CHURCH ALLIANCE
PROPOSED AGENDA FOR CFTC MEETING

- Introductions
- Objective and Overview of Meeting
- Background
    - Church Alliance
    - Church Plans
    - Church Benefits Boards
    - Use of Swaps by Church Plans
- Issues of Interest
    - Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties
        - Definition of Special Entity
        - Swap Dealer as Advisor
    - Definitions of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"
        - Definition of MSPs/MSBSPs
        - Definition of SDs/SBSDs
    - End-User Exception to Mandatory Clearing of Swaps
        - Definition of Financial Entity
- Q&A

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CHURCH ALLIANCE

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THE CHURCH ALLIANCE: A HISTORY

The Church Alliance is a coalition of chief executive officers of thirty-seven (37) denominational benefit programs, covering mainline Protestant denominations, two branches of Judaism, and Catholic schools and institutions. These benefit programs provide pensions and health benefits to more than one million clergy, lay workers, and their family members.

The Church Alliance was formed in 1974 as the "Church Alliance for Clarification of ERISA" to address the burdens imposed on established church plans by the ERISA legislation. That law, when passed in 1974, threatened the continued legal viability of church plans as they had existed, in some cases, for over 200 years. Since its formation, the Church Alliance has continued to work on tax, pension, securities, and health law issues that impact the ability of church pension boards to serve the individuals who dedicate their lives to working for religious institutions.

The affairs of the Church Alliance are directed by a twelve-member Steering Committee ("Steering Committee") selected by the membership. A committee of legal counsel for the members, known as the Core Lawyer Working Group ("CLWG") counsels the membership on substantive issues of interest.

BACKGROUND INFORMATION ON CHURCH BENEFIT PLANS AND PROGRAMS

Church benefit plans and programs have been in existence for many years; many of the plans and programs represented through the Church Alliance pre-date the enactment of the Internal Revenue Code in 1913. In fact, some church retirement programs have been in existence since the 1700's. Initially, these benefit programs were akin to benevolence programs in that they provided benefits to clergy in need. Over the years, however, the benefit programs expanded to more systematically cover the provision of retirement and welfare benefits for both clergy and lay workers.

Church benefit plans are typically maintained by a self-incorporated church pension or retirement board that has generally been designated as the entity that sponsors or administers and maintains the benefit programs for eligible employees within the denomination. These benefit plans are generally multiple-employer in nature and cover thousands of church employers throughout the country, many of which are located in rural communities. These programs often also cover foreign ministry organizations. Church benefit boards thus typically provide retirement and welfare benefits to thousands (or, in the case of the larger denominations, tens of thousands) of ministers and lay workers at multiple locations. Having a program sponsored by one organization serving multiple church employers provides for continuity and consistency of employee benefits for the many ministers who move from one church to another within a denomination.

The participating employers covered under these church benefit plans are often small, local churches with few employees. In many churches, the local church's pastor may be the local church's only employee. If other employees exist, they are often part-time workers who assist with secretarial or bookkeeping duties or perhaps provide for building maintenance. These duties are often carried out by volunteers. In addition, many small local churches are staffed by bi-vocational pastors (clergy who work for a secular employer part-time or full-time and pastor a church or churches on the side).

Local churches are typically run by volunteer vestries, boards of deacons, boards of elders, parish councils, or the like. The individuals who have these volunteer leadership roles are focused on fulfillment of their church's ministry, and the burden of allocating both human and monetary resources to direct ministry leaves them with little time to focus on employee benefit compliance issues. In the case of small to medium-sized churches, these individuals may, and usually do, lack the expertise required to understand the various employee benefit legal requirements that must be met. Except in the largest churches, the typical church budget does not support the hiring of outside experts required to assist the local church with employee benefits compliance. As a result, absent the availability of the programs provided through the church benefit boards and church associations, many of these employers would be unable to provide retirement or welfare benefits to their employees.

The benefits provided by church benefit boards or church associations are often mandated by the denominational polity. Over the years, church denominations have organized themselves in a variety of ways reflecting their own theological beliefs and forms of church polity. For example, some denominations are organized in a "hierarchical" polity, in which a "parent" church organization sets the policy for the entire denomination. Other denominations have organized themselves in a diocesan, synodical or presbyterian structure under which policy-

making is carried out on a local or regional level, through representatives drawn from the various churches within the geographic area served by a particular level of governance. Several other denominations, composed of autonomous churches, or conventions or associations of churches, cooperate in "congregational" or "connectional" forms of governance in which churches and church ministry organizations are associated by voluntary and cooperative participation. It is these diverse sets of church polities, and the differing levels of control exercised over churches and church ministry organizations under a particular polity, that make compliance with some employee benefit requirements of the Code most difficult.

Retirement Plans

As noted above, some church retirement plans have been around for centuries, and many pre-date the enactment of the Code and ERISA. As Congress enacted various laws governing the regulation and tax treatment of particular types of pension programs, church plans began to classify themselves as a particular type of plan. Frequently, the practices and history of these plans were unique to the church plan world, and fitting them into one category or another was not a simple exercise.

One practice that has long been widespread in the church plan world, and is still in effect today, is the practice of distributing benefits in the form of an annuity payment following retirement. This practice of annuitizing benefits from an accumulation account reflecting contributions made during active service led some church plans to follow the rules governing 403(b) tax-deferred annuities. Other programs with a more traditional defined benefit plan formula were structured as qualified plans within the meaning of section 401(a) of the Code.

The vast majority of participants in church retirement plans are not highly compensated employees, either as that term is defined in the Code or in common usage. There are many reasons for this. While churches strive to provide their clergy and lay workers with an adequate salary, the nature of church budgets and the primary funding source (*i.e.*, the offering plate) have resulted in overall compensation for church plan participants that is lower than that provided to their secular counterparts. In many cases, church employees are also essentially volunteers who are motivated by a desire to serve their church, not to maximize compensation and benefits, but rather to participate in its ministry.

Some denominations do not have any ability to mandate participation in the denominational retirement program by its member churches. This is true because of the particular denomination's polity. The denomination's constitution, Book of Discipline, Book of Order, or the like may provide that a sub-unit of church government has the ability to appoint and remove officials of local churches within that sub-unit but has no control over the provision of benefits by a local church. This lack of control means that some local churches may choose to participate in the denominational retirement plan, while others may not. Sometimes a denomination, again through its constitution, Book of Discipline, Book of Order, or the like, is able to mandate participation in retirement plans for clergy, but not lay workers.

Health Care Plans

Church benefit boards and church associations also offer health benefits to church workers through church health care plans. Many of these church health care plans have been in existence for over 50 years. Most church benefit boards and church associations offer a nationwide plan (often on a self-funded basis), which allows often itinerant clergy families the comfort and security of career-long, portable, comprehensive medical coverage, on an affordable basis through a plan that reflects their denomination's belief system in terms of the benefits and coverage it provides.

In addition, because health care plans offered by church benefit boards and church associations are national in scope, these plans are able to take advantage of "economies of scale," allowing individual churches and members of the clergy to purchase health care coverage for less than it would cost to purchase similar coverage through the small group or individual insurance markets. This approach has allowed thousands of small churches, many in rural or disadvantaged areas, to provide meaningful health care benefits to members of the clergy and lay employees.

The application of federal and state benefit laws to denominational church health care plans presents different challenges than it would to a typical single or multiple employer group health plan. As discussed above, each denomination has a unique polity established to reflect its theological beliefs. Thus, each denomination has a different level of authority and control over its individual churches as employers. As a result, in some denominations, the church plan sponsor has the ability to mandate employer coverage decisions; in other denominations, the national plan can control only the plan design and administration, but not the eligibility and participation rules or employer contributions toward employee's cost of coverage. However, in many of these denominations, the national church benefit organizations do not have the ability to refuse to provide coverage to individual churches. As a result, the churches often have the ability to opt in and out of the denominational plan at will.

CHURCH ALLIANCE

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February 22, 2011

By Hand Delivery

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

Re: Proposed Regulations on Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, RIN 3038—AD25

Dear Mr. Stawick:

I. INTRODUCTION

We are pleased to submit this comment letter, on behalf of the Church Alliance, regarding the regulations proposed by the Commodity Futures Trading Commission (CFTC or Commission) on business conduct standards for swap dealers (SDs) and major swap participants (MSPs) with counterparties.[1] Our comments are directed toward clarifying that "church plans" and the pension boards that maintain them are included within the definition of the term "Special Entity" for purposes of these regulations, and requesting clarification as to when an SD is deemed to be acting as an advisor to a Special Entity.

The Church Alliance is a coalition of thirty-seven (37) denominational benefit programs that provides pensions and health benefits to more than one million clergy, lay workers, and their family members. These benefit programs are defined as "employee benefit plans" and "church plans" under Sections 3(3) and 3(33) of the Employee Retirement Income Security Act of 1974 (ERISA), respectively, and therefore come within the definition of a "Special Entity" under Section 731 of the Dodd-Frank Wall

[1] 75 Fed. Reg. 80637 (December 22, 2010) (Proposing Release).

Street Reform and Consumer Protection Act (Dodd-Frank), which enacted a new Section 4s of the Commodity Exchange Act (CEA) that will become effective in July to govern the registration and regulation of SDs and MSPs. A church plan is an employee benefit plan as defined in Section 3(3) of ERISA.[2] Under ERISA Section 3(33)(C)(i), a church plan includes a plan maintained by an organization, the principal purpose or function of which is the administration or funding of a plan or program to provide retirement or welfare benefits for employees of a church or a convention or association of churches, if the organization is controlled by, or associated with, a church or a convention or association of churches. Church benefits boards, like those represented by the Church Alliance, are organizations described in ERISA Section 3(33)(C)(i). A church benefits board is also (i) typically an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (Code), (ii) an organization described in Code Section 414(e)(3)(A), which describes organizations that are permitted to administer or fund church plans, and (iii) exempt from treatment as an investment company pursuant to Section 3(c)(14) of the Investment Company Act. Our references throughout this letter to church plans should accordingly also be read to include church benefits boards.

To fulfill obligations to their beneficiaries, church plans invest in a wide variety of asset classes, and as part of their investment and risk management policies, they have authorized the use of certain derivatives. The authorized derivatives include futures, forwards, and swaps. Accordingly, the denominational benefits boards represented through the Church Alliance have an interest in the regulation of the swap market.

II. DEFINITION OF SPECIAL ENTITY

A. Proposed Definition

New CEA Section 4s(h) authorizes the CFTC to adopt rules or regulations establishing general business conduct standards for SDs and MSPs. In addition, that section authorizes the CFTC to adopt rules or regulations mandating enhanced duties for SDs and MSPs when acting as advisors or counterparties to "Special Entities." The term Special Entity is defined to include, among others, "any employee benefit plan, as defined in Section 3 of [ERISA]."[3] As noted by the CFTC in the Proposing Release, because Dodd-Frank, in defining a Special Entity, refers to any employee benefit plan as defined in Section 3 of ERISA, the term includes employee benefit plans that are not subject to regulation under ERISA, such as church plans.[4]

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[2] ERISA Section 3(3) defines the term "employee benefit plan" to mean "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." An employee welfare benefit plan provides medical benefits to participants and beneficiaries and an employee pension benefit plan provides retirement income to employees. *See* ERISA Sections 3(1)(A) and 3(2)(A)(i), respectively.

[3] New CEA Section 4s(h)(2)(C)(iii).

[4] 75 Fed. Reg. 80637, at 80649 &n.89.

Nevertheless, the CFTC also noted several letters submitted during the pre-proposal stage that raised issues concerning possible ambiguities in the statutory definition of Special Entity. The CFTC did not propose to clarify the Special Entity definition in the Proposing Release and the definition of that term in proposed Regulation §23.401 simply repeats the statutory language.[5] The CFTC cited the range of issues surrounding the definition of Special Entity as a reason not to propose to clarify the definition but, instead, to request comment on the definition in general and on several specific issues, including:

> "• Should the definition 'employee benefit plans, as defined in Section 3 of ERISA' be clarified in any way?
>
> "• Should the definition 'employee benefit plans, as defined in Section 3 of ERISA' be limited to plans subject to regulation under ERISA?
>
> "• Should the Commission 'look through' an entity to determine whether it is a Special Entity for the purposes of these rules? If so, why? If not, why not? If so, should the Commission clarify that master trusts, or similar entities, that hold assets of more than one pension plan from the same plan sponsor are within the definition of Special Entity?"[6]

B. Clarifications to Proposal

1. Treatment of Church Plans

In response to the specific questions posed by the CFTC, the Church Alliance recommends that the CFTC revise the proposed definition of Special Entity to include a separate paragraph stating, "A plan defined as a church plan in Section 3(33) of Title I of the Employee Retirement Income Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d)." This revision would make the definition of Special Entity in Regulation §23.401 consistent with CFTC Regulation 4.5, which excludes various employee benefit plans from being construed as commodity pools, and has separate paragraphs excluding, among others, "governmental plans" and "church plans."[7] Such a revision to the proposed definition will make clear what Congress intended to provide in Dodd-Frank, that church plans are Special Entities deserving of enhanced conduct by SDs and MSPs advising or entering into swaps with them.

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[5] Dodd-Frank Section 721(b) authorizes the CFTC to adopt a rule to define any term included in an amendment to the CEA made by Dodd-Frank Title VII, Subtitle A.

[6] 75 Fed. Reg. 80637, at 80649.

[7] *See* 17 C.F.R. § 4.5 (a)(4)(iii) and (v).

Accordingly, the answer to the second question cited above is clearly *no*, the definition "employee benefit plans, as defined in Section 3 of ERISA" should *not* be limited to plans subject to regulation under ERISA. Because new CEA Section 4s(h)(2)(C)(iii) uses the quoted language and the phrase "defined in" rather than the more limited "subject to," the plain meaning of the statute is that any employee benefit plan defined in ERISA, including a church plan, should be treated as a Special Entity. The Church Alliance submits that, as a matter of policy, church plans should not be treated differently than ERISA-covered plans and governmental plans when entering into swaps with SDs and MSPs that would not be traded on designated contract markets or swap execution facilities.[8]. During the CFTC open meeting on December 9, 2010, at which these proposals were presented, Commissioner Chilton noted that those pension plans subject to ERISA regulation are subject to several requirements, and he inquired of staff whether the CFTC's proposals were duplicative. The staff responded that they had been in contact with their counterparts at the Department of Labor (DOL), who did not express concern that the proposals would interfere with DOL's administration of ERISA, but this colloquy demonstrates that, if anything, additional duties are appropriate for SDs and MSPs dealing with plans *not* subject to regulation under ERISA, as compared to plans already subject to the regulation and protections afforded by ERISA.

Swaps have not previously been subject to regulation in the United States and, therefore, there is a lack of precedent for parties and their counsel to rely upon in deciding whether it is lawful to enter into particular transactions. Moreover, some of the relevant terms in Dodd-Frank are ambiguous and could be interpreted in multiple ways. Consequently, the CFTC should take this opportunity to exercise its authority under Dodd-Frank Section 721(b) so that the definition of the term Special Entity includes a paragraph stating "A plan defined as a church plan in Section 3(33) of Title I of the Employee Retirement Income Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d)." Such a clarification will help to assure that individuals who dedicate their lives to working for religious institutions are not disadvantaged in terms of the treatment of their pensions or health benefits compared to other workers.

2. Treatment of Church Benefits Boards

The CFTC further needs to clarify that the definition of a Special Entity includes church benefits boards that hold the assets of church plans, so that such organizations receive the protections afforded Special Entities with respect to swaps under the CEA and the implementing regulations. The CFTC also requested comment on the following specific issues:

> "• Should the Commission 'look through' an entity to determine whether it is a Special Entity for the purposes of these rules? If so, why? If not, why not? If so, should the Commission clarify that

[8] Proposed Regulation 23.450, pursuant to paragraph (g) thereof, would not apply to a swap that is initiated on a designated contract market or swap execution facility where the SD or MSP does not know the identity of the Special Entity.

> master trusts, or similar entities, that hold assets of more than one pension plan from the same plan sponsor are within the definition of Special Entity?"

The CFTC should adopt a definition of the term Special Entity that makes clear that it includes a church benefits board that holds the assets of one or more church plans, church endowments, and other church-related funds on a commingled basis. Such a definition would be reflective of the close and unique relationship between church benefits boards and their constituent church plans, a relationship recognized in both ERISA and the Code.

Dodd-Frank provides that commercial end users should be able to conduct swap transactions largely as they have been accustomed to. Church denominations have organized themselves so that church pension boards are typically the entities that handle investments for the denomination's benefit plans and for other church assets, including church endowments. The use of church benefits boards is more administratively efficient, and such boards have greater resources, investment skills and market clout than the individual churches and other denominationally affiliated organizations that contribute to the boards.

The functions of a church benefits board are similar to those of a tax-exempt trust that is commonly used as the funding vehicle for a qualified private sector pension plan. Church benefits boards may also be likened to a master trust that is established by several multiple-employer pension plans. The CFTC has previously provided relief to the trustees of such a master trust similar to the relief available to trustees of individual pension plans,[9] providing a precedent for the church benefits board context. The CFTC, by making clear that a church benefits board is to be treated like a church plan and given Special Entity status, will provide guidance to fulfill the purposes of the regulation, while at the same time not attempting to dictate or micromanage how the religious denominations of America have chosen to structure themselves.

We note also that the ERISA plan asset rules themselves often "look through" commingled investment vehicles and, in such cases, subject such commingled investment vehicles to the same ERISA requirements as apply to the underlying plans. In addition, the legislative history under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) and the Internal Revenue Service regulations under Code Section 403(b) expressly recognize the right and authority of church benefits boards to hold, on a commingled basis for investment purposes, the assets of Code Section 401(a) qualified plans, Code Section 403(b) plans, and other non-plan church-related assets.[10] Further, the investment company exemption provided in Section 3(c)(14) of the

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[9] CFTC Staff Letter 86-8, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) § 23,014 (April 4, 1986). Although that letter was issued almost 25 years ago, it has been cited favorably within the last year. *See* CFTC Staff Letter 10-06, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) § 31,557, at 64,025 & n.11 (March 29, 2010).

[10] TEFRA Conf. Rept. Pub. L. 97-248, 1982-2 C.B. 462, 524-5; Internal Revenue Service Pvt. Ltr. Rul. 200229050 (July 19, 2002); Internal Revenue Service Reg. Sec. 1.403(b)-9(a)(6).

Investment Company Act of 1940 to church benefit boards as well as to church plans, supports treating a church benefits board similarly to a church plan, and both as Special Entities under Dodd-Frank.

III. SWAP DEALER AS ADVISOR

A. Proposed Definition

Dodd-Frank provides that SDs that act as advisors to Special Entities are subject to a general antifraud prohibition, have a duty to act in the best interests of the Special Entity, and must make reasonable efforts to obtain information necessary to make a reasonable determination that any swap recommended is in the best interests of the Special Entity. The information that an SD must make reasonable efforts to obtain includes the financial and tax status, and the investment or financing objectives, of the Special Entity, as well as any other information that the CFTC may prescribe by rule or regulation.[11] The CFTC has proposed Regulation § 23.440 to establish requirements for SDs acting as advisors to special entities. For purposes of that section, the term "acts as an advisor to a Special Entity" would include where an SD recommends a swap or trading strategy that involves the use of swaps to a Special Entity. The term would not include an SD's provision of: (1) information to a Special Entity that is general transaction, financial, or market information; or (2) swap terms in response to a competitive bid request from the Special Entity. The CFTC's proposed definition does not address what it means to act as an advisor in connection with any other dealings between an SD and a Special Entity.[12]

B. Clarifications to Proposal

The Church Alliance believes that the CFTC should clarify whether providing certain required information makes an SD an advisor to a Special Entity. For example, the CFTC proposes to require that, at a reasonably sufficient time prior to entering into a high-risk complex bilateral swap with a Special Entity, an SD provide a scenario analysis designed in consultation with the Special Entity to allow the Special Entity to assess its potential exposure. The CFTC notes that the scenario analysis would apply when "high-risk complex bilateral swaps" are offered or recommended.[13] The CFTC should revise proposed Regulation 23.440(a) to make clear that an SD who provides the disclosures of material information required by proposed Regulation 23.431 for a high-risk complex bilateral swap that is offered, but not recommended, would not be considered to be an advisor to a Special Entity. We reiterate that, because swaps have not previously been subject to regulation in the United States and, therefore, there is a lack of precedent for parties and their counsel to rely upon in deciding whether particular transactions could be lawfully entered into, and because certain of the relevant terms in Dodd-Frank are ambiguous

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[11] New CEA Section 4s(h)(4).

[12] 75 Fed. Reg. 80637, at 80650.

[13] 75 Fed. Reg. 80637, at 80644.

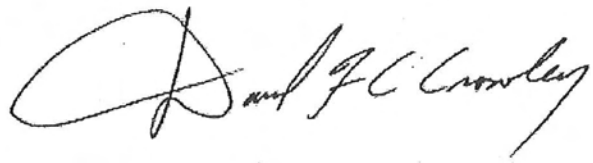
and could be interpreted in multiple ways, the CFTC should take this opportunity to exercise its authority under Dodd-Frank Section 721(b) to provide as much guidance as possible regarding what it means for an SD to act as an advisor to a Special Entity. That will serve the interests of both parties in having a clear understanding of rights and obligations in connection with particular swap transactions.

IV. CONCLUSION

The Church Alliance appreciates the opportunity to comment upon the proposed regulations that would establish business conduct standards for SDs and MSPs. We believe that the definition of the term "Special Entity" in these regulations should refer specifically to church plans and should include church benefits boards. Further, the CFTC should provide additional guidance as to when an SD is deemed to be acting as an advisor to a Special Entity.

We would welcome the opportunity to discuss our recommendations for revisions to the proposals in greater detail with Commissioners and staff at your convenience. Please feel free to contact the undersigned at 202-778-9447 if you have any questions or wish to discuss this matter further.

Sincerely,



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August 29, 2011

By Hand Delivery

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Proposed Regulations on Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, File Number S7-25-11

Dear Ms. Murphy:

INTRODUCTION

We are pleased to submit this comment letter, on behalf of the Church Alliance, regarding the regulations proposed by the Securities and Exchange Commission (SEC or Commission) on business conduct standards for security-based swap dealers and major security-based swap participants (collectively, SBS Entities).[1] Our comments are directed toward clarifying that "church plans" and the pension boards that maintain them are included within the definition of the term "Special Entity" for purposes of these regulations.[2]

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[1] 76 Fed. Reg. 42395 (July 18, 2011) (Proposing Release).

[2] A similar letter was filed on behalf of the Church Alliance in response to the proposed regulations of the Commodity Futures Trading Commission (CFTC) regarding business conduct standards for swap dealers and major swap participants with counterparties. The SEC indicated that it has taken into account the comments filed with the CFTC in developing its proposals and cites the Church Alliance letter. 76 Fed. Reg. 42395, at 42422 & n.182.

The Church Alliance is a coalition of thirty-seven (37) denominational benefit programs that provide pension and health benefits to more than one million clergy, lay workers, and their family members. These benefit programs are defined as "employee benefit plans" and "church plans" under Sections 3(3) and 3(33) of the Employee Retirement Income Security Act of 1974 (ERISA), respectively, and therefore, come within the definition of a "Special Entity" under Section 764(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which enacted a new Section 15F of the Securities Exchange Act of 1934 (Exchange Act) to govern the registration and regulation of SBS Entities. A church plan is thus an employee benefit plan as defined in Section 3(3) of ERISA.[3] Under ERISA Section 3(33)(C)(i), a church plan includes a plan maintained by an organization, the principal purpose or function of which is the administration or funding of a plan or program to provide retirement or welfare benefits for employees of a church or a convention or association of churches, if the organization is controlled by, or associated with, a church or a convention or association of churches. Church benefits boards, like those represented by the Church Alliance, are organizations described in ERISA Section 3(33)(C)(i).[4] A church benefits board is also (i) typically an organization described in Code Section 501(c)(3), (ii) an organization described in Code Section 414(e)(3)(A), which describes organizations that are permitted to administer or fund church plans, and (iii) exempt from treatment as an investment company pursuant to Section 3(c)(14) of the Investment Company Act of 1940. Our references throughout this letter to "church plans" should accordingly also be read to include church benefits boards.

To fulfill obligations to their beneficiaries, church plans invest in a wide variety of asset classes, and as part of their investment and risk management policies, they have authorized the use of certain derivatives. The authorized derivatives include futures, forwards, swaps, security-based swaps, structured notes, and options. Accordingly, the denominational benefits boards represented through the Church Alliance have an interest in the regulation of the security-based swap market.

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[3] ERISA Section 3(3) defines the term "employee benefit plan" to mean "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." An employee welfare benefit plan provides medical or other welfare benefits to participants and beneficiaries and an employee pension benefit plan provides retirement income to employees. *See* ERISA Sections 3(1)(A) and 3(2)(A)(i), respectively.

[4] Section 414(e)(3)(A) of the Internal Revenue Code of 1986, as amended (Code), is identical to ERISA section 3(33)(C)(i), and church pension boards are also sometimes referred to as Section 414(e)(3)(A) organizations.

DEFINITION OF SPECIAL ENTITY

Proposed Definition

New Exchange Act Section 15F(h) authorizes the SEC to adopt rules or regulations establishing general business conduct standards for SBS Entities. In addition, that section authorizes the SEC to adopt rules or regulations mandating enhanced duties for SBS Entities when acting as advisors or counterparties to "Special Entities." The term Special Entity is defined to include, among others, "any employee benefit plan, as defined in Section 3 of [ERISA]."[5] As noted by the SEC in the Proposing Release, the term Special Entity refers to any employee benefit plan as defined in Section 3 of ERISA, including employee benefit plans that are not subject to regulation under ERISA, such as church plans.[6]

Nevertheless, the SEC notes that comments submitted during the pre-proposal stage raised issues concerning possible ambiguities in the statutory definition of Special Entity. The SEC did not propose to clarify the Special Entity definition in the Proposing Release and the definition of that term in proposed Regulation § 240.15Fh-2 simply repeats the statutory language. However, in the Proposing Release, the SEC requests comments on the definition in general and on several specific issues, including:

- "Should the Commission interpret 'employee benefit plan, as defined in section 3' of ERISA to mean a plan that is subject to regulation under ERISA?"[7]; and
- "Should the Commission interpret 'special entity' to include a master trust holding the assets of one or more funded plans of a single employer and its affiliates?"[8]

Clarifications to Proposal

Treatment of Church Plans

In response to the specific question posed by the SEC, the Church Alliance recommends that the SEC revise the proposed definition of Special Entity to include a separate paragraph stating, "A plan defined as a church plan in Section 3(33) of Title I of the Employee Retirement In-

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[5] New Exchange Act Section 15F(h)(2)(C).

[6] 76 Fed. Reg. 42395, at 42421 & n. 178.

[7] *Id.* at 42422. In connection with the SEC's request for comments on this interpretive issue, there is a citation to the Church Alliance's comment letter to the CFTC requesting clarification that church plans and church benefits boards be included in the definition of Special Entity. *Id.* at 42422 & n.182.

[8] *Id.* at 42422.

come Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d)." Such a revision to the definition of Special Entity in proposed Regulation § 240.15Fh-2 would make clear what Congress intended to provide in Dodd-Frank, that church plans are Special Entities deserving of enhanced conduct by SBS Entities advising or entering into security-based swaps with them.

Accordingly, the answer to the question cited above is clearly *no*, the definition "employee benefit plan, as defined in Section 3 of ERISA" should *not* be limited to plans subject to regulation under ERISA. Because new Exchange Act Section 15F(h)(2)(C) uses the quoted language and the phrase "defined in" rather than the more limited phrase "subject to," the plain meaning of the statute is that any employee benefit plan defined in ERISA, including a church plan, should be treated as a Special Entity.[9] The Church Alliance submits that, as a matter of policy, church plans should not be treated differently than ERISA-covered plans and governmental plans when entering into security-based swaps with SBS Entities that would not be traded on registered national securities exchanges or registered swap execution facilities.[10]

Security-based swaps have not previously been subject to regulation in the United States and, therefore, there is a lack of precedent for parties and their counsel to rely upon in deciding whether it is lawful to enter into particular transactions. Moreover, some of the relevant terms in Dodd-Frank are ambiguous and could be interpreted in multiple ways. Consequently, the SEC should take this opportunity to exercise its authority under Dodd-Frank Section 764(a) so that the definition of the term Special Entity includes a paragraph stating "A plan defined as a church plan in Section 3(33) of Title I of the Employee Retirement Income Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d)." Such a clarification will help to ensure that individuals who dedicate their lives to working for religious institutions are not disadvantaged in terms of the treatment of their pensions or health benefits compared to other workers.

Treatment of Church Benefits Boards

The SEC also needs to clarify that the definition of a Special Entity includes church benefits boards that hold the assets of church plans, so that such organizations receive the protections afforded to Special Entities with respect to security-based swaps under the Exchange Act and the implementing regulations.

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[9] The only comment cited from the pre-proposal stage as specifically opposing treating church plans as Special Entities, the SIFMA/ISDA 2010 Letter, provides no explanation why the plain language of Dodd-Frank should not be followed in this regard.

[10] Proposed Regulation § 240.15Fh-5, pursuant to paragraph (c) thereof, would not apply to a security-based swap that is initiated on a registered national securities exchange or a registered security-based swap execution facility where the SBS Entity does not know the identity of the Special Entity.

The SEC should adopt a definition of the term Special Entity that makes clear that it includes a church benefits board that holds the assets of one or more church plans, church endowments, and other church-related funds on a commingled basis. Such a definition would be reflective of the close and unique relationship between church benefits boards and their constituent church plans, a relationship recognized in ERISA, the Code, and various federal securities laws.

Dodd-Frank provides that commercial end users should be able to conduct swap and security-based swap transactions largely as they have been accustomed to. We believe that religious organizations are deserving of similar treatment. Church denominations have organized themselves so that church pension boards are typically the entities that handle investments for the denomination's benefit plans and for other church assets, including church endowments. The use of church benefits boards is more administratively efficient, and such boards have greater resources, investment skills and market clout than the individual churches and other denominationally affiliated organizations that contribute to the boards.

The functions of a church benefits board are similar to those of a tax-exempt trust that is commonly used as the funding vehicle for a qualified private sector pension plan. Church benefits boards may also be likened to a master trust that is established by several multiple-employer pension plans. In the Proposing Release, the SEC requested comment on whether the interpretation of Special Entity should include a master trust holding the assets of one or more funded plans of a single employer and its affiliates, a parallel to the church benefits board context. The SEC, by making clear that a church benefits board is to be treated like a church plan and given Special Entity status, will provide guidance to fulfill the purposes of the regulation, while at the same time not attempting to dictate or micromanage how the religious denominations of the United States have chosen to structure themselves.

We note also that the ERISA plan asset rules themselves often "look through" commingled investment vehicles and, in such cases, subject such commingled investment vehicles to the same ERISA requirements that apply to the underlying plans. In addition, the legislative history under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) and the Internal Revenue Service regulations under Code Section 403(b) expressly recognize the right and authority of church benefits boards to hold, on a commingled basis for investment purposes, the assets of Code Section 401(a) qualified plans, Code Section 403(b) plans, and other non-plan church-related assets.[11] Further, the investment company exemption provided in Section 3(c)(14) of the Investment Company Act of 1940 to church benefits boards, as well as to church plans, supports treating a church benefits board similarly to a church plan, and both as Special Entities under Dodd-Frank.

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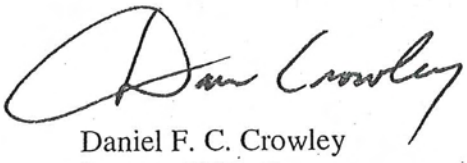
[11] TEFRA Conf. Rept. Pub. L. 97-248, 1982-2 C.B. 462, 524-5; Internal Revenue Service Pvt. Ltr. Rul. 200229050 (July 19, 2002); Internal Revenue Service Reg. Sec. 1.403(b)-9(a)(6).

CONCLUSION

The Church Alliance appreciates the opportunity to comment on the proposed regulations that would establish business conduct standards for SBS Entities. We believe that the definition of the term "Special Entity" in these regulations should refer specifically to church plans and should include church benefits boards.

We would welcome the opportunity to discuss our recommendations for revisions to the proposals in greater detail with Commissioners and staff at your convenience. Please feel free to contact me at 202-778-9447 if you have any questions or wish to discuss this matter further.

Sincerely,



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On Behalf of the Church Alliance

CHURCH ALLIANCE

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February 22, 2011

By Hand Delivery

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Re: Proposed Regulations on Further Definitions of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" – CFTC RIN 3038-AD06; SEC File Number S7-39-10

Dear Mr. Stawick and Ms. Murphy:

I. INTRODUCTION

On behalf of the Church Alliance, we are pleased to submit this comment letter regarding the regulations proposed by the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) (and collectively, Commissions) under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) to further define the terms "swap dealer," (SD) "security-based swap dealer," (SBSD) "major swap participant," (MSP) "major security-based swap participant," (MSBSP), and "eligible contract participant" (ECP).[1] Our comments are directed toward clarifying that: (1) "church plans" and their

[1] 75 Fed. Reg. 80173 (December 21, 2010) (Joint Release).

related church benefits boards are included within those entities, whose positions or contracts that are held for the primary purpose of hedging or mitigating any risk directly associated with plan operation, are *excluded* in determining whether the plans maintain a substantial position in swaps; and (2) church plans and certain related entities are not SDs or SBSDs.

The Church Alliance is a coalition of thirty-seven (37) denominational benefit programs that provide pensions and health benefits to more than one million clergy, lay workers, and their family members. These benefit programs are defined as "church plans" under Section 3 (33) of the Employee Retirement Income Security Act of 1974 (ERISA). A church plan is an employee benefit plan as defined in Section 3(3) of ERISA.[2] Under ERISA Section 3(33)(C)(i), a church plan includes a plan maintained by an organization, the principal purpose or function of which is the administration or funding of a plan or program to provide retirement or welfare benefits for employees of a church or a convention or association of churches, if the organization is controlled by, or associated with, a church or a convention or association of churches. Church benefits boards, like those represented by the Church Alliance, are organizations described in ERISA Section 3(33)(C)(i). A church benefits board is also (i) typically an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (Code), (ii) an organization described in Code Section 414(e)(3)(A), which describes organizations that are permitted to administer or fund church plans, and (iii) and exempt from treatment as an investment company pursuant to Section 3(c)(14) of the Investment Company Act. Our references throughout this letter to church plans should accordingly also be read to include church benefits boards.

To fulfill obligations to their beneficiaries, church plans invest in a wide variety of asset classes, and as part of their investment and risk management policies, they have authorized the use of certain derivatives. The authorized derivatives include futures, forwards, and swaps. Accordingly, the denominational benefits boards represented through the Church Alliance have an interest in the regulation of the swap market.

II. DODD-FRANK'S STATUTORY SCHEME

Dodd-Frank provides that the CFTC has jurisdiction over "swaps," and the SEC has jurisdiction over "security-based swaps." Dodd-Frank Sections 721 and 761 add to the Commodity Exchange Act (CEA) and the Securities Exchange Act of 1934 (Exchange Act) definitions of the terms SD, SBSD, MSP, and MSBSP. Dodd-Frank Section 712(d)(1) authorizes the CFTC and the SEC, in consultation with the Board of Governors of the Federal Reserve System, to further define the terms swap, security-based swap, security-based swap agreement, SD, SBSD, MSP, MSBSP, and ECP. Dodd-Frank Sections 721(b)(2) and 761(b)(2) provide additional au-

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[2] ERISA Section 3(3) defines the term "employee benefit plan" to mean "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." An employee welfare benefit plan provides medical benefits to participants and beneficiaries and an employee pension benefit plan provides retirement income to employees. *See* ERISA Sections 3(1)(A) and 3(2)(A)(i), respectively.

thority for the Commissions to further define these terms. The CFTC and SEC jointly published proposed regulations on December 21, 2010 that would further define the terms SD, SBSD, MSP, and MSBSP, and would amend the definition of the term ECP.

III. DEFINITIONS OF MSP/MSBSP

A. Proposed Definitions

The Commissions have proposed to define the terms MSP and MSBSP in proposed Regulations 1.3(qqq) and 240.3a67-1, respectively. The first prong of these proposed definitions provides that, in determining whether a person maintains a "substantial position" in swaps or security-based swaps, "positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of Section 3 of [ERISA] for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan," shall be excluded.[3] The proposed definitions track the statutory language essentially verbatim. The Commissions also request comment in the Joint Release on whether that exclusion should be available to different types of entities.[4]

B. Clarifications to Proposals

1. Treatment of Church Plans

The Church Alliance recommends that the Commissions revise the proposed definitions of MSP and MSBSP by replacing the phrase "paragraphs (3) and (32)" with the phrase "paragraphs (3), (32), and (33)." Because the term "church plans" is defined in paragraph (33) of Section 3 of ERISA, the recommended clarification should leave no doubt that, for purposes of excluding positions and contracts from the first test of the MSP/MSBSP definition, all employee benefit plans should be treated similarly, whether the plans are for workers in the private sector, government, or churches and church-affiliated denominational employers. The Church Alliance believes that Congress did not mean to discriminate against church plans in this regard, and this Congressional intent is evident by the fact that Congress used the phrase "as defined" rather than the narrower phrase "subject to" ERISA. Nevertheless, we are concerned that a regulatory body or a reviewing court could misinterpret Congressional intent if there is no specific reference to church plans in the regulatory text of the definitions and there is such a reference to governmental plans.[5]

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[3] Proposed CFTC Regulation 1.3(qqq)(1)(ii)(A) and SEC Regulation 240.3a67-1(a)(2)(i).

[4] 75 Fed. Reg. 80173, at 80201.

[5] If the Commissions for some reason determine that they do not want to make a specific reference to paragraph (33) of Section 3 of ERISA in the regulatory text, the Commissions should

We note that the CFTC has recognized this issue in the context of its separate rulemaking proposing business conduct standards for SDs and MSPs, which contains a definition of the term "Special Entity" for those purposes that also refers to any employee benefit plan defined in Section 3 of ERISA and any governmental plan as defined in the same section.[6] In the other rulemaking, the CFTC states, in the preamble of the *Federal Register* release announcing those proposals, that employee benefit plans defined in Section 3 cover more than plans that are "subject to" ERISA, and specifically refers to church plans.[7] The CFTC notes, however, that certain commenters in the pre-proposal stage found the authorizing provision in Dodd-Frank[8] to be ambiguous and, therefore, the CFTC specifically requested comment regarding whether the phrase "employee benefit plans, as defined in Section 3 of ERISA," should be clarified in any way.[9] The Church Alliance believes that the employee benefit plans that are eligible for the exclusion in the first test of the MSP/MSBSP definitions also needs to be clarified to specifically reference church plans, as described above. The clarification takes on added importance in the MSP/MSBSP context, because the Joint Release contains no similar discussion to that contained in the release announcing the business conduct standards for SDs and MSPs.

The Church Alliance recommends that the requested clarification to the MSP/MSBSP definitions described above be included in the regulatory text of the definitions. This will enhance legal certainty and eliminate any need for persons relying on the exclusion of positions and contracts to scour the *Federal Register* to divine the intended meaning of the phrase "employee benefit plan." Including the revised phraseology expressly within the regulatory text itself is especially important given the number of rulemakings necessary to implement Dodd-Frank and the length and complexity of the various *Federal Register* notices involved in that process.

The recommended revisions discussed above also would make the definitions of the terms MSP and MSBSP consistent with CFTC Regulation 4.5, which excludes various employee

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make clear, preferably in the regulatory text but at least in the preamble, that employee benefit plans defined in ERISA Section 3(3) include church plans.

[6] 75 Fed. Reg. 80637 (December 22, 2010). The Church Alliance will file a separate comment letter addressing that rulemaking.

[7] 75 Fed. Reg. 80637, at 80649 & n.89.

[8] Dodd-Frank Section 731 added a new CEA Section 4s to govern the registration and regulation of SDs and MSPs. The "Special Entity" definition is set forth in new CEA Section 4s(h)(2)(C), and employee benefit plans generally, and governmental plans specifically, are referred to in subparagraphs (iii) and (iv), respectively. *See also*, proposed CFTC Regulation 23.401, 75 Fed. Reg. 80637, at 80657.

[9] 75 Fed. Reg. 80637, at 80649.

benefit plans from being construed as commodity pools, and has separate paragraphs excluding, among others, "governmental plans" and "church plans."[10]

Further, as the Commissions stated, "the appropriateness of these proposals [regarding definitions of swap entities] should be considered in light of the substantive requirements that will be applicable to dealers and major participants, including capital, margin and business conduct requirements."[11] Any reasonable assessment of the proposed MSP/MSBSP definition in light of these other requirements clearly demonstrates that such requirements are inappropriate and unnecessary for church plans, as is the case for other employee benefit plans, and the proposed MSP/MSBSP definitions should be revised to ensure that result. The concomitant costs associated with registration and the other requirements applicable to MSPs/MSBSPs would be an undue and unnecessary burden for church plans, which would only serve to diminish the benefits available to beneficiaries of such plans. That would certainly not serve the interests of such beneficiaries or the public interest. In addition, the Church Alliance submits that, in the proposed business conduct standards for SDs and MSPs referred to above, church plans should be treated as Special Entities when dealing with or being advised by SDs and MSPs, which would afford church plans enhanced protections in those circumstances.[12] It would therefore be an anomalous result to classify church plans as MSPs or MSBSPs, and make them subject to substantial business conduct requirements, when church plans should be designated as Special Entities and thus entitled to be the *beneficiaries* of such extra protection.

One of the concerns that led to the enactment of the MSP/MSBSP provisions in Dodd-Frank is systemic risk. Church plans' activities in swap and security-based swap transactions did not present systemic risk in the past and do not present such risk now. It is difficult to envision how they could ever present such risk, but if the Commissions have such concerns, the other two prongs of the MSP/MSBSP definitions, which address "substantial counterparty exposure" and "highly leveraged financial entities," should be sufficient to cover any entity that presents true systemic risk.

Swaps have not previously been subject to regulation in the United States and, therefore, there is a lack of precedent for parties and their counsel to rely upon in deciding whether it is lawful to enter into particular transactions. Moreover, some of the relevant terms in Dodd-Frank are ambiguous and could be interpreted in multiple ways. Consequently, the Commissions should take this opportunity to exercise their authority under Dodd-Frank Sections 712(d)(1), 721(b)(2) and 761(b)(2) to clarify the definitions of MSP and MSBSP so that church plans and their related church benefits boards may exclude from the consideration as to whether they are

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[10] *See* 17 C.F.R. § 4.5 (a)(4)(iii) and (v).

[11] 75 Fed. Reg. 80173, at 80175 & n.8.

[12] The Church Alliance has asserted that position in its separate comment letter on the business conduct standards rulemaking.

maintaining a substantial position in swaps or security-based swaps, those positions and contracts that are maintained for the primary purpose of hedging or mitigating any risk directly associated with plan operations. Such a clarification will help to assure that individuals who dedicate their lives to working for religious institutions are not disadvantaged in terms of the treatment of their pensions or health benefits compared to other workers.

2. *Treatment of Church Benefits Boards*

The Commissions also need to clarify that church benefits boards that hold the assets of church plans are treated like church plans for purposes of the MSP/MSBSP definitions. The Commissions should include language in the regulatory text of the MSP/MSBSP definitions that makes it clear that the provision permitting exclusion of swap positions that constitute hedging or risk mitigation also applies to a church benefits board that holds the assets of multiple church plans, church endowments, and other church-related funds on a commingled basis. Such regulatory text would be reflective of the close and unique relationship between church benefits boards and their constituent church plans, a relationship recognized in both ERISA and the Code.

Dodd-Frank provides that commercial end users should be able to conduct swap transactions largely as they have been accustomed to. Church denominations have organized themselves so that church pension boards are typically the entities that handle investments for the denomination's benefit plans and for other church assets, including church endowments. The use of church benefits boards is more administratively efficient, and such boards have greater resources, investment skills and market clout than the individual churches and other denominationally affiliated organizations that contribute to the boards.

The functions of a church benefits board are similar to those of a tax-exempt trust that is commonly used as the funding vehicle for a qualified private sector pension plan. Church benefits boards may also be likened to a master trust that is established by several multiple-employer pension plans. The CFTC has previously provided relief to the trustees of such a master trust that is similar to the relief available to trustees of individual pension plans,[13] providing a precedent for the church benefits board context. The Commissions, by making clear that a church benefits board is to be treated like a church plan when defining the terms MSP and MSBSP, will provide guidance that is consistent with the purposes of the regulations, while at the same time not attempting to dictate or micromanage how the religious denominations of America have chosen to structure themselves.

We note also that the ERISA plan asset rules themselves often "look through" commingled investment vehicles and, in such cases, subject such commingled investment vehicles to the

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[13] CFTC Staff Letter 86-8, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) § 23,014 (April 4, 1986). Although that letter was issued almost 25 years ago, it has been cited favorably within the last year. *See* CFTC Staff Letter 10-06, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) § 31,557, at 64,025 & n.11 (March 29, 2010).

same ERISA requirements as apply to the underlying plans. In addition, the legislative history under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) and the Internal Revenue Service regulations under Code Section 403(b) expressly recognize the right and authority of church benefits boards to hold, on a commingled basis for investment purposes, the assets of Code Section 401(a) qualified plans, Code Section 403(b) plans, and other non-plan church-related assets.[14] Further, the investment company exemption provided in Section 3(c)(14) of the Investment Company Act of 1940 to church benefits boards as well as to church plans, supports treating a church benefits board similarly to a church plan, for purposes of the exclusion of hedging and risk mitigation positions from the first test of the MSP/MSBSP definitions.

IV. SD/SBSD DEFINITIONS

A. Proposed Definitions

The Commissions propose to further define the terms SD and SBSD. Among other things, a person would be deemed to be an SD or SBSD if the person "[r]egularly enters into swaps [security-based swaps] with counterparties as an ordinary course of business for its own account."[15] An exception to the definitions is provided for "a person that enters into swaps [security-based swaps] for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business."[16]

B. Clarifications to Proposal

1. Adding a Hedging/Risk Mitigation Exception

The SD/SBSD definitions should expressly state that the terms do not include any employee benefit plans, including church plans, with respect to any swap they enter into for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan. If hedging or risk mitigation activity could bring an employee benefit plan, including church plans, within the SD/SBSD definitions, they would be forced to reduce the use of swaps and security-based swaps for hedging and risk mitigation, rather than risk being required to comply with the onerous regulatory requirements for SDs and SBSDs. In the case of church plans, compliance with those requirements not only are costly in their own right, but are wholly incompatible with the demands of operating an employee benefit plan to secure maximum returns for beneficiaries. Discouraging hedging and risk mitigation is clearly contrary to Dodd-Frank's in-

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[14] TEFRA Conf. Rept. Pub. L. 97-248, 1982-2 C.B. 462, 524-5; Internal Revenue Service Pvt. Ltr. Rul. 200229050 (July 19, 2002); Internal Revenue Service Reg. Sec. 1.403(b)-9(a)(6).

[15] Proposed CFTC Regulation 1.3(ppp)(1)(iii) and SEC Regulation 240.3a71-1(a)(3).

[16] Proposed CFTC Regulation 1.3(ppp)(2) and SEC Regulation 240.3a71-1(b).

tent, as well as the public interest and the interests of workers who depend upon pensions for retirement income.

2. *"Regular Business" Exception*

The "*Exception*" in proposed CFTC Regulation 1.3(ppp)(2) and SEC Regulation 240.3a71-1(b) that "[t]he term 'swap dealer' [*security based swap dealer*] does not include a person that enters into swaps [security-based swaps] for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business," should be clarified by inserting the words "swap dealing" and "security-based swap dealing," respectively, between the words "regular" and "business." Without this clarification, the exception's plain terms fail to exclude *on their face* the hedging and risk management activity of employee benefit plans. Church plans enter into swaps and security-based swaps for the purpose of hedging or mitigating risks directly associated with plan operations and as an integral part of their "regular business," *i.e.*, maximizing the pensions and health benefits available to their beneficiaries.

The clarification is necessary to better reflect the Commissions' intent in the plain terms of the regulatory definitions and to eliminate the legal risk of future indiscriminate application of the definitions. Failing to eliminate that risk will harm employee benefit plans, including church plans, as well as swap and security-based swap markets, because that legal risk would cause employee benefit plans to diminish their use of swaps and security-based swaps to avoid the extensive costs of compliance with the regulatory requirements applicable to SDs and SBSDs.

Further, as we discussed above in the context of the MSP/MSBSP definitions, the proposed business conduct standards for SDs and MSPs should be clarified to treat church plans as Special Entities when dealing with or being advised by SDs and MSPs, which would afford church plans enhanced protections in those circumstances. It would therefore be an anomalous result to classify church plans as SDs or SBSDs, and make them subject to substantial business conduct requirements, when church plans should be designated as Special Entities and thus entitled to be the *beneficiaries* of such extra protection.

V. CONCLUSION

The Church Alliance appreciates the opportunity to comment upon the proposed regulations that would further define the terms SD, SBSD, MSP, and MSBSP. We believe that the exclusion available in the MSP/MSBSP definitions for hedging and risk mitigation positions of employee benefit plans should refer specifically to church plans and should also refer to church benefits boards. Further, the Commissions should clarify the definitions of SD and SBSD to make sure that the hedging and risk mitigation activities of employee benefit plans, including church plans, do not inadvertently sweep those plans into the definitions.

We would welcome the opportunity to discuss our recommendations for revisions to the proposals in greater detail with Commissioners and staff at your convenience. Please feel free to

contact the undersigned at 202-778-9447 if you have any questions or wish to discuss this matter further.

Sincerely,

Daniel F. C. Crowley
Partner, K&L Gates
On Behalf of the Church Alliance

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April 6, 2011

By Hand Delivery

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Re: Proposed Regulations Concerning the End User Exception to Mandatory Clearing of Swaps, RIN 3038—AD10

Dear Mr. Stawick:

I. INTRODUCTION

We are pleased to submit this comment letter, on behalf of the Church Alliance, regarding the regulations proposed by the Commodity Futures Trading Commission (CFTC or Commission) concerning the end user exception to mandatory clearing of swaps.[1] Our comments are directed toward clarifying that "church plans" and the pension boards that maintain them are included within the definition of the term "financial entity" for purposes of these regulations.

The Church Alliance is a coalition of thirty-seven (37) denominational benefit programs that provide pensions and health benefits to more than one million clergy, lay workers, and their family members. These benefit programs constitute "employee benefit plans" and "church plans" as defined under Sections 3(3) and 3(33) of the Employee Retirement Income Security Act of 1974 (ERISA), respectively, and therefore come within the definition of a "financial entity" under Section 723(a)(3) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which enacted a new Section 2(h) of the Commodity Exchange Act (CEA or Act) that will become effective in July 2011 to govern clear-

[1] 75 Fed. Reg. 80747 (December 23, 2010) (Proposing Release).

ing of swaps. A church plan is an employee benefit plan as defined in Section 3(3) of ERISA.[2] Under ERISA Section 3(33)(C)(i), a church plan includes a plan maintained by an organization, the principal purpose or function of which is the administration or funding of a plan or program to provide retirement or welfare benefits for employees of a church or a convention or association of churches, if the organization is controlled by, or associated with, a church or a convention or association of churches. Church benefits boards, like those represented by the Church Alliance, are organizations described in ERISA Section 3(33)(C)(i).[3] A church benefits board is also (i) typically an organization described in Code Section 501(c)(3), (ii) an organization described in Code Section 414(e)(3)(A), which describes organizations that are permitted to administer or fund church plans, and (iii) exempt from treatment as an investment company pursuant to Section 3(c)(14) of the Investment Company Act. Our references throughout this letter to church plans should accordingly also be read to include church benefits boards.

To fulfill obligations to their beneficiaries, church plans invest in a wide variety of asset classes, and as part of their investment and risk management policies, they have authorized the use of certain derivatives. The authorized derivatives include futures, forwards, and swaps. Accordingly, the church plans and denominational benefits boards represented through the Church Alliance have an interest in the regulation of the swap market.

II. END USER EXCEPTION TO MANDATORY SWAP CLEARING

A. Proposed Regulation

New CEA Section 2(h)(7) provides an elective exception to the mandatory clearing requirement of new CEA Section 2(h)(1) if one party to a swap (i) is not a "financial entity"; (ii) uses swaps to hedge or mitigate commercial risk; and (iii) notifies the CFTC how it generally meets its financial obligations for non-cleared swaps. For purposes of that provision, a financial entity includes, among others, "an employee benefit plan as defined in paragraphs (3) and (32) of [ERISA]."[4] The CFTC has proposed to implement

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[2] ERISA Section 3(3) defines the term "employee benefit plan" to mean "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." An employee welfare benefit plan provides medical or other welfare benefits to participants and beneficiaries and an employee pension benefit plan provides retirement income to employees. *See* ERISA Sections 3(1)(A) and 3(2)(A)(i), respectively.

[3] Section 414(e)(3)(A) of the Internal Revenue Code of 1986, as amended (Code), is identical to ERISA section 3(33)(C)(i), and church pension boards are also sometimes referred to as Section 414(e)(3)(A) organizations.

[4] New CEA Section 2(h)(7)(C)(i)(VII).

this provision by revising its Regulation 39.6. Proposed Regulation 39.6(a) would provide that the exception to mandatory clearing of swaps is available if one party to the swap "is not a 'financial entity' as defined in Section 2(h)(7)(C)(i) of the Act, is using the swap to hedge or mitigate commercial risk as defined in § 39.6(c), and provides . . . the information specified in § 39.6(b)." One of the pieces of information to be provided is "[w]hether the electing counterparty is a 'financial entity' as defined in section 2(h)(7)(C)(i) of the Act."[5]

Understandably, the CFTC has focused its attention in proposed Regulation 39.6 on the types of companies one might readily think of when considering the so-called "commercial end user exemption," such as those companies that manufacture or produce goods and services. There is scant discussion of the financial entities that are *not* eligible for the clearing exception, such as the employee benefit plans referred to above.[6] The Church Alliance respectfully requests that the CFTC clarify Regulation 39.6 so that church plans are included within the definition of the term financial entity for purposes of the regulation and, therefore, subject generally to the requirement for mandatory clearing of swaps.

The Church Alliance notes that the phrase "employee benefit plan . . . as defined in paragraphs (3) and (32) of section 3 of [ERISA]" appears in the major swap participant definition,[7] and similar phraseology may be found in the definition of the term "Special Entity."[8] The term Special Entity is relevant for purposes of determining what business conduct standards would have to be followed by swap dealers and major swap participants who deal with or advise such an entity about swaps, and the term is defined to include, among others, "any employee benefit plan, as defined in Section 3 of [ERISA]."[9] As noted by the CFTC in the preamble of the *Federal Register* release announcing the proposed business conduct standards, because Dodd-Frank, in defining a Special Entity,

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[5] Proposed Regulation 39.6(b)(2).

[6] *See* 75 Fed. Reg. 80747, at 80748 & n.7, 80750.

[7] Dodd-Frank Section 721(a)(16), which added a new Section 1a(33) to the CEA. The CFTC has proposed to further define the term major swap participant, and the Church Alliance has filed a separate comment letter on that rulemaking. 75 Fed. Reg. 80173 (December 21, 2010).

[8] New CEA Section 4s(h)(2)(C)(iii) and (iv), added by Dodd-Frank Section 731. The CFTC has proposed to implement the business conduct standards authorized by that statutory provision in a separate rulemaking for which the Church Alliance also has filed a separate comment letter. 75 Fed. Reg. 80637 (December 22, 2010).

[9] New CEA Section 4s(h)(2)(C)(iii).

refers to any employee benefit plan as *defined in* Section 3 of ERISA, the term includes employee benefit plans that are not *subject to* regulation under ERISA, such as church plans.[10]

Nevertheless, the CFTC also noted when proposing the business conduct standards that several letters were submitted during the pre-proposal stage that raised issues concerning possible ambiguities in the statutory definition of Special Entity and, therefore, the CFTC specifically requested comment regarding whether the phrase "employee benefit plans, as defined in Section 3 of ERISA," should be clarified in any way.[11] The Church Alliance believes that the provision in Regulation 39.6 that treats employee benefit plans as financial entities, so that they are therefore ineligible for the exception from mandatory clearing of swaps, also needs to be clarified to specifically reference church plans. The clarification takes on added importance in the mandatory clearing context, because the Proposing Release contains no similar employee benefit plan discussion to that contained in the release announcing the proposed business conduct standards for swap dealers and major swap participants and discussed above.

B. Clarifications to Proposal

1. Treatment of Church Plans

The Church Alliance recommends that the CFTC revise proposed Regulation 39.6 by: (1) redesignating the proposed paragraph (a) as paragraph (a)(1); and (2) adding a paragraph (a)(2) stating, "For purposes of this section, a financial entity as defined in Section 2(h)(7)(C)(i) of the Act includes a plan defined as a church plan in Section 3(33) of Title I of the Employee Retirement Income Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d)." This revision would make the definition of financial entity for purposes of Regulation 39.6 consistent with CFTC Regulation 4.5, which excludes various employee benefit plans from being construed as commodity pools, and has separate paragraphs excluding, among others, "governmental plans" and "church plans."[12]

Such a revision to the proposed definition will make clear what Congress intended to provide in Dodd-Frank, that church plans should be subject to the mandatory clearing requirement for swaps. A requirement for swaps to be cleared through central counterparties is one of the ways that Dodd-Frank intends to reduce systemic risk, a goal that the Church Alliance supports. The Church Alliance submits that, as a matter of policy,

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[10] 75 Fed. Reg. 80637, at 80649 &n.89.

[11] 75 Fed. Reg. 80637, at 80649.

[12] *See* 17 C.F.R. § 4.5 (a)(4)(iii) and (v).

church plans should treated consistently with ERISA-covered plans and governmental plans with respect to the mandatory clearing requirement and other aspects of Dodd-Frank and the regulations thereunder.

Swaps have not previously been subject to regulation in the United States and, therefore, there is a lack of precedent for parties and their counsel to rely upon in deciding whether it is lawful to enter into particular transactions. Moreover, some of the relevant terms in Dodd-Frank are ambiguous and could be interpreted in multiple ways. Consequently, the CFTC should take this opportunity to exercise its authority under Dodd-Frank Section 721(b)[13] so that the definition of the term financial entity in Regulation 39.6 includes a paragraph encompassing a plan defined as a church plan. Such a clarification will help to assure that individuals who dedicate their lives to working for religious institutions are not disadvantaged in terms of the treatment of their pensions or health benefits compared to other workers.

2. Treatment of Church Benefits Boards

The CFTC further needs to clarify that the definition of a financial entity for purposes of new CEA Section 2(h)(7) and CFTC Regulation 39.6 includes church benefits boards that hold the assets of church plans, so that such organizations will also be subject to the mandatory clearing requirement for swaps. When the CFTC proposed business conduct standards for swap dealers and major swap participants, it also requested comment on the following specific issues:

> "Should the Commission 'look through' an entity to determine whether it is a Special Entity for the purposes of these rules? If so, why? If not, why not? If so, should the Commission clarify that master trusts, or similar entities, that hold assets of more than one pension plan from the same plan sponsor are within the definition of Special Entity?"[14]

The CFTC should adopt a definition of the term financial entity in Regulation 39.6 that makes clear that it includes a church benefits board that holds the assets of one or more church plans, church endowments, and other church-related funds on a commingled basis. Appropriate language for this purpose could be added to the text of the new paragraph (a)(2) of Regulation 39.6 recommended by the Church Alliance and discussed above. Such a definition would be reflective of the close and unique relationship be-

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[13] Dodd-Frank Section 721(b) authorizes the CFTC to adopt a rule to define any term included in an amendment to the CEA made by Dodd-Frank Title VII, Subtitle A.

[14] 75 Fed. Reg. 80637, at 80649.

tween church benefits boards and their constituent church plans, a relationship recognized in both ERISA and the Code.

The functions of a church benefits board are similar to those of a tax-exempt trust that is commonly used as the funding vehicle for a qualified private sector pension plan. Church benefits boards may also be likened to a master trust that is established by several multiple-employer pension plans. The CFTC has previously provided relief to the trustees of such a master trust similar to the relief available to trustees of individual pension plans,[15] providing a precedent for the church benefits board context. The CFTC, by making clear that a church benefits board is to be treated like a church plan and given financial entity status for purposes of new CEA Section 2(h)(7) and CFTC Regulation 39.6, will provide guidance to fulfill the purposes of the regulation, while at the same time not attempting to dictate or micromanage how the religious denominations of America have chosen to structure themselves.

We note also that the ERISA plan asset rules themselves often "look through" commingled investment vehicles and, in such cases, subject such commingled investment vehicles to the same ERISA requirements as apply to the underlying plans.[16] In addition, the legislative history under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) and the Internal Revenue Service regulations under Code Section 403(b) expressly recognize the right and authority of church benefits boards to hold, on a commingled basis for investment purposes, the assets of Code Section 401(a) qualified plans, Code Section 403(b) plans, and other non-plan church-related assets.[17] Further, the investment company exemption provided in Section 3(c)(14) of the Investment Company Act of 1940 to church benefits boards as well as to church plans, supports treating a

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[15] CFTC Staff Letter 86-8, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) § 23,014 (April 4, 1986). Although that letter was issued almost 25 years ago, it has been cited favorably within the last year. *See* CFTC Staff Letter 10-06, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) § 31,557, at 64,025 & n.11 (March 29, 2010).

[16] Department of Labor regulations provide that, except where the underlying entity is an investment company registered under the Investment Company Act of 1940, when an employee benefit plan acquires or holds an interest in (i) a group trust exempt from taxation under Code Section 501(a) pursuant to the principles of Rev. Rul. 81–100, 1981–1 C.B. 326, as modified by Rev. Rul. 2011-1, 2011-2 I.R.B. 251, or (ii) a common or collective trust fund of a bank, plan assets include the plan's investment and an undivided interest in each of the underlying assets of the collective investment entity. 29 C.F.R. § 2510.3-101(h)(1)(i) and (ii).

[17] TEFRA Conf. Rept. Pub. L. 97-248, 1982-2 C.B. 462, 524-5; Internal Revenue Service Pvt. Ltr. Rul. 200229050 (July 19, 2002); Internal Revenue Service Reg. Sec. 1.403(b)-9(a)(6).

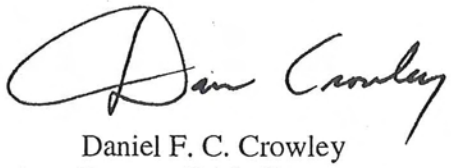
church benefits board similarly to a church plan, and both as financial entities under Dodd-Frank Section 723.

III. CONCLUSION

The Church Alliance appreciates the opportunity to comment upon the proposed regulations that would implement the end user exception to mandatory clearing of swaps. We believe that the definition of the term "financial entity" in these regulations should refer specifically to church plans and should include church benefits boards.

We would welcome the opportunity to discuss our recommendations for revisions to the proposals in greater detail with Commissioners and staff at your convenience. Please feel free to contact the undersigned at 202-778-9447 if you have any questions or wish to discuss this matter further.

Sincerely,



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On Behalf of the Church Alliance