanding derivatives entered into by the CEB were collateralized (unchanged compared to 2009) by the CEB's counterparties. The CEB

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is permitted to receive cash deposits and/or certain types of securities which are currently all triple-A rated (US Treasuries, German, French, UK or Dutch government bonds) as collateral for derivatives. At the end of 2010, 75% of the collateral was in the form of cash deposits and 25% was in the form of securities. As of December 31, 2010, the CEB had total outstanding derivatives of €22.9 billion (approximately \$30.5 billion).

The CEB has a strong financial foundation. As of December 31, 2010, the CEB had subscribed capital of €3.3 billion (approximately \$4.4 billion), of which roughly €370 million (approximately \$495.2 million) had been paid in, and financial reserves amounting to €1.7 billion (approximately \$2.3 billion). If necessary, the CEB's Governing Board may make calls upon subscribed and unpaid capital in order to enable the CEB to meet its obligations, including repaying the CEB's indebtedness. Since the CEB's inception, no such calls have ever been made.

The CEB has a proven ability to manage OTC derivative transactions prudently and effectively, and MDBs are among the safest counterparties in the markets. This is evidenced by (i) the excellent ratings that rating agencies typically attribute to MDBs — the CEB benefits from the highest possible (AAA) rating by Standard and Poor's, Moody's and Fitch — and (ii) the low risk weightings that bank regulators assign to transactions with MDBs. Further, the aggregate volume of derivatives transactions involving MDBs is not so large as to create systemic risk in derivatives markets. Accordingly, for the reasons expressed in this comment letter, the CEB should not be subject to the Commissions' derivatives regulations and should be eligible at least for the partial relief described above.

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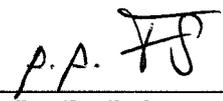
Thank you for your consideration and please do not hesitate to contact us at jacques.mirantepere@coebank.org or jan.debel@coebank.org if you have questions or would find further background helpful.

Sincerely,

Council of Europe Development Bank



Jacques Mirante-Péré
Chief Financial Officer



Jan De Bel
General Counsel