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August 16, 2012

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

Re: Exemptive Order Regarding Compliance With Certain Swap Regulations, RIN 3038-AD85; Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, RIN 3038-AD57.

Dear Secretary Stawick:

This letter is submitted on behalf of the undersigned firms (the "Firms") in response to the Commodity Futures Trading Commission's (the "CFTC" or the "Commission") proposed exemptive order to delay the effectiveness of certain provision of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") (the "Proposed Order").[1] The Firms appreciate the opportunity to provide comments to the Commission with respect to the Proposed Order and to address certain related issues raised by the Commission's proposed cross-border interpretive guidance and policy statement ("Proposed Cross-Border Guidance").[2]

[1] *See* 77 Fed. Reg. 41,110 (July 12, 2012).

[2] *See* Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,214 (July 12, 2012).

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I. SUMMARY

The Firms welcome and appreciate the Commission's willingness to address the uncertainties and challenges facing prospective swap dealer and major swap participant ("MSP" and, together with swap dealer, "Swap Entity") registrants and, in particular, those operating from outside the U.S. or otherwise conducting cross-border business. We agree with the Commission that it is important to "ensure an orderly transition" to Dodd-Frank's regulatory framework and to "provide greater legal certainty to market participants" with respect to U.S. regulation of their cross-border activities.[3]

In order for phase-in exemptive relief to achieve these objectives and to avoid market and economic disruption, fragmentation or other misalignment, we believe it needs to satisfy certain key criteria:

- It should be sufficiently comprehensive to provide relief on all material open issues facing firms that conduct cross-border business that affect the structuring of their swap activities or the scope and nature of their compliance obligations, including, in particular, the material open issues that are discussed in the Proposed Cross-Border Guidance;

- It should avoid the application of interim definitions, standards or requirements that are subject to comment and likely to evolve, where doing so would require costly changes in operations or systems, or other compliance steps that may, after the fact, prove to have been unnecessary under the Commission's final cross-border guidance;

- It should afford prospective registrants and provisional registrants the necessary time in which to implement the systems and system changes necessary for compliance with applicable requirements and standards once the scope, nature and application of these standards and requirements are finalized and published; and

- It should minimize avoidable market and economic disruption – an objective that requires:

    - the minimization of avoidable competitive disparities; and

    - bridging the timing gap between U.S. implementation of Dodd-Frank and implementation of regulatory reform by other major G-20 signatories in order for inter-jurisdictional determinations of comparability and equivalence to be meaningful (and to prevent avoidable competitive disparities), but without indefinite delay in the implementation of Dodd-Frank.

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[3] *See* Proposed Order at 41,113.

The Proposed Order would accomplish many important goals. As drafted, however, the Proposed Order would not fully achieve the objectives or satisfy the criteria outlined above. If these shortcomings are not appropriately addressed in the final exemptive order, the Firms anticipate widespread uncertainty, market disruption and the potential for inadvertent non-compliance with Dodd-Frank regulatory requirements, despite concerted efforts to achieve compliance. In the absence of appropriate interim relief, these consequences can be avoided only if the Commission were to defer registration of Swap Entities until the Proposed Cross-Border Guidance is finalized and until firms have the requisite time to implement the necessary infrastructure and compliance requirements on the basis of the Commission's final cross-border guidance. To do so while maintaining a level playing field would require deferral for all registrants – U.S.-based and non-U.S.-based.

We recognize that the Commission would not view this as a desirable implementation timeline, and we are not requesting or recommending that the Commission adopt such an approach. This is precisely why it is critical for the Commission to carefully fashion phase-in exemptive relief in a manner that appropriately balances the competing objectives and obstacles facing the Commission and the private sector and that avoids adverse market and economic impacts. It is equally important for the Commission to finalize the phase-in exemptive relief as promptly as possible and as far in advance of registration (and attendant compliance obligations) as possible.

Our recommendations for addressing the objectives and concerns described above are discussed more fully in the following sections. We believe that adoption of these recommendations would facilitate a transition to regulatory reform that is consistent with the Commission's own objectives: an orderly transition that would not disrupt or fragment markets or result in potentially significant economic costs. These recommendations would avoid the need for firms, the Commission and the National Futures Association ("NFA") to devote scarce capital and human resources to achieve temporary compliance with interim standards that are likely to evolve (and in some cases possibly to be eliminated) through the rulemaking process. Additionally, these recommendations would more efficiently focus the resources of the Commission, the NFA and the private sector on regulation of those activities that are the most significant in scope and that most directly impact the U.S. public and the U.S. financial system. We believe that ensuring an orderly transition that would not disrupt or fragment markets or result in potentially significant economic costs is a critical public interest objective and is therefore fundamental to any Commission action under the CEA, whether interpretive, exemptive or rule-based.

II. RELATIONSHIP BETWEEN THE PROPOSED ORDER AND INITIAL COMPLIANCE DATES

Put simply, the proposed phase-in exemptive relief does two things. It provides needed relief from requirements whose scope and application are not yet defined. However, it also establishes the interim 'rules-of-the-road' for the phase-in exemptive relief period triggered

by registration. Among these rules are those that will determine which entities must register, which rules must be complied with and in what circumstances.

As in all rulemakings, affected parties require time to act on the basis of the Commission's determinations, as they will be revealed in its final phase-in exemption. Because the exemption implicates both whether an entity must register and what obligations the entity has upon registration, it necessarily implicates the registration requirement itself. It also implicates requirements that apply to non-registrants, such as reporting requirements. As a result, it is important both that the Commission act with all deliberate speed in finalizing the order, and that the Commission provide an appropriate minimum interval between publication of its final phase-in exemption and applicable initial compliance deadlines. We recommend that firms be given a three-month interval in order to provide an orderly registration and compliance process.

This interval would be consistent with the Commission's practice, in implementing Dodd-Frank, of establishing a similar interval between publication of a rule and its effective or compliance date in circumstances where the rule requires substantive implementation measures (such as the Commission's mandatory clearing and reporting rules). Additionally, the sooner the Commission is able to finalize the phase-in exemption, the shorter the delay before its requirements apply.

III. ISSUES RAISED BY THE PROPOSED ORDER

A. U.S. Persons

The Proposed Order would adopt the "U.S. person" definition proposed by the Commission in its Proposed Cross-Border Guidance as the operative definition for purposes of the exemption.[4] As explained immediately below, adopting the proposed U.S. person definition for purposes of the Proposed Order would be unworkable and would give rise to a number of significant problems.

[4] Under the Cross-Border Proposal, the term "U.S. person" would include, but not be limited to: (1) any natural person who is a resident of the United States; (2) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in either case either (i) organized or incorporated under the laws of the United States or having its principal place of business in the United States or (ii) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person; (3) any individual account (discretionary or not) where the beneficial owner is a U.S. person; (4) any commodity pool, pooled-account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership or equity interest is held, directly or indirectly, by a U.S. person(s); (5) any commodity pool, pooled-account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the Commodity Exchange Act (the "CEA"); (6) a pension plan for the employees, officers, or principals of a legal entity with its principal place of business inside the United States; and (7) an estate or trust, the income of which is subject to United States income tax regardless of source.

1. Proposed Definition

The use of *any* novel definition of U.S. person for purposes of phase-in exemptive relief, even one that is not controversial or complex in application, would present compliance obstacles at commencement of the phase-in exemptive period. This is the case because existing systems and counterparty documentation, by definition, do not contemplate the new definition and would need to be modified in order to identify, or to collect the information necessary to evaluate, the status of counterparties. This would be particularly true in the case of the Commission's proposed U.S. person definition.

As a simple and concrete example, there will be insufficient time following finalization of the phase-in exemption (and the operative U.S. person definition), and before the earliest required registration date, to incorporate any new definition of U.S. person in a revised documentation protocol and complete an industry adherence process. Internal compliance, data capture and related systems also require modification. More fundamentally, there will be manifestly insufficient time for firms to evaluate their operations in light of the definition, make and implement any necessary restructuring and registration determinations, where applicable, and complete the steps necessary for compliance with Dodd-Frank that are dependent on the U.S. person definition.

Apart from these timing considerations, the Commission's proposed U.S. person definition is novel, extremely broad and presents many challenges in interpretation and application. We fully expect, as the Commission must also, that the proposed U.S. person definition will evolve and be refined during the finalization of the cross-border guidance. It would defeat the purpose of the phase-in period exemptive relief if the Commission were to require firms to implement the new definition (even if they could operationally), at potentially great expense, on an interim basis, in circumstances where the relevant definition could well evolve and they would have wasted scarce time and resources on ultimately unnecessary registration, implementation and compliance workstreams.

As a matter of policy, firms should not be put into a position where they must guess about which entities they must register because they have not had the time to collect the information necessary to determine whether the counterparties with which those entities transact are U.S. persons, as newly defined. Nor should they have to make a decision as costly and burdensome as registration, with its related compliance and infrastructural costs, based on a definition that could change.

The cost-benefit implications of such an outcome need no articulation. The Commission is also well aware that private sector resources – like the Commission's own – are currently stretched to the breakpoint by the workstreams required to implement Dodd-Frank. Such an approach cannot be fairly described as a prudent application of resources.

2. Recommendations for a Phased-in Definition

(a) *Phase-in period definition*. As the foregoing discussion illustrates, there are essentially two related but distinct challenges presented by the U.S. person definition: what can realistically be accomplished in the very near term immediately following finalization of the phase-in exemption, and what should be done during the somewhat longer period thereafter and until finalization of the definition in the Commission's final cross-border guidance.

To address the first challenge, we have suggested above that the Commission provide firms with a three-month interval after publication of the final exemption before they are required to comply with registration and substantive compliance obligations. To address the second challenge, the Firms respectfully request that the Commission adopt an interim "U.S. person" definition based on factors such as residence, place of organization or incorporation and principal place of business. This definition is intended to enable firms to use existing systems, documentation, and data that they currently have for Dodd-Frank implementation purposes prior to the effective date of the final "U.S. person" definition. In the case of a counterparty who is represented by a fiduciary, a firm should be permitted, while this interim definition is in effect, to rely as a safe harbor on the U.S./non-U.S. person status of the fiduciary representing the counterparty. In many cases, this may be the only information currently captured by a firm's systems.[5] This interim definition would remain in place until publication of a final definition and, to provide time for the implementation of that final definition, three months thereafter.[6]

In the event that the Commission determines to adopt a more detailed definition of "U.S. person" that would apply before it adopts its final definition as part of the final cross-border guidance, we have identified several considerations below that the Commission should, in our view, take into account in connection with any "U.S. person" definition it adopts, whether on an interim basis or otherwise.

(b) *Reasonable reliance.* Consistent with the Commission's external business conduct standards, a firm should be permitted to reasonably rely on representations by its counterparties as to their status. Similarly, in the case of funds, where transaction documentation obligates a fund to notify its counterparty if its status changes, the counterparty should be permitted to continue to rely on representations made to it at the time it initially transacts with the fund.

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[5] We emphasize that this would solely be an interim safe harbor that reflects the practical realities regarding the information currently captured by firms' systems, and would not require a firm that is otherwise able to determine the U.S. person status of its underlying counterparty to treat its counterparty as a U.S. person solely based on the status of the counterparty's fiduciary. As discussed below, we are of the view that the location or nationality of a fund's investment manager should not be determinative of the fund's U.S. person status.

[6] For additional detail on this interim definition approach, *see* Letter from Kenneth E Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, to David A. Stawick, Secretary, the Commission, dated Aug. 13, 2012; Letter from Sarah A. Miller, CEO, IIB, to David A. Stawick, Secretary, the Commission, dated Aug. 9, 2012; and Letter from Alex Radetsky, Vice President and Assistant General Counsel, the Clearing House, to David A. Stawick, Secretary, the Commission, dated Aug. 13, 2012.

(c) *Funds and other collective investment vehicles.* We strongly urge the Commission not to adopt a "U.S. person" definition that would capture a fund or other collective investment vehicle solely on the basis of the U.S. person status (whether based on location or nationality) of the fund's investment manager. Doing so is unnecessary and could place U.S.-based investment managers at a severe competitive disadvantage in attracting non-U.S. fund clients without addressing any important policy or risk mitigation objective. The Commission also should not adopt a definition that depends on the registration status of a fund's "operator." Doing so would capture funds with minimal U.S. investment or connection and could hinder U.S. investor access to foreign funds, again with minimal policy or risk mitigation benefits.

We similarly urge the Commission not to adopt a "U.S. person" definition that is based on the composition of fund ownership, at least during the period prior to the effective date of a final "U.S. person" definition. Additionally, any such definition should be applied only to funds formed after the effective date of the final "U.S. person" definition. Although it is the case that Swap Entities would be in a position to request representations from fund counterparties regarding their U.S. person status, fund counterparties would not be in a position to provide such representations except with respect to funds formed after the effective date of a final "U.S. person" definition for which the fund's subscription materials could have been adapted to capture the information relevant to the CFTC's final U.S. person definition.

If the Commission determines to adopt a "U.S. person" definition applicable to funds that looks to the composition of investors in a fund, in no event should the definition capture a fund on the basis of (a) a "look-through" beyond direct investors to indirect investors (in the absence of evasion)[7] or (b) less than majority direct U.S. ownership. The Commission also would need to exclude from the U.S. person status any publicly offered fund that is initially offered outside the U.S. (in a manner compliant with Regulation S under the Securities Act of 1933) and whose principal listing exchange is located outside the U.S.

(d) *Branches, conduits and affiliates*. For purposes of the final phase-in exemption, the following persons should be treated as non-U.S. persons for all purposes: (i) foreign branches of U.S. banks, (ii) so-called "conduit" affiliates of U.S. persons and (iii) foreign affiliates of U.S. persons, including those guaranteed by a U.S. person or executing as agent for a U.S.-affiliated swap dealer to whom the transaction is booked; provided that foreign branches of U.S. banks would be required to comply with (1) "entity" level rules that are applicable to U.S.-based Swap Entities and (2) "transaction" level rules, other than in connection with transactions with counterparties that are non-U.S. persons (for the avoidance of doubt, for these purposes, at least while comparable transaction requirements have not been adopted

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[7] We note that this would be consistent with the Commission's approach in the case of the non-"eligible contract participant" Fx pools. *See* Commission Regulations § 1.3(m)(5). Additionally, the Commission has anti-evasion authority which it could exercise in appropriate cases involving funds formed after the effective date of the final phase-in exemption that are structured to evade.

outside the U.S., transactions between foreign branches of U.S. banks would qualify as transactions between non-U.S. persons).

Upon expiration of the phase-in exemptive period, the status of the foregoing persons would be determined in accordance with the Commission's final cross-border guidance (assuming, of course, that the phase-in exemptive period extends for a reasonable amount of time following publication of the final guidance).

If the Commission were instead to incorporate these proposed categories (*i.e.*, "conduit" affiliates, guaranteed affiliates, etc.) in the phase-in exemption, it would be, in practical terms, tantamount to adopting these concepts without comment under the Proposed Cross-Border Guidance. This would effectively prejudge the outcome of the public comment process and defeat a fundamental objective of the phase-in exemption. This result would be particularly prejudiced given the significant issues of scope and application that are raised by these categories.

(e) *Non-Swap Entities.* The Proposed Order would apply only to Swap Entities. The Proposed Cross-Border Guidance, however, would also apply to non-Swap Entities, with respect to which specified Commission rules (clearing, trade execution, large trader reporting, real-time public reporting, swap data repository ("SDR") reporting and swap data recordkeeping) would apply to U.S. persons (for all their swaps) and non-U.S. persons (for their swaps with U.S. persons). Consistent with this proposed interpretation, we respectfully request that the Commission confirm that, during the phase-in exemptive period, two non-U.S. persons (who are not Swap Entities) – particularly the non-U.S. subsidiaries and affiliates of U.S. multinationals – will not be subject to Commission rules for their swaps with each other.

In addition, during this period, we request that the Commission provide an exemption from real-time public reporting, SDR reporting and swap data recordkeeping for a non-U.S. non-Swap Entity for its swaps with a U.S. person. This would alleviate the concerns that some non-U.S. end users have about transacting with U.S. persons, at least while the cross-border guidance is still pending. At the same time, because the U.S. person party to the swap would remain subject to the aforementioned rules, the Commission can remain assured that reporting and recordkeeping by the U.S. person will continue to take place as required and that it will have access to the transactional data retained by the U.S. person.

(f) *Other registrant categories*. In implementing Dodd-Frank, the Commission has adopted conforming definitional changes to a number of registrant categories, such as those applicable to introducing brokers, futures commission merchants, commodity pool operators and commodity trading advisors. The scope of these definitions, and the regulatory obligations that attach to these categories, are each also affected by cross-border considerations and the scope of the U.S. person definition. The Firms respectfully request confirmation by the Commission that, during the phase-in exemptive period, market participants may rely on the phase-in "U.S. person" definitions proposed above in connection with the registration and related compliance

obligations applicable to the swap-related activities of these registrant categories.[8] Firms are concerned that, in the absence of such clarification, the definition of "U.S. person" may be expanded, without due consideration, with respect to these other registrant categories and result in an unwarranted departure from several decades of regulatory treatment for such registrants.

B. Aggregation

The Commission's final swap dealer definition includes a *de minimis* exemption for firms whose annual gross notional swap activity, when aggregated with affiliates under common control, does not exceed $8 billion.[9] While the Commission's final entity definitions increased the proposed *de minimis* threshold, it also introduced, for the first time and without an opportunity for comment, the aggregation requirement.

It has been widely observed that application of the aggregation requirement would effectively make the *de minimis* exemption unavailable to any affiliate of a registered swap dealer. Although the aggregation issue is not addressed in the Proposed Order, in the Proposed Cross-Border Guidance, the Commission has proposed to require a non-U.S. person to register as a swap dealer if it engages in swap dealing transactions exceeding the swap dealer *de minimis* threshold in the Final Entity Rules with (i) U.S. persons or (ii) non-U.S. persons where the potential registrant's obligations thereunder are guaranteed by a U.S. person. For the purposes of assessing whether this *de minimis* threshold is exceeded, the Commission proposed to require aggregation of the notional value of all such transactions by such non-U.S. person and such person's non-U.S. affiliates. The Commission further requested comment as to whether the notional value of swap dealing by non-U.S. affiliates registered as swap dealers with the Commission should be excluded for the purposes of this calculation.[10]

The Firms wish to emphasize, as a threshold matter, that unless aggregation relief is available during the phase-in exemptive period, any final modification to the aggregation requirement will be moot and/or firms will have needlessly undertaken the burden and expense of registering and coming into compliance with Dodd-Frank obligations that no longer exist.

As a general matter, we understand and acknowledge the circumvention concerns that animated the Commission's aggregation requirement. We do not believe, however, that the exclusion from the *de minimis* threshold of swap volume by a Commission registered swap dealer presents material circumvention concerns. We see no other prejudice or regulatory risk that is created by excluding the positions of registered swap dealers. We similarly do not see any basis for concluding that a given *de minimis* level of activity by an affiliate of a registered

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[8] For the avoidance of doubt, this definition would not apply in the context of the futures activities of these other registrant categories.

[9] *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. 30,596 (May 23, 2012) ("Final Entity Rules").

[10] *See* Cross-Border Guidance at 41,222.

swap dealer presents any different or greater risks or policy concerns than a comparable level of activity by an unregistered swap dealer with no registered swap dealer affiliate.

As noted above, without an exclusion of registered swap dealer volume from aggregation, the *de minimis* exemption becomes effectively unavailable to any company that is part of a group that includes a registered swap dealer. We see nothing in Dodd-Frank that requires or implies the need for such a result nor any policy need for such a result.

The Firms also see no basis to limit aggregation relief to affiliates of a registered swap dealer on the basis of the U.S. or non-U.S. status of the registered swap dealer or its affiliates. Any such distinction would create potential competitive disparities that are not warranted by any policy considerations. We are not aware of any provisions of Dodd-Frank that require or imply the need for such a distinction. As a result, we believe that the Commission should provide aggregation relief that is available to all affiliates of all registered swap dealers.

To the extent that the Commission wishes to further consider the appropriate scope of aggregation relief, we encourage the Commission to do so in the context of its cross-border guidance. For purposes of the exemption's phase-in period, however, the Commission should include the broadest aggregation relief necessary to avert the risk that, during the phase-in period, firms will have needlessly undertaken efforts to register and come into compliance with Dodd-Frank's attendant compliance obligations.

We note that another salutary benefit of the approach to aggregation relief recommended above is that it would enable firms busily engaged in restructuring their swaps business activities to apply their resources with maximum efficiency to those swap dealing activities that are the most significant in scope. It would therefore facilitate efficiency in firms' efforts to come into compliance with Dodd-Frank, enabling them to give priority to those entities that conduct the greatest level of U.S. dealing activity. Proceeding in this way will also enable the Commission and the NFA to marshal their resources more effectively during an implementation and registration process that is certain to be challenging at best.

Finally, we note that even the broadened aggregation relief recommended above may not be adequate for certain groups with multiple active swap dealing entities. In particular, in our view it would be appropriate for the Commission to consider further whether it is necessary, at least during the phase-in exemptive period, to apply the aggregation rule across non-U.S. affiliated entities where each entity's swap dealing with U.S. persons does not pose a significant risk to the U.S., such as in the case of an entity whose swap dealing activity is already subject to local regulation by a G-20 supervisor and would, absent aggregation, fall below the *de minimis* threshold. In these cases we recommend that the Commission permit firms to develop a realistic conformance plan acceptable to the Commission under which such affiliates would be required, within a reasonable conformance period, to come into conformity with relevant Dodd-Frank obligations as ultimately finalized by the Commission in the Commission's cross border guidance.

C. U.S-Based Swap Dealers – Non-U.S. Counterparties

Under the Proposed Order, the CFTC treats both U.S.-based and non-U.S.-based swap dealers comparably in the application of transaction-level requirements to U.S. counterparties. However, the Proposed Order does not treat U.S.-based dealers and non-U.S.-based dealers comparably in the application of transaction-level rules to non-U.S. counterparties. In the long term, we all hope and anticipate that harmonized U.S. and non-U.S. transaction-level requirements will be adopted across major financial markets, and those requirements, together with the Commission's cross-border guidance, will establish the rules of the road for their application. In the short term, however, during the exemption's phase-in period, while transaction-level requirements have not yet come into effect outside the U.S., the Commission should ensure competitive parity by exempting all swap dealers from transaction-level requirements in connection with transactions with non-U.S. counterparties.

D. Legacy Portfolios

The Firms wish to bring to the Commission's attention a related issue that is raised by the restructuring of cross-border swap dealing activities. Specifically, many firms who discontinue their swap dealing (or U.S.-facing swap dealing) activities will nonetheless be left with legacy portfolios of swaps resulting from their prior swap activity. As the Commission will appreciate, for a variety of reasons it will not be possible for firms to novate their entire swap portfolios to the entity that is succeeding to the relevant swap dealing activity, or to unilaterally terminate such swaps. Although a static legacy portfolio does not raise swap dealer issues itself, as a practical matter, swap portfolios by their nature are not static portfolios that will just run out over time. Requests will be made by counterparties to novate transactions, transactions may be terminated early or modified, and lifecycle events will occur.

We believe it is important that the Commission provide interpretative guidance or relief confirming that certain swap activity that is limited to legacy swap portfolio does not constitute swap dealing or give rise to a registration requirement. This conclusion could be reached by interpretation in circumstances where the holder of the legacy portfolio sets guidelines that it will only entertain a counterparty request in relation to the portfolio where the transaction meets its own criteria for reducing the portfolio or its risk profile, or engaging in lifecycle events that are required of it under the pre-established terms of the relevant swap (as opposed to market-making, quoting two-sided markets, supplying liquidity, profiting from bid-offer spreads, and the like). Under these conditions, any resulting transaction would be fairly described as having been undertaken for the purpose of achieving the legacy portfolio holder's trading (*i.e.*, risk/portfolio reduction) objectives and not for the purpose of accommodating its counterparties' trading objectives.

To the extent the Commission would want to consider further the circumstances in which such a conclusion is warranted, we recommend that the Commission provide interim relief during the phase-in exemption in circumstances where swap activity involving the legacy portfolio is limited to: (1) terminations; (2) modifications that shorten the duration or reduce or eliminate the risk of an existing swap; (3) novations (out of the portfolio); (4) life-cycle events

(pursuant to the pre-existing terms of the legacy swaps); (5) submissions to clearing and portfolio compression; and (6) portfolio hedging.

E. Compliance Plan

Under the Proposed Order, the Commission proposes that, as a condition to phase-in exemption, registrants file a "compliance plan" with respect to their plans for substitute compliance. We respectfully request that the Commission eliminate this requirement because it will unnecessarily distract legal and compliance professionals from more important and immediate substantive compliance responsibilities, without accomplishing important near-term objectives. Alternatively, we request that the Commission clarify that the proposed compliance plan submission is intended solely to identify those effective or proposed rules that the registrant then contemplates complying with on a substitute compliance basis, subject to their finalization and the completion of the Commission's own comparability analysis, and is not intended to include, when initially filed, any substantive analysis or comparison of U.S. and non-U.S. regulatory requirements applicable to Swap Entities.

F. MSPs – Parent Guarantees

In the Commission's final major swap participant definition, the Commission determined not to include a parental guarantee of a subsidiary's swaps in the computation of the parent's outward exposure computations in circumstances where the subsidiary is subject to capital oversight by the Commission, the Securities and Exchange Commission ("SEC") or an appropriate bank regulator.[11] The Commission did not, however, provide comparable relief in the case of a non-U.S. subsidiary subject to Basel-compliant capital oversight by another G-20 prudential supervisor. We believe as a matter of policy and comparable national treatment that the Commission should provide comparable treatment of parent guarantees in the case of such subsidiaries and urge the Commission to incorporate this treatment in its final phase-in exemption and cross-border guidance. At a minimum, we request that the Commission adopt this approach for purposes of the final phase-in exemption while it considers this further in the context of the cross-border guidance.

G. Entity-Level Requirements[12]

The entity-level requirement relief in the Proposed Order would provide much needed relief to foreign swap dealers during the phase-in exemptive period. But similar relief was not provided to U.S.-based swap dealers, and it did not address a number of issues that will provide challenges for non-U.S. swap dealers who provisionally register but who, absent final

[11] Final Entity Rules at 30,689.

[12] We intend to address comments regarding the distinctions drawn by the Commission in the Proposed Cross-Border Guidance between entity-level requirements and transaction-level requirements, and among different transaction-level requirements, in a separate comment letter.

cross-border guidance (and, possibly, final capital rules), have not determined their ultimate booking structure. As a result, we recommend to the Commission that conforming changes be incorporated in the Commission's final phase-in exemption with regard to the issues discussed immediately below.

1. Principals; Associated Persons

The Proposed Order included no phase-in period relief with respect to principals and associated persons of registrants. We believe these registrations are closely related to entity regulation and that limited relief would be appropriate, on an interim basis during the phase-in exemptive period, for a variety of reasons. In this regard, we note that many swap dealers operating cross-border are globally active banks that operate diversified financial operations. This paradigm differs considerably from traditional Commission (and SEC) registrants and applies equally across many U.S. and non-U.S. registrants.

Additionally, differences in governance structures and the roles of boards of directors outside the U.S. could influence the Commission's thinking about principal registration. In this connection, the Commission may wish to consider whether comparable foreign requirements to assess the qualifications and disqualifications of firm personnel provide a basis for substituted compliance with U.S. obligations applicable to principals and associated persons. We believe these considerations should be taken into account by the Commission in the context of the cross-border guidance.

These considerations could ultimately influence the Commission's thinking about the appropriate designation of principals and associated persons and result in tailoring the application of these registration requirements in the context of globally active, diversified financial institutions. Additionally, to the extent restructuring occurs based on the Commission's final cross-border guidance, the relevant individuals may change, obviating the need for the work and expense undertaken to register individuals who may no longer be required to register.

In light of the foregoing, we recommend that, at least on an interim basis during the phase-in exemptive period, registration of individuals as "principals" apply at the level of the U.S. swap dealing business giving rise to registration. For example, the senior officers of the branch or division of a registrant conducting the U.S. swap dealing business should be responsible as "principals." Similarly, only those individuals who are directly involved in soliciting or accepting swaps with U.S. persons, or directly supervising individuals so involved, should be regarded as "associated persons." We further recommend that, during the phase-in exemptive period, registrants be permitted to apply their home/host country disqualification standards in lieu of U.S. statutory disqualification standards for personnel located outside the U.S. for non-U.S. personnel.

We believe this approach would capture those individuals most directly involved and responsible for overseeing and supervising the relevant regulated activity, provide adequate protection in excluding wrong-doers and should, therefore, be integrated into the Commission's final phase-in exemption.

2. Limited Designation

We continue to believe that, for globally active financial conglomerates, only a part of whose business includes swap dealing (or swap dealing with U.S. persons), the concept of limited designation would be appropriate, particularly during the phase-in exemptive period, while this issue is subject to substantive comment and dialogue.

In this connection we wish to emphasize that we are not proposing limited designation in the same way that the Commission has applied it, for example, in the context of agricultural firms. We recommend instead that limited designation apply in the following way to a globally active, diversified financial conglomerate. Specifically, the entity as a whole would register, and not merely a branch, division or office. The capital requirements and risk management obligations would apply on an entity-wide basis and capture all of the risks arising from all of the entity's activities, wherever undertaken (subject only to substitute compliance).

However, regulation by the Commission and NFA would focus on those aspects of an institution's operations and personnel that are engaged in U.S.-regulated swap dealing activity that is subject to regulation under Dodd-Frank.[13] We believe this approach would result in a more balanced application of Dodd-Frank, and a more efficient and appropriate commitment of registrant, Commission and NFA resources.

3. Examinations

Consistent with the foregoing, the Firms believe that Commission and NFA examination authority should be co-extensive with the extent to which Dodd-Frank Title VII requirements apply to swaps activity. For example, for a non-U.S. registrant, the Commission and NFA would examine the location(s) from which the registrant solicits or accepts swaps with U.S. persons.

4. Swap Data Repository Reporting

The Proposed Order would exempt non-U.S. Swap Entities that are not affiliates or subsidiaries of a U.S. swap dealer from SDR reporting requirements for all swaps with non-U.S. counterparties. However, the Commission does not propose to provide the same exemption for non-U.S. swap dealers affiliated with a U.S. Swap Entity and the foreign branches of U.S. swap dealers.

(a) *Non-U.S. swap affiliates of U.S. persons*. As noted above, as part of the Proposed Order, the Commission has proposed that a non-U.S. Swap Entity that is not an affiliate or subsidiary of a U.S. swap dealer would be permitted to delay compliance with SDR and large trader reporting requirements for swaps with non-U.S. counterparties. If, on the other hand, the non-U.S. Swap Entity is affiliated with a U.S. swap dealer, the proposal would require

[13] In this connection, it would be important for the Commission to consider the status of the entity for purposes of determining its and its counterparties' transaction-level obligations.

the non-U.S. Swap Entity to comply with those reporting requirements for all of its swaps. The Commission explained in the preamble to the Proposed Order that it was not extending relief to non-U.S. Swap Entities that are affiliated with U.S. swap dealers due to the Commission's supervisory interest in data related to the swaps activities of non-U.S. Swaps Entities that are "part of a U.S.-based affiliated group."

As the language in the preamble clarifies, we believe that it was not the Commission's intent to cover non-U.S Swap Entities that are headquartered outside the U.S. and are not controlled by a U.S. parent, merely because they may have a U.S. swap dealer subsidiary or affiliate. Accordingly, we respectfully request that, if the Commission retains the differential treatment of non-U.S. Swap Entities who are and those who are not branches or affiliates of U.S. persons, it distinguish the two categories based on whether the non-U.S. Swaps Entity is "a branch, or a direct or indirect subsidiary, of a U.S. swap dealer (or a U.S. person that owns a U.S. swap dealer)."

In addition, unless the Commission grants the relief regarding infrastructure gaps described below, we request that the exemption provide that SDR reporting for swaps with non-U.S. counterparties by the non-U.S. branches of U.S. swap dealers and the non-U.S. swap dealer affiliates of U.S. swap dealers begin 90 days after registration is required. This additional relief is necessary to make the infrastructure changes noted below if such non-U.S. branches and non-U.S. swap dealer affiliates do not receive the relief provided to other non-U.S. swap dealers.

(b) *Confidentiality concerns.* As the Commission is aware, requiring compliance with SDR reporting under Part 45 by branches and affiliates of, as well as U.S. and non-U.S. swap dealers in connection with transactions with counterparties (regardless of their U.S. or non-U.S. person status) located in jurisdictions outside the U.S. could raise potentially significant issues with respect to compliance with non-U.S. privacy and data protection laws. Compliance with these requirements should therefore be delayed during the phase-in exemptive period and until the relevant legal issues have been satisfactorily resolved. Pending that resolution, firms should be permitted to comply with their Part 45 reporting requirement by submitting swap data in a manner that complies with home/host country requirements.

(c) *Infrastructure gaps.* The application of Part 45 SDR reporting to foreign branches and affiliates of U.S. swap dealers would require these entities operating outside the U.S. to develop reporting systems and protocols that are not currently in place and that would require additional time for effective implementation, particularly as it relates to timeliness of submissions. At the same time, many potential registrants have already established the infrastructure globally to report swap transaction data to the Global Trade Repository (the "GTR") established by the OTC Derivatives Supervisors' Group, which includes the Commission as a member. Although the GTR provides for reporting on a T+1 basis, rather than a real-time basis, we believe that Commission access to data through the GTR should still provide an effective means for the Commission to monitor for systemic risk. Reporting to the GTR would also address the confidentiality concerns noted above, since submissions to the GTR are permitted to include redacted identification of non-U.S. counterparties. We therefore respectfully request that, during the exemption's phase-in period, the Commission permit these

entities to comply with SDR reporting for swaps with non-U.S. persons on a substitute basis by reporting to the GTR.

5. Internal Clearing Conflicts of Interest Rules

The Commission's internal clearing conflicts of interest rules apply, and are intended to apply, in parallel to Swap Entities, on the one hand, and affiliated futures commission merchants, on the other. Due to the nature of the information barriers required by the rules, application of them to any one category of registrant effectively requires application to both. Yet, while the Proposed Order and Proposed Cross-Border Guidance would categorize these rules as entity-level requirements subject to a one-year delay and the possibility of subsequent substituted compliance (for a non-U.S. Swap Entity) and a delay until January 1, 2013 (for a U.S. Swap Entity), they would not provide parallel relief to an affiliated futures commission merchant. This is despite the fact that the compliance date for the internal clearing conflicts of interest rules for futures commission merchants (Rule 1.71(d)) – unlike the rest of the futures commission merchant internal conflicts rules – was set to coincide with the compliance date for the parallel Swap Entity rules (23.605(d)).[14]

Consistent with what we believe to be the intent behind this synchronization of compliance dates, we respectfully request that the Commission permit a futures commission merchant to delay compliance with the internal clearing conflicts of interest rules until compliance with parallel rules is required for the futures commission merchant's affiliated Swap Entity under the final order. Absent this relief, the relief granted on the internal clearing of interest rules by the Proposed Order to Swap Entities would effectively be negated, and the prospect of substituted compliance for Swap Entities would, as a practical matter, be precluded.

H. Transaction-Level Requirements

The Proposed Order suggests that non-U.S. Swap Entities may comply with transaction-level requirements as applied to transactions with non-U.S. counterparties "only as may be required by the home jurisdiction of such registrants."[15] However, the Firms believe there are circumstances, *e.g.*, the London branch of a French bank, in which compliance with requirements of the "non-U.S. home or other host jurisdiction" should also be permitted. We respectfully request that the Commission modify the final phase-in exemption accordingly.

IV. TERM

Under the Proposed Order, the relief for non-U.S. Swap Entities (and foreign branches of U.S. Swap Entities with respect to transaction-level requirements) would expire on

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[14] *See* 77 Fed. Reg. 20,168 (Apr. 3, 2012).

[15] *See* Proposed Order at 41,119 (emphasis added).

July 12, 2013.[16] In order for inter-jurisdictional determinations of comparability and equivalence to be meaningful (and to prevent competitive disparities), without indefinite delay in the implementation of Dodd-Frank, the Proposed Order must bridge the timing gap between U.S. implementation and implementation in other major G-20 signatories.

The Firms, therefore, recommend that the Commission carefully align the term of the exemptive order with implementation in other G-20 jurisdictions rather than allow it to expire with respect to all non-U.S. Swap Entities at an arbitrary future date. For example, the Commission could consider a jurisdiction-by-jurisdiction approach under which non-U.S. Swaps Entities would be released from the relief under the exemptive order and subject to Dodd-Frank compliance obligations as their non-U.S. home or other host jurisdictions implement derivatives reforms consistent with the G-20's agreed-upon principles.

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We would be pleased to provide further information or assistance at the request of the Commission or its staff. Please do not hesitate to contact Edward J. Rosen (212 225 2820) or Colin D. Lloyd (212 225 2809) of Cleary Gottlieb Steen & Hamilton LLP, outside counsel to the Firms, if you should have any questions with regard to the foregoing.

Respectfully submitted,

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BNP Paribas
Citi
Crédit Agricole Corporate and Investment Bank
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Deutsche Bank AG
HSBC
Morgan Stanley
Standard Chartered Bank
UBS AG
Wells Fargo & Company

[16] The relief would expire 12 months following the publication of the Proposed Order in the Federal Register, which occurred on July 12, 2012. *See* Proposed Order at 41,119.