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September 26, 2011

Mr. David Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

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

Re: Acceptance of Public Submissions for a Study on International Swap Regulation Mandated by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act [Release No. 34–64926; File No. 4–635]

Dear Mr. Stawick and Ms. Murphy:

The International Swaps and Derivatives Association, Inc. ("ISDA") is writing in response to the Commodity Futures Trading Commission's ("CFTC") and Securities and Exchange Commission's ("SEC" and, collectively, the "Commissions") request for comment on issues related to your study of international swap regulation ("Request").

Since 1985, ISDA has worked to make the global over-the-counter ("OTC") derivatives markets safer and more efficient. Today, ISDA is one of the world's largest global financial trade associations, with over 800 member institutions from 56 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers.

We have attached a chart responding to the questions posed in the Commissions' request. For purposes of the regulatory comparisons, we have provided information regarding current and proposed derivatives legislation/regulation in the United States, the European Union, Japan, Hong Kong and Singapore.

However, we feel it is important to reiterate our concerns regarding the overall scope of international swap regulation, in particular the problems posed by disparate application of new regulatory standards. ISDA has expressed its concerns regarding this issue in recent regulatory

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comment letters (see attached) and in Congressional testimony and we have highlighted similar concerns in Section F of the Commissions' Request.[1]

In particular, we would like to stress that ISDA and its members completely support and are committed to a robust regulatory framework for OTC derivatives – one that creates level playing fields across borders for all market participants. In keeping with this support, ISDA will continue to play a leadership role in implementing important aspects of new regulatory frameworks, such as efforts related to clearing and the establishment of trade repositories.

It is important, however, to remain cognizant of the fact that the lack of consensus between policymakers on issues such as trading requirements, standards for market participants, and other fundamental issues may create an unlevel playing field and lead to regulatory arbitrage opportunities and, potentially, the movement of business and entities across jurisdictional borders. These dangers are especially concerning in instances where one jurisdiction may be moving more quickly to implement such reforms than others, creating temporary arbitrage opportunities and allowing other jurisdictions to improve upon or forego aspects of the regulatory regime.

It is evident that we are entering a new era of finance and financial regulation. ISDA supports public policy and industry efforts to build a more robust, stable financial system in which safe, efficient OTC derivatives markets enable more effective risk, investment and financial management. However, these efforts must be balanced with the need to ensure the continued competitiveness of the existing financial markets.

The best way to avoid this outcome is for the regulators from all jurisdictions to achieve a convergence of the rule sets and a convergence of the timelines for implementation, thereby reducing the impact of any temporary or permanent regulatory differences between the various jurisdictions and mitigating the damage that these differences will cause.

The attached chart provides ISDA's responses to sections A (status of regulation), B (regulatory requirements for market participants) and F (regulatory comparison) of the Commissions' request. We believe CCPs, data repositories and execution platforms/markets are best positioned to comment on sections C-E and G.

* * *

ISDA appreciates the opportunity to provide these comments. Should you require further information, please do not hesitate to contact me or my staff.

Sincerely,

Robert Pickel
Executive Vice Chairman

[1] See attached ISDA letter regarding "Proposed rules: Registration of Swap Dealers and Major Swap Participants," January 24, 2011, joint trade association letter to Treasury Secretary Geithner and EC Commissioner Barnier regarding "Extra-territorial effects in EU and U.S. regulation of derivatives," July 5, 2011 and testimony of ISDA Chairman Stephen O'Connor before the U.S. House of Representatives Committee on Financial Services, June 16, 2011.

	United States	European Union	Japan	Hong Kong	Singapore
A. Status of Regulation					
1. Please provide the name of the jurisdiction being commented upon.	United States	European Union (The comments below relate to legislation and regulation being introduced at an EU level. We do not discuss legislation or regulatory initiatives of individual member states.)	Japan	Hong Kong	Singapore
2. Does the jurisdiction have a legal definition of the term “swap”, “security-based swap”, or other similar term or terms (hereinafter referred to as a “Swap” or “Swaps”)? If so, please provide such definition(s).	Swap: Commodity Exchange Act - 7 U.S.C. §1a(47) Security-Based Swap ("SBS"): Securities Exchange Act of 1934 - 15 U.S.C. §78c(a)(68)	The Markets in Financial Instruments Directive ("MiFID") Annex 1 Section C numbers (4) to (10) includes certain derivatives contracts within the definition of financial instruments. These are: (4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash; (5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event); (6) Options, futures, swaps, and any other derivative contract relating to commodities that can by physically settled provided that they are traded on a regulated market and/or MTF; (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can by physically settled not otherwise mentioned in section (6) and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognized clearing houses or are subject to regular margin calls; (8) Derivative instruments for the transfer of credit risk: (9) Financial contracts for differences; (10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognized clearing houses or are subject to regular margin calls. Further elaboration of these definitions is set out in the European Commission regulation implementing MiFID (articles 38-39). The proposed EU Regulation on OTC Derivatives ("EMIR") proposes to define "derivatives" and "derivative contracts" to mean the above categories of derivatives contracts. See also question 3 below.	Financial Instruments and Exchange Act ("FIEA") defines "Derivative Transactions" in Articles 2-20 as: (1) market transactions of derivatives (exchange traded derivatives defined in Article 2-21); (2) OTC transactions of derivatives (defined in Article 2-22); or (3) foreign market derivatives transactions (defined in Article 2-23). Generally, "Derivative Transactions" include futures/forwards, swaps or options on "Financial Instruments" or "Financial Indicators". The term Financial Instruments is defined to include securities, currency, monetary claims etc. The term Financial Indicators includes prices, rates etc. of a Financial Instrument, weather and economic indicators and indices, prices and indices relating to property etc. "Securities Related Derivative Transactions" are defined in Article 28, paragraph 8, item 6 to mean, broadly speaking, Derivative Transactions related to Securities. Financial Instruments and Financial Indicators specifically exclude from its scope "commodities" and "commodities index" defined in the Commodity Derivatives Act. Commodity Derivatives Act defines "Commodity Derivative Transactions" in Article 2, paragraph 15 to mean: (1) transactions on a commodity market (Article 2, paragraph 10); (2) OTC commodity derivatives transactions (Article 2, paragraph 14); or (3) foreign commodity market transactions (Article 2, paragraph 13). "Commodity" is defined to include: agricultural, forestry, livestock and fishery products, and minerals and refined products thereof. "Commodity Index" is defined as the numerical value derived from the level or difference of prices of two or more Commodities.	No definition	No definition.

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3. Are Swaps are included within the scope of any statute, regulation, or other legal requirement in the jurisdiction?	Provisions related to swaps are primarily included in the Commodity Exchange Act and Securities Exchange Act, although references may be in other statutes (e.g., Federal Bankruptcy Code, Federal Deposit Insurance Act)	The principal existing EU legislation which is **already fully in force** covering derivatives is as follows: MiFID: requires member states to impose (among other things) authorization requirements and prudential and conduct of business rules on persons who provide investment services or conduct investment activities (including acting as a dealer) in relation to derivatives (whether traded on a regulated market or multilateral trading facility or over the counter). It also covers regulated markets and multilateral trading facilities that provide trading facilities for derivatives. The Market Abuse Directive ("MAD"): requires member states to prohibit insider dealing and market manipulation in relation to financial instruments admitted to trading on an EU regulated market and financial instruments whose price or value depends on a financial instrument so admitted. The definition of financial instruments for these purposes differs from that in MiFID but covers certain derivative contracts. The Banking Consolidation Directive and Capital Adequacy Directive (collectively, "CRD"): require member states to impose (among other things) risk-based capital requirements and large exposure restrictions on credit institutions (banks) and investment firms regulated under MiFID on both an individual and consolidated basis, including in relation to their derivatives activities. There is also existing legislation imposing prudential requirements on insurance companies that has an effect on their use of derivatives. The EU directives on undertakings for the collective investment in securities ("UCITS"): regulates the use by regulated funds of derivatives contracts. There is other legislation which also has an impact on the use of derivatives, such as the Financial Collateral Directive.	FIEA, Commodity Derivatives Act	Not expressly.	No.

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a. If not, is the jurisdiction planning to or considering whether to regulate, or to modify regulation of, Swaps?		The principal EU legislative initiatives affecting the regulation of derivatives are as follows: EMIR: When it is adopted and comes into force, EMIR will introduce requirements on market participants to clear OTC derivatives, to report derivatives to trade repositories and to adopt risk mitigation techniques in relation to uncleared OTC derivatives. It will also regulate central counterparties and trade repositories. MiFID 2/MiFIR: The European Commission is expected to propose legislation amending and supplementing MiFID in the form of a new directive amending MiFID, and a new regulation ("MiFID 2/MIFIR"). This legislation is likely to include requirements for certain OTC derivatives to be traded on a regulated market, multilateral trading facility or organized trading facility as well as transparency and position limits/management requirements in relation to certain derivatives. It is also likely to extend the scope of authorization and other requirements in relation to commodity derivatives and to make some amendments to the definition of derivatives. MAD2: The European Commission is expected to propose legislation replacing MAD with a new regulation ("MAD2"). Among other things, this is likely to extend the scope of the insider dealing and market manipulation rules to a wider class of derivative contracts. There is already a separate legislative proposal ("REMIT") to apply insider dealing and market manipulation rules to commodities and commodity derivative transactions falling outside MAD. Short selling: The European Commission has proposed a regulation on short selling imposing transparency obligations on certain net short positions, restricting uncovered short sales and giving the authorities powers to impose restrictions on or additional transparency obligations with respect to certain short transactions. A number of the proposed obligations would affect short positions resulting from derivatives contracts, in particular trades in sovereign credit default swaps. Crisis management: The European Commission is expected to publish a legislative proposal on crisis management, including resolution regimes for banks and some investment firms. These proposals are likely to include proposals specifically dealing with the ability of the authorities to impose a temporary stay on the termination of derivative contracts where an entity is subject to resolution. In addition, the European Commission has proposed legislation ("CRD4") amending the CRD largely aimed at implementing the Basel III package and there is an existing directive ("Solvency II") awaiting implementation which will replace the capital framework for insurance companies.		The Securities and Futures Commission is drafting amendments to the Securities and Futures Ordinance to regulate Swaps. Any amendments are subject to legislative approval.	

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b. Please further describe the present status of regulatory efforts and the anticipated timeline for such efforts.	TBD	With respect to the principal legislative initiatives referred to in 3(a): EMIR: The EU institutions are expected to reach agreement on the final text of EMIR by the end of 2011, with EMIR to come into force by the end of 2012 (although the final date is still subject to negotiation). MiFID2/MiFIR and MAD2: The EU Commission is expected to publish formal legislative proposals on MiFID 2 and the revised MAD in October or November 2011. The text will then be negotiated by the EU institutions. Short selling: The EU institutions are expected to reach agreement on the final text of the proposed regulation by the end of 2011. Crisis management: The EU Commission is expected to publish formal legislative proposals on crisis management by the end of 2011. The text will then be negotiated by the EU institutions	FIEA has been revised in May 2010 to include new regulations for clearing and trade reporting of OTC derivatives, which will be fully implemented by November 2012. Subordinate regulations in the form of cabinet ordinances will be published before the implementation.	Proposed amendments to the Securities and Futures Ordinance are expected to be submitted to the legislature before the end of 2011. Hong Kong has announced plans to build an OTC derivatives clearinghouse within its stock exchange and an OTC trade data repository to be directly managed by its banking regulator, the Hong Kong Monetary Authority ("HKMA").	The Monetary Authority of Singapore ("MAS") has announced that it will issue consultation papers on clearing and reporting requirements for OTC derivatives.
4. What type of counterparty may enter into a Swap? Do any limitations apply?	Must be an "eligible contract participant" (defined at 7 U.S.C. §1a(66)) unless the transaction is a swap entered into on, or subject to the rules of, a contract market or a SBS transaction effected on a registered national securities exchange.	There are currently no restrictions in EU legislation on the type of counterparty that may enter into derivative transactions. (See question 3 above in relation to the authorization requirements imposed under MiFID) [Authorized firms will be subject to conduct of business rules when dealing with clients.]	No limitation as a matter of contract law. Any person who is not licensed/registered/permitted under the applicable regulatory laws may not conduct as its business on a continuing and habitual basis derivatives transactions that are subject to such regulation. Banks, securities companies, insurance companies and other regulated entities are restricted to the scope of derivatives businesses allowed under the respective regulatory laws and subject to registration/permission/notification as applicable.	No limitation for counterparty. (Rules for Business Conduct will apply when entering into transactions with non-professional investors.)	No.
5. Are certain types or classes of Swaps prohibited, or are certain entities prohibited from entering into certain types or classes of Swaps?	No, but there are restrictions on how certain entities can enter into certain swaps (Also see response to question 4 above).	Certain types of entities may be restricted from entering into certain types or classes of Swaps under legislation specific to those types of entity (e.g., there are restrictions on the types of assets that insurance companies or regulated funds are permitted to invest in). There is no general legislation prohibiting certain types or classes of swaps, although the proposed EU short selling regulation may prevent parties entering into uncovered credit default swaps and would grant national regulators the power to take action to ban or restrict short sales in certain financial instruments, or any transaction in sovereign credit default swaps in exceptional circumstances. In addition, when a legislative proposal for MiFIR is published it is likely to contain powers for ESMA and regulators in each Member State to prohibit or restrict (temporarily or permanently) certain financial instruments or types of financial activity, and for ESMA to require a person to reduce the size of a position in derivatives.	No general prohibition. Where, however, two unlicensed/unregistered/unapproved entities enter into a derivative transaction, such transaction may be held void as a wagering contract and thus void as being repugnant to public policy.	No general prohibition. Regulated activity (e.g. leveraged FX) requires license.	There are certain restrictions on entry into derivatives by regulated entities such as insurance companies.

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6. If Swaps are regulated: (a.) Who determines which instruments, transactions, or agreements should be regulated as Swaps?	CFTC and SEC. (The Treasury has authority with respect to certain foreign exchange ("FX") transactions.) [7 U.S.C. §1b]	The relevant definition is set out in European legislation (in MiFID). The European Commission has powers to adopt legislation further specifying the definitions set out in MiFID. In addition, the European Commission, the European Securities and Markets Authority ("ESMA") and national regulators may issue guidance on the instruments that they consider would fall within the relevant definition. The proposals in EMIR envisage that ESMA and the European Commission would together determine which derivative contracts will trigger the clearing obligations in EMIR	The Ministry of Economy, Trade and Industry ("METI") and Ministry of Agriculture, Forestry and Fisheries ("MAFF") for commodity derivatives and the Financial Services Agency ("FSA") for FX, rates, securities, credit and most other derivatives (other than the commodities derivatives covered by the Commodity Derivatives Act).	The Securities and Futures Commission ("SFC") would regulate Swaps once the proposed legislation is passed into law.	MAS.
b. Which Swaps, if any, are required to be executed on an organized market, on an electronic execution facility, or on any other type of market?	Swaps/SBS subject to mandatory clearing must also be traded through a board of trade designated as a contract market an exchange or on a registered or exempt swap execution facility. [7 U.S.C. §2(h)(8) and 15 U.S.C. §78c-3(h)]	There are currently no requirements in EU legislation for derivatives to be executed on a market. However, MiFID 2 is expected to contain a requirement for certain derivatives to be executed only on a regulated market, multilateral trading facility or organized trading facility	No requirements	Not known yet.	None.
c. Which Swaps, if any, are required to be cleared by a central counterparty and, for those required to be cleared, how are the trades of non-clearing participants cleared?	Clearing is required for any swap/SBS which the CFTC or SEC has decided should be required to be cleared. [7 U.S.C. §2(h) and 15 U.S.C. §78c-3(a)]]	There are currently no requirements in EU legislation for derivatives to be cleared by a central counterparty. If and when EMIR is adopted, derivatives will be required to be cleared by a central counterparty if it is decided that they are eligible for clearing in accordance with Article 4 of EMIR. Non-clearing participants will need to establish a relationship with a clearing participant in order for their trades to be cleared	The types of OTC derivatives transactions which must be cleared by clearing organizations are those that "in light of the condition of the transactions, are regarded as having a material impact on the capital market of Japan in case of default of the transactions". (Article 156-62, FIEA) Detail will be set out in Cabinet Office Ordinances. As of September 26, 2011, the FSA has stated that iTraxx Japan Index credit derivatives transactions should be cleared by a central counterparty established in Japan, and the Japan Securities Clearing Corporation is currently acting in such a capacity. The exact scope of this clearing obligation as it relates to iTraxx Japan Index trades (e.g., whether non-Japanese entities will be subject to this requirement) will be set in the Cabinet Office Ordinances.	Hong Kong has announced that the first products to be cleared will be interest rate swaps and non-deliverable FX forwards. The CCP plans to offer client clearing services.	Determination is pending.

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d. Which Swap transactions, if any, are required to be reported to a data repository or other entity, the public, or regulatory authorities?	All swap/SBS transactions must be reported. [7 U.S.C. §2(a)(13)(G) and 15 U.S.C. § 78m(1)(G)]	There are currently no requirements in EU legislation for derivatives to be reported to a trade repository. If and when EMIR is adopted, counterparties subject to EMIR will be required to ensure that the details of any derivative contract they have concluded (and any modification or termination of the contract) are reported to a trade repository or failing which to ESMA (Article 7 EMIR). Currently MiFID only requires the reporting to regulators of derivatives admitted to trading on a regulated market. MiFID 2/MiFIR is likely to include provisions extending the obligation to report transactions to other classes of derivatives and to impose post-trade reporting to the public of certain transactions in derivatives. The proposed short selling regulation envisages reporting to regulators and/or public reporting of net short positions in certain financial instruments (including positions resulting from derivatives).	Transactions which are necessary to be disclosed in light of customers' protection are to be stored and reported to the regulators (Article 156-64, FIEA). Detail will be set out in Cabinet Office Ordinances.	Reporting will begin with interest rate swaps and non-deliverable forwards by the end of 2012. Reporting of other asset classes will be phased in after that. Reporting will be required of all OTC trades with a Hong Kong "leg" [ie. all Authorized Institutions, Licensed Corporations and other entities with significant exposure to the OTC derivatives markets].	Determination is pending.
e. Is regulatory oversight of the Swap market conducted by one single regulatory authority or divided among different regulatory authorities? If the latter, please identify each relevant regulatory authority and describe its responsibilities and jurisdiction.	CFTC : oversight of the swaps market, swap-related financial market utilities and swap dealers. SEC: oversight of the SBS market, SBS-related financial market utilities and SBS dealers. Federal financial regulators (FRB, OCC, FDIC, FHFA and FCA): prudential oversight of regulated swap/SBS dealers and major swap participants ("MSPs")/major security-based swap participants ("MSBSPs")	Regulatory oversight is exercised by the national regulators in each Member State, depending on their national regulatory structures. ESMA co-ordinates and oversees the actions of national securities and markets regulators (e.g. the proposed short selling regulation will give ESMA some co-ordination powers with respect to actions taken by national regulators under the regulation). The European Banking Authority co-ordinates and oversees the actions of national banking regulators. The European Commission has a role in developing EU legislative proposals and adopting implementing and delegated legislation under the legislative framework and in monitoring the overall functioning of the single market and EU legislation	The Ministry of Economy, Trade and Industry ("METI") and Ministry of Agriculture, Forestry and Fisheries ("MAFF") for commodity derivatives and the Financial Services Agency ("FSA") for FX, rates, securities, credit and most other derivatives (other than the commodities derivatives covered by the Commodity Derivatives Act).	The SFC will regulate swaps, securities firms and money market managers. The HKMA will continue to regulate banks.	MAS is the sole regulator.

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f. How does the regulatory framework regulate potential systemic risk created by Swaps? Does it, for example, create a new oversight body or designate certain entities as systemically important?	Title I of the Dodd-Frank Act established the Financial Stability Oversight Council ("FSOC") to, among other things, identify risks to the financial stability of the U.S. posed by large financial institutions. FSOC also has authority to identify firms as systemically important and recommend enhanced oversight by the Federal Reserve Board.	Regulation 1092/2010 established a European Systemic Risk Board ("ESRB") whose function is to exercise macro-prudential oversight of the financial system. Its role extends to the whole financial system, and is not restricted to derivatives. In addition, the European Commission has been consulting on a general EU framework for troubled and failing banks (including provisions for recovery and resolution planning and managing systemic risk). A legislative proposal is expected in late 2011.	FSA and the Bank of Japan ("BOJ") monitor systemic risk including risk created by derivative products. FSA hosts supervisory colleges for important financial institutions to enable authorities including BOJ to collect relevant information. And, BOJ biannually publishes Financial System Report with two objectives: to present a comprehensive analysis and assessment of the stability of Japan's financial system, and to facilitate communication with concerned parties in order to contribute to securing the stability.		
g. Does the regulatory authority, or regulatory authorities if more than one regulator has oversight responsibilities over the Swap market, have the ability to share information related to Swaps with domestic and foreign regulatory authorities?	CFTC, SEC, FSOC and prudential regulators are authorized to share information and consult and coordinate with foreign regulators. [15 U.S.C. §8325]	MiFID and the CRD have provisions which allow the exchange of information between EU regulators and which also allow the exchange of information with third country authorities under cooperation agreements concluded with those authorities, but only if the information disclosed is subject to guarantees of confidentiality which are at least equivalent to those applicable to EU authorities under the directives. The proposed text of EMIR envisages that the European Commission will submit proposals to the Council of Ministers for the negotiation of international agreements with third countries regarding mutual access to information held in trade repositories. Trade repositories are required to make information available to a number of entities including relevant national regulators and regulators of a non-EU country that has entered into an international agreement with the EU.	FSA became a member of IOSCO's "Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ("MMoU")" on Feb 19, 2006 in sharing securities enforcement matters. FSA and BOJ are involved in "OTC Derivatives Regulator's Forum" which objective is to coordinate the sharing of information routinely made available to regulators or to the public by OTC derivatives CCPs and trade repositories. FSA has established Supervisory College for four financial institutions.	There are provisions enabling the sharing of information under certain conditions.	There are provisions enabling MAS to share information with foreign regulators under certain conditions.

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h. How are cross-border Swap transactions regulated? Does the Swap regulatory framework apply to persons located outside of the jurisdiction doing business with persons located within the jurisdiction, and, more generally, to cross-border Swap activities?	Swap/SBS rules do not cover activities outside the U.S. unless (1) for swaps - the activities have a significant effect in or on the U.S. or involve evasion of U.S. rules; and (2) for SBS - the activities involve evasion of U.S. rules. [7 U.S.C. §2(i) and 15 U.S.C. § 78dd(c)]	The proposed text of EMIR is unclear as to how it applies to cross-border transactions. However, it appears to impose the clearing, reporting and risk mitigation requirements only on a counterparty to a derivative that is established in the EU. However, these requirements will apply even if the other counterparty is not established in the EU (in the case of the clearing obligation only if the third country entity would also have been subject to the clearing obligation if it were established in the EU). There are issues about how these obligations will apply to entities that have an establishment both in and outside the EU. We note that the most recent drafts of EMIR "international coordination" articles allow the practical possibility that EU legislation could defer to a non-EU jurisdiction, such as the U.S., if a number of conditions are satisfied and the non-EU regulatory regime is found to be "equivalent" to the EU's regime MiFID and the CRD generally only apply to entities incorporated in the EU and leave the treatment of branches of non-EU entities and cross-border business into the EU by non-EU entities to national law. It is expected that the European Commission's proposal for MiFID 2 / MIFIR will include proposals requiring non-EU entities doing business with EU clients or counterparties to obtain authorization in the EU and to comply with at least some of the rules applicable to EU authorized firms. MAD applies to transactions in relevant instruments that are admitted to trading in the EU or whose price or value depends on those instruments regardless of where the parties to those transactions are located.	FIEA and the Commodity Derivatives Act regulate derivatives with on-shore entities in Japan. Generally, the above laws require license/registration/approval/filing be obtained or made for an off-shore person to conduct derivatives with on-shore entities. There are notable exclusions and exemptions. These include, transactions with persons recognized as having professional knowledge and experience, including licensed/registered financial institutions etc. under the FIEA. Similar exclusions exist under the Commodity Derivatives Act, but a prior filing is necessary if such commodity derivative transaction relates to Commodities or Commodity Indices listed on Japanese exchanges.	Trade reporting will be required of any transactions which are originated, executed, or booked by a bank or licensed corporation (under SFC) and their subsidiary; not clear if a deal originated by a sale in Hong Kong and booked offshore would be included in the scope of transaction reporting. Mandatory clearing can be satisfied either in HK or through other CCPs who have applied for licensing in HK.	Pending.
i. What enforcement authority exists over Swaps, and who may exercise such authority?	CFTC and SEC are generally responsible for enforcing statutory regime applicable to swaps/SBS. [7 U.S.C. §6b-1 and 15 U.S.C. §78o–8(l)]	National regulators in each Member State have enforcement power in relation to breaches of national law and regulation (and breaches of EU regulations), although ESMA is likely to have some enforcement authority over trade repositories under EMIR.	Japanese FSA is responsible for enforcing statutory regime applicable to OTC derivatives other than those on commodities that are covered by METI and MAFF.	HKMA has supervisory responsibility for OTC derivative transactions of authorized institutions ("AI"). OTC derivative transactions of non-AI (and their non-bank subsidiaries) will be subject to rules to be promulgated by the SFC. HKMA and SFC will use different regulatory instruments, HKMA - Banking Ordinance and SFC - Securities & Futures Ordinance.	The MAS is responsible.

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B. Regulatory Requirements for Market Participants					
1. How does the regulatory framework address participants in the Swap market? What are the registration or licensing requirements for Swap-related dealers, market participants, intermediaries, or others (individually and collectively, “Participants”)?	It is unlawful for any person to act as a swap/SBS dealer, futures commission merchant ("FCM") or as an MSP/MSBSP unless registered as such. [7 U.S.C. §§6d(f) and 6s(a) and 15 U.S.C. §§ 78c-5(a) and 78o-8(a)]	MiFID regulates persons who carry on investment services and activities in relation to financial instruments. These persons are required to seek authorization unless they fall within an exemption. Article 2 of MiFID sets out the entities which are exempt from the requirements of MiFID. These include insurance undertakings, central banks and entities which only deal on their own account in certain circumstances.	In relation to FX, rates, securities, credit and most other derivatives (other than commodity derivatives covered under the Commodity Derivatives Act), if any person is engaged in financial instruments business, the person must register as financial instruments business operators (FIBO) or a registered financial institution (RFI). Financial instruments business includes: (1) market transactions of derivatives or foreign market derivatives transactions; (2) intermediary, brokerage or agency service for market transactions of derivatives and foreign market derivatives transactions; (3) intermediary, brokerage or agency service for entrustment of market transactions of derivatives or foreign market derivatives transactions; (4) OTC transactions of derivatives or intermediary, brokerage or agency service for OTC transactions of derivatives, etc..	Pending.	None specific to dealing in OTC derivatives.
2. Are any types of Participants in the Swap market excluded or exempted from Swap-related registration or licensing requirements?	Certain entities engaging in limited dealing activities (e.g., in connection with customer loans) may be excluded from the definition of "swap dealer." Certain financing affiliates of commercial end-users may be excluded from definition of MSPs. [7 U.S.C. §1a and 15 U.S.C. §78c]	Entities which fall within the exemptions from the authorization requirements under MiFID (as described above) will be exempt from the requirement to seek authorization when carrying on investment services in relation to financial instruments (including swaps).	In relation to commodity derivatives, if a person is engaged in businesses related to OTC commodity derivatives (including agency, intermediation or brokerage) whether the underlying commodity or index is traded domestically or overseas, generally such person must obtain the permission of the relevant ministers in charge (METI or MAFF or both). As an exception to the general rule, OTC commodity derivatives with or for the defined professional customers (generally equivalent to those defined under FIEA) do not constitute the defined OTC Commodity Derivatives (“Excluded OTC Commodity Derivatives”). If any person is engaged in businesses related to certain Excluded OTC Commodity Derivatives referencing listed commodities or indices published by the relevant minister or similar indices (“Specified OTC Commodity Derivative Transactions”), such person needs to file with the relevant ministries (METI or MAFF or both) in advance.	Pending.	Not applicable.

	United States	European Union	Japan	Hong Kong	Singapore
3. What is the process for updating, withdrawing, or terminating Swap-related registration or an exemption from Swap-related registration?		There is no requirement to apply to any authority in order to fall within an exemption under MiFID or EMIR. An entity which is authorized under MiFID would apply to its national regulator in accordance with any applicable procedures under national law in order to update, withdraw or terminate its authorization.	In cases where a FIBO falls under specified condition, Commissioner of the FSA may rescind its registration or order suspension of all or part of its business by specifying a period not exceeding six months.	Pending.	Not applicable.
4. What are the Swap-related prudential regulatory requirements (e.g., capital, liquidity, margin, risk management, segregation, collateral)?	Swap/SBS dealers and MSPs/MSBSPs are subject to prudential requirements set by the CFTC/SEC or, if applicable, the relevant prudential regulator related to capital, margin and other prudential requirements. Dealers and MSPs/MSBSPs also subject to rules related to segregation and risk management. [7 U.S.C. §6s and 15 U.S.C. §78o-8]	An entity which is authorized under MiFID will be subject to the prudential requirements imposed by its regulator in accordance with the CRD, which include risk based capital requirements and large exposure restrictions. It will also be subject to rules regarding client asset protection, which may require it to segregate assets belonging to its clients. In addition, an entity which is subject to EMIR which enters into an uncleared OTC derivative contract will be required to ensure that appropriate risk mitigation arrangements are in place, including "accurate and appropriate exchange of collateral". EMIR also imposes prudential requirements on central counterparties (including exposure management, margin, and a default fund), and requires a CCP to keep records and accounts that will enable it to distinguish in accounts the assets and positions held for the account of one clearing member from the assets and positions held for the account of any other clearing member, and that will enable a clearing member to distinguish assets and positions of its clients from its own assets and positions.	FIBO is subject to minimum capital and net asset requirement, as well as capital adequacy ratio ("CAR") regulation. A FIBO shall keep the capital-to-risk ratio (like U.S. net capital rule) at no less than 120 percent. And, securities companies having more than 1 trillion Yen in total assets are required to conduct consolidated and effective group-wide risk management. These companies are subject to capital adequacy requirements (Basel II or capital-to-risk ratio like U.S. net capital rule) on a consolidated basis. *FSA has introduced consolidated regulation and supervision on such large securities groups since April 2011. FIBO also needs to comply with customers' assets segregation rules.	HK is expected to adopt Basel 3 standards for capital and liquidity. Pending on other issues.	MAS will likely adopt more stringent standards than Basel 3.
5. What are the requirements related to insolvency or bankruptcy in regard to Participants?	Specific requirements apply to the liquidation of FCMs and other entities in the case of insolvency.	There are no insolvency or bankruptcy requirements specific to persons trading in derivatives contracts. However, there is an EU directive dealing protecting the enforceability of financial collateral arrangements, including financial collateral arrangements in relation to derivative contracts. The European Commission is considering proposals to introduce EU legislation on netting but the timing for this is now unclear. See above relating to the proposed EU crisis management package.	There are no insolvency or bankruptcy requirements specific to persons trading in derivatives contracts. General insolvency regime applies to all the Participants. However, there is a statute ensuring the enforceability of netting and collateral arrangements securing derivatives and other (e.g. repo trades) types of market transactions. In order for such netting statute to apply, one of the parties to the netting agreement must be a financial institution licensed/registered under the Japanese regulatory laws, such as the Banking Act, the Insurance Business Act or FIEA. In each of the insolvency laws, there is a provision protecting netting generally in case the requirements for the application of the above netting statute are not satisfied.	None.	None.

	United States	European Union	Japan	Hong Kong	Singapore
6. What are the Swap-related business conduct requirements (e.g., interaction with counterparties, disclosure, supervision, reporting, recordkeeping, documentation, confirmation, valuation, conflicts of interest, avoidance of fraud and other abusive practices)?	Swap/SBS Dealers and MSPs/MSBSPs are subject to business conduct requirements addressing, among other things: interaction with customers and counterparties (e.g., standards of care and documentation), internal conflicts of interest, reporting, limitations on certain business activities, recordkeeping, confirmation, portfolio reconciliation, maintenance of daily trading records and standards for interacting with certain "special entities." [7 U.S.C. §6s(h) and 15 U.S.C. §78o-8(h)]	EMIR does not impose conduct of business requirements in relation to derivatives (other than the requirements relating to risk mitigation techniques, including requirements for confirmation, reconciliation, risk management and collateral). Where an entity that carries on derivatives related business is required to be authorized under MiFID, MiFID prescribes the relevant conduct of business requirements, which include provisions on conflicts of interest and customer facing duties (including rules on the acceptance of inducements, suitability of advice, appropriateness and best execution), although the impact of these will vary depending on the nature of the service or activity and the nature of the counterparty.	In general, FIBO is subject to business conduct rules including: (1) duty of good faith to customers; (2) principle of suitability; (3) prohibition of compensation of loss; (4) prohibition of an act of providing a customer with false information, conclusive evaluations on uncertain matters, etc.; (5) obligation to clarify conditions of transactions in advance; (6) delivery of document prior to conclusion of contract; (7) delivery of document upon conclusion of contract; (8) managing the money or Securities deposited from a customer or other security deposit and securities, separately from his/her own property with regard to his/her derivative transactions, etc.	Pending.	MAS guidelines to banks on risk management and business conduct.
7. Do Participants have the ability to share information with domestic and/or foreign regulatory authorities?	Registered swap/SBS dealers and MSPs/MSBSPs are required to disclose swap and other related information with domestic regulators and FSOC. CFTC and SEC shall share information with foreign regulators. [7 U.S.C. §6s(f) and 15 U.S.C. §78o-8]	Persons trading in derivatives contracts may be subject to confidentiality obligations arising expressly or implicitly under contract or national law, in particular privacy laws and bank secrecy laws. If a person is required to disclose information to a regulatory authority which regulates or supervises that person, this requirement may override any confidentiality obligations to which the person is subject under the law of that regulator's country. However, where a regulatory authority which does not have jurisdiction over that person requests information, that person may not be able to provide that information if it would breach the confidentiality obligation.	When Commissioner of the FSA finds it necessary and appropriate for the public interest or protection of investors, he/she may order a FIBO, a person who conducts transactions with the FIBO, etc., to submit reports or materials that will be helpful for understanding the business or property of FIBO, etc.	Yes.	Banking secrecy laws apply. There are certain exceptions.

	United States	European Union	Japan	Hong Kong	Singapore
8. How are foreign Participants treated (e.g., a special recognition category, an exclusion or an exemption from registration)?	No exclusion or special recognition for swap/SBS dealers or MSPs/MSBSPs doing business in the U.S., regardless of nationality.	See section A, 3(h) above.	Non-Japan firms and Japan firms will be required to obtain the same types of registrations in order to conduct OTC derivatives as a business, and be regulated under the same statutory framework.	Pending.	No distinction.

C. Regulatory Requirements for Organized Markets, Electronic Execution Facilities, and Other Types of Markets

N/A

D. Regulatory Requirements for Central Counterparties

N/A

E. Regulatory Requirements for Data Repositories

N/A

F. Regulatory Comparison

1. Across jurisdictions, for any or all items listed above, which areas of regulation are similar and which areas are different?

See above.

2. In viewing the existing laws, institutions, and enforcement mechanisms of each respective jurisdiction as a whole, are such similarities and differences appropriate and desirable for regulatory purposes, or do certain aspects of a particular jurisdiction's Swap market warrant a different regulatory approach?

We strongly support uniformity in international swaps regulation. It is critical that the broad themes and general requirements for regulation be consistent across jurisdictions. Inconsistent regulation would result in increased costs, less competition and increased risks to financial stability, as described in our response to question 3 below.

In addition, international harmonization requires more than similarity of regulatory requirements. The U.S. regulators must also recognize entities that are in compliance with appropriate foreign regulations as being in compliance with U.S. requirements and foreign regulators should recognize entities that are in compliance with U.S. regulations as being in compliance with foreign requirements. Further, U.S. and foreign regulators must exempt transactions and entities outside their jurisdiction unless the relevant regulations are being evaded. Such recognition and exemption is necessary to avoid inconsistent and duplicative regulation and permit international markets to function. For example, if central clearing is required for a cross-border swap, the relevant regulators must recognize the same swap clearing organization and must exempt the swap and clearing organization from inconsistent or duplicative requirements.

3. What are the potential costs and benefits (in terms of investor protection, market efficiency, competition, or other factors) that may arise from further consistency/harmonization of regulations across borders?

Because the regulation of the swaps market is in a state of flux, it is difficult to assess the costs and benefits of new regulations or of harmonization with accuracy at this time. However, if international swap rules are not appropriately harmonized, the consequences are likely to include:

- An increase in the costs to market participants in managing risks through swaps.
- A reduction of cross-border business, reducing customer choice and reducing competition.
- Distortions of competition, because market participants will select their counterparties for trading on the basis of regulatory rather than economic factors.
- New risks to financial stability, because all firms (whether financial or corporate) will have more difficulty in integrating firm risk management and more fragmented markets will make supervisory oversight more difficult.
- A reduction in the ability of financial firms to centralize booking and risk management of OTC derivatives in single entities, resulting in the use of more regionalized booking and risk management structures, increasing firms' costs and potentially making it more difficult to engage in effective risk management.
- Increased costs and burdens for firms subject to supervision and inspection by multiple regulators, especially if the regulators are imposing different requirements.
- Movement of businesses to jurisdictions in response to regulatory developments rather than for economic reasons.

4. How should consistency in regulation across jurisdictions be measured and are there factors other than the harmonized text of a regulation that should be taken into consideration when assessing the degree to which cross-border regulatory harmonization has been implemented in practice?

Harmonization should not be measured simply in terms of similar texts. Regulatory harmonization should also be measured by compatibility: whether regulations allow cross-border swaps and international competition between swap dealers to continue in an economically meaningful way.

In addition to textual similarity, other factors that could improve harmonization include:

Recognition/exemption of entities regulated by other jurisdictions: There should be mutual recognition/exemption between jurisdictions. For example, clearing organizations and swap execution facilities that are registered outside the U.S. should be recognized as eligible for clearing and executing U.S. and cross border swaps and foreign regulators should recognize U.S. registered entities. Similarly, the U.S. regulators should recognize dealers that are registered outside the U.S., and meet the relevant prudential requirements, as U.S. swap dealers without having to register as such and foreign regulators should recognize U.S. registered dealers that meet foreign requirements.

Consistent and Nonduplicative Reporting: The same transactions should not have to be reported twice so internationally compatible reporting systems should be reported for cross-border trades.

Avoiding Differences in Implementation and Regulatory Approach: Even if regulatory requirements are similar, they could have different outcomes because of differences in implementation and supervisory approach. For example, margin regulations that are similar could lead to different results if different standards are implemented for the models that calculate initial margin or if some supervisors take a principles-based approach while others are more specific in their requirements.

Avoiding Technical Differences: If different firms are required to use different technical standards in different jurisdictions, there will potentially be very significant costs. Such technical standards could apply, for example, to reporting or recordkeeping requirements.

Avoiding Excessive Compliance Costs: There are additional costs and burdens for firms that are subject to supervision and inspection by multiple regulators even if they were applying an identical supervisory framework (e.g. dealing with requests for information, supervisory inspections, etc.).

Minimize the Impact of Timing Differences: Differences in the timing of regulatory implementation between jurisdictions could lead to regulatory arbitrage. If such timing gaps are significant they could affect the balance of competition and could lead to business movements that could result in long term changes in international markets.

5. Assuming that a theoretically "optimal" set of regulations for a particular jurisdiction might take into consideration elements unique to a specific market in ways that might make cross-border harmonization difficult, to what extent do the benefits of greater regulatory harmonization across borders outweigh the costs associated with having regulations that might be less tailored to a particular market's circumstances? In what areas do you believe the benefits of harmonization most outweigh any potential downsides? Are there any areas where you believe the likely benefits of "optimal" market-specific regulation outweigh the likely benefits of harmonization?

The following is a list of specific areas in which inconsistent international regulations will make cross-border harmonization difficult, and suggestions to address these areas. This is not intended to be an exhaustive list.
Clearing Requirement: If a U.S. financial firm enters into a swap with a non-U.S. financial counterparty, each party may be required to clear the transaction but in different clearing organizations. In addition, failure to coordinate standards for different clearing organizations could result in discrepancies that would add to systemic risk in times of stress. Suggestion: Regulators should coordinate requirements and recognize clearing organizations in other jurisdictions are eligible to clear swaps subject to mandatory clearing requirements.
Central Execution Requirement – SEFs: If a U.S. financial firm executes a swap with a non-U.S. financial counterparty, each may be required to execute the transaction on a different swap execution facility (SEF) or other trading platform. Also, international discrepancies in trading platforms could add to systemic risk. Suggestion: Regulators should coordinate requirements and recognize trading platforms in other jurisdictions or exempt swaps executed on foreign trading platforms for purposes of the central execution requirements.
Swap Dealer Registration/Regulation: Non-U.S. swap dealers with U.S. customers may potentially have to register as swap dealers with U.S. regulators. Suggestion: Regulators should recognize prudential regulation by home country regulators and should provide relief from transactional regulations for non-U.S. swap dealers whose U.S. activities are intermediated by a U.S.-registered entity.
Margin Requirements: For cross-border swaps, U.S. and non-U.S. regulators may have conflicting margin requirements as to amounts and types of collateral needed. Also, if non-U.S. swap dealers (such as the non-U.S. subsidiary of a U.S. entity) are subject to U.S. margin requirements, swaps between the dealer and non-U.S. customers may also be subject to conflicting margin requirements. Suggestion: Regulators should align the scope and content of U.S. and non-U.S. margin requirements.
Reporting: Cross-border swaps may have to be reported both to a swap data repository (SDR) in the U.S. and also in a foreign jurisdiction. This could result in duplicative reporting and, unless the reporting parameters are standardized, could also result in inconsistent data. The objective of reporting is to allow regulators to obtain a comprehensive sense of the market. Inconsistent reporting would undermine this purpose.
Also, the obligation to report in one jurisdiction may lead to conflicts with confidentiality requirements in other jurisdictions. The requirement under the Dodd-Frank Act for regulators to agree to indemnity and enter into confidentiality arrangements with SDRs (Commodities Exchange Act, Sec. 21(d)) potentially give rise to multiple issues. Suggestion: Regulators should encourage a single international SDR for each asset class with sub-repositories as needed for different jurisdictions. In the absence of an international SDR, regulators should recognize SDRs in other jurisdictions. There should also be legal protections for financial firms and SDRs that report swaps in compliance with regulatory requirements.
Extra-Territorial Application to Funds: It is not entirely clear how the swap regulations will apply to funds with foreign clients or foreign managers. Suggestion: Swap regulations should only apply to funds organized in the U.S.
Regulation of Branches of Banks: If U.S. regulators of a branch of a foreign bank apply swap regulation to the entire bank or if U.S. regulators apply swap regulation to the activities of a foreign branch or affiliate with its non-U.S. clients, the bank will be subject to overlapping and contradictory regulation. Suggestion: The regulators should limit their supervision of the bank and its non-U.S. activities and should recognize foreign prudential regulation.
Inter-Affiliate Transactions: If inter-affiliate transactions are subject to clearing and margin requirements, then corporate groups will be restricted in their ability to manage risks on an international group-wide basis. Suggestion: Regulators should coordinate so as to exempt inter-affiliate transactions form swap regulations.
Public Disclosure: Cross-border swaps may be subject to potentially duplicative and conflicting requirements for public disclosure of the terms of swaps. Suggestion: The regulators should harmonize rules so as to facilitate a single public report of swap transactions.
Section 716 ("Push-out Rule") and the Volcker Rule: Foreign regulators have not proposed rules similar to the "push-out" and Volcker rules except in the United Kingdom, where limits have recently been suggested on trading and derivatives activities of ring-fenced retail banking entities (although not on members of the same corporate group as such entities). Implementation of these rules would place U.S. banks at a distinct competitive disadvantage relative to their foreign counterparts. Suggestion: These rules should be repealed as they are not effective in controlling systemic risk and unfairly disadvantage banks operating in the U.S..
Guarantee: The issuance of a guarantee should not subject the guarantor to any registration requirement to which it would not otherwise be subject, and should not affect the applicability of the Dodd-Frank Act to the guaranteed swap activity.

6. In the United States, what steps should or could be taken to better harmonize statutory requirements under the Dodd-Frank Act with statutory requirements implemented in other jurisdictions?

Regulations should be drafted to provide flexibility to allow for harmonization. Where necessary, statutory changes should be adopted that permit implementation of the suggestions above.

7. In the United States, what steps could be taken to harmonize CFTC or SEC regulations with regulations promulgated by authorities in other jurisdictions?

See above.

G. Swap Market Information

N/A

To:

Michel Barnier,
Commissioner for the Internal Market and Services,
The European Commission,
BERL 10/034,
B-1049 Brussels,
Belgium

The Honorable Timothy Geithner,
Secretary,
The Department of the Treasury,
1500 Pennsylvania Avenue, NW,
Washington, D.C. 20220,
United States

5 July 2011

Dear Commissioner Barnier,
Dear Secretary Geithner,

Extra-territorial effects in EU and US regulation of derivatives

In September 2009, leaders of the G20 undertook to strengthen the international financial regulatory system. Shared G20 commitments included measures to ensure stricter rules on transparency, capital, counterparty risk (through clearing and other operational commitments) and trading of derivatives contracts. Considerable progress has been made on these commitments by G20 members, and it is clear that G20 leaders will successfully deliver them.

Importantly, understanding the global nature of today's financial markets, the G20 also undertook to 'take action at the national and international level to raise standards together so that our national authorities implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage.'

The associations signing this letter are concerned that regulation in different G20 jurisdictions may be creating conditions which will lead to the above-mentioned harmful outcomes, ultimately decreasing the ability of global regulators to effectively regulate an increasingly global capital marketplace.

Extra-territorial application of one nation's laws to another nation's markets and firms is a fundamental concern in a global market like derivatives, where it is common for counterparties based in different parts of the world to transact with each other.

Specifically, in the United States and Europe, we believe that both sets of rules, as proposed in the United States and as currently being debated in the EU, leave the global derivatives business with ambiguity and problematic extra-territorial challenges and issues of legal uncertainty and misunderstanding which might give rise to material risk.

We are also concerned that recent public commentary by EU and US decision-makers on issues deriving from extra-territorial aspects of financial legislation may be giving a misleading impression as to the proven commitment of decision-makers in these (and other) jurisdictions to problem-solving and avoidance of conflicts and unnecessary burdens.

The G-20's goal of addressing key systemic risk issues cannot be met without international coordination on market infrastructure, regulatory transparency, and counterparty credit risk. Examples of extra-territorial concerns that have arisen due partly to insufficient coordination are included below:

Licensing, authorisation or registration rules: Rules for licensing entities that are significant participants in the swap market should be coordinated so that those entities do not face duplicative regulatory regimes. We urge global legislators and regulators to work together towards a sensible and mutually acceptable solution that reflects the legitimate interest in regulatory oversight of entities active in a jurisdiction in a manner that gives due recognition to the rules that are applicable to an entity in its home jurisdiction.

Potential overlap and conflict in regulation of derivatives market participants in foreign jurisdictions: It is important that global regulators agree to a coherent and complementary approach to the regulation of activities of financial institutions such as banks, broker dealers and asset managers in foreign jurisdictions, ensuring both a sufficiently stringent regulatory standard and an avoidance of conflict and overlap in regulation. An example of the difficulties that can be caused in this context is the extra-territorial application of margin requirements to non-US subsidiaries, branches or affiliates of US financial services institutions, meaning that these subsidiaries, branches and affiliates will face dual (and possibly, conflicting) regulatory requirements (as opposed to local competitors who will have to comply only with the local regulatory regime). Similarly, non-US firms have concerns about their US subsidiaries, branches or affiliates facing dual (and possibly, conflicting) requirements in the US and in their home jurisdiction. We also urge global regulators to enter into mutual recognition arrangements where each would limit the extra-territorial reach of their regulation so long as a firm complies with their home country regulations.

Discrimination in dealing with sovereigns: We urge global regulators to avoid or revisit regulatory approaches which apply discriminatory rules to locally-regulated financial institutions' dealing with entities from other jurisdictions, particularly sovereigns from those jurisdictions (both recent EMIR drafts and recent US draft prudential regulations propose that sovereigns outside their jurisdiction should have to post margin with the firms regulated under each set of regulations).

Rules for CCPs: Regulators should seek to agree on the standards for equivalence or recognition of CCPs in each others' jurisdictions – to avoid such ambiguity and to give CCPs and regulators the opportunity

to meet these standards (also giving market participants the opportunity to prepare for compliance and to transition to a cleared environment for their trading activities). Equivalence is critical for rules on clearing as conflicting clearing requirements would be impossible to comply with if the rules of each of two different jurisdictions require a trade to be cleared in its jurisdiction.

Trade Repositories: The Dodd-Frank Act's requirement that US-based Swap Data Repositories (SDRs) obtain indemnification from foreign regulators as a pre-condition to data sharing is, we understand, an area of discussion currently between global regulators. This statutory requirement is not only unnecessary (given international agreements on sharing of data and work such as that pursued in the OTC Derivatives Regulators Forum at international level) but also undermines the ability of trade repositories to provide coherent information on risk in the derivatives business to regulators throughout the world (the original goal of creating data repositories). Likewise, pre-conditions to recognition of third country repositories in EU regulation are best drafted in cooperation and understanding with regulators in those third countries. We support the continued dialogue among global regulators on these issues.

The above examples are not exhaustive, but indicative of the problems faced by regulators and industry alike in the current environment. The signatory associations would be happy to provide regulators with more detail on extra-territorial concerns if this would be helpful.

Failing to address problems such as these will have significant adverse consequences not only for financial and non-financial companies, but also for the global economy. Even if extra-territorial application of domestic rules and the associated erection of artificial barriers to the functioning of businesses with an international footprint is not the intention, in many instances, the economic effects often associated with protectionism will result. Application of one jurisdiction's rules to institutions operating in another jurisdiction makes it more costly to transact in markets subject to such rules, which in turn undermines the ability of firms to manage risk and makes for higher financing costs for the real economy. This in turn undermines investment and employment.

Of further concern is that extra-territorial application of rules will lead to a more fragmented view of activity in financial markets, making it more difficult for regulators to monitor, much less prevent a build-up of systemic risk.

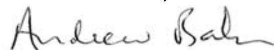
We therefore urge policymakers to redouble their efforts to ensure that reform of the international financial regulatory system is based on consistency of approach and on mutual recognition. We believe that there remains considerable scope both in the Dodd-Frank Act and EU regulation to prevent, alleviate or limit the harmful effects of such overlapping, inconsistent and ambiguous rules. **We believe that regulators should seek to limit the damaging effects of divergence, either by consultation with international counterparts in preparation of legislation, or by resolving these differences in the course of implementation of legislation.** We encourage political leaders and regulators to give these issues the attention they merit, working *proactively* within the mechanisms available to them in each jurisdiction, and through *constructive and open* bilateral and multilateral dialogue. In this regard, we welcome the recent establishment of a Trans-Atlantic regulatory working group to address differences between the EU and US regulators on derivatives regulation and observe that the EU-US Financial Markets Regulatory Dialogue had been helpful in resolving issues such as these in the past. Furthermore, we believe that industry could add value to regulators' consideration of these extra-territorial effects and urge the participants in these groups to consider how they could take advantage of the relevant knowledge available from associations and market participants engaged in multiple jurisdictions.

Yours sincerely,

Conrad P. Voldstad, CEO, International Swaps and Derivatives Association (ISDA)

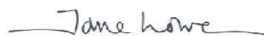
T. Timothy Ryan, Jr., President & CEO, Global Financial Markets Association (GFMA)

Guido Ravoet, Chief Executive, European Banking Federation (EBF)

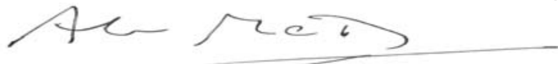


Andrew Baker, Chief Executive Officer, Alternative Investment Management Association (AIMA)

Anthony Belchambers, CEO, Futures and Options Association (FOA)



Jane Lowe, Director, Markets, Investment Management Association (IMA)



Alex McDonald, CEO, Wholesale Market Brokers' Association (WMBA) and London Energy Brokers' Association (LEBA)

Cc
Jonathan Faull, Director General, Internal Market DG, European Commission
Sharon Bowles MEP, Chairman, Economic and Monetary Affairs Committee, European Parliament
Werner Langen MEP
Jacek Rostowski, Polish Minister for Finance
George Osborne, Chancellor of the Exchequer, United Kingdom
Francois Baroin, Minister for the Economy, Finance and Industry, France
Wolfgang Schäuble, Federal Minister of Finance, Germany
Steven Maijoor, Chairman, European Securities Markets Authority
Gary Gensler, Chairman, Commodity Futures Trading Commission
Mary L. Schapiro, Chairman, Securities and Exchange Commission
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January 24, 2011

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

Re: Proposed rules: Registration of Swap Dealers and Major Swap Participants (RIN 3038 - AC95)

Dear Mr. Stawick:

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to comment on the proposed regulations (the "**Proposed Regulations**"), promulgated by the Commodity Futures Trading Commission ("**CFTC**" or the "**Commission**") in accordance with section 4s ("**Section 4s**") of the Commodity Exchange Act (the "**CEA**"), which was added to the CEA by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**"), with respect to the registration of swap dealers ("**SDs**") and major swap participants ("**MSPs**" and, together with SDs, "**Swaps Entities**").

ISDA commends the Commission for its careful consideration of the issues raised by the new registration requirements of the Dodd-Frank Act and respectfully submits the following comments in response to the Proposed Regulations.

I. Phased Implementation

The Commission has proposed a system of phased implementation for the "transitional period" between July 21, 2011, the date by which regulations establishing a process for Swaps Entities' registration are to be in place and the potentially later effective dates of key definitional

[1] ISDA was chartered in 1985 and has over 800 member institutions from 54 countries on six continents. Our members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the risks inherent in their core economic activities.
Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business through documentation that is the recognized standard throughout the global market, legal opinions that facilitate enforceability of agreements, the development of sound risk management practices, and advancing the understanding and treatment of derivatives and risk management from public policy and regulatory capital perspectives.

rulemakings and rulemakings with respect to capital, margin and a variety of other important aspects of doing business as a SD or an MSP[2]. These potentially later rulemakings will complete the determination of who must register and what the responsibilities of registrants will be. The Commission proposes that "voluntary", provisional registration begin on April 15, 2011.

We appreciate that the Commission has invited comment on alternatives to this system of phased implementation, including the extension of the effective date of the Proposed Regulations until such time as rules further defining the terms "swap dealer" and "major swap participant," and rulemakings implementing the other key requirements become effective. ISDA supports such an extension of the effective date of the Proposed Regulations because an early, provisional registration procedure is not cost-effective or otherwise efficient for potential Swaps Entities (or, we would think, the Commission). At the time of pre-registration, many potential Swaps Entities will not know if they must register or if they will be able to function under the still-developing regulatory regime. Compliance with new regulations may require extensive changes to the way that Swaps Entities presently organize themselves and conduct their business. It is therefore only reasonable that those entities should be aware of all their compliance obligations with certainty *before* they are asked to register – otherwise unnecessary costs and unnecessary disclosure may result,[3] burdening both regulator and regulated.

ISDA further believes that the registration process should be minimally disruptive to ongoing business operations and the swaps markets, irrespective of the date on which registration occurs.[4] Although nominally voluntary, provisional registration from July 21, 2011 onwards will be necessary to avoid business interruption. Given that (i) if a Swaps Entity does not provisionally register in advance, then on the day that it must register, its business must stop, because it will not yet be through the registration process; and (ii) in the Release the stated reason provided for provisional registration is that without such a system, Swaps Entities may not be registered on time, we question how "voluntary" provisional registration will in fact be. Furthermore, the subsequent finalization of each relevant regulation will again threaten business interruption as compliance becomes necessary. ISDA urges the Commission to (i) postpone the effective date of the registration requirements until all important aspects of compliance are settled and (ii) provide for a compliance period after the effective date of the registration requirements. ISDA additionally requests that the CFTC introduce reasonably extended compliance periods into any rulemakings that may be left to later development as a less disruptive, less costly, and generally more appropriate alternative to the threat of business interruption.

There is a growing awareness that the swaps markets and the Commission face a growing "chicken and egg" problem in attempting to develop in a single stroke an entirely new market regulatory

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[2] Section 4s governs registration and regulation of SDs and MSPs, and includes rules relating to capital and margin requirements, reporting and recordkeeping requirements, daily trading records, business conduct standards, documentation standards, duties and designation of a chief compliance officer.

[3] For example, the proposed regulation establishing and governing the duties of swap dealers and major swap participants requires that a Swaps Entity furnish a copy of its written risk management policies and procedures to the Commission upon application for registration. See 75 FR 71397 (November 23, 2010). It is not practical for an entity to develop such a detailed plan to Commission specification until it knows for sure that it will actually be a Swaps Entity.

[4] Although the Paperwork Reduction Act section of the release accompanying the Proposed Regulations (the "Release") suggests that it will merely take a matter of minutes for Swaps Entities to complete the forms required by the Proposed Regulations, we are dubious that this is accurate. Additionally, the time and cost burden to those entities of compliance with the attendant rules and regulations cannot be understated.

structure. We share the Commission's goal of implementing appropriate and meaningful regulation and believe that a first step is to provide adequate time for compliance.

II. Allocation of Responsibilities

The Commission has proposed that Swaps Entities will be required to become and remain members of at least one registered futures association. Presently, there is only one such association, the National Futures Association (the "**NFA**") and so the Commission has proposed registration of Swaps Entities through the NFA. The Commission has further proposed three alternatives for monitoring compliance by Swaps Entities with all requirements applicable to them under the CEA and CFTC regulations: (1) the Commission directly and solely responsible; (2) the NFA responsible but with CFTC oversight; or (3) division of responsibilities between the CFTC and the NFA. ISDA favors self-regulation but believes that the swaps market needs self-regulation that is solely focused on swaps and the intricacies of the swaps markets.

The Benefits of Self-Regulation

The United States has a long-established tradition of financial market self-regulation, based on self-regulatory organizations ("**SROs**") acting under the oversight of the Commission and the Securities and Exchange Commission (the "**SEC**"), as the case may be. ISDA believes that SROs help safeguard the integrity of the financial markets. They benefit from the experience of industry participants and the desire of the industry to maintain the highest ethical standards and promote investor confidence. SROs also reduce the costs of regulation to the government and the taxpayer. The Commission and the SEC have recognized the virtues of SROs by ceding to them a host of responsibilities, especially those that are registration and compliance-related.

In the Release, the Commission notes that it presently relies heavily on the NFA as SRO in the futures markets (previously the Commission's most significant market responsibility) with respect to all aspects of the registration process and for monitoring compliance with all subsequent requirements. Presumably the Commission regards this as the most efficient use of its own resources, a judgment that would seem to apply equally to SRO usage in the swaps markets. Chairman Gensler has noted the resource constraints the Commission faces in implementing the Dodd-Frank Act in recent Senate testimony.[5] In light of those resource constraints, the evident benefits of SRO use mean that a system of self-regulation in the swaps market would be optimal for all concerned. In addition to relieving potential resource constraints at the Commission, we believe that having an SRO whose primary mission is to promote market integrity and compliance with defined standards has the additional benefit of being a very efficient means of achieving those objectives. Of course, in light of the fact that NFA has acted as an SRO for the futures industry exclusively, it would be necessary for the organization to develop a range of new capabilities in order to have the expertise necessary to serve as an effective SRO for the swaps industry. ISDA respectfully offers to serve as an expert resource on the swaps market to the appropriate SRO.

III. Section 2(i) of the CEA—Extraterritorial Application of SD and MSP Registration Requirements

In Section E of the Proposed Regulations, the CFTC solicits comment on whether and to what extent it should extend SD and MSP registration requirements to persons engaging in swap dealing

[5] See http://cftc.gov/PressRoom/SpeechesTestimony/ChairmanGaryGensler/opagensler-63.html

activities that "'have a direct and significant connection with activities in, or effect on, US commerce'" or "contravene rules or regulations the Commission may promulgate to prevent evasion." (75 Fed. Reg. 71382.) ISDA may comment more broadly on extraterritoriality in its response to the definitions release ("Definitions Release").[6] However, ISDA is grateful for the CFTC's raising the issue in the present context and will take this opportunity to offer some generalized views. Any comments ISDA now provides on extraterritoriality are subject to continuation in later letters.

It is ISDA's view that, particularly in light of present circumstances, the registration regime should reach only those persons that transact with US customers.[7] Registration itself should be only with respect to US customer business, and regulation following from registration should be considered accordingly. ISDA's position is grounded in (i) principles of statutory interpretation, as set forth in the Supreme Court's recent *Morrison* decision, (ii) Section 721 of the Dodd-Frank Act which expressly authorizes the CFTC to designate a person as a swap dealer for "a single type or single class or category of . . . *activities* and considered not to be a swap dealer for other types, classes, or categories of . . . *activities*," and (iii) principles of international comity, which are codified in part in the Dodd-Frank Act's international harmonization provision.[8] We leave for later letters the equally important and complex topic of regulation of the activities of US SDs and MSPs in foreign jurisdictions, whether by foreign or US regulators.

Limits of Registration

Section 722 of the Dodd-Frank Act provides that the CFTC's jurisdiction under Title VII shall not extend "to activities outside the United States unless those activities—(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the Wall Street Transparency and Accountability] Act." *Morrison* dictates that Section 722 be read narrowly. This is even more the case when the operative statutory provision under consideration makes no mention of extraterritorial application. Given that Section 731 *itself* does not expressly address extraterritorial application, principles of statutory construction mandate that there be a strong presumption against its application extraterritorially.[9]

Even if principles of statutory construction did not mandate such a reading, a narrow reading of Section 722, consistent with the message of *Morrison* and principles of international comity, embodied in part in the international harmonization provision of the Dodd-Frank Act (§ 752), require that the CFTC should nevertheless decline to take an expansive view of its jurisdiction, at least until it has coordinated with foreign regulators on the establishment of consistent international registration standards.[10] The international harmonization provision contemplates that other

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[6] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," Release No. 34-63452, File No. S7-39-10, RIN 3038-AD06 (CFTC), RIN 3235-AK65 (SEC), 75 Fed. Reg. 80174 (Dec. 21, 2010).
[7] "US customer" should refer to non-SDs and non-MSPs that are US persons and "US persons" should be defined at least as narrowly as it is defined in SEC Regulation S.
[8] The Dodd-Frank Act § 752.
[9] *Morrison*, 130 S. Ct. at 2878 ("When a statute gives no clear indication of an extraterritorial application, it has none.")
[10] CFTC Global Markets Advisory Committee Meeting, Tr. 100:3-5 (Oct. 5, 2010) (CFTC General Counsel Dan Berkovitz stated that there is "no bright-line rule that says * * * the statute applies to its fullest extent in every single possible application.").

countries will regulate their own swap dealing activities and does not provide for US authorities to regulate those same swap dealing activities concurrently. And, as the Supreme Court said in *Morrison*, "[even] when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms."[11]

Above all, the practicalities of implementing any registration regime, especially in a short time frame, dictate that registration parameters be clearly defined and reasonably limited. A bright line limiting registration to persons that transact with US customers would:

- promote stability and legal certainty in light of the short time frame in which the CFTC must implement the registration provisions;
- facilitate prompt compliance with the registration provisions by allowing for a clear determination of the persons that must register;
- increase the CFTC's ability to effectively oversee and implement registration of a clearly-identifiable group of persons; and
- reinforce the CFTC's commitment to respecting principles of international comity.

General Principles

We suggest that several broad principles may be helpful going forward:

- Registration should be limited to persons that meet the definition of SD or MSP solely on the basis of their business with US customers, and it should be solely US customer business that is subject to any attendant regulation.
- To the extent registration is to be required, the CFTC should adapt registration requirements for foreign registrants whose home countries have enacted and implemented comparable registration regulations that do not conflict with US regulations. As foreign regulators work to adopt their regulatory regimes, we urge the CFTC to coordinate with them on phase-in of respective implementation and compliance requirements. In determining comparability, ISDA urges an "in substance" assessment of comparability that does not require a one-to-one matching of discrete regulations. So, for example, in circumstances where swap dealers are in some other capacity comprehensively regulated (*e.g.*, as a bank or broker-dealer authorized to deal swaps), and so in some fashion registered, the comparability requirement would be met. (Without deference to home country regulation, registration may be prohibitively expensive, operationally impractical and impossible to achieve within the time frame set for implementation. Such circumstances will promote regulatory arbitrage and separation of markets.)
- When a foreign registrant's home country has comparable registration regulations that directly conflict with CFTC regulations, the CFTC should consider principles of international comity in determining whether and to what extent those registrants should be further regulated by the CFTC (we would expect that when the relevant "actor" is outside of the United States, the CFTC would generally defer to foreign regulation). Of course, the home country regulator has the greatest interest in, and is in the best position to, regulate foreign persons.
- Inter-affiliate and inter-bank branch trades should not count for purposes of characterizing an entity as an SD or MSP, and should not be the basis for attendant

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[11] *Morrison*, 130 S. Ct. at 2883 (citing *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437 455-456, 127 S. Ct. 1746 (2007).

regulation. These are simply mechanisms for risk allocation within corporate groups, rather than new positions.

ISDA stresses that principles of restraint and regard for comity are vital in this context, with respect to foreign participants in US markets and with respect to the treatment of US participants in foreign markets.

IV. Proposed Regulation 23.22—Requirements Applicable in the Case of an Associated Person of a Swap Dealer or Major Swap Participant

The Commission has requested comment as to whether it should by regulation restrict "associated persons" of Swaps Entities to "natural" persons.[12] ISDA believes that the Commission should restrict the "associated person" definition to natural persons on the same basis as such definition is restricted to natural persons for other classes of CFTC registrants. In particular, this restriction is consistent with the regulatory purpose of reaching individuals who work at point of "sale". Further, pursuant to the Dodd-Frank Act, the definitions of FCM, IB, CPO and CTA have directly or indirectly been amended to incorporate references to swaps. Thus, IB status will be just as available (and necessary) in the swaps market to both jural entities and natural persons (for the latter, as an alternative to associated person status) as it is in the futures market.[13] However, even when those FCMs, IBs, CPOs and CTAs are engaged in the swaps market, their "associated persons" remain limited to natural persons. It would be logically inconsistent to subject Swaps Entities, operating in the same market, to a broader definition of "associated person."

In addition, it has been established that the Commission's existing "associated person" definition is not limited to "direct" employees of Commission registrants.[14] Therefore, a jural entity that, for example, employs a salesperson whose activities are for the benefit of a Commission registrant[15] need not be an "associated person". However, the actual salesperson (and that sales person's supervisor, if any) within that jural entity *will* be an "associated person" of the Commission registrant. Given that the apparent policy goal is to prohibit persons who are subject to statutory disqualification from being associated with Swaps Entities, a definition of "associated person" that

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[12] Under the Dodd-Frank Act, persons subject to a statutory disqualification (*i.e.*, disqualification under Section 8a(2) or 8a(3) of the CEA) may not be associated persons of Swaps Entities. Under existing CFTC futures regulations, associated persons of existing CFTC registrants (*e.g.*, futures commission merchants ("**FCMs**"), retail foreign exchange dealers ("**RFEDs**"), commodity pool operators ("**CPOs**") or commodity trading advisors ("**CTAs**")) are required to be registered, unless they choose to register instead as "introducing brokers" ("**IBs**"). Current Commission regulations define "associated person" as any *natural person* associated with such entities. This language is mirrored in the statutory definition of "associated person of a swap dealer or major swap participant", with the notable exception that such definition is not limited to "natural" persons. See Section 721(a)(4) of the Dodd-Frank Act. The Dodd-Frank Act does not require registration of associated persons of Swap Entities themselves (unless the Swaps Entities are also FCMs, *etc.*), it simply prohibits such association by disqualified persons.

[13] We note that the definition of IB in the Dodd-Frank Act includes any person conducting the activities of an IB (including with respect to swaps) *except an individual who elects to be and is registered as an associated person of an FCM*. We query why such an election is available only to those who choose to be associated persons of FCMs.

[14] *See Stotler & Co. v. CFTC*, 855 F.2d 1288, 1293 (7th Cir. 1988) ("If a person acts as a salesman and solicits orders for a particular futures commission merchant, he may be an associated person with that merchant, even if he places some trades with others."). *See also Bogard v. Abraham-Reitz & Co.*, [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,273 at 29,393 (CFTC July 5, 1984) ("even if [one] were an independent contractor whose conduct in the performance of the services undertaken was not controlled by [the purported principal], that status would not itself preclude his being [an] agent"); *Lobb v. J.T. McKerr & Co.*, [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 36,441 n. 13 (CFTC Dec. 14, 1989).

[15] The Commission states that "associated person" has typically referred to a salesperson of a Commission registrant.

is limited to natural persons need not be broadened because the persons at point of sale or supervising those at point of sale would in any event be "associated persons".[16]

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ISDA appreciates the opportunity to provide comments on the proposed rules and looks forward to working with the Commission as it continues the rulemaking process. Please feel free to contact me or my staff at your convenience.

Sincerely,

Robert Pickel
Executive Vice Chairman

[16] There is little value in the jural entity that directly employs the salesperson being an associated person because even if that entity is subject to statutory disqualification, there is little to stop the principals of that entity forming another "clean" jural entity. It is altogether more difficult for natural persons to evade statutory disqualification.

Testimony of Stephen O'Connor
Managing Director, Morgan Stanley
and
Chairman, International Swaps and Derivatives Association
Before the
US House of Representatives Committee on Financial Services
June 16, 2011

Chairman Bachus, Ranking Member Frank and Members of the Committee:

Thank you for the opportunity to testify today. As the Committee's hearing demonstrates, there is significant interest and concern among corporations, asset managers, government entities and financial institutions in the US and abroad regarding the impact of new regulatory frameworks that are being proposed or implemented in key jurisdictions.

In my time today, I will focus on the over-the-counter (OTC) derivatives markets, and will discuss the major differences that appear to be developing between US and foreign regulatory regimes. I will also discuss the potential impact of those differences for US financial markets and the US economy.

I would like to begin by making five key points:

- First, ISDA and our members completely support and are committed to a robust regulatory framework for OTC derivatives – one that creates level playing fields across borders for all market participants, for example for US firms doing business abroad and non-US institutions operating in the US.
- Second, we have over the past three years made substantial progress in implementing the most important aspects of that framework – those that address systemic risk issues, such as clearing and trade repositories.
- Third, while we have made significant progress in addressing systemic risk further improvements can and will be made. I should also note that in this area, the systemic risk rules relating to clearing and regulatory reporting, there is great consistency between the US and other major jurisdictions and this is very helpful for market participants.
- On the other hand, my fourth point is that there is far less consensus in the US and overseas regarding matters outside the systemic risk area. These issues relate primarily to

OTC derivatives market structure. They are the subject of considerable discussion and debate, both within the US, and between the US and other jurisdictions. It appears that there will be significant divergences from the US regulatory approach in international regulatory regimes.

- Fifth and finally, in addition to the potentially substantive ***policy*** differences between US and other regulatory regimes, there are equally significant ***timing*** differences between jurisdictions. Given the scope of US reform efforts, it is virtually impossible to determine how different aspects of the new regulations may interact or conflict with each other. And given the pace of those efforts, it is likely that there will be different playing fields between the US and foreign markets for some time. ISDA believes that the application and effect of US law and regulation should be as even handed as possible with respect to both US and non-US financial institutions. Currently, it appears as though this will not be the case.

To summarize, there are large and growing differences in the pace and scope of regulatory reform efforts in the US and other jurisdictions. These differences have less to do with key systemic risk issues and more to do with the structure and functioning of the OTC derivatives markets. They put US financial markets at a disadvantage by driving up costs and reducing liquidity. And they do so without demonstrating any clear benefit to equal or outweigh the considerable costs they impose.

Finally, ISDA is an international organization, representing the interests of firms across the globe and it is important to recognize that conflicting regulatory requirements will affect both US and non-US firms doing business here, which could limit participation by non-US firms in the US capital markets, potentially resulting in lower liquidity as well as business moving abroad.

* * *

I would like to address each of my points in more detail. But before I do, it's important to note that much of my discussion of the regulatory regimes for OTC derivatives in the US, EU and elsewhere is based on our current reading of the proposals that are under consideration. Those proposals may change. In addition, the rule-making process in the US is in full swing. It

will be some months before all of the proposed regulations are finalized and longer still until they are implemented and their impact assessed. Both of these factors make it somewhat more difficult to conduct a precise comparison of the different regulatory frameworks that are being developed.

I would also like to point out that we at ISDA are sensitive to the perceptions that surround any discussions or comments that we or other market participants may have regarding the implementation of the Dodd-Frank Act. The financial crisis was but a few short years ago, and our economy and our markets have still not fully recovered. It would be easy for many to dismiss our views as just another effort to block, impede or delay regulatory reform.

With the memory of the financial crisis so fresh in our minds, let me assure the Committee that we do not undertake our commitments to regulatory reform lightly. We recognize their importance and we understand our responsibility to act and speak responsibly.

That is why it is important to state clearly: The International Swaps and Derivatives Association squarely supports financial regulatory reform. What's more, we have worked actively and engaged constructively with policymakers in the US and around the world to achieve this goal.

This, indeed, is our mission: to make over-the-counter (OTC) derivatives markets safe and efficient. And it's one that we have remained committed to since our founding in 1985. ISDA has, for example, helped to significantly reduce credit and legal risk by developing the ISDA Master Agreement and a wide range of related documentation materials, and in ensuring the enforceability of their netting and collateral provisions. The Association has also been a leader in promoting sound risk management practices and processes.

Today, ISDA has more than 800 members from 56 countries on six continents. These members include a broad range of OTC derivatives market participants: asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers, as well as global, international and regional banks.

In the years leading up to and since the passage of the Dodd-Frank Act, ISDA, the major dealers, buy-side institutions and other industry associations have worked collaboratively with global regulatory supervisors to deliver structural improvements to the global OTC derivatives markets. These structural improvements, which have helped to significantly decrease systemic

risk, involve three key areas – reducing counterparty credit risk, increasing transparency, and improving the industry's operational infrastructure.

One of the important ways that ISDA and the industry have worked to reduce counterparty credit risk is by embracing central clearing of derivatives transactions. Currently over 90% of new eligible credit and interest rate derivatives transacted between clearing house members are cleared on central counterparties. The volume of uncleared interest rate swaps has declined 42% between 2008 and 2010.

Another systemically important area of focus for ISDA and market participants is the establishment of trade repositories for the different OTC derivatives asset classes. Trade repositories collect and maintain a database of all OTC derivatives transactions, such databases being available to regulators at any time. They can play an important role in improving regulatory transparency by providing an unprecedented level of market and firm-wide risk exposures to the appropriate supervisors and regulators. ISDA has helped to establish repositories for interest rate, credit and equity swaps and is in the process of doing so for commodity swaps.

To strengthen the industry's operational infrastructure, ISDA and market participants have improved OTC derivatives processing, resulting in greater automation and reduced confirmation backlogs. Electronic confirmation of transactions is increasing across OTC asset classes.

In these and other ways, ISDA and the industry are demonstrating our long-standing commitment to build robust, stable financial markets and a strong financial regulatory framework. Our work is not done yet. Further progress lies ahead, and in fact we have always recognized that there must be a process of continuous improvement across all areas of our markets.

* * *

Let me turn to address the issues that are the main focus of your hearing today.

Today, OTC derivatives market participants are concerned by the potentially divergent approaches being taken in key regulatory jurisdictions. While it is too early to know for sure what frameworks will be adopted in the EU, EC officials have indicated publicly that it is not

their intention to change the structure of the OTC derivatives markets. It appears, rather, that the EC is focusing on the key systemic risk issues arising from the financial crisis that have been identified by the G-20 and the Financial Stability Board -- counterparty credit risk, regulatory transparency and operational infrastructure.

These systemic risk issues are, as you know, also the major drivers behind the Dodd-Frank Act. As I noted before, they are where ISDA and the industry are most heavily focused. There is, however, a significant US regulatory emphasis on areas not related to these systemic risk issues. This emphasis may go beyond the statutory requirements of the Act and will create new rules that will adversely affect the existing swaps markets with little apparent benefit. Requirements for the use and structure of execution platforms, capital and margin requirements, and business conduct standards are among the issues that could differ substantially between regimes.

The proposals regarding electronic trading platforms, which we in the US refer to as swap execution facilities (or SEFs) and those in the EC refer to as organized trading facilities (or OTFs) are one example.

In the US alone, there are different requirements proposed by the CFTC and the SEC regarding how derivatives are to be traded on SEFs. Under the CFTC SEF version, swap users requesting price quotes must do so from at least five dealers for swaps transactions that are required to be cleared and possibly traded on a SEF. The SEC SEF rule allows swap users to request a price quote from a single dealer for such transactions.

The CFTC SEF requirement has raised a number of questions among market participants. There is to our knowledge no objective evidence that supports or that indicates why five is the optimal number of dealers from whom quotes should be requested on a SEF. The law itself only specifies that participants have the ability to request quotes from multiple participants. It is widely believed that the requirement will adversely impact the liquidity of OTC derivatives markets and, perhaps most importantly, limit the liquidity available to entities using derivatives to hedge and mitigate risk, such as asset managers and corporate end-users. In addition, it would not offer any significant countervailing benefits. The prices of OTC derivatives transactions that will be cleared -- and which as noted must be traded on a SEF if there is one that makes them available for trading -- are already very competitive. It should be noted that regulatory visibility

into trading patterns and risk exposures can already be provided by trade repositories without any downside.

At this point in the process, the CFTC SEF requirement has no regulatory parallel in the EC or other major jurisdictions. Consequently, the proposal could uniquely and adversely impact US markets and US competitiveness.

Similarly, banks operating in the US will be forced to comply with the Section 716 of the Dodd-Frank Act, the so-called "push-out" provision, which has no counterpart in proposed EU or Asian regulations. ISDA supports the removal of Section 716 to resolve inefficiencies, such as loss of exposure netting, that will be created by forcing institutions to conduct their swaps business across multiple legal entities. In addition, non-US firms may have a serious disadvantage with respect to the provision as they do not have the benefit of the Section 716 exemptions now enjoyed by US firms. At a minimum, ISDA believes the Section 716 exemptions should be extended to US branches of foreign banks.

Another important point of divergence relates to new rules regarding business conduct between swap dealers and their customers. The CFTC’s proposed rules appear to apply concepts more applicable to the traditional agency role of securities and futures firms and do not recognize that the vast majority of swap counterparties are sophisticated financial market participants or at least have access to sophisticated advisors. The proposed rules would alter the arm’s length nature of the relationship between swap dealers and their counterparties, creating confusion regarding the parties' respective responsibilities, and potentially resulting in severe market disruption, at least for certain type of counterparties. For example, in their current form, the new standards could effectively preclude participation in the OTC swap markets by pension plans, municipalities and other “Special Entities;” introduce substantial and unnecessary uncertainty and litigation into the swap markets; and subject market participants to unnecessary costs, execution delays, and risks. Furthermore, these standards go well beyond the protections required by the statute and are counter to Congress' intent of maintaining a robust and competitive US derivatives market. They also go well beyond the regulatory framework contemplated in other jurisdictions.

Another key area of potential divergence relates to clearing rules for transactions between affiliated institutions. Inter-affiliate trades are used for internal hedging and risk management, and do not increase systemic risk as such trades are not executed with external counterparties.

European policymakers are discussing an exemption for transactions between related EU affiliates from mandatory clearing requirements. The current US framework would not. In fact, given the Section 716 requirements of the Act, inter-affiliate trading is likely to increase. This means that two subsidiaries of a single US financial institution, and potentially two subsidiaries of a non-US firm, that engaged in a swap transaction could be required to post margin on that transaction, and potentially be required to centrally clear the transaction. In effect, this means that firms active in the US would need to post collateral and clear transactions with themselves. We believe that these provisions should not apply to inter-affiliate transactions of any financial institution. Inter-affiliate trades should be excluded from most Title VII requirements as their inclusion will only increase costs and burdens for US financial institutions and of trading in the US markets.

The potential solution for these areas of divergence is to build a rational dialogue around consideration and adoption of the well-considered positions of other countries. This would mitigate the negative impact to the US markets described earlier. In other situations where non-US proposals create potentially negative impacts, a solution would be to request harmonization of the non-US rules to US regulator proposals if our proposal causes less detriment and greater protection to the markets.

The final area of divergence that I would like to discuss today relates to the previously obscure issue of extraterritoriality, which has taken on added stature in recent weeks. There are today large and growing concerns regarding the applicability of the Dodd-Frank Act outside of the US. Concerns around the extraterritorial scope of Dodd-Frank are already creating a great deal of uncertainty among market participants about whether and how to implement a new regulatory framework that may duplicate or conflict with that of their parent country. For instance, if derivative transactions between an Italian company and the UK subsidiary of a US bank were subjected to transaction level Dodd-Frank rules, but similar transactions between that Italian company and a UK bank without a US parent were not subject to those same rules, the end result would be that foreign companies would avoid doing business with swaps dealers affiliated with US companies. They would instead transact with financial institutions not covered by the scope of these margin requirements. It could put US markets at a serious competitive disadvantage.

Adding to the uncertainty are new rules issued by federal regulators on margin requirements that included provisions regarding extraterritorial application of those requirements, at least for swap dealers subject to prudential regulation. These rules would create significant issues for swap dealers affiliated with US holding companies and unnecessarily drive up the expense for foreign companies doing business with these swaps dealers.

The extraterritoriality proposals are inconsistent with Congressional intent regarding the territorial scope of the new regulatory framework for derivatives. Congress included provisions in Dodd-Frank that explicitly instruct regulators to impose the regulations outside the US only if there is a "direct and significant connection" with US activities or commerce or as necessary to avoid evasion of Dodd-Frank. These provisions are intended to appropriately balance the protection of the safety of the financial system with the competitiveness of US institutions, which is also necessary for a healthy US banking system.

Disadvantaging foreign institutions and US subsidiaries of such institutions, through divergent capital requirements or otherwise, discourages foreign investment in US subsidiaries, which leads to fewer jobs and to less competition within our shores. Such divergent treatment also creates the potential for retaliatory measures abroad, thus limiting opportunities and creating a hostile market environment for both US- and foreign-based firms.

Unlike the potential solution for the first few issues, the solution here is to recognize rational limits on the extent to which US rules can govern offshore transactions. The goal should be a level playing field and the recognition that other jurisdictions will also have comprehensive and complementary regulatory regimes, even if not the same as ours.

* * *

Each of the issues I have discussed reflects potentially important differences in policy across jurisdictions. These differences could significantly disadvantage participants in the US OTC derivatives markets – be they financial institution dealers (US or non-US), pension funds managing their risk and investment returns, corporations hedging their interest rate exposure, or energy firms managing their exposure to volatile commodity prices.

In addition to these policy differences, there are also important differences in timing that could significantly impact US financial markets. The fact that firms based or doing business in

US markets will be subject to a new regulatory framework well before a complementary framework is established in other key jurisdictions is itself a cause for concern. The potential for that US framework to inadvertently create an uneven playing field for the US markets adds to those concerns. So too does the prospect that some firms active in the US markets may have to comply with two sets of regulatory regimes. Ultimately this could lead to increased costs, decreased liquidity and a reduction in the overall availability of capital in the US markets.

As we all know, the volume of rulemakings in the US is very large, the rules are complicated, and there are significant interdependencies among many of them. Dealers and swaps market participants will need to devote significant resources to adapting to and implementing these new rules over the next few years. To make matters worse, many market participants do not yet know whether or how or when the new rules will apply to them. The scale of change required in the swaps market by the Dodd-Frank Act, including new trading, reporting and clearing requirements, registrations, compliance regimes, and documentation requirements cannot be overstated.

It's clear that additional time is required to review and evaluate the full mosaic of the proposed new rules. The CFTC's decision to reopen Title VII comment periods for 30 days is a step in the right direction. However, simply re-opening the comment period does not provide any insight on how the extensive prior comments on the original proposals may have influenced the Commission's thinking in crafting final rules. The comment period re-opening cannot replace the value of allowing consideration of how the thousands of comments will be incorporated into the rules, and how such re-proposed rules will interact and come together in an overall framework for market infrastructure. So it is essential that market participants have an opportunity for additional review and comment on the entire revised set of rules which the Commissions will publish after evaluating comments received.

In addition to the need for a second or subsequent comment period on rule proposals, there is also a significant need for a rational, appropriate phase-in of implementation of the rules across markets and market participants. The former will be essential so that rules are appropriately tailored, work in tandem, and avoid unduly impairing market liquidity or adversely impacting investors. The latter is about enabling market participants to implement the changes most effectively. Both issues are, however inter-related: it is not enough to phase-in implementation if the final rules themselves are unworkable or in conflict.

ISDA supports efforts to provide policymakers and market participants with additional time needed to weigh the individual and cumulative impact of the proposals, as well as their costs and benefits. This would help to ensure that US markets and their competitiveness are not unintentionally harmed by any aspects of the proposed rulemakings.

We have developed, and have discussed with the Commissions, suggested approaches that would phase in the implementation of new rules. Our approach is based on a series of key principles that we believe should govern the implementation schedule. We have outlined these principles in detail in a letter to the Commissions. To summarize them, ISDA believes that:

- Sufficient time should be granted to market participations to implement the final rules so as to avoid market disruptions;
- Our first implementation priority is providing regulators with enhanced transparency through the trade repositories;
- Requirements should be phased in by type of market participant and asset class;
- Systemically important initiatives should be phased in first;
- We need to allow adequate time for these changes to flow through to customers; and
- Regulators should rationalize how they implement different rules.

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It's clear that we are entering a new era of finance – and of financial regulation – in the US and abroad. ISDA supports public policy and industry efforts to build a more robust, stable financial system in which safe, efficient OTC derivatives markets enable more effective risk, investment and financial management.

As we work to do so, it is vitally important that the competitiveness of the US financial markets stay top of mind. Financial institutions, pension funds, asset managers, corporations, energy and commodity companies and others routinely use OTC derivatives. According to our research, over 90% of the largest US companies use OTC derivatives to manage their business and financial risks.

OTC derivatives play an important role in the American financial systems and the American economy. While we are all supportive of initiatives that decrease systemic risk, policy differences that impose significant costs but offer few, if any, offsetting benefits may lead to

increase costs, decreased liquidity, a reduction in growth capital, the erosion of US competitiveness and the loss of jobs in the US financial markets. Although the US remains one of the most dynamic, innovative marketplaces in the world, we note that transaction volume in London already exceeds that in New York. We also note that the five largest US-based dealers reported a notional amount outstanding equal to only 37% of the total notional amount for interest rate, credit, and equity derivatives globally.

The best way to avoid many of the issues that I have discussed, and to protect the competitiveness of US markets, is to work with the EU and other overseas jurisdictions towards a convergence of the rule sets and a convergence of the timelines for implementation, thus reducing the impact of any temporary or permanent regulatory differences between the US and other financial markets and mitigating the damage that these differences will cause.

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