National Association of College and University Business Officers
1110 Vermont Avenue, NW, Suite 800, Washington DC 20005-3544
T 202.861.2500 F 202.861.2583
www.nacubo.org

August 29, 2011

Via Electronic Submission: rule-comments@sec.gov

Elizabeth M. Murphy
Secretary of the Commission
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants - Proposed Rule (File Number S7-25-11) (the "Proposing Release")

Dear Ms. Murphy:

The National Association of College and University Business Officers (NACUBO) is pleased to have the opportunity to comment on the rules proposed by the Securities and Exchange Commission (the "Commission" or the "SEC") concerning business conduct standards for security-based swap dealers and major security-based swap participants[1] with counterparties (the "Proposed Rules")[2] under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").[3] NACUBO is a membership organization, representing 2,100 colleges and universities in the United States. Most of our members are federally tax-exempt organizations described in Section 501(c)(3) of the Internal Revenue Code of 1986. Many of our members use customized over-the-counter swaps as a cost-effective tool for managing the diverse range of risks facing their particular institutions. Our purpose in commenting is to respond to the Commission's inquiry in the Proposed Rules Release as to an appropriate definition of "endowment" for purposes of identifying "Special Entities" (as defined in the Act) whose transactions would be subject to the business conduct rules.

We would first like to credit the Commission's obvious efforts to take into account comments that had been previously submitted to the Commodity Futures Trading Commission ("CFTC") in connection with its companion rulemaking.[4] We believe that the Commission's Proposed Rules represent a significant step in the right direction. In particular, we support the Commission's

[1] For ease of reference, we use the term "SBS Dealer" to include both security-based swap dealers and major security-based swap participants.
[2] *See* 17 CFR Part 240, Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 76 FR 42396 (July 18, 2011) (the "Proposed Rules Release").
[3] Pub. L. No.111-203, 124 Stat.1376 (2010).
[4] *See* 17 CFR Parts 23 and 155, Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 FR 80638 (December 20, 2010).

proposal that would permit an SBS Dealer and a Special Entity to agree through written representations that such SBS Dealer is not "acting as an advisor" to the Special Entity. As you are aware from the comments on the CFTC rulemaking, there is concern that overly broad application of the heightened duty that applies when an SBS Dealer both advises and transacts with a Special Entity would adversely affect the willingness of SBS Dealers to engage in transactions with Special Entities or the pricing on those transactions. This is not simply a concern of the SBS Dealers. It is very much a concern of financially sophisticated endowments which do not rely on SBS Dealers performing an advisory role. The Commission's proposal would help to provide clarity as to the role played by the SBS Dealer and, consequently, the duty undertaken. It is our hope that the Commission's suggested approach will also be adopted by the CFTC in its business conduct rules for swap dealers and major swap participants.

The same concern for avoiding costly application of the business conduct rules in areas where there is no significant need for special regulation should inform the Commission's attempt to define "endowment." The need for a definition comes about because the Act includes, as a category of "Special Entity," "any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986." As the Commission notes in the Proposed Rules Release, "endowment" is not defined in the Act or in the U.S. federal securities laws generally. However, the federal securities laws and regulations do nevertheless employ a consistent concept of "endowment," which well serves the purposes of the Act and the objectives of the current rulemaking.

Section 3(c)(10)(B)(i) of the Investment Company Act of 1940, as amended by the Philanthropy Protection Act of 1995 (the "PPA") to provide an exclusion from the definition of "investment company" for pooled charitable fund arrangements, refers to the "investment and reinvestment" of "assets of the general endowment fund or other funds of one or more charitable organizations." There are several noteworthy aspects to this definition. First, an "endowment" is likely invested in securities in whole or in part. Second, keying off the word "general," an "endowment" is often a collection of funds that a charity holds. Third, given the mention of "other funds," an endowment is not the only type of fund that a charity may hold. The major distinction here, evident from the face of the balance sheet of most major charities, is between endowment funds, on one hand, and general operating funds or other current-use funds, on the other.

Prior to the adoption of the PPA, the Commission had itself relied on a similar concept of "endowment fund" in rules adopted under the Securities Exchange Act of 1934, as amended. Thus, Rule 13d-1(b)(1)(ii)(F) includes "endowment funds" in the list of regular market participants entitled to file an abbreviated Schedule 13G instead of Schedule 13D in appropriate circumstances. The Commission's intent in using the concept here seems to clearly be to describe the regular investment activities of charities. The concept also appears in Rule 16a-1(a)(1)(vi), which provides relief from certain of the burdens of Section 16. The SEC staff has specifically considered the use of "endowment fund" in this context in providing interpretative guidance under Section 16 to the effect that the investment funds comprising the "endowment fund" of a charity are held "for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business" within the meaning of Rule 16a-1(a)(1).[5]

[5] Harvard University, SEC Interpretative Letter (July 8, 1992).

Drawing from this background, we would propose that the Commission define "endowment" to refer to a charitable organization when acting with respect to its investment funds. This definition would employ the most common understanding of the word "endowment" in a charitable context.[6] The definition would not be intended to reach a charity's activities with regard to its operating and other current-use funds or liability management activities, areas which are removed from the temptations and potential abuses that are inherent in the process of buying and selling investments.[7]

With respect to the Commission's further question in the Proposed Rules Release of whether an "endowment" ought to include an organization that uses the assets of its endowment to pledge or maintain collateral obligations, or otherwise enhance or support the organization's obligations under a security-based swap, we believe that the need for regulatory clarity argues against such an interpretation. The question of when investments comprising certain types of charitable funds can be pledged or drawn upon in support of different types of obligations (or even whether in fact there has been such a pledge) is a complicated one, and there are already appropriate limits on such activities under state law and fiduciary principles.

The Commission also asks whether "Special Entity" should exclude a "collective investment vehicle in which one or more Special Entities has invested." We believe that they clearly should be excluded. Indeed, we know of no legislative suggestion that they be included. There would be little policy reason for such an inclusion. The obvious concern of the business conduct rules relating to Special Entities is the nature of the dealings between an SBS Dealer and a Special Entity. This concern is not implicated where a third party that is not a Special Entity exercises investment discretion on behalf of a collective investment vehicle that happens to include a Special Entity. While there are other schemes of investment regulation that mandate that certain collective funds be "looked through" for various purposes,[8] it should be noted that these schemes have an entirely different purpose. They are seeking to regulate the relationship between the sponsor of a collective vehicle and the protected investor, whereas the Special Entity conduct rules are at a critical step removed in seeking to regulate the relationships of SBS Dealers.

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[6] While "endowment fund" does have a specific, defined meaning at state law under the Uniform Prudent Management of Institutional Funds Act, in effect in forty-nine states and the District of Columbia ("UPMIFA"), it seems doubtful that Congress was attempting to incorporate that particular specialized meaning. Under Section 2(2) of UPMIFA, an "endowment fund" is "an institutional fund or a part of an institutional fund that is not wholly expendable by the institution on a current basis," pursuant to legally binding gift restrictions – in other words, a permanent or semi-permanent fund. The state law focus is on the individual fund created by a single set of gift restrictions, whereas common parlance and, undoubtedly, the Act use "endowment" to refer to the invested collective of multiple "endowment funds" in the UPMIFA sense, as well as other long-term investment funds of the charity, including "quasi-endowment," "board-designated endowment" and unrestricted investment funds. That is not to say that state law is irrelevant here; to define "endowment" with reference to a charity's investment funds is entirely consistent with UPMIFA's overall emphasis on the prudent investment and application of those funds.

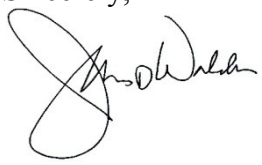
[7] The Commission also asked whether to interpret "endowment" to include funds that are not separate legal entities. Indeed, our suggested approach would identify endowments as funds that are not separate legal entities. They belong to their associated charities, are subject to special considerations under UPMIFA and other state law, and are generally not the exclusive funds of such charities.

[8] See, for example, Department of Labor rules relating to ERISA fund investment in venture capital and real estate collective vehicles. 29 CFR §2510.3-101.

For this reason, any inclusion of collective investment vehicles in the definition of "Special Entity" would likely prove unworkable. The members of NACUBO invest in a broad range of collective vehicles, including private equity funds, venture capital funds, hedge funds, funds-of-funds, real estate funds and natural resources funds, all of which may occasionally use SBS swaps in their investment business. The cost of bringing the dealings of all of these funds within the "Special Entity" conduct rules would be substantial, with no discernible benefit. There would also be a serious risk that Special Entities would be regarded as disfavored investors in collective vehicles by sponsors seeking to avoid another layer of otherwise avoidable regulation, posing significant peril to the investment programs of Special Entities.

We are grateful for the opportunity to comment on these important rules. We also appreciate the Commission's effort to provide rules that protect the interests of Special Entities without hindering their ability to prudently and effectively engage in the over-the-counter derivatives markets to manage operational risk.

Sincerely,



John D. Walda
President and Chief Executive Officer