August 13, 2012

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581
RIN 3038-AD85

Re: Exemptive Order Regarding Delayed Compliance with Certain Swap Regulations

Ladies and Gentlemen:

The Clearing House Association L.L.C. (the "**Clearing House**")[1] is writing to comment on the proposed exemptive order (the "**Proposed Order**")[2] issued by the Commodity Futures Trading Commission (the "**Commission**") regarding delayed compliance with certain swap regulations. The Clearing House welcomes the attention of the Commission to these important issues and appreciates the opportunity to provide these comments.

The Proposed Order is a constructive measure to provide relief for globally active firms, and we appreciate the Commission's efforts to address operational difficulties, cross-border issues and divergences in international implementation through exemptive relief and delayed effectiveness in the Proposed Order. However, we believe that the Proposed Order is inadequate in a number of crucial aspects, so that the relief provided under it may be

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[1] Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively employ over 2 million people and hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S. See The Clearing House's web page at www.theclearinghouse.org.

[2] 77 Fed. Reg. 41110 (July 12, 2012).

ultimately ineffective in accomplishing its objectives and, as a result, harmful to U.S. and foreign swap dealers.

An effective exemptive order must focus on allowing sufficient time to ameliorate the significant uncertainties and challenges faced by both U.S. and foreign swap dealers. To achieve this goal, the Proposed Order should strive to accomplish the following objectives:

First, the Commission's stated purpose for the Proposed Order is to facilitate orderly transition to the new regulatory regime while avoiding de-stabilizing effects on the market that may result from such transition. The Proposed Order will not accomplish this purpose unless there is a complete exemption from the application of rules or concepts that are still subject to comment or significant ambiguities. More specifically, the Proposed Order will not preserve a stable market if concepts from the proposed interpretive guidance and policy statement (the "**Proposed Guidance**")[3] on the cross-border application of certain swaps provisions are required to be applied prior to their finalization. The Proposed Order must avoid the need for market participants to devote resources to making <u>final</u> decisions based on <u>proposed</u> concepts that may have uncertain outcomes.

Second, the Proposed Order must treat swap dealers equally and consistently so that the relief itself does not create an unlevel playing field among market participants or disparities in the manner in which market participants may meet the needs of the same client base during the exemptive period. Any disparate effects during the exemptive period will lead to market fragmentation and detrimental impacts on the earnings, job creation potential, safety and soundness, and overall business operations of potential registrants[4] that will be too late to correct after-the-fact by modifications introduced or implemented at the end of the exemptive period.

Third, the exemptive relief must incorporate a sufficient amount of time to accomplish its purpose of providing an orderly transition to the new regulatory regime as well as to changes in non-U.S. regulatory regimes. Allowing sufficient time is important in several inter-related contexts:

- As referenced above, time is required for the Commission ultimately to resolve ambiguities, uncertainties and open policy issues in the Proposed Guidance.

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[3] 77 Fed. Reg. 41213 (July 12, 2012).

[4] This comment letter uses the term "potential registrant" to mean entities, whether U.S. or non-U.S. (unless the term explicitly limits its meaning to one or the other), that are currently analyzing their swap business and business structure under the Commission's rules to determine whether they may have to register as either a swap dealer or a major swap participant ("**MSP**").

- Time is also required to resolve the interplay of regulatory regime changes across jurisdictions, and particularly ambiguities and uncertainties derived from the timing differences in implementation of swaps market reform among major jurisdictions.

- An appropriate implementation period after resolution of the ambiguities and uncertainties described in the first two bullets is necessary to conform to final rules and guidance in the United States and other major jurisdictions. Granting such time is the only way for the Proposed Order to effectively allow for development of comparability and equivalency analyses, as the Commission has recognized through the timing exemptions that already appear in the Proposed Order.

- Furthermore, beyond cross-border issues, compliance with the various and intricate requirements imposed under the new U.S. regulatory regime is expected to be significantly operationally intensive. Sufficient time to implement operational solutions for all of these requirements is necessary. Our member firms are expending enormous resources to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**"), and particularly Title VII thereof, and despite these efforts are increasingly of the view that timely implementation of the registration requirement and its attendant operational complexities will be extremely challenging.

For ease of reference, we have compiled the phase-in dates proposed throughout this letter into a timeline, attached hereto as **Appendix A**.

Final exemptive relief will not achieve its intended objectives without adopting the modifications we describe below. Although several of the three thematic elements outlined above run through each of the comments we provide below, we have attempted to group certain comments in accordance with the most applicable theme.

A. The Proposed Order Must Provide for Exemptive Relief from Those Concepts that are Not Yet Final Under the Proposed Guidance

We will be submitting comments in relation to the Proposed Guidance to describe more specifically our concerns with the cross-border application of Commission regulations implementing Title VII of Dodd-Frank.

The Commission asks a number of questions in the Proposed Guidance that evidence that the Commission is contemplating changing the applicability of various requirements. Beyond the Commission's questions, other concepts will also require clarification. Until such

issues are definitively resolved, market participants need relief from their application so that they are not, as a practical matter, forced to comply with more onerous, or simply different, requirements than may ultimately be adopted. Further, resolution of ambiguities and open questions in the Proposed Guidance is required ultimately to determine whether or not an entity would be required to register. Applying any of the concepts from the Proposed Guidance before it is finalized (particularly in relation to registration decisions that need to be made soon) constitutes an incorrect assumption and prejudgment that the Proposed Guidance will eventually be applied as proposed. In Section C. below, we recommend that the Commission provide certain relief with regard to timing of registration and application of the rules in light of this issue. In this Section A., we urge modification, during the Proposed Order's exemptive period, of the incorporation of certain concepts from the Proposed Guidance so that decisions on registration and transaction regulation can focus on those entities that are more clearly required to register.

1. Limited Incorporation of Concepts from the Proposed Guidance

We recognize that certain definitional concepts must be incorporated in the Proposed Order in order to understand the effect of the Proposed Order on potential registration and on transactions. We believe that the Commission has incorporated only those concepts from the Proposed Guidance that are necessary to understand the Proposed Order's effect, including the concepts of U.S. person, transaction-level requirements and entity-level requirements. However, to avoid the confusion and resource expenditures that would ensue if the full breadth of these definitions were applied unchanged from the Proposed Guidance, we recommend below certain modifications to how those terms are incorporated, in order to apply a more basic common understanding of such terms and additional flexibility during the temporary exemptive period of the Proposed Order.

Other concepts that are still subject to comment in the Proposed Guidance do not seem to have been, and we agree should not be, incorporated at this time. As examples, the Proposed Guidance describes how guarantees, risk transfers, back-to-back transactions, "conduit" structures and other market practices may require certain entities to register or comply with certain transactional requirements. Several of these requirements would lead to registration for entities that previously were not expected to have to register. As we read the Proposed Guidance and the Proposed Order, these and certain other concepts are not implicitly or explicitly incorporated into the Proposed Order, and would not be applied for determining registration status unless they are incorporated into final guidance. Explicit confirmation from the Commission that these concepts will not be so incorporated or applied is needed in order to provide market participants with the measure of legal certainty necessary to effectively plan their operations.

2. All Potential Registrants – Aggregation of Either U.S. or Non-U.S. Transactions to Determine Registration Status

Under both the Proposed Guidance and the Commission's entity definition rules,[5] entities would be required to aggregate the swaps of all of their affiliates, including their registered swap dealer affiliates, for purposes of the calculation of *de minimis* thresholds for swap dealer registration. We note that the Proposed Guidance proposes that potential non-U.S. registrants would not have to aggregate their transaction volumes with the volumes of U.S.-based affiliates and also asks a question about the aggregation of a registered swap dealer's transaction volume.

Aggregation relief would not be meaningful, however, if not included in the Proposed Order. In addition, such relief should be applied more broadly to all registrants. We believe that the Commission has recognized, based on these questions and certain calculation modifications found in the Proposed Guidance, that the aggregation principle is overly broad, and while appropriate in certain circumstances would lead to anomalous and unnecessary consequences in other circumstances. We believe that the aggregation requirement would be particularly onerous for many multinational firms operating through numerous entities, both in the United States and abroad. Therefore, there must be phased application of the aggregation requirements to all potential registrants. Unless relief is provided in the Proposed Order, final decisions about registration and compliance will have to be made based on a principle that the Commission already recognizes is potentially too broad.

The Proposed Guidance recognizes only a limited exemption—non-U.S. potential registrants would not have to aggregate transaction volume from their U.S. affiliates for determining compliance with the *de* minimis thresholds for registration. The Proposed Order should incorporate that exemption as well as additional relief. Non-U.S. potential registrants still require temporary relief from the aggregation principle even for aggregation with non-U.S. affiliates. Furthermore, an exemption from the aggregation requirement should not be limited to only non-U.S. persons. The problems associated with application of the aggregation concept apply also to decisions by U.S. persons about their registration status. For example, under the Proposed Guidance, a U.S. bank that has a foreign bank parent and non-U.S. affiliates would be required to aggregate the U.S.-facing transactions of all of its non-U.S. affiliates for purposes of the *de minimis* threshold, while its non-U.S. affiliates would not be required to aggregate the positions of the U.S. bank affiliate for purposes of their own calculations. We believe that the Commission has recognized that ambiguous results such as these may be subject to change when the Proposed Guidance is finalized.

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[5] See "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant,' and 'Eligible Contract Participant,'" 77 Fed Reg. 30596 (May 23, 2012).

Therefore, while the Proposed Guidance is still subject to comment, the Proposed Order should provide a temporary exemption from the aggregation principle for all potential registrants in order to allow for appropriate and stable phase-in of the coverage of the new regulatory regime. At a minimum, application of the aggregation principles appearing in final guidance should be delayed for at least 3 months after release of such guidance,[6] or until the end of the exemptive period, whichever is later. However, a more appropriately calibrated and prudent approach would be for the Commission to allow firms affected by the Commission's aggregation requirement to submit alternative schedules for compliance with the aggregation rule. Doing so would allow multinational firms to properly plan and prepare for registration of potentially many different entities, and would allow both potential registrants and the Commission to focus resources initially on those entities that engage in more significant swap activity. In lieu of the delay of the application of the aggregation principles, submission of a schedule for registration should occur 3 months after the initial registration date and would allow each affiliated group the flexibility to register the more significant dealers in an affiliate group first, and (as requested below) exclude those dealers' transaction volume from aggregation with subsequent potential registrants to determine whether those entities would be required to register.

With regard to substantive application of the aggregation requirements, at a minimum, there should be no aggregation of a registered swap dealer's volume with that of its unregistered affiliates. Without this exclusion, virtually every entity that engages in swaps with U.S. persons and is affiliated with a registered swap dealer would be automatically required to register under the aggregation rubric. To avoid unnecessary expenditure of resources on the part of both firms and the Commission, the Proposed Order should also exclude from the aggregation principle entities in the process of transferring their swap dealing positions to their registered swap dealer affiliates.

3. All Potential Registrants – Transacting with U.S. Persons

For purposes of the Proposed Order, the Commission explicitly incorporates the definition of "U.S. person" from the Proposed Guidance. This incorporation raises several distinct concerns.

As will be discussed in The Clearing House's separate comment letter on the Proposed Guidance, the U.S. person definition adopted in the Proposed Guidance is extremely broad.

[6] Throughout this letter we recommend an implementation delay of 3 months from the date of the finalization of the Proposed Guidance for a number of concepts that need further development. An efficient way to accomplish this would be for the Proposed Guidance to become effective 3 months after publication in the Federal Register. Note, however, that, for several of our recommendations, we continue to believe that the full exemptive period under any final exemptive order is an appropriate timeframe, and therefore have requested that phase-in of such recommendations occur 3 months after finalization of the Proposed Guidance or at the end of the exemptive period of a final order, whichever is later.

Potential registrants will be required to utilize that broad definition for purposes of calculating *de minimis* thresholds of swaps activity with U.S. counterparties for swap dealer registration determinations, as well as for purposes of determining the applicability of certain transaction- and entity-level requirements for swaps with U.S. counterparties. As some examples of the breadth of this proposed definition, we note that:

- Various fund and investment vehicle structures require look-through to investors or persons who may absorb liabilities of the entity to determine whether any such persons are U.S. persons. The definition does not include appropriate levels of materiality of ownership or liability absorption by such U.S. persons.

- Significant ambiguity exists with regard to the interaction between the jurisdiction of organization of certain vehicles and the jurisdiction of investment advisors, managers and commodity pool operators. Similarly, managed account structures will need to be defined with more precision to focus on discretion of the manager and recourse to and responsibility of the beneficial owners.

- The Commission itself recognizes that the definition is in flux and asks a question regarding potential expansion of the definition to, among other entities, those non-U.S. persons that are controlled by or under common control with a U.S. person. We absolutely disagree with expansion of the definition so widely, but we highlight this as evidence of the potentially overbroad application and evolving nature of the proposed definition.

In practical terms, the Commission would effectively adopt the U.S. person definition as proposed via the Proposed Order without providing meaningful opportunity for comment from market participants who will be burdened by its application. Significant waste of time and resources will occur if final decisions and analysis (particularly with regard to registration) must be made under a proposed definition. Moreover, market participants do not yet have systems and documentation designed to capture and implement these definitions, or to make the determinations of the status of each of their counterparties.

Therefore, we believe that an alternative U.S. person definition based on existing market and regulatory practices for which market participants already can and do collect information on counterparties would be more appropriate, both for purposes of interim relief under the Proposed Order and, as will be discussed in The Clearing House's separate comment letter on the Proposed Guidance, on a permanent basis. The definition should be based on the following:

- Entities should be deemed U.S. persons based on traditional concepts of citizenship, organization and domicile, and not based on the presence of U.S.

owners, such that entities (other than funds or other collective investment vehicles) organized, incorporated or having their principal place of business in the United States would be considered U.S. persons.

- Any form of fund or collective investment vehicle should be considered a U.S. person only if (i) it is organized or incorporated in the United States, or (ii) it is domiciled and operated principally by personnel (*i.e.,* sponsored) in the United States, without regard to the U.S. person status of any of the vehicle's investment managers.[7] Moreover, publicly distributed funds should not require any look-through and should not be included if they are initially offered and listed outside the United States.

- The ownership of a fund or other collective investment vehicle should not determine its status as a U.S. person. Such a definition would require extensive knowledge of a fund's investor base, even if it does not stay constant over time. Further, it will likely serve to impede significantly U.S. investor access to foreign funds. If the Commission were to determine that a U.S. person definition should include funds or collective investment vehicles having U.S. investors, the definition should not (i) look through direct investors to indirect investors (unless there is evidence of evasion), and (ii) include funds or collective investment vehicles with less than majority direct U.S. ownership.

- U.S. persons may include employee benefit plans for the benefit of U.S.-domiciled employees of U.S. persons.

- As described further below, foreign branches of U.S. persons, entities that may be considered "conduits" for U.S. persons, entities guaranteed by a U.S. person and entities executing transactions as agent for a U.S. person should all be excluded from consideration as a U.S. person, at least during the exemptive period.

[7] We do not believe that the U.S. person status of any of a fund's investment manager (a sponsor may hire multiple investment managers) should be a basis for determining the status of the funds themselves, although the location from which the fund is operated (*i.e.,* sponsored) may have bearing on its U.S. person status. In addition, we do not believe that a fund or collective investment vehicle should be captured as a U.S. person merely because of the U.S. registration status of its operator, such as commodity pool operator registration. There are no policy or risk mitigation benefits from tainting an otherwise offshore fund with such minimal U.S. linkages. In addition, sponsors and fund clients will avoid hiring U.S. investment managers if it may taint their fund.

Narrowing the U.S. person definition in this way would focus on those entities traditionally considered to have a direct and significant connection to the United States while avoiding wastefully capturing entities with little meaningful link to the U.S. financial system.[8]

Such a definition should be adopted in an appropriately phased manner in order to give market participants adequate time to implement systems and documentation accordingly. Therefore, we believe that at the outset of the exemptive period under the Proposed Order, firms should be able to use their preexisting, internal definitions of U.S. persons, based on their market and regulatory experience in order to make determinations about registration and transactional requirements. At an appropriate point during the exemptive period—at least three months after finalization of the Proposed Order—by which firms have had the opportunity to implement necessary operational changes based on a final order, the U.S. person definition discussed above should be phased in for use by market participants. Finally, this definition should also be adopted in the Proposed Guidance as the permanent standard, as it builds on commonly understood indicia of jurisdictional status. If, however, the final definition in the Proposed Guidance retains the breadth of the current Proposed Guidance (or any greater scope than the recommended definition above), an additional exemptive period of at least three months after finalization of the Proposed Guidance or the end of the exemptive period, whichever is later, should be given to allow market participants to appropriately incorporate such definition into planning efforts for registration and transactional compliance.

4. All Potential Registrants – Delivery of Compliance Plans

The Proposed Order also requires compliance plans from both U.S. and non-U.S. potential registrants that are relying on the exemptions contained therein. These compliance plans require difficult judgments to be made about registration, substituted compliance and other topics that will not be resolved until the Proposed Guidance is finalized. It is thus not possible to even begin to finalize registration plans, much less compliance plans, until the questions asked in relation to, and the ambiguities embedded in, the Proposed Guidance are resolved. Furthermore, submission of compliance plans in the time frame described in the Proposed Order will likely be well before final implementation of swaps market reform in many other jurisdictions.

Therefore, we believe that it should be sufficient for a compliance plan to generally identify relevant future, proposed and final regulations in the jurisdiction in question, and to include a statement of intention to comply with any final regulations where substituted compliance would be permissible under final guidance. During the supervisory process, registrants can provide updates on their compliance efforts in such jurisdictions. Any

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[8] The Commission should also clarify that entities transacting with any counterparty, but especially fund counterparties, should be able to rely on representations from the counterparty regarding its status as a U.S. person at the time of entering into the transaction, together with a covenant on behalf of the counterparty to provide actual notice of changes in status.

substantive analysis of comparability and equivalence should be addressed at a later stage when rules of the relevant jurisdiction are final and implemented.

However, if the compliance plans themselves are, contrary to our recommendation above, to include a substantive analysis of compliance with, and comparability of, local regulations, then more time will be needed. In such case, compliance plans from registrants should be due no earlier than 3 months after the Proposed Guidance is finalized, and the compliance plan submission provision must be flexible to allow staggered submissions over time as jurisdictions propose and finalize swaps market reform.

5. All Potential Registrants – Information Access Representations

A similar issue arises in relation to the information accessibility requirements associated with registration. The filing of a foreign registrant's Form 7-R constitutes an agreement that the registrant's books and records will be available for inspection by the Commission, the U.S. Department of Justice and the National Futures Association, as well as a representation that the registrant is not subject to any blocking, privacy or secrecy laws which would interfere with or create an obstacle to full inspection of such books and records. The Commission has recognized in the Proposed Guidance that memoranda of understanding or similar arrangements may be required for the Commission to benefit from information sharing and cooperation of local regulators. Yet without such arrangements in place, it will be difficult, if not impossible, for foreign registrants to represent that the required level of information access can be provided. The Proposed Order should accordingly exempt compliance with such agreements and representations, for both potential non-U.S. registrants and non-U.S. branches of potential U.S. registrants, until concrete progress has been made under the cooperation arrangements referenced in the Proposed Guidance, such that registrants may realistically make such representations.

6. Issues Not Covered by the Proposed Guidance, But for Which Exemptive Relief is Necessary

The issues described above in sections A.1. through A.5. of this letter represent situations where the Proposed Guidance cannot be applied through the Proposed Order without undue burden and uncertainty of outcome, and therefore modifications of the definitions and other principles of the Proposed Guidance are necessary during a temporary exemptive period in order to ensure stability of transition to registration and compliance. Below we describe several points that are not addressed in either the Proposed Order or the Proposed Guidance at all, but that will require certain registration, timing or similar exemptions through the Proposed Order in order to accomplish its stated purposes.

a. All Potential Registrants – Curtailment of Swap Activity

As decisions are made about appropriate structure, potential registrants may wish to curtail the dealing or similar swap activity (or U.S.-facing swap activity) of certain entities in order to register a more limited number of such entities. However, a legacy portfolio of swaps may remain at such entities, but the portfolio will run off over time. The Commission should recognize that potential registrants may make decisions to curtail activity and those entities should not be required to register. In addition, the Commission should provide an exemption from dealing and registration for "maintenance" transactions that such entities undertake that are not on the order of holding oneself out as a dealer. Permissible "maintenance" transactions that would not give rise to dealing or a registration requirement would include terminations, modifications to shorten the tenor or reduce the risk of a swap, novations or assignments out of the portfolio, continuations or extensions of maturity required by pre-existing terms of the swap, clearing and portfolio compression and hedging transactions that reduce the risk of individual or aggregate transactions in the portfolio. We believe that these legacy portfolio issues should be addressed in the Proposed Guidance, but given the shorter timeframe in which registration decisions must be made, relief for such entities should also be included in the Proposed Order while the Commission is considering appropriate interpretive guidance.

b. All Potential Registrants – Limited Designation

We recognize that the Commission has determined that registration will apply on an entity basis, and not on a branch, department, division or business line basis. Nevertheless, we believe it warrants further discussion as to whether, at least during the interim exemptive period, the Commission should interpret Dodd-Frank's limited designation provisions to limit the application of certain of its requirements to the branches, departments, divisions or business lines that engage in U.S. swap dealing activities. Such a limited designation would limit the impact of certain governance rules to, and would target sales practice and related recordkeeping rules on, those businesses that engage in U.S. swap dealing. It would not apply to capital, risk management and similar rules that relate to the safety and soundness of the entity as a whole.

For non-U.S. potential registrants (whether or not affiliated with a U.S. parent), this may help in distinguishing between those locations engaged in swap dealing with U.S. persons and those locations (particularly those outside the United States) that are not. For all potential registrants, there are also certain businesses that, even though they engage in swaps, are not themselves in the business of dealing in swaps. For example, loan portfolio managers may purchase, as an end user, interest rate or credit swaps to hedge the loan book. Similarly, an institution's treasury or asset-liability management function may purchase swaps as a customer of other dealers in order to manage critical financial operations. A limited designation approach, at least during the interim period, would allow registrants to focus on coming into compliance first for their U.S. dealing business—rather than these non-dealing businesses. The

Commission will be able initially to focus resources much more efficiently and will be able to consider, at the end of the exemptive period, whether continuation of such limited designation would maintain such benefits.

By way of example, limited designation of this sort would also provide relief to foreign entities (whether or not affiliated with a U.S. parent) in terms of registration of principals and the scope of required representations on Form 7-R. In particular, limited designation of this type should allow for registration of principals at the level of the relevant branch or division engaged in U.S. swap dealing activity, providing relief for multiple and variable levels of governance structures common in globally active non-U.S. banks. Further, for purposes of evaluating statutory disqualification, "associated persons" should be limited to those individuals directly involved with solicitation or acceptance of swaps with U.S. persons. At least during the exemptive period, this relief would enable foreign entities and the Commission to focus on the business with direct effects on the U.S. market and avoid entanglement with irrelevant foreign operations.[9]

B. The Proposed Order Must Avoid Disparate Competitive Impact in Order to be Effective

Particular impacts of the Proposed Order must be corrected in order to provide for equal treatment during the exemptive period and equality of opportunity to address customer needs across multiple jurisdictions. Stability of the market is important, as the Commission recognizes, and unequal application of the Proposed Order will only serve to disrupt participation in the markets. In addition, when coupled with our concerns about the application of proposed, unfinalized and uncertain concepts (discussed in more detail above), the competitive impacts can be exacerbated. The following modifications should be made in order to provide a leveling of the playing field during the pendency of the Proposed Order

1. All Potential Registrants – Dealing with Certain Non-U.S. Persons

In addition to utilizing, during the temporary exemptive period, a more straightforward definition of U.S. person as recommended above, unequal treatment among potential registrants will occur unless the treatment of certain entities is explicitly clarified in the Proposed Order. More specifically, the Proposed Order should broadly clarify that all potential registrants (U.S. or non-U.S.) may treat all counterparties that are (a) non-U.S. branches of U.S. persons,[10] (b) non-U.S. entities benefitting from a guarantee from a U.S. person, (c) non-U.S.

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[9] For purposes of our limited designation recommendation, the entity would still be registered as a swap dealer. However, with regard to other swap dealers facing "non-designated" business lines (such as a corporate treasury function) of a limited designation swap dealer, the Commission should consider granting flexibility to the swap dealer in applying certain requirements, particularly external business conduct requirements, to such non-designated business.

[10] Including when a non-U.S. branch of a U.S. person faces a non-U.S. branch of another U.S. person.

persons acting as agent for a U.S. person or (d) non-U.S. entities that may meet the definition of "conduit" under the Proposed Guidance, as non-U.S. persons for all purposes, during the full term of the exemption to allow time for the ambiguities in the Proposed Guidance surrounding these concepts to be resolved.[11] Without such clarification during the exemptive period, such potential counterparties will find their transaction opportunities curtailed while potential registrants attempt to narrow their counterparty base for purposes of determining their registration status. Furthermore, without this temporary clarification during the exemptive period, potential registrants will, as described in Section A. above, be applying proposed concepts to a counterparty's status in order to make a final decision about registration, in a situation in which they do not yet have operational capabilities to efficiently discern such status.

2. All Potential Registrants – Incorporating Definitions of Transaction-Level and Entity-Level Requirements

Similar to the issues with incorporation of the U.S. person definition, the definitions from the Proposed Guidance of transaction-level and entity-level requirements should not be incorporated as proposed. Such definitions are still subject to significant debate, and we and other commenters will be submitting recommendations for appropriate changes to those definitions.

In order to provide appropriate relief and sequencing during the temporary exemptive period, the Proposed Order must provide greater flexibility with regard to required application of the various rules, particularly the application of such rules to non-U.S. business units and transactions with non-U.S. persons for which the Commission recognizes appropriate phase-in is necessary. To that end, there are certain rules that the Commission currently categorizes as entity-level rules that should, at a minimum, more appropriately be categorized as transaction-level rules. All potential registrants, whether U.S. or non-U.S. and regardless of affiliation or branch status, should not be required to apply either swap data repository reporting[12] rules or

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[11] For example, the Proposed Guidance states that non-U.S. swap dealers must apply transaction-level rules to their transactions with U.S. persons, except for transactions with non-U.S. branches of U.S. persons. See Proposed Guidance at 41228. Yet the Proposed Order merely incorporates the U.S. person definition (which, under the Proposed Guidance, includes the non-U.S. branches of U.S. persons), and states that non-U.S. swap dealers "however, . . . shall comply with such requirements that are in effect for all swaps with U.S. counterparties." Clarification is needed that non-U.S. swap dealers need not apply U.S. transaction-level requirements during the exemptive period in transactions with the non-U.S. branches of U.S. institutions. In addition, we note that, unless such change is made, the Proposed Order would be internally inconsistent because the Commission has already made a determination in the Proposed Order that a non-U.S. branch of a U.S. person need only comply with local requirements in its transactions with non-U.S. persons during the exemptive period.

[12] See "Swap Data Recordkeeping and Reporting Requirements," 77 Fed. Reg. 2136 (Jan. 13, 2012) ("**SDR Reporting**").

large trader reporting[13] requirements to transactions with non-U.S. persons during the exemptive period. In addition, as a conforming change, rules related to record-keeping under Rule 23.201 (other than the business records subsection)[14] ("**Swap Data Recordkeeping**") should also be treated as transaction-level rules.[15] For swaps with non-U.S. counterparties, these rules more appropriately relate to the specific transactions with such counterparties rather than broader books and records concepts. Incurring the costs of developing appropriate reporting infrastructure for swaps with non-U.S. counterparties would, during the interim Proposed Order period, create a disadvantage vis-à-vis those potential registrants for which delayed implementation of these requirements has been granted in the Proposed Order.

Moreover, as we have noted throughout this comment letter, there are proposed concepts in the Proposed Guidance regarding aggregation of swap volumes, as well as various relationships (guarantees, back-to-back transactions, etc.), that may require entities to register that are not fully prepared to implement the operational reporting infrastructure, particularly in overseas operations. Also, application of these rules to transactions with non-U.S. counterparties will raise significant issues under non-U.S. privacy and data protection laws and negatively affect relationships with such counterparties if compliance is required prematurely. Certain potential registrants should not be expected to have to risk non-compliance with local privacy and data protection laws when other registrants will not have that conflict. For all of these reasons, these rules should be categorized as transaction-level rules and, as contemplated by the Proposed Order, not applied to transactions with non-U.S. persons during the exemptive period.[16]

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[13] See "Large Trader Reporting for Physical Commodity Swaps," 76 Fed. Reg. 43851 (July 22, 2011) ("**Large Trader Reporting**").

[14] See "Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants," 77 Fed. Reg. 20128, 20202 (Apr. 3, 2012) ("**Internal Business Conduct Standards**").

[15] By focusing on the application of Swap Data Recordkeeping to transactions with non-U.S. counterparties, we do not intend to require non-U.S. registrants to apply Swap Data Recordkeeping requirements to their transactions with U.S. counterparties for the exemptive period of the Proposed Order.

[16] We also note that the Proposed Order does not currently address certain provisions of the Commodity Exchange Act that may apply to swap dealers and MSPs by virtue of their general applicability under the Commission's regulations. For example, Rule 1.31 sets forth certain recordkeeping obligations that apply by their terms to all books and records required to be kept under the Commission's regulations. See 17 C.F.R. 1.31. Although the Commission proposes that broad corporate recordkeeping be categorized as an entity-level requirement, neither the Proposed Order nor the Proposed Guidance explicitly address Rule 1.31, which could be read to apply to books and records required under daily trading records, position limits, and other Commission

3. Potential U.S. Registrants – Transaction-Level Requirements

Under the Proposed Order, potential non-U.S. registrants (including their U.S. branches) are given the ability, during the pendency of the exemptive period, to engage in transactions with non-U.S. persons subject only to the transaction-level rules of the jurisdiction of the potential registrant. In contrast, such relief is only granted to the non-U.S. branches of potential U.S. registrants, and not to their U.S. operations. Until the Proposed Guidance is finalized, and the issues around substituted compliance and the scope of interaction with non-U.S. persons are clarified, we believe that parity of application of transaction-level rules should be a significant objective of the Proposed Order.

To that end, in the absence of final applicable and effective transaction-level rules in a non-U.S. jurisdiction, no potential registrant should have to apply any U.S. transaction-level rules to non-U.S. counterparties in that jurisdiction during the exemptive period under the Proposed Order. For jurisdictions where final transaction-level rules are effective and applicable, all registrants should be permitted to apply such local transaction-level rules during the exemptive period, and at least until the Proposed Guidance on the application of various rules is finalized, business operations can be restructured to comply with those rules applicable to transactions with non-U.S. counterparties and substituted compliance analyses and determinations can be made.[17] Such a temporary exemption would enhance the appropriate sequencing of the implementation of compliance infrastructure. In addition, it is necessary to address discrepancies in the implementation timing of U.S. and non-U.S. regulatory reform. Anything less fails to maintain the equality of opportunity to address non-U.S. customer needs while jurisdictional implementation efforts and substituted compliance determinations are being developed during the pendency of the exemptive period.

We do not believe that this temporary exemption—designed to apply rules equally across potential registrants as all potential registrants transition to final rules—would significantly impair the Commission's ability to regulate U.S. registrants. In fact, it will permit phase-in of the requirements across classes of customers in a more efficient and logical way. As an example, no significant impairment should result from an exemption for application of the

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rules. The Proposed Order therefore should clarify that the applicability of Rule 1.31 is subject to the exemptive periods applicable to entity-level requirements.

[17] We also note that the Proposed Order, as currently drafted, allows only compliance with the rules of the home jurisdiction of the non-U.S. registrant or location of the branch. We recommend that, for all potential registrants, the rules of the non-U.S. counterparty's jurisdiction may apply instead. Similarly, for non-U.S. registrants, we also recommend that the Proposed Order clarify that the laws of the "host" jurisdiction of a non-U.S. registrant (such as the jurisdiction in which its branch is located) may apply instead.

external business conduct rules[18] to transactions with non-U.S. counterparties. The Commission has determined, in the context of the Proposed Guidance, that such rules are related to counterparty protection and the Commission's interest in application of such requirements to non-U.S. counterparties should be relatively low, at least in an interim exemptive period.

As a further example, the application of clearing and margin requirements to a cross-border transaction will inevitably run into jurisdictional conflicts, as more time will be needed for implementation of comparable non-U.S. rules. The Commission would not seem to have a significant impairment in its regulatory coverage if clearing and margin rules were temporarily delayed from application in the case of non-U.S. counterparties who are likely expecting their local rules to mandate such requirements and who may be significantly inconvenienced if they are required to clear in U.S. central clearing facilities in the absence of finalization of non-U.S. clearing requirements.

4. Non-U.S. Registrants Affiliated with U.S. Persons – Delayed Compliance with Reporting Requirements

Under the Proposed Order, foreign swap dealers may delay compliance with SDR Reporting and Large Trader Reporting requirements for swaps with non-U.S. counterparties during pendency of the Proposed Order. However, foreign swap dealers that are affiliates or subsidiaries of U.S. swap dealers would not be able to similarly delay compliance. In addition, non-U.S. branches of U.S. registrants would also not be able to delay compliance with such rules because such rules are currently classified as entity-level rules under the Proposed Guidance and the Proposed Order.

Although the Commission states that it has a supervisory interest in this information, it does not justify or substantiate the differential treatment applied to such affiliates, subsidiaries or branches. Such differential treatment would create a competitive disadvantage for overseas branches and affiliates of U.S. entities and would not serve the Commission's purpose of mitigating risk to the United States. Therefore, we recommend that foreign swap dealers, and foreign branches of U.S. registrants, should be subject to delayed compliance for these regulatory reporting requirements regardless of their affiliation with, or technical status as, U.S. entities. One potential method of accomplishing such goal, as we recommend above, is to classify the SDR Reporting and Large Trader Reporting requirements as transaction-level requirements, and therefore not applicable to transactions with non-U.S. counterparties during the exemptive period of the Proposed Order. If such modifications to the definitions of transaction-level rules are not made, all non-U.S. registrants and non-U.S. branches of U.S.

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[18] See "Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties," 77 Fed. Reg. 9734 (Feb. 17, 2012).

registrants would still require the clarification in the Proposed Order that such rules will not be required to apply during the exemptive period.

C. The Proposed Order Must Provide for Appropriate Phase-in and Sequencing In Order to Fulfill its Purpose of Providing for an Orderly and Effective Transition

Overall, potential registrants must have clear guidance and knowledge of the applicable rules and concepts in order to make appropriate decisions regarding registration, structuring of swap business, operational build-out, financial resource allocation, and compliance infrastructure. Clear guidance and understanding is required to ensure that a potential registrant is capable of compliance upon registration or upon effectiveness of requirements. Unfortunately, through the Proposed Order and its interplay with the Proposed Guidance and other rules, the Commission is asking potential registrants to make these decisions with imperfect information and without the benefit of regulatory clarity.

In order to make these decisions and ensure compliance when required, all material open issues and concepts in yet-to-be finalized rules and guidance must either be resolved or an appropriate exemption from such compliance must be granted until they are resolved. The Proposed Order is the vehicle through which the Commission must address this dilemma and provide interim relief for a number of challenges facing potential registrants (not only in relation to cross-border transactions) and against potential disruption of the swaps markets. The Proposed Order is also the appropriate tool because both we and the Commission recognize that it is temporary, allowing for sequencing and finalization of critical guidance while not presenting a significant departure from the goal of enhancing the regulation of swaps markets.

1. Term of the Exemptive Period under the Proposed Order

As proposed under the Proposed Order, the term of the exemptive period would run for 12 months following publication of the Proposed Order. We believe that, at a minimum, the exemptive period should last for 12 months following publication of the final Proposed Order in the Federal Register. Linking the term of the exemption to a finalized order would be more appropriate and would more efficiently allow market participants to plan implementation based on final Commission action, rather than a proposal subject to change. Nevertheless, given the ambiguity around certain concepts in the Proposed Guidance and the need to coordinate implementation with market reforms in other jurisdictions, we also believe some added flexibility is necessary, as discussed below.

Coordination of the Term with the Proposed Guidance. We have recommended above certain modifications to substantive definitions and other concepts in order to make the registration and transactional compliance processes more manageable and more consistent across potential registrants during the Proposed Order's exemptive period. In addition to these

substantive modifications, the term of the exemptive period of the order should be modified depending upon finalization of the Proposed Guidance. We believe that neither the Commission nor potential registrants want to duplicate efforts or engage in iterative application of changing rules and registration requirements. Assuming the Proposed Guidance is finalized some time during the exemptive period, the Proposed Order must be flexible enough to allow for sufficient time to incorporate the concepts of the Proposed Guidance into operational processes and procedures. Therefore, the term of the Proposed Order should be at least the proposed 12 months, or at least 3 months after finalization of the Proposed Guidance, whichever is longer.

Coordination of the Term with International Swap Markets Reform. We urge also that the various requirements of the Proposed Order and the Proposed Guidance ultimately be implemented in such a way that faithfully maintains competitiveness between U.S. and foreign firms, particularly while the G20 countries are implementing reforms on differing timeframes. Therefore, timing of the termination of the Proposed Order's relief should be aligned, and should be periodically extended (without need for industry application for extension) to align, with the implementation of appropriate rules in the G20 jurisdictions. In order to effectively allow for development of comparability analyses for substituted compliance, as is the Commission's stated purpose for the Proposed Order, the Proposed Order should also be extended on a specific jurisdiction basis in order to be able to finalize such analyses. The Proposed Order should clarify the procedures and mechanics for these extensions.

We also note that for all potential non-U.S. registrants, requiring compliance with SDR Reporting requirements prior to implementation of appropriate similar regulations in the potential registrant's countries of operation may raise significant questions under local privacy and data protection laws and regulations. Delay of compliance with such rules in the Proposed Order would be appropriate until the local supervisor has finalized rules comparable to SDR Reporting for such jurisdiction, after which substituted compliance would be appropriate. At a minimum, all registrants should be permitted to suppress any data elements which they believe may violate local laws if reported, at least until local supervisors have provided guidance on the reporting, sharing and potential international delivery of such information.

2. Timing of Registration Requirements

We recognize that the term of the exemptive period may provide relief to registrants regarding the application of certain rules; however it does not provide relief from the registration requirement. We recommend that, for purposes of registration for all potential registrants, the required registration date be sequenced until at least 2 months after the Proposed Order is finalized and effective (recognizing that this will require registration of certain entities within the exemptive period of such final order, and will subject registrants to those rules for which relief is not provided in the final order). Registration decisions must necessarily be made based on the relief provided in a final Proposed Order, and therefore

preparation for registration cannot be finalized until such relief is known. SDR Reporting, Large Trader Reporting and Swap Data Recordkeeping requirements would not commence until registration is required.

In addition, as we have commented above, registration, during the period of the Proposed Order, should be based solely on the modified definitions of U.S. person, transaction-level rules and entity-level rules recommended above. In addition, as we have requested above, the Proposed Order should clarify that entities that would potentially have to register based on proposed concepts in the Proposed Guidance are exempt from registration during the exemptive period. Upon completion of the Proposed Guidance, any entities that would have to register based on the final definitions and concepts in the Proposed Guidance should be provided 3 months after the finalization of the Proposed Guidance, or until the end of the term of the Proposed Order, whichever is later, to register.

3. Potential U.S. Registrants – Entity-Level Requirements

Additional phasing of various requirements will also be necessary to avoid destabilizing markets and significant potential non-compliance upon registration. As evidenced by the Proposed Order, the Commission recognizes that, even when registered, a swap dealer or MSP must be able to phase-in compliance with various requirements that are subject to further development. Although the Proposed Order provides appropriate relief for some (primarily cross-border) compliance goals that obviously must be phased in, it does not effectively capture the complete required phase-in necessary to preserve efficiency of the swaps markets and equality of opportunity to address customer needs. Therefore, even after registration as a swap dealer or major swap participant, the Proposed Order must provide for sequencing of compliance with certain additional requirements as we describe further below.

The Proposed Order would apply entity-level requirements to U.S. registrants as of January 1, 2013, while entity-level requirements would not apply to non-U.S. registrants during the pendency of the exemptive period. Our potential U.S. registrant members understand that, during the time that the Proposed Order exempts certain transactions from the transaction-level requirements, it may still be important to impose certain entity-level requirements on a registrant for purposes of safety and soundness of operation. Nevertheless, a number of the entity-level rules are operationally difficult to implement and, despite the significant resources already being put toward compliance infrastructure, more time will be needed. In addition, the disparity between entities is not consistent with keeping a level playing field during the exemptive period, and some relief must be granted, particularly with regard to those U.S. registrants with a global presence and overseas branches. To this end:

- Entity-level rules (subject to the modification described above in section B.2. of this comment letter for certain requirements that should be treated as

transaction-level requirements) for U.S. registrants should be delayed until February 1, 2013;

- Reporting of historical swaps[19] should be delayed until 90 days after the SDR Reporting requirements for the relevant asset class commence (application of Historical Swap Reporting to overseas branches is described below); and

- Overseas branches should be provided with the ability to phase-in, over the exemptive period, Historical Swap Reporting requirements for swaps with non-U.S. counterparties and risk management rules related to intra-day trader monitoring,[20] with final compliance required at the end of the exemptive period.

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Thank you for considering the concerns raised in this letter. If you have any questions, or need further information, please contact Alex Radetsky (e-mail: Alex.Radetsky@theclearinghouse.org, telephone number: (212) 612-9285).

Respectfully Submitted,

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The Clearing House Association L.L.C.

[19] See "Swap Data Recordkeeping and Reporting Requirements," 77 Fed. Reg. 35200 (June 12, 2012) ("**Historical Swap Reporting**").

[20] See Internal Business Conduct Standards, 77 Fed. Reg. at 20207. We believe that the Commission recognizes that the infrastructure and focus on U.S. regulations at overseas operations may not be as developed as in the U.S. operations of potential U.S. registrants, and we would therefore urge flexibility in the timing of implementation of appropriate policies and procedures that will promote compliance with these requirements.

Appendix A

For purposes of the timeline below, we have estimated potential final dates for the Proposed Order and the Proposed Guidance. Other dates are indicative dates based on recommendations in the comment letter to provide time for phase-in of certain requirements after finalization of the Proposed Order or the Proposed Guidance. All dates would be subject to change dependent upon the actual dates of a Final Order and the Final Guidance.

Estimated Date	Phased-in Requirement
Sept. 15, 2012 (est.)	Finalization of Proposed Order = Final Order
Nov. 15, 2012	Registration · Determined using internal U.S. person definition Registration-related relief to appear in Final Order · Limited designation – at least until end of exemptive period, unless extended · Aggregation relief – until 3 months after the Final Guidance or end of exemptive period, whichever is later **or** submission of alternative schedules for registration 3 months after first registration date · Legacy portfolio for curtailed dealing activities – at least until end of exemptive period unless made permanent · Relief for non-U.S. persons captured only by Proposed Guidance (conduit structures, back-to-back practices, etc.) – until 3 months after Final Guidance or end of exemptive period, whichever is later Reporting requirements begin for transactions with U.S. persons · SDR Reporting for credit and rate swaps · Large Trader Reporting · Swap Data Recordkeeping (except for non-U.S. registrants)
Dec. 15, 2012	Registration · Transition to interim U.S. person definition in Final Order and register additional entities, if necessary
Dec. 31, 2012 (est.)	Finalization of Proposed Guidance = Final Guidance

Jan. 15, 2013	Submission of basic Compliance Plans by initial registrants, unless substantive compliance/comparability analysis required (then see Mar. 31, 2013)
Feb. 1, 2013	Entity-level requirements (subject to SDR Reporting, Large Trader Reporting and Swap Data Recordkeeping requirements being transaction-level requirements for transactions with non-U.S. counterparties) applicable to U.S. registrants
Feb. 15, 2013	Reporting requirements for transactions with U.S. persons · SDR Reporting for FX, equities and commodities swaps · Historical Swap Reporting for credit and rate swaps Submission of alternative registration schedules based on aggregation concepts, if such alternative is adopted.
Mar. 31, 2013	Effectiveness of Final Guidance, **except** for concepts still subject to exemptive period of Final Order Registration (each of these subject to effectiveness of Final Guidance or end of exemptive period of Final Order, **whichever is later**) · Register entities that are required to register based on final U.S. person definition in Final Guidance · Register entities that are required to register based on other final concepts (*e.g.*, conduit structures, back-to-back practices, etc.) in Final Guidance · If alternative registration schedule concept not adopted, then register entities that are required to register based on final aggregation concepts in Final Guidance Submission of Compliance Plans for initial registrants, if substantive compliance/comparability analysis required · Other registrants continue to be able to submit 60 days after registration, if later than Mar. 31, 2013 · Subject to extension if additional time is necessary, on a jurisdiction-by-jurisdiction basis, to provide substantive comparability analysis
May 15, 2013	Reporting requirements for transactions with U.S. persons · Historical Swap Reporting for FX, equities and commodities swaps
Sept. 15, 2013	End of exemptive period (12 months after Final Order), **unless** extended · Extensions required for:

- o If finalization of Final Guidance + 3 months is later than Sept. 15, 2013
- o Coordination with implementation of swaps market reform in G20 jurisdictions
- o Individual jurisdiction-by-jurisdiction basis in order to finalize comparability analyses

Registrants permitted to treat (i) non-U.S. branches of U.S. persons, (ii) non-U.S. entities benefitting from a guarantee from a U.S. person, (iii) non-U.S. persons acting as agent for a U.S. person and (iv) non-U.S. persons that may be a "conduit" for a U.S. person, all as non-U.S. counterparties until end of the exemptive period.

Transaction-level requirements (including SDR Reporting, Large Trader Reporting and Swap Data Recordkeeping) not applicable for swaps with non-U.S. counterparties until end of exemptive period

Limited designation of branch, department, division or business line permitted until end of exemptive period, **unless** extended

Relief from swap dealer definition and registration for entities that have curtailed swap dealing but retain legacy portfolios permitted until end of exemptive period, unless permanent interpretation in Final Guidance.

Historical Swap Reporting and intra-day risk monitoring do not apply to overseas branches of U.S. registrants for transactions with non-U.S. persons until end of exemptive period

All reporting rules subject to extension beyond exemptive period for harmonization with local data privacy and confidentiality rules.

Any other exemptions provided in the Final Order permitted until end of exemptive period

Other — Information access representations not effective until relevant memoranda of understanding or other cooperation agreements in place between Commission and non-U.S. regulators