

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy



By Electronic Mail

August 13, 2012

Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20219
Attention: David A. Stawick, Secretary

**Regarding: CFTC July 12 Exemptive Order Regarding Compliance With
Certain Swap Regulations**

Dear Mr. Stawick:

The Financial Services Roundtable (“the Roundtable”)¹ respectfully submits these comments in response to the exemptive order released by the Commodity Futures Trading Commission (the “Commission”) regarding the proposed timeframes for non-U.S. entities to comply with certain new regulatory requirements promulgated under Title VII of the Dodd-Frank Act.² The Exemptive Order was released in conjunction with proposed formal guidance from the Commission regarding the application of Title VII requirements to non-U.S. persons, as well as swap transactions involving foreign entities, including the foreign affiliates or branches of entities based within the United States.³ The Roundtable and its membership continue to review the Commission’s proposed Cross-Border Guidance and likely will submit further comments regarding that release.

As an initial matter, we thank the Commission for its efforts to clarify the extent of its extra-territorial authority. In past letters we have consistently stated the importance of formal guidance or a formal rulemaking regarding the Commission’s interpretation of Section 722(d) of the Dodd-Frank Act. This section, which amended § 2(i) of the Commodity Exchange Act (“CEA”), states that Title VII of the Dodd-Frank Act shall not apply to activities outside the United States unless those activities— “(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or

¹ The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America’s economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

² See Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 Fed. Reg. 41110 (Jul. 12, 2012) (hereinafter “Exemptive Order”).

³ See Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214 (Jul. 12, 2012) (hereinafter “Cross-Border Guidance” or “Guidance”).

promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the [Dodd-Frank] Act of 2010.”

Due to the global nature of the swaps market, in which cross-border transactions are common, the Commission’s Cross Border Guidance will constitute a key component in the implementation and effectiveness of the overall regulatory framework envisioned by the 2009 G-20 Agreement with respect to the regulation of over-the-counter derivatives. We applaud the Commission’s continued efforts to work with the regulatory officials of other nations to enact clear, uniform, and workable standards that will improve current oversight of the swaps market. However, we note that certain aspects of the Commission’s Cross-Border Guidance raise complex questions regarding what specific swaps transactions and which specific market participants will fall under the purview of U.S. regulations. Our members who will be affected by the release are currently preparing detailed responses on how aspects of the Cross-Border Guidance can be clarified and improved. Due to the international nature of this topic, we also note that foreign regulators also have submitted comments suggesting changes to the standards contemplated in the Commission’s current Cross-Border Guidance Proposal.⁴

In view of these issues, as well as the points made below, we respectfully request that the Commission postpone the provisional registration deadline for non-U.S. entities that may be Swaps Dealers and Major Swap Participants (including the non-U.S. affiliates of U.S. entities and the non-U.S. branches of U.S. banks) until after the Commission issues its final interpretive guidance on the application of § 2 (i) of the CEA.

Extending the deadline for registration will allow the Commission to benefit fully from an array of comments from participants in the swaps market. We are confident that the perspectives and suggestions provided by these additional comments will aid the Commission to improve and clarify many aspects of the current proposal. Furthermore, delaying the registration until a reasonable time after the Cross-Border Guidance is finalized will help ensure that entities facing the possibility of registration do not unnecessarily and prematurely dedicate the legal, compliance, and technological resources necessary to officially register. Similarly, delaying the registration date will help ensure that the infrastructure and supervisory resources of the Commission and the National Future Association (“NFA”) can be more effectively focused on entities whose activities clearly meet the Commission’s final standard for what constitutes “direct and significant” impact on the commerce of the United States.

We note that our members are concerned that several aspects of the current Cross-Border Guidance Proposal would extend CFTC authority unnecessarily into areas of the swap market that do not meet the statutory test outlined in CEA § 2(i). These provisions of the rule pose a significant risk of imposing duplicative and unnecessary regulatory requirements on institutions that present extremely limited exposures to the U.S.

⁴ See Letter from Patrick Raaflaub, Chief Executive Officer, and Mark Branson, Head of Banks Division, Swiss Financial Market Supervisory Authority FINMA, to Chairman Gary Gensler, U.S. Commodity Futures Trading Commission (Jul. 5, 2012) (on file with the Secretary of the Commission).

marketplace. It is our hope that the Commission amends the final version of the Cross-Border Guidance to ensure that the scope of the U.S. regulatory regime is not overextended into areas that are clearly beyond the intended scope of the Dodd-Frank Act. In the interim, amending the Commission's Exemptive Relief Order to extend the required registration date will allow the Commission time to consider each of the concerns raised by industry participants.

Our members have noted certain aspects of the current Cross-Border Guidance that are of particular concern. For example, several elements of the Proposed Guidance's definition of "U.S. person" contain ambiguities that may substantially increase the scope of its application. The Guidance seeks to apply a majority-ownership test regarding the classification of investment funds, but it includes no details on how the Commission views the "directly or indirectly" standard contained in the definition. The proposed Guidance also fails to address how the proposal would affect the activities of foreign agents acting on behalf of U.S. persons.

Another area of the Commission's Guidance that we believe must be altered is its proposal for the aggregation of swaps transactions made by the affiliates of non-U.S. persons when determining the non-U.S. person's status under the swap dealer *de minimis* test. We agree with the Commission that a foreign-based entity need not aggregate the swaps positions held by its U.S. affiliates. Conversely, we believe, and ask the Commission to clarify, that U.S. based entities need not aggregate the swaps positions of foreign affiliates for purposes of the *de minimis* exception. We also strongly believe that the Commission's Guidance must be amended to exclude the consideration of positions held by foreign affiliates that are already registered with, and thus regulated by, the Commission. As a result of the current proposal, any prospective non-U.S. swaps dealer that is an affiliate of a registered Title VII dealer must seemingly verify that none of its transactions with U.S. persons constitute swap dealing under the Commission's regulations. We submit that the aggregation rule, as currently constituted, may dramatically and unnecessarily increase the scope of Title VII's registration requirements. The uncertainty posed by the provision justifies a thorough review by the Commission. As before, the Roundtable asks for an extension of the registration deadline for foreign entities until market participants have had an opportunity to analyze the Commission's formal response to the issues raised by these concerns.

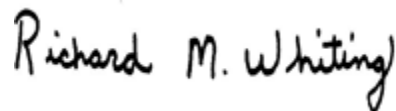
Other key aspects of the Cross-Border Guidance where we believe that additional direction is necessary include the basis on which the Commission will accept a petition to allow "substituted compliance" by a foreign regulator. Clarity on this point is necessary for many entities that may limit or even terminate their transactions with U.S. based entities unless they will be able to rely on the transaction requirements of their respective home countries. We also note that certain aspects of which regulations constitute "entity-level" requirements must be clarified in the final release. For example, the Commission's Regulation 1.31 sets forth certain recordkeeping obligations that apply to all the books and records requirements required by the Commission's rules. Rule 1.31, however, is not included in the Proposed Guidance's list of entity-level requirements. We submit that clarity on both of these points would be extremely helpful to foreign entities that are contemplating registration.

Aside from the ambiguous aspects of the Proposed Guidance, the membership of the Roundtable expresses its concern regarding areas of the rule that may take considerable time to implement. The currently proposed registration schedule creates compliance timelines that may be difficult or even impossible to meet. For example, the definition of “U.S. person” has no clear analog to existing regulations from either the Commission or the Securities & Exchange Commission. Even aside from the issues referenced earlier in our letter, aspects of the U.S. person definition contained in the Cross-Border Guidance require considerable amounts of counterparty data to be collected and analyzed. We are concerned that the Commission is not allowing sufficient time for affected entities to fully analyze the extent to which their swap dealing activities involve U.S. persons. This is especially true in view of the ongoing analysis that market participants must complete regarding the other rulemakings which have been finalized by the Commission.

In sum, we believe that the circumstances merit a limited extension of the provisional registration deadline contemplated in the Commission’s Exemptive Order. Specifically, we believe any registration requirement must be delayed until market participants have a reasonable time to consider the finalized version of the Commission’s Cross Border Interpretative Guidance.

Thank you for your consideration of our comments. If you have any questions, please do not hesitate to call me or Richard Foster, the Roundtable’s Senior Regulatory Counsel, at (202) 589-2424.

Sincerely,

A handwritten signature in black ink that reads "Richard M. Whiting". The signature is written in a cursive, slightly slanted style.

Richard M. Whiting
Executive Director and General Counsel
Financial Services Roundtable