September 26, 2011

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

Re: International Swaps Regulation Mandated by Dodd-Frank

Dear Mr. Stawick:

This letter is submitted on behalf of Americans for Financial Reform[1] in response to the Commodity Futures Trading Commission's ("CFTC") request for comment[2] on establishing common swap and clearinghouse regulations in the United States, Europe and Asia. Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] ("Dodd-Frank") requires the CFTC and the Securities and Exchange Commission ("SEC") to study swap and clearinghouse regulations in European and Asian jurisdictions and to identify areas where these regulations might align with U.S. regulations.

Section 719(c)'s requirement that U.S. regulatory agencies harmonize U.S. financial regulations with regulations promulgated in Europe and other foreign jurisdictions has prompted U.S. regulators to examine foreign laws and rules and consult with their foreign counterparts regarding financial reform.[4] We believe these examinations are critical and endorse them as well as long-term, worldwide coordination.

However, swap dealers, major swap participants and U.S futures exchanges want to use Section 719(c) to argue that this single provision trumps the many specific sections of Dodd-Frank that require prompt financial reform of the previously unregulated derivatives market

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[1] Americans for Financial Reform (AFR) is a coalition of more than 250 American organizations who have come together to advocate for reform of financial sector regulation. Members of the AFR include consumer, civil rights, investor, retiree, labor, religious and business groups along with prominent economists and other experts.
[2] 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, 76 Fed. Reg. 44508 (July 26, 2011).
[3] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[4] Letter from Treasury Secretary Timothy Geithner to Congressman Spencer Bachus, 1 (Sept. 14, 2011) (explaining that the SEC and CFTC have studied the international implications of Dodd-Frank regulations and are working with their European and Asian counterparts to produced comparable financial regulations)[hereinafter "Treasury Secretary Geithner's Letter to Congressman Bachus"].

within the U.S by requiring capital reserves, collateralization and transparency.[5] Specifically, Wall Street and its allies have ignored the many congressional mandates for expedition in establishing these kinds of measures in order to read this one provision as *requiring* the delay of implementation of the entirety of the Dodd-Frank derivatives rules until rules have been adopted in all major foreign jurisdictions.[6]

Despite claims to the contrary, comprehensive and harmonious international financial regulation is best, and perhaps only, achieved by the timely implementation of the robust financial regulations required by Dodd-Frank-mandated regulation of derivatives. We are dealing with a worldwide market that exceeds $600 trillion notional value. The unregulated nature of that market exposes the world to continued systemic risk, especially in a time of worry about sovereign defaults and the defaults of banks that hold sovereign debt. Defaults of that nature are conceded by almost everyone as having the ability to trigger undercapitalized and non-transparent credit derivatives of the kind that were triggered in the 2008 subprime fiasco. Estimates indicate that Dodd-Frank's implementation will bring one half of the world derivatives market under Dodd-Frank's statutory capital and transparency protections when the U.S. rules implementing the statute are final.

With worldwide economic stability at stake, tough regulatory protections for the derivatives markets are needed instantaneously. Moreover, the Dodd-Frank statute has served as a legislative template for foreign jurisdictions to follow. This fact will also be true of the final Dodd-Frank rules when foreign jurisdictions move into their own rulemaking implementation phase. Finally, the significant extraterritorial scope of the Act and its underlying rules in and of itself will create rigorous, international standards for financial regulation that will restore transparency and stability to global derivatives markets.

I. Uniform, International Financial Regulation is Best Achieved by Demonstrating the Efficiency and Effectiveness of U.S. Financial Regulatory Reforms.

The most effective and efficient means to achieve harmony between different regulatory regimes around the world would be to demonstrate that Dodd-Frank regulations implementing the Dodd-Frank statute would ensure the stability and long-term profitability of financial markets. In contrast, delaying the implementation of Dodd-Frank-mandated regulations would compromise U.S. leadership on capitalization, collateralization and transparency within derivatives markets. Also, delaying implementation of Dodd-Frank regulations would facilitate piecemeal and haphazard international regulations that would fail to protect U.S. investors, consumers and taxpayers from systemic instability in derivatives markets, as the impact of these

[5] *See infra* pp. 5.

[6] Clearly, Gottlieb, Steen & Hamilton, *Dodd Frank: One Year Later: Key Current Issues for Financial Institutions*, July 27, 2011, ii (asserting that "most [financial] institutions would rather see implementation of the [Dodd-Frank] Act take as long as necessary to avoid what virtually all observers recognize is a risk of potentially serious unintended consequences)[hereinafter "*Dodd Frank: One Year Later*"].

markets is felt across jurisdictional boundaries in cases such as the sovereign debt crisis, which appears to be imminent.[7]

U.S. leadership on derivatives reform for most swaps markets through capitalization, collateralization and transparency statutory guidelines has helped standardize the general principles that are driving international financial reform. Treasury Secretary Timothy Geithner recently described Dodd-Frank as "set[ting] the global standard for oversight and transparency in the derivates market."[8] As such, the Dodd-Frank statute has served as a model for derivatives reform for multiple jurisdictions. For example, the European Commission's laws governing over-the-counter (OTC) derivatives align with principles established by Dodd-Frank: Europe is preparing to implement Dodd-Frank's two-tiered registration scheme,[9] impose reporting requirements on the once-opaque OTC derivatives market, and require central counterparties to clear standard OTC derivative contracts.[10] Also, in May of last year Japan amended its Financial Instruments and Exchange Act to adopt similar reporting and clearing requirements to the United States[11] and the Indian parliament is debating legislation that, like Dodd-Frank, will restore transparency to OTC markets.[12]

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[7] Testimony of Wallace Turbeville, *Public Roundtable to Discuss International Issues Relating to the Implementation of Title VII of the Dodd-Frank Act: before the CFTC and SEC*, 43 (2011), *available at* http://www.sec.gov/news/press/2011/2011-151-transcript.pdf ("Derivatives are ephemeral, they defy the notion of territoriality, they defy a lot of things—they defy understanding.")[hereinafter *Roundtable to Discuss International Issues*]; testimony of Lael Brainard, *Financial Regulatory Reform: The International Context: Hearing before the H. Comm. on Financial Services*, 1 (2011), *available at* http://financialservices.house.gov/UploadedFiles/061611brainard.pdf (noting that today's financial markets are global and highly-interconnected)[hereinafter "Brainard"].

[8] Treasury Secretary Geithner's Letter to Congressman Bachus, *supra* note 4, at 1. *See also,* Brainard, *supra* note 7, at 1 (commenting that the United States is taking the lead in enacting financial reforms and should maintain this lead).

[9] CFTC, *Derivatives Reform: Comparison of Title VII of the Dodd-Frank Act to International Legislation*, Oct. 5, 2010, *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/speechandtestimony/gmac_100510-cftc2.pdf[hereinafter "*Derivatives Reform*"].

[10] European Commission, *Making Derivatives Markets in Europe Safer and More Transparent*, IP/10/1125, Brussels, Sept. 15, 2010, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1125&format=HTML&aged=0&language=EN&guiLanguage=en.

[11] Financial Services Agency, Government of Japan, *New Regulation of OTC Derivatives in Japan*, Oct. 2010, *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/gmac_100510_fsag.pdf; *Derivatives Reform*, *supra* note 9.

[12] George Mathew, *'Optimistic About Parliament Passing FCRA Amendment Bill in Next Session'*, INDIAN EXPRESS, June 27, 2011, *available at http://www.indianexpress.com/news/optimistic-about-parliament-passing-fcra-amendment-bill-in-next-session/809040/2*.

Now the U.S. is about to complete the implementation phase of crafting the operational rules that will bring the Dodd-Frank statutory standards to life. Any significant delay in enacting Dodd-Frank operational *rules* would compromise the United States's ability to influence the substance of global derivatives operational *rules* as this influence has so far facilitated homogeneous global *legislative* guidelines for the capitalization, collateralization and transparency of derivatives markets worldwide.

U.S. leadership on derivatives reform has been so central to worldwide progress on operational implementation[13] that failure to make final Dodd-Frank rules in a timely manner would undercut the swift implementation of derivatives regulation that has been anticipated by well-regarded financial regulators throughout the world.[14]

Specifically, delaying the implementation of Dodd-Frank provisions would leave foreign jurisdictions without a derivatives regulatory model upon which to base their financial regulatory regimes. The result would be chaotic and uncoordinated international derivatives reforms that would prove difficult, if not impossible, to cohere into comprehensive, global financial regulations, especially through the highly impractical and utopian goal of ensuring that no one country acts until all countries are ready to act together.[15] Because moving forward simultaneously will never realistically happen, the desire for such an Orwellian achievement must be viewed for what it really is: global delay in implementing derivatives reform. Someone must go first. The U.S. is poised to do so. In going first, the U.S. would set up model regulations that would ensure that $300 trillion in derivatives is properly capitalized, collateralized and transparent.

a. Delaying the Implementation of Dodd-Frank Regulations Would Unnecessarily Postpone the Implementation of Comprehensive, International Financial Regulations and Radically Increase the American Public's Exposure to Financial Risk.

To delay implementing the final Dodd-Frank derivatives regulations, as the Wall Street and big U.S. futures exchanges call for, until all foreign jurisdictions that have finalized financial reform statutes also finalize operational regulations to implement the principles established by

[13] Treasury Secretary Geithner's Letter to Congressman Bachus, *supra* note 4, at 2 ("The U.S. initiative to develop global margin standards and myriad other efforts go far in promoting alignment between other countries' derivative regulations and rules enacted under the Dodd-Frank Act.").
[14] *See* § 754 of the Dodd-Frank Act, *supra* note 3. *See also* Letter from Committee on Capital Markets Regulation to Senator Christopher Dodd *et al*., 1-2 (Dec. 15, 2010) (commenting that Dodd-Frank has required federal agencies to issue 230 new rules in a short amount of time: the statute required the SEC to issue approximately sixty new rules and the CFTC to issue approximately forty new rules within a year of the statute's enactment).
[15] Treasury Secretary Geithner's Letter to Congressman Bachus, *supra* note 4, at 1 (explaining that the SEC and CFTC have studied the international implications of Dodd-Frank regulations and are working with their European and Asian counterparts to produce comparable financial regulations).

these statutes, would only compound the delays that afflict the U.S. rule-making process and undercut the aggressive schedule established by Congress for implementing Dodd-Frank derivatives regulations that were designed to prevent another economic meltdown and, subsequently, U.S. taxpayers to once again bail out the Too Big To Fail swap dealing institutions.[16] The CFTC failed to finalize its rules by the July 16, 2011, deadline set by Congress[17] and has continued to push back internal deadlines.[18] Additionally, CFTC Chairman Gary Gensler recently announced that his agency would not finalize all of its financial regulations until the second or even third quarter of 2012.[19] Because the CFTC cannot begin any oversight over the unstable U.S. swaps market until its regulations are finalized, the CFTC will not be ready to regulate derivatives markets until June 2012 at the earliest[20]—over four years after the 2008 financial collapse that devastated the U.S. and world economies.

Wall Street's call for much longer U.S. delay until international derivatives standards are uniformly and simultaneously adopted flaunts—as Wall Street and U.S. futures exchanges well know—Congress's specific and repeated desire for speedy financial regulation and would prolong American taxpayers', businesses' and consumers' exposure to significant economic risk. Again, we are all for international coordination and cooperation as intended by Section 719(c); however, coordination does not mean that the U.S. must delay implementation of Dodd-Frank's oversight of derivatives on some theory that delay will lead to perfect coordination of a world regulatory format. Congress wanted the U.S. to lead and coordinate; not delay and coordinate.

Further, the development of global and operational derivatives *regulation* (as opposed to general statutory standards) in other jurisdictions lags so far behind the likely operational effect of U.S. derivatives regulation, that to postpone the implementation of the Dodd-Frank regulatory structure (likely to be operational by mid-2012) would leave global derivatives markets unregulated way too far into the foreseeable future. Although the rest of the world is following the Dodd-Frank statutory framework, non-U.S. jurisdictions have not begun the arduous process of translating statutory principles into operational regulations. For example, the U.K. has indicated that it will not implement the general reforms recently stipulated by the Independent Commission on Banking until 2019 when the new rules established by the Basel III international

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[16] *See supra* note 14.
[17] Testimony of CFTC Chairman Gary Gensler, *Hearing before the H. Comm. on Agriculture* (2011), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-88.
[18] *CFTC Insiders Blow Whistle on Position Limit Rule*, THOMAS REUTERS, Sept. 14, 2011, *available at* http://newsandinsight.thomsonreuters.com/Securities/News/2011/09_-_September/Exclusive__CFTC_insiders_blow_whistle_on_position_limit_rule/ (reporting that the CFTC has already missed one deadline to finalize position limits and that CFTC Chairman Gary Gensler now hopes to have a position limits rule approved in early October).
[19] Conference Call with CFTC Chairman Gary Gensler (Sept. 12, 2011).
[20] *See* CFTC Open Meeting on Two Proposed Rules Under the Dodd-Frank Act (Sept. 8, 2011) (voting to approve the gradual implementation of clearing and trade execution requirements and of trading documentation and margining requirements so that these requirement will not take effect immediately after they are finalized).

agreement on capital held by banks must come into effect.[21] The European Union is in a similar position: it is enacting financial reform legislation and has not begun the rule making process.[22] In contrast, the United States is at the brink of completing the complex "implementation" stage and has construed regulations for derivatives by mid-2012.

Thus, to delay implementing Dodd-Frank regulations until the international community proposes specific global derivatives regulations would postpone U.S. derivatives regulatory efforts indefinitely and leave the American public vulnerable to the demonstrated risks associated with opaque financial markets for years if not decades to come.

Again, swap dealers and major swap participants are attempting to use a single provision within Dodd-Frank calling for international cooperation to undercut the sense of urgency that is manifest throughout the remainder of the statute. Despite this attempt, the general language of Section 719(c) does not justify delaying the implementation of Dodd-Frank derivatives regulations as these rules promise to protect U.S. investors, consumers and taxpayers against market instability and rising commodities costs, and the repeated need to bail out the Too Big to Fail institutions.

b. Dodd-Frank-Mandated Financial Regulations Transcend Jurisdictional Boundaries and Apply to U.S. and Foreign Financial Entities.

Dodd-Frank derivatives provisions mandate that global banks and other financial entities comply with U.S. derivatives regulations even if these banks and financial entities are located in foreign jurisdictions. Section 722(d) of the Dodd-Frank Act states that the statue's provisions apply to swaps that either "have a direct and significant connection with activities in, or effect on, commerce of the United States" or that contravene regulations that prevent the evasion of Dodd-Frank provisions.[23] Also, Dodd-Frank does not specifically exempt foreign banks or institutions from its purview[24] so that U.S. regulatory agencies have significant latitude in how they apply U.S. regulations to foreign financial entities.

The immense size of U.S. financial markets means that Title VII of the Dodd-Frank Act will almost serve as a *de facto* global standard for derivatives regulation. The United States government oversees half of the world's $600 trillion global derivatives market[25] and most major

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21 Robert Peston, *Banks Face Biggest Shake-Up for Decades*, BBC, Sept. 12, 2011, available at http://www.bbc.co.uk/news/business-14877861.

[22] Douglas J. Elliott, *The Danger of Divergence: Transatlantic Cooperation on Financial Reform*, THE BROOKINGS INSTITUTION, I and III (Oct. 2010) (commenting that while Europe is still considering major financial-reform legislation, the U.S. "has already set a framework to address the root causes" of the 2008 financial crisis).

[23] *See* § 722(d) of the Dodd-Frank Act, *supra* note 3.

[24] *Dodd Frank: One Year Later*, *supra* note 6, at 29.

[25] Ben Protess, *Dodd-Frank Inches Along*, N.Y. TIMES, Sept. 6, 2011, *available at* http://dealbook.nytimes.com/2011/09/06/dodd-frank-inches-along/?scp=1&sq=600%20trillion%20derivatives%20market&st=cse.

foreign banks and financial entities participate in U.S.-regulated markets.[26] The dominant position of U.S. financial markets means that most global financial entities conduct swap transactions either in the United States[27] or with U.S. counter parties[28] and so will be subject to Dodd-Frank regulation. Further, the high-volume trades regularly conducted by global financial entities are likely to have "a direct and significant connection" with U.S. markets, even if the trades are transacted outside of the United States. Consequently, major foreign banks will register as swap dealers with the CFTC and develop internal practices that comply with U.S. trading requirements—these banks cannot afford to be sued in U.S. courts for violating U.S. regulations or in any way risk not having access to the world's most lucrative markets.[29]

The CFTC can require non-U.S. swap dealers who trade on U.S. markets or with U.S. counterparties to register as swap dealers and adhere to CFTC regulations.[30][31] Also, the CFTC

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[26] Federal Reserve Bank of New York, THE FOREIGN EXCHANGE AND INTEREST RATE DERIVATIVES MARKETS: TURNOVER IN THE UNITED STATES, April 2010, *available at* http://www.newyorkfed.org/markets/triennial/fx_survey.pdf. *See also* Testimony of Professor Michael Greenberger, *Energy Market Manipulation and Federal Enforcement Regimes: Hearing before the S. Comm. on Commerce, Science, and Transportation*, 5 (2008) (observing that major foreign futures exchanges trade in the U.S. on U.S.-based trading terminals of foreign delivered futures contracts)[hereinafter *Energy Market Manipulation and Federal Enforcement Regimes*].

[27] Thomas Riggs III, *Roundtable to Discuss International Issues*, *supra* note 7, at 64.

[28] Marcelo Riffaud, *Roundtable to Discuss International Issues*, *supra* note 7, at 99.

[29] *See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant"*, RIN 3235–AK65, 75 Fed. Reg. 244 (Dec. 21, 2010) (noting that failure to register with the CFTC may result in enforcement action by the CFTC); CFTC, *CFTC Sues II Foreign Currency Firms in Second Nationwide Sweep Against Unregistered Firms*, Sept. 8, 2011, *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6108-11 (announcing that the CFTC sued eleven foreign currency firms for not registering under the 2008 farm bill, the Dodd-Frank Act, and the CFTC's own regulation).

[30] *Dodd Frank: One Year Later*, *supra* note 6, at 29.

[31] There has been some suggestion that a foreign entity that is subject to regulation under Dodd-Frank may avoid direct oversight by the CFTC and/ or SEC if the entity's home jurisdiction has a "comparable" regulatory regime. In the past, the CFTC allowed foreign boards of trade that conducted business in the U.S. to avoid direct U.S. regulation if the boards of trade operated under equivalent or "comparable" regulatory regimes. In practice, the CFTC allowed foreign boards of trade to avoid direct U.S. regulation when they did business in the United States even when the foreign board of trade was subject to regulation that was notably inferior to U.S. regulation. For example, the CFTC considered certain foreign regulatory schemes "comparable" to the U.S. regulatory scheme even though the foreign regulatory schemes did not have position limits to curb speculation. Ultimately, the CFTC went to substantial lengths to require certain foreign boards of trade that were exempt from U.S. regulations even though they did business in the U.S. to adopt position limits. *See e.g.* Testimony of Professor Michael Greenberger, *Excessive Speculation: Position Limits and Exemptions: Hearing before the Commodity Futures Trading Commission*, 22 (2009); Testimony of Professor Michael Greenberger, *Energy Speculation: Is Greater Regulation Necessary to Stop Price Manipulation?—Part II: Hearing*

has determined that proposed margin collection requirements under the Dodd-Frank Act will apply to U.S. and foreign counterparties of a covered swap entity.[32] Thus, the extraterritorial reach of Dodd-Frank, in and of itself, goes a long way to establishing uniform, global standards for derivatives.[33]

Further, Wall Street's refrain that U.S. prudential regulators' requirement that big bank swaps dealers collateralize uncleared swaps disadvantages big banks' foreign subsidiaries, *vis a vis* completely foreign banks in foreign jurisdictions that do not require similar collateralization, is unavailing. Similarly and completely unavailing is the constant Wall Street refrain that the requirement of U.S. prudential regulators that big bank swaps dealers must collateralize uncleared swaps disadvantages their foreign subsidiaries vis a vis completely foreign banks in those foreign jurisdictions, which do not now require similar collateralization.[34] First, as shown below, many foreign jurisdictions, such as the U.K., have imposed prudential capital requirements on U.K. banks that exceed the requirements now required by U.S. regulators, thereby leading U.K. banks like Barclays to threaten to leave the U.K. for the U.S. For every example of unfair advantage because of perceived strictness here, there is another example of

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before the H. Energy and Commerce Subcomm. on Oversight and Investigations, 6-7, 18-19 (2009). We believe that the extraterritorial effect of Dodd-Frank means that if U.S. registration is required, direct foreign oversight is inappropriate. Alternatively, the CFTC should replace the "comparability" standard used to allow regulation of U.S. conduct by a foreign jurisdiction with the "substantially identical" standard. The latter standard would further ensure that foreign jurisdictions will follow Dodd-Frank regulation templates.

[32] Clearly, Gottlieb, Steen & Hamilton, *Prudential Regulators Propose Swap Margin and Capital Requirements*, April 14, 2011, 2 ("The proposed margin collection requirements would generally apply to U.S. and non-U.S. domiciled counterparties of a covered swap entity.")[hereinafter *Swap Margin and Capital Requirements*]; *Dodd Frank: One Year Later*, *supra* note 6, at 38 ("The Federal banking agencies have proposed to apply U.S. margin requirements to transactions by separately incorporated foreign subsidiaries of U.S. persons . . . with other foreign persons, even when the subsidiary does not have a guarantee from its U.S. parent.").

[33] *See also* Stephen R. Smerek & Jason C. Hamilton, *The Long Arm of the Law: Morrison, Dodd-Frank, and the Extraterritorial Reach of U.S. Regulators*, Oct. 4, 2011, 2 (noting that Dodd-Frank authorizes the SEC to regulate certain securities transactions conducted by foreign investors outside of the United States, e.g. a transaction that has a foreseeable and substantial effect on the U.S. economy); Suzanne Kapner, Victoria McGrane & Sara Schaefer Munoz, *Overseas Banks Pursue 'Living-Will' Exemption*, WALL STREET JOURNAL, Sept. 14, 2011, *available at* http://online.wsj.com/article/SB10001424053111903532804576567043654281066.html?mod=dist_smartbrief (reporting that foreign banks who have a small U.S. presence are pushing for an exemption from new rules proposed by the Federal Deposit Insurance Corporation that would require these banks to submit "living wills"—outlines of how a company would be liquidated in the event of a failure—to U.S. regulators).

[34] Matt Cameron, *Foreign Regulators Leave U.S. Isolated on Uncleared Margin Rules*, RISK.NET, Sept. 5, 2011, *available at* http://www.risk.net/risk-magazine/feature/2104312/foreign-regulators-leave-isolated-uncleared-margin-rules.

perceived unfair strictness abroad. Second, by requiring adequate collateralization in uncleared swaps, our prudential regulators, like the U.S. Fed, are protecting the U.S. taxpayer from the kind of multi-trillion dollar bailout that derived from the lack of any collateralization by U.S. banks, including foreign subsidiaries, to meet their extraordinary losses from imprudent and risky derivatives trading in the subprime market. Again, some regulation here is better than none at all everywhere. Whatever "advantage" is gained by foreign banks not having to post collateral is lost by foreign taxpayers whose foreign governments choose not to protect them against systemic risk. But, most importantly, Wall Street's argument overlooks Dodd-Frank's requirement that, if the foreign swaps dealer is dealing with U.S. customers or if the "completely foreign transaction" has a "direct and significant" adverse impact on the U.S. economy, "foreign" uncleared swaps will have to be collateralized in accordance with U.S. requirements. Finally, this argument also overlooks the fact that approximately 95% of the world's swap market is dominated by four, Too Big to Fail U.S. banks.[35] It is these four banks that will be governed by the U.S. Fed's collateral requirements and it is these banks that pose the biggest threat to the world economy.

Ironically, the financial industry's argument to curb U.S. progress on financial reform in the name of promoting a single, international financial regulatory regime ignores the obvious fact that Dodd-Frank establishes robust, global financial rules that U.S. agencies are relatively near to implementing.[36] Specifically, the financial industry would jettison the well-respected, near-complete regulatory framework created by Dodd-Frank in favor of the hope of a utopian regulatory regime whose parameters and principles have yet to be clearly identified and, subsequently, ensure no regulation anywhere for years to come.[37] Wall Street's self evident motive is crystal clear: to delay the implementation of prudent financial reforms that will require the financial industry to end risk-taking activities that proved highly lucrative for U.S. and foreign banks, but that cost American taxpayers trillions of dollars in subsidies.[38]

II. Robust Regulations Are Unlikely to Prompt Global Banks and Financial Entities to Relocate Their Trading Operations Outside of the United States.

As Congressman Barney Frank recently observed, Wall Street arguments against implementation of derivatives reform until all countries have regulations that are uniform worldwide, defy the laws of physics because every bank claims to be on the bottom because of its countries' regulations: U.S. banks argue that regulation under Dodd-Frank prevents them

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[35] Tyler Durden, *Five Banks Account for 96% of the $250 Trillion in Outstanding U.S. Derivative Exposure; Is Morgan Stanley Sitting on an FX Derivative Time Bomb?*, ZEROHEDGE.COM, Sept. 26, 2011, *available at* http://www.zerohedge.com/news/five-banks-account-96-250-trillion-outstanding-derivative-exposure-morgan-stanley-sitting-fx-de (reporting that J.P. Morgan, Citi, Bank of American and Goldman Sachs control 94.4% of derivative risk in the global financial system).

[36] *See supra* pp. 5 (anticipating that CFTC rules will be completed by summer of 2012).

[37] Turbeville, *Roundtable to Discuss International Issues*, *supra* note 7, at 79.

[38] PBS, *The True Cost of the Bank Bailout*, Sept. 3, 2010, *available at* http://www.pbs.org/wnet/need-to-know/economy/the-true-cost-of-the-bank-bailout/3309/.

from competing with European banks; European banks argue that European financial regulations favor U.S. banks.[39]

For example, U.S. and British banks oppose proposed margin and capital requirements in their respective jurisdictions for the same reason: the requirements (supposedly) impede international competitiveness.[40] More recently, Jamie Dimon, chief executive of J.P. Morgan Chase, commented that the Basel III agreement is "un-American" and that it will compromise American banks' dominance in the global financial industry.[41] The ongoing fight between London-based Barclays Bank and the British government over financial reform in Britain epitomizes this trend. Barclays has repeatedly threatened to relocate to the United States if the British government requires British banks to separate their high street retail operations from their investment banking work.[42] As Barney Frank has observed, the simultaneous "threatened" migration of U.S. banks to the U.K. and U.K. banks to the U.S. means that the banks will soon meet in the middle of the Atlantic Ocean. Again, the extraterritorial scope of Dodd-Frank will prevent major international banks from evading robust regulation by relocating their operations offshore if they still have U.S. customers or a significant impact on U.S. markets.

In the long run, there can be no doubt that if the U.S. implements its regulation, most nations will follow by adopting regulations of a similar nature. If they do not, then systemic risk will migrate to those smaller countries that want to encourage undercapitalized and non-transparent trading. Their taxpayers will have the choice of bailing out these banks: or not. And, if they do not, especially if they cannot because their country does not have the financial reserves

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[39] Barney Frank, *A Thousand Cuts: In Bits and Pieces, Conservatives Attack Wall Street Reforms*, BOSTON GLOBE, July 30, 2011, *available at* http://www.barneyfrank.net/news/one-thousand-cuts-boston-globe-op-ed-congressman-barney-frank.

[40] *Swap Margin and Capital Requirements*, *supra* note 32, at 2 (stating that U.S. banks complain that the extraterritorial application of Dodd-Frank-mandated margin requirements will "intensify the competitive disparities faced by U.S.-domiciled bank holding companies operating outside the U.S."); *Acclaim for Banking Shake-Up Plan*, BBC, Sept. 12, 2011, *available at* http://www.bbc.co.uk/news/business-14877861 (reporting that British banks considered capital requirements proposed by the British government to be "out of step with internationally agreed measures" and predicted the requirements will increase operational costs for British banks).

[41] Tom Braitwaite & Patrick Jenkins, *JP Morgan Chief Says Bank Rules 'Anti-US*, FINANCIAL TIMES, Sept. 12, 2011, *available at* http://www.cnbc.com/id/44481524/; Cheyenne Hopkins & Ian Katz, *Volcker Rule May Extend to Overseas Banks With U.S. Operations*, BLOOMBERG, Sept. 17, 2011, *available at* http://www.businessweek.com/news/2011-09-17/volcker-rule-may-extend-to-foreign-banks-operating-in-u-s-.html (reporting that Wayne Abernathy, vice president of the American Bankers Association, complained that transactions conducted by American banks "can easily be done by foreign competitors").

[42] *Don't Push Us to Leave UK, Barclays Warns Treasury*, THE FIRST POST, March 21, 2011, *available at* http://www.thefirstpost.co.uk/76636,business,dont-push-us-to-leave-uk-barclays-warns-treasury (reporting that Barclays's former chief executive, John Varley, made a "thinly veiled threat" to British government officials that the bank would move its operations to the United States).

to do so, the perceived counterparty risk of doing business in these locations will strangle those markets in their infancy.

III. Conclusion

Regulation of this $600 trillion market, which has caused (and if it remains unregulated will cause) worldwide systemic risk, must start somewhere. Congress made it clear that regulation must start here where at least half the market will, upon implementation of Dodd-Frank, be properly capitalized and transparent. History shows that if the U.S. leads, the rest of the world's important markets will follow. That is now apparent by the follow-on statutory or statutory-like actions of the European Union and large Asian markets. The use of U.S. regulations, after they are implemented, as a regulatory template will almost certainly follow. But even if we act alone, it is better to reduce risk by half than delay on the utopian hope that the U.S. and all other countries will develop a simultaneous international model, especially in the absence of a U.S. *working* template for regulation. Section 719(c) encourages coordination; it does not nullify the many indications of Congress that coordination does not mean delay, leaving American taxpayers exposed to a repeat of the 2008 financial fiasco.

Sincerely,

Michael Greenberger

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