August 27, 2012

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

Re: Comment Letter on the Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57)

Dear Mr. Stawick:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to provide the Commodity Futures Trading Commission (the "**Commission**") with comments regarding the Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions (the "**Proposed Interpretive Guidance**").[2] We appreciate the Commission's efforts to provide clarity as to the reach and intent of the new Title VII swap regulatory landscape. We understand that the Commission strives to balance effective oversight of the U.S. swap market with the congressionally mandated restriction on the Commission's cross-border jurisdiction in Section 2(i) of the Commodity Exchange Act (the "**CEA**"). However, we do not believe the Proposed Interpretive Guidance strikes this balance correctly, and we are concerned that the proposed regime reaches beyond the Commission's statutory authority and threatens to disrupt significantly the swaps market both in the United States and worldwide.

Our Key Conceptual Concerns with the Proposed Interpretive Guidance. In Annex A, we describe our key concerns with the Proposed Interpretive Guidance and the ways in which it could be revised to better achieve congressional intent and facilitate a

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

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

smoother transition toward Title VII implementation. Although we have already separately commented on the Commission's Proposed Exemptive Order Regarding Compliance with Certain Swap Regulations (the "**Proposed Exemptive Order**"),[3] the provisions of the Proposed Interpretive Guidance are in many instances closely interlinked with those in the Proposed Exemptive Order; we will therefore reference the Proposed Exemptive Order where necessary to analyze fully the issues presented in the Proposed Interpretive Guidance.

We believe that there are a number of problematic themes that permeate the Proposed Interpretive Guidance, summarized briefly below.

Jurisdictional Limitations. The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") amended Section 2(i) of the CEA to provide that:

> The provisions of this Act related to swaps that were enacted by the [Dodd-Frank Act] (including any rule prescribed or regulation promulgated under that 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 promulgate as are necessary or appropriate to prevent the evasion of any provision of this chapter that was enacted by the [Dodd-Frank Act.][4]

Section 2(i) of the CEA is thus a restriction on the Commission's cross-border jurisdiction, not a grant of additional jurisdiction.

However, the Proposed Interpretive Guidance evidences a Commission view that it should seek to maximize its cross-border jurisdiction, resulting in a very broad assertion of regulatory authority that reaches far beyond the plain meaning of Section 2(i). For example, we believe that the tenuous connection required for a non-U.S. entity to qualify as a "non-U.S. affiliate conduit," as defined in the Proposed Interpretive Guidance, is insufficient to ensure that there is a "direct and significant connection with activities in, or effect on, commerce of the United States." We believe that the Commission's approach of seeking to maximize, rather than restrict, Title VII's cross-border reach is inconsistent with congressional intent.

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[3] Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 Fed. Reg. 41,110 (proposed July 12, 2012); letter submitted by SIFMA to the Commodity Futures Trading Commission on the subject of the proposed exemptive order regarding compliance with certain swap regulations (Aug. 13, 2012) (*available at* http://www.sifma.org/issues/item.aspx?id=8589939889) (the "**August 13th Letter**").

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 722(d) (2010) (emphasis added).

In many instances, the Commission justifies its broad view of Title VII's reach through concerns about evasive activity. We do not believe that potential evasion concerns are sufficient to justify extraterritorial expansion of Title VII requirements for a number of reasons. First, the Commission has broad anti-evasion authority in the CEA to address concerns about entities attempting to evade its jurisdiction by moving their swap activities abroad.[5] Second, Section 2(i)(2) of the CEA, which directly follows the provisions that limit the Commission's cross-border authority, specifically addresses cross-border evasion. Section 2(i)(2) suggests that the Commission should regulate evasive activities directly and specifically, rather than through a broad, unprecedented reach of U.S. regulation. Expansion of the domestic regulatory regime in an attempt to curtail potentially evasive activities occurring beyond U.S. borders will lead to wide-reaching regulations that may not, in many instances, be well tailored to the purposes for which they were intended.

Level Playing Field for All Organizational Structures. We believe that the Commission should adopt, as a basic tenet of its Title VII regime, an approach to swap regulations that maintains a level playing field for swap market participants wherever possible. In a number of places the Proposed Interpretive Guidance creates comparative advantages and disadvantages for particular parties. In particular, in a number of instances, the Commission categorizes and regulates entities based on their organizational structure rather than the functional interrelationships within their organization. For example, the proposed *de minimis* threshold calculations require that potential registrants aggregate their swap activities with those of all corporate affiliates, irrespective of the actual coordination, or lack thereof, among those affiliates' swap activities. We believe that the Commission should strive to achieve equality of treatment, wherever possible, regardless of organizational structure, such as whether a swap market participant is operating in the United States or outside the United States, or whether it uses a traditional bank branching model or broker-dealer subsidiary.

Substituted Compliance and Comity. The Commission's concept of "substituted compliance," as proposed, is unnecessarily narrow and does not accord with generally accepted notions of comity. It is not equivalent to "regulatory recognition" principles and seems to inquire unreasonably into the minutiae of foreign regimes' swap regulations. This is detrimental to the well-established principles of comity that typically govern extraterritorial applications of domestic regimes. We believe that the substituted compliance concept should entail a principles-based inquiry, rather than a line-by-line comparison, to establish the relative comparability of foreign regimes. Once a jurisdiction has been deemed comparable (but not necessarily equivalent), the Commission should defer to that jurisdiction's regulations for all transactions in that jurisdiction, regardless of the location or national identity of the counterparty. This offers

[5] 7 U.S.C. § 2(h)(4).

the best approach for minimizing systemic risk while avoiding the over-regulation of foreign jurisdictions.[6]

Rulemaking. We believe that the Proposed Interpretive Guidance is a "rule" under the Administrative Procedure Act ("**APA**") and a "regulation" under the CEA. Accordingly, we believe that in promulgating the Proposed Interpretive Guidance, the Commission is required to observe the rulemaking procedures contemplated by the APA and the CEA, including the provision of a thorough and detailed cost-benefit analysis. The form of the Proposed Interpretive Guidance, provided as a descriptive release rather than a conclusory set of rules, contributes to a lack of clarity and makes it difficult to determine the Commission's proposed view on key issues, as described in greater detail below.

Coordination. We believe that the Commission should closely coordinate with the Securities and Exchange Commission (the "**SEC**"), the U.S. prudential regulators and foreign regulators to harmonize swap regulations. Many of the entities regulated by Title VII will be subject to multiple regulatory regimes. Without a unified approach to swap regulations among these various regimes, compliance with any one of the multiple—and possibly duplicative—sets of standards may be compromised.[7] This will be particularly important in the case of margin and capital regulations, which are typically the primary responsibility of the prudential regulators, and requirements such as clearing, for which laws in jurisdictions with conflicting requirements cannot be satisfied simultaneously. Moreover, privacy laws in some jurisdictions will make it impossible to comply with U.S. requirements.

Over-Regulation of Firms' Internal Risk-Management Strategies. In the interest of preventing any possible evasion of the Title VII requirements, the Commission has proposed an overly complicated regulatory framework that will impair legitimate and important risk-management strategies of financial institutions. The Proposed Interpretive

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[6] We note that the Global Financial Markets Association ("**GFMA**") submitted a comment letter on August 13, 2012, commenting on both the Proposed Interpretive Guidance and Proposed Exemptive Order with a specific focus on the Commission's proposed substituted compliance regime. We here reiterate our support of and agreement with the comments and proposed approach to a more workable substituted compliance regime contained in that letter. Letter submitted by GFMA to the Commodity Futures Trading Commission on the subject of the proposed interpretive guidance on the cross-border application of certain swaps provisions of the Commodity Exchange Act and the proposed exemptive order regarding compliance with certain swap regulations (Aug. 13, 2012) (*available at* http://www.gfma.org/correspondence/item.aspx?id=340).

[7] For additional discussion, see comment letter submitted by Swiss Financial Market Supervisory Authority ("**FINMA**") to the Commodity Futures Trading Commission on the subject of swap dealers registration under Dodd-Frank Act (Jul. 5, 2012) (*available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58317&SearchText=) and comment letter submitted by Financial Services Agency Government of Japan and Bank of Japan to the Commodity Futures Trading Commission on the subject of proposed CFTC cross-border releases on swap regulations (Aug. 13, 2012) (*available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58383&SearchText=).

Guidance's approach to interaffiliate swaps, non-U.S. affiliate conduits, aggregation for purposes of registration requirements and back-to-back swap transactions would negatively impact the ability of regulated entities to engage in internal risk-management strategies.[8] For example, booking entities that do not face third-party counterparties may have to register as swap dealers as a function of interaffiliate swaps that transfer swap positions to the booking entity. This unnecessarily reaches into a financial institution's internal risk management structure and could have unintended consequences, such as fragmentation of positions in a way that increases costs and systemic risks. To the extent the Commission is concerned about evasive actions taken by regulated entities that do not wish to adhere to their new Title VII requirements, we believe the Commission's anti-evasive authority provides a better means of addressing this concern.

Complexity and Lack of Clarity. Successful application of the Dodd-Frank swap regulatory regime requires clear, simple and bright-line rules that can easily be applied by market participants based on objective criteria. Unfortunately, the Proposed Interpretive Guidance and the Proposed Exemptive Order are, in many instances, unnecessarily complex and unclear. In some cases, this complexity appears to be a way to maximize the Commission's jurisdiction, which we believe is inappropriate. For example, many Title VII requirements apply to entities that are "U.S. persons." The proposed definition of "U.S. person," however, is unnecessarily complex and unclear in a way that appears to be designed to broaden the Commission's jurisdiction as much as possible.[9] Similarly, the treatment of booking entities is unclear and, as proposed, contradictory to the treatment of these same entities under the Final Entity Definition Rules, which exclude swaps between affiliates from swap dealing activity.[10] The imprecision and inconsistencies embodied in the Proposed Interpretive Guidance and the Proposed Exemptive Order, particularly as they interrelate, will make these provisions difficult to implement. Consequently, we believe that many provisions should be simplified and clarified.

Implementation Issues. The Proposed Interpretive Guidance complicates an already difficult Title VII implementation process. In the past, we have provided the Commission with a blueprint for phasing in Title VII requirements.[11] With respect to the Proposed Interpretive Guidance in particular, however, we believe that the Commission

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[8] *See* Proposed Interpretive Guidance at 41,229 ("[T]he Commission is concerned that given the nature of the relationship between the [non-U.S. affiliate] conduit and the U.S. person, the U.S. person is directly exposed to risks from and incurred by the conduit.").

[9] As we argued in our August 13th Letter on the Proposed Exemptive Order, it also problematically links the availability of relief under the Final Exemptive Order to the definition of "U.S. person" currently contained in the Proposed Interpretive Guidance—thereby conditioning the availability of relief on information that may change even after the relief itself becomes effective.

[10] 17 C.F.R. § 1.3(ggg)(6)(i).

[11] Letter submitted by SIFMA to the Commodity Futures Trading Commission on the subject of the proposed compliance and implementation schedules for clearing, trading execution, documentation and margin (Nov. 4, 2011) (*available at* http://www.sifma.org/issues/item.aspx?id=8589936345).

must provide market participants sufficient time to analyze and implement the definition of "U.S. person" after that definition is finalized in order to determine whether they fit within the definition. We also believe that the Commission must provide sufficient time after publication of the Final Interpretive Guidance for market participants to analyze the Guidance and consider its effect on their swap businesses before additional registration or regulatory requirements become effective.

Our Specific Responses to the Commission's Questions. Annex A provides our suggestions and specific responses to the Commission's questions in the Proposed Interpretive Guidance and its general request for responses in the Proposed Exemptive Order. Annex B provides a chart that lists each of our main points and the specific questions to which we believe they apply.

We note that although we would have preferred to comment on the two proposals together, due to timing considerations we have already commented separately on the Proposed Exemptive Order. The two proposals, however, are closely and vitally linked, and as noted above, we will therefore refer to and comment on the Proposed Exemptive Order as necessary in this letter to address appropriately our concerns with respect to the Proposed Interpretive Guidance. Additionally, we reiterate our position in our letter commenting on the Proposed Exemptive Order, submitted August 13, 2012 that, because the two proposals are styled as different documents with different comment deadlines and likely different publication dates in the *Federal Register*, it would be inappropriate and confusing for the final interpretive guidance (the "**Final Interpretive Guidance**") and the final exemptive order (the "**Final Exemptive Order**") to reference each other.

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We thank the Commission for its consideration of our comments. If you have any questions, please do not hesitate to call the undersigned at 202-962-7400.

Respectfully submitted,

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Executive Vice President
Public Policy and Advocacy
SIFMA

ANNEX A

Recommendations

This Annex is divided into key topics in the Proposed Interpretive Guidance and Proposed Exemptive Order. Each Topic begins with a summary of our key points. Each point is then discussed in greater detail.

I. Issues Presented by Definitions Contained in the Proposed Interpretive Guidance

A. Definition of "U.S. Person" During the Interim Period

- The Commission should include as part of the Final Exemptive Order a workable, uniform definition of "U.S. person" that will apply until 90 days after the final definition of "U.S. person" is published.

B. Definition of "U.S. Person" in the Final Interpretative Guidance

- The Commission should adopt a simpler, more easily applied definition of "U.S. person" in the Final Interpretive Guidance.

- The Commission should clarify that the final definition of "U.S. person" included in the Final Interpretive Guidance will function as the single definition for all swap dealer regulation purposes. However, this definition of "U.S. person" should not override existing practice either in the futures market or with respect to clearing by futures commission merchants.

- The Commission should delete the statement that the definition of a "U.S. person" is not limited to the list of entities enumerated.

- A swap counterparty should be responsible for determining its own U.S.-person status.

- In the alternative, the Commission should define a market participant's responsibilities to determine its counterparty's U.S.-person status in a manner similar to the external business conduct standards, allowing for reasonable reliance on counterparty representations.

- For the purposes of any individual swap, the determination of whether a counterparty to that swap is a U.S. person or a non-U.S. person should be made at the inception of the swap based on the most recent updated representation from the counterparty, which should be renewed by the counterparty once per calendar year.

C. Issues Presented by the Proposed Definition of "U.S. Person"

- The Commission should clarify that prong (ii)(B) of the proposed definition of "U.S. person" is not meant to capture an entity merely because it is guaranteed by a U.S. person.

- Commodity pools organized outside the United States should be permitted to assess on an annual basis whether they are U.S. persons by virtue of being majority owned by U.S. persons. Publicly offered and listed commodity pools organized outside the United States should be excluded from the definition of "U.S. person."

- The Commission should include a threshold of required ownership by U.S. persons so that entities with only *de minimis* U.S. person ownership are excluded.

- The Commission should not include in the definition of "U.S. person" a non-U.S. person that is controlled by, or under common control with, a U.S. person.

- The Commission should delete prong (v) from the definition of "U.S. person."

- The Commission should exclude supranational organizations from the definition of "U.S. person."

D. Non-U.S. Affiliate Conduit

- Qualifying as a non-U.S. affiliate conduit does not provide a sufficient nexus to the United States to justify treatment different from other non-U.S. counterparties, and therefore the non-U.S. affiliate conduit concept should be removed from the Guidance.

- In the alternative, the Commission should replace the non-U.S. affiliate conduit definition provision that the conduit "regularly enter into swaps" with a provision regarding the counterparty's direct transfer of risk of a swap to its U.S. affiliate.

- The Commission should remove the concept of "indirect" majority ownership from the definition of non-U.S. affiliate conduit.

- The Commission should clarify that swap dealers may rely on a counterparty's representations as to its non-U.S.-affiliate conduit status.

- For the purposes of any individual swap, the determination of whether a counterparty to that swap is a non-U.S. affiliate conduit should be made at the inception of the swap based on the most recent updated representation from the counterparty, which should be renewed by the counterparty once per calendar year.

II. Swap Dealer and MSP Registration

A. Registration and Aggregation Issues and Comments

- A person should not be required to aggregate the swap dealing transactions of its affiliates to determine the applicability of Title VII to that entity's swap dealing activities.

- Entities should not be required to aggregate swap dealing positions with registered Swap Entity affiliates.

- A non-U.S. person that transacts swaps only with non-U.S. counterparties and Non-U.S. Branches should not be required to aggregate its positions with affiliates.

- In determining whether its swap dealing activities exceed the *de minimis* threshold, a U.S. person should aggregate only with its U.S. affiliates.

- A non-U.S. person should not be required to include swaps with Non-U.S. Branches towards its MSP calculation.

- Registration should not be required solely as a result of being guaranteed by a U.S. person or being affiliated with a non-U.S. person that is guaranteed by a U.S. person.

- In the alternative, only guarantees by a U.S. person for which there is a material likelihood of payment by that U.S. person should contribute towards the *de minimis* threshold.

- Any *de minimis* threshold aggregation requirements should not apply until sufficient time after the Final Interpretive Guidance has been published in the *Federal Register*.

- Swap activity undertaken in respect of a legacy portfolio in run-off should not be included in an entity's aggregation calculation and should not itself trigger a registration requirement.

- The Commission should clarify that guaranteed swap positions are attributed to the guarantor for purposes of the MSP calculation.

B. Booking and Solicitation Issues and Comments

- The Commission should not require a person to register as a swap dealer by virtue of risk transfers achieved through interaffiliate swaps.

- The Commission should clarify that a U.S. person that solicits, on a fully disclosed agency basis, swaps that are booked into a non-U.S. affiliate does not have to register as a swap dealer.

III. Entity-Level and Transaction-Level Requirements

A. Treatment of Non-U.S. Branches as Swap Counterparties

- From the perspective of their counterparties, Non-U.S. Branches should be treated as non-U.S. persons.

B. Division into Entity-Level and Transaction-Level Requirements

- All forms of swap reporting, including SDR Reporting and Large Trader Reporting, should be categorized as Transaction-Level Requirements.

- Position limits and anti-manipulation rules should be categorized as Transaction-Level Requirements.

C. Application of Transaction-Level Requirements

- U.S. swap dealers should be eligible for substituted compliance for Transaction-Level Requirements to the same extent as non-U.S. swap dealers and Non-U.S. Branches.

- The Commission should treat Part 43 real-time reporting in the same way as external business conduct. In particular, real-time reporting should not apply to Non-U.S. Swap Entities or Non-U.S. Branches for transactions with non-U.S. persons.

- The Commission should not apply the external business conduct standards to swaps between a U.S. Swap Entity and a non-U.S. person.

- The Commission should take into account the issue of foreign jurisdictions' privacy laws.

D. Emerging Market Exemption from Transaction-Level Requirements

- The Commission should clarify that the use of the Emerging Market Exemption is not limited to "emerging markets" in the colloquial sense and should rename it as the "Foreign Ancillary Activity Exemption."

- The Emerging Market Exemption should be available to transactions that non-U.S. swap dealers enter into with non-U.S. persons guaranteed by U.S. persons and with non-U.S. affiliate conduits.

- The Emerging Market Exemption should be available to two Non-U.S. Branches' transactions with each other in an "emerging market" as well as to transactions between a Non-U.S. Branch and a non-U.S. swap dealer operating in the relevant market.

- The "Emerging Market Exemption" threshold of 5% should be increased to 15%.

- The Commission should clarify how the Emerging Market Exemption threshold is calculated.

- The Commission should clarify that the Emerging Market Exemption permits reliance on local standards for all swaps, including swaps with U.S. persons, swaps with non-U.S. affiliate conduits and swaps that are guaranteed by U.S. persons.

E. Application of Entity-Level Requirements

- The Commission should clarify that firms may exercise discretion in the designation of principals and in the reporting duties of the chief compliance officer. In addition, for non-U.S. swap dealers, designation as an "associated person" and requirements related to persons that solicit swaps for that swap dealer should only apply to those who solicit swaps from U.S. persons other than Non-U.S. Branches.

IV. Substituted Compliance

- The Commission's concept of "substituted compliance," as proposed, is unnecessarily narrow and does not accord with generally accepted notions of comity. The Commission should adopt an approach to cross-border transactions that is consistent, not only with international notions of comity and coordination, but also with its own precedent.

- Substituted compliance for Transaction-Level Requirements should be available for swaps of Non-U.S. Branches and Non-U.S. Swap Entities with U.S.-person counterparties.

- The Commission should clarify which law is "substituted" for U.S. law under "substituted compliance."

- The Commission should not impose its requirements on non-U.S.-person registrants until the accompanying non-U.S. regulatory regimes are fully formed.

- In the alternative, the Commission should develop a process to extend exemptive relief where potentially comparable foreign requirements are proposed but not yet final, or where the Commission has not completed comparability determinations.

V. Treatment of Non-Swap Entities

- Non-Swap Entities should be entitled to the same treatment and relief as Swap Entities.

VI. Exemptive Order and Compliance Plan Draft

A. SDR and Large Trader Reporting Requirements

- The relief granted to Non-U.S. Swap Entities with respect to SDR Reporting and Large Trader Reporting for swaps with non-U.S. counterparties should be available, regardless of whether the Non-U.S. Swap Entity is affiliated with a U.S. swap dealer.

B. Length of Proposed Exemptive Relief

- The end of the Proposed Exemptive Order's relief should be tied to the publication of the Final Exemptive Order, rather than that of the proposal, in *the Federal Register*.

C. Compliance Plans

- The Commission should clarify that the initial compliance plans required to apply for Exemptive Order relief need only provide a basic indication of a non-U.S. entity's desire to seek substituted compliance and that indications should be made at the level of the Commission's eight rulemaking categories (as opposed to the Commission's 38 individual rulemaking areas) and should relate only to those categories that are relevant to the G-20 Commitments, i.e., Comprehensive Regulation of Swap Dealers and MSPs, Clearing, Trading, Data and Enforcement.

VII. Other Issues

- The Commission should coordinate its cross-border Title VII regulations with the SEC, the prudential regulators and foreign regulators.

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I. Issues Presented by Definitions Contained in the Proposed Interpretive Guidance

A. Definition of "U.S. Person" During the Interim Period

Recommendation: The Commission should include as part of the Final Exemptive Order a workable, uniform definition of "U.S. person" that will apply until 90 days after the final definition of "U.S. person" is published.[12]

As discussed in the August 13th Letter, unlike regulation in other markets, swap market regulation has not historically required market participants to determine whether their counterparties are "U.S. persons." As a result, there is currently no commonly accepted definition of "U.S. person" that market participants have incorporated into their operational and compliance systems for swaps. Before a final definition of "U.S. person" (the "**Final Definition**") is published and has been implemented in the market, it would be impossible for our members to do anything other than rely on their current systems and internal classifications. For most, this would mean that a U.S. person would consist of:

- any natural person who is a resident of the United States; and
- any corporation, partnership, LLC, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing that is organized or incorporated under the laws of the United States or has its principal place of business in the United States.

For the purposes of this definition (the "**Interim Definition**"), non-U.S. branches of U.S. swap dealers ("**Non-U.S. Branches**") would not be considered U.S. persons. We believe that this definition should govern in the period before the Final Definition has been published and for 90 days thereafter (the "**Interim Period**").

We believe that the Interim Definition is appropriate to identify "core" U.S. persons and that it would capture a large portion of entities that would be U.S. persons under the Final Definition. Such a definition would allow most of our members to identify those counterparties that are U.S. persons during the Interim Period without the necessity of building new, interim systems that might have to be changed when a Final Definition is adopted. Adopting such an Interim Definition has the additional benefits of effectively phasing in Title VII requirements by targeting these core U.S. persons and of being conceptually similar to existing definitions of U.S. person in other contexts, such as Regulation S.

An Interim Period that lasts at least 90 days following the publication of the Final Definition is critical to a smooth transition into full Title VII compliance. Incorporating a

[12] This section is responsive to Question 1 of the Proposed Interpretive Guidance.

new definition of "U.S. person," particularly a definition as complicated and unprecedented as the one proposed in the Proposed Interpretive Guidance and in the Proposed Exemptive Order, will be a time-consuming and burdensome task that cannot be done quickly after the Final Definition is published. Further, if the Final Exemptive Order is published in the *Federal Register* before the Final Definition, we believe that the Final Exemptive Order should refer to this Interim Definition rather than the proposed definition in the Proposed Interpretive Guidance. Otherwise, regulated entities will be required to make registration and other compliance decisions based on a complex definition that is subject to change.

We emphasize that our members intend to interpret the concept of "U.S. person" based solely on information already tracked by or readily available to them. We believe that the ultimate responsibility of counterparty classification should fall to the counterparties themselves, who are clearly the best positioned to analyze and interpret the application of the Final Definition to them. To the extent that counterparties make representations to regulated entities during the Interim Period, those representations should govern the U.S. person interpretation. However, as previously noted, it will be nearly impossible to obtain representations from all counterparties in the short time allotted prior to the required registration date. Thus, in the absence of representations from counterparties, our members will interpret the Interim Definition using a good-faith standard based on available information.

During the Interim Period, it is likely that different members will have disparate information available to them,[13] which may lead to different status determinations with respect to the same counterparties. Although this result is not ideal, we believe that it is a consequence of the extremely short timeline provided to determine whether counterparties are U.S. persons. We note that any inconsistency with respect to counterparty status across our members, as a result of their varying operational capacities with respect to the Interim Definition, would persist only so long as the Interim Definition is in effect.

Further, we believe that, during the Interim Period, swap dealer and major swap participant ("**MSP**") (together, "**Swap Entity**") registration requirements should be based on the Interim Definition discussed above. Specifically, we believe that only those entities that engage in swap dealing activities above the *de minimis* threshold with U.S. persons meeting the Interim Definition should be required to register with the Commission as Swap Entities during the Interim Period.

[13] Indeed, some members have indicated that they do not currently track a counterparty's principal place of business.

B. Definition of "U.S. Person" in the Final Interpretative Guidance

Recommendation: The Commission should adopt a simpler, more easily applied definition of "U.S. person" in the Final Interpretive Guidance.[14]

We recognize that the Commission has legitimate supervisory interests that extend beyond swap activities wholly transacted within the United States. We believe, however, that the currently proposed definition of "U.S. person" is unworkably broad and, in many instances, may not provide a sufficient jurisdictional nexus to satisfy the Commission's "direct and significant" mandate in Section 2(i) of the CEA.[15] Further, the vagueness and the breadth of the proposed definition would present considerable operational difficulties, should regulated entities be required to apply it as currently drafted. The ability to comply with any definition of "U.S. person" will be predicated upon the ability to ascertain and analyze the necessary information, particularly with respect to counterparties. As such, a workable definition must be clear, must provide a bright line with respect to whether a given entity is or is not a U.S. person and must rely only on information that can be reasonably and systematically diligenced.

We ask that the Commission adopt the following definition, which we believe is sufficiently broad to secure the Commission's regulatory interests with respect to United States markets, yet sufficiently precise to allow regulated entities to determine with confidence and specificity their regulatory obligations. Specifically, we ask that the Commission define "U.S. person" as:

(i) any natural person who is a resident of the United States;

(ii) any plan within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, excluding any plan maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens (a "**Plan**");

(iii) any commodity pool, pooled account, collective investment vehicle or other vehicle the assets of which are invested on a collective basis regardless of form of organization (a "**Commodity Pool**"), in each case where:

(a) the Commodity Pool is organized or incorporated under the laws of the United States; or

(b) the Commodity Pool is (1) directly majority owned as of the beginning of a calendar year by U.S. persons or, in the case of ownership by a Commodity Pool, a Commodity Pool that is a U.S. person solely by virtue of clause (a) above, and (2) not a publicly offered Commodity Pool that is

[14] This section is responsive to Question 1 of the Proposed Interpretive Guidance.

[15] 7 U.S.C. 2(i)(1).

initially offered outside the United States (in a manner compliant with Regulation S under the Securities Act of 1933) and listed principally on an exchange located outside the United States.

(iv) any corporation, partnership, limited liability company, association, joint-stock company, endowment or any form of enterprise similar to any of the foregoing (other than an Estate, Trust, Plan or Commodity Pool), in each case that is either:

(a) organized or incorporated under the laws of the United States or

(b) having its principal place of business in the United States.[16]

(v) any individual account (discretionary or not) (other than an Estate, Trust, Plan or Commodity Pool) where the direct beneficial owner is a U.S. person by virtue of clause (i) or (iv) above in this definition;

(vi) any estate (other than a Trust, Plan or Commodity Pool) ("**Estate**") of which any executor or administrator is a U.S. person by virtue of clause (i) or (iv) above in this definition, except that any such Estate shall not be a U.S. person if (1) an executor or administrator of the Estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the Estate and (2) the Estate is governed by foreign law; and

(vii) any trust (other than an Estate, Plan or Commodity Pool) ("**Trust**") of which any trustee is a U.S. person by virtue of clause (i) or (iv) above in this definition, except that any such Trust shall not be a U.S. person if (1) a trustee who is not a U.S. person has sole or shared investment discretion with respect to the Trust assets, and (2) no beneficiary of the Trust (and no settlor if the Trust is revocable) is a U.S. person by virtue of clause (i) or (iv) above in this definition.

We recommend that the Final Definition exclude Non-U.S. Branches from the scope of U.S. person for the reasons detailed below. We further urge the Commission to implement the recommendation of both the European Commission and the Financial Services Authority that the definition of "U.S. person" exclude a person that is established in, or is resident in, a jurisdiction that has regulations in force comparable to those under Title VII and the Commission's rules under Title VII.[17] This approach

[16] A counterparty could determine its own principal place of business using information collected as part of Customer Identification Programs and Anti-Money Laundering procedures.

[17] *See* comment letter submitted by the European Commission to the Commodity Futures Trading Commission on the subject of the proposed CFTC rules (Aug. 24, 2012) (available at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234) and comment letter submitted by the Financial Services Authority to the Commodity Futures Trading Commission on the subject of the proposed interpretive guidance and policy statement on cross-border application of certain swaps (…continued)

would not excuse such non-U.S. persons from registration, if necessary, with the Commission, but it would give effect to the same principles of international comity that the Commission seeks to recognize through substituted compliance while addressing the Commission's concerns that a swap market participant could seek to avoid regulation by being organized in a jurisdiction that does not have regulations comparable to those in the United States.

We believe that our suggested definition of "U.S. person" would solve a number of the conceptual problems with the Commission's proposed definition. It is a more clear and workable definition that preserves the Commission's legitimate interest in protecting U.S. markets from undue systemic risk. In addition, our suggested definition would decrease regulatory uncertainty by requiring only a specific entity to assess its status under one prong of the definition. The Commission's definition as proposed arguably could have required an assessment of multiple prongs for a variety of different legal entities, such as entities formed as trusts. While additional concerns addressed by our suggested definition are more thoroughly addressed later in this letter, we briefly summarize them here to highlight how the Commission's proposed definition differs from our suggested definition:

- Prong (ii)(B) of the Commission's proposed definition requires consideration of the "indirect" owners of a person when determining whether that person is a U.S. person. The Proposed Interpretive Guidance gives no indication as to how indirect ownership should be determined or whether there is an ownership threshold below which treatment as a U.S. person should not be required, placing an enormous burden on market participants without assuring a sufficient jurisdictional nexus. As a result, we believe that the "indirect" language should be removed.

- Prong (ii)(B) of the Commission's proposed definition makes reference to legal entities "in which the direct or indirect owners thereof are *responsible for the liabilities* of such entity."[18] We believe that the Commission intended only to capture partnerships where the partners have unlimited liability. However, as written, the language is significantly broader and its ultimate scope is much less clear. We therefore seek clarification from the Commission that the language is intended only to capture partnerships where the partners have unlimited liability.

- Like prong (ii)(B), prong (iv) of the Commission's proposed definition relies problematically on the concept of indirect ownership and provides no threshold below which U.S. person ownership would be deemed not to be a controlling

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(continued…)

provisions of the Commodity Exchange Act and proposed exemptive order regarding compliance with certain swap regulations (Aug. 24, 2012) (available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58433&SearchText=).

[18] Proposed Interpretive Guidance at 41,218 (emphasis added).

interest. As a result, we believe that the language "or indirectly," should be removed from the definition.

- Prong (iv) of the Commission's proposed definition would be unworkable for several reasons. Arguably, the prong would require a commodity pool organized outside the United States to monitor its level of U.S. person ownership on an ongoing basis. This requirement would be overly burdensome and, in some cases, impossible. Therefore, we recommend that such a commodity pool could determine its U.S.-person status based on U.S. person ownership on an annual basis, based on the composition of its investors as of the beginning of each calendar year. Prong (iv) would also be unworkable for commodity pools that are publicly offered outside the United States and listed on foreign exchanges. Therefore, we recommend that they be excluded from the definition of "U.S. person."

- Prong (v) requires registration of "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 CEA."[19] We believe that prong (iv), subject to our recommendations, is more appropriate for capturing commodity pools that are U.S. persons than prong (v), which links the U.S.-person status of a commodity pool to the regulatory requirements of its operator. This could capture a commodity pool with minimal—and potentially no—U.S. investors or U.S. connection and could hinder U.S. investor access to foreign funds, with minimal policy or risk mitigation benefits. We believe that it is inappropriate to look to the status of the commodity pool operator of a commodity pool to determine the commodity pool's status as a U.S. person. Therefore, we believe that prong (v) should be deleted.

- Prong (vii) of the Commission's proposed definition seeks to include as a U.S. person any "estate or trust, the income of which is subject to United States income tax regardless of source." We do not believe that the Commission's swap regulatory authority should be premised on the broad taxing authority of the United States. Therefore, we believe that prong (vii) should be deleted.

Our suggested definition eliminates these issues, without wholly reinventing the Commission's overall approach to the definition of "U.S. person" in the Proposed Interpretive Guidance. Our proposed definition is operationally workable (although regulated entities will likely require some time to come into compliance, as noted in our above request for interim relief), provides clarity in its interpretation and preserves the core elements of the Commission's proposed definition. Consequently, we urge the Commission to adopt our suggested definition as the final definition of "U.S. person."

[19] *Id.*(emphasis added).

Recommendation: The Commission should clarify that the final definition of "U.S. person" included in the Final Interpretive Guidance will function as the single definition for all swap dealer regulation purposes. However, this definition of "U.S. person" should not override existing practice either in the futures market or with respect to clearing by futures commission merchants.[20]

The term "U.S. person" is used, but not defined, in other Commission rules.[21] While the Commission indicates that the proposed definition is "[f]or purposes of [the] interpretive guidance"[22] and "[s]olely for purposes of the temporary exemptive relief,"[23] it is possible that this definition could become the *de facto* definition of "U.S. person" for all Title VII purposes. Because we believe that consistency of interpretation and of application is essential in the implementation of a new and sweeping regulatory framework and that this consistency will be best served by specifying a single, practicable definition at the outset of the compliance process, we ask that the Commission clarify in the Final Interpretive Guidance that the definition of "U.S. person" for cross-border swap regulation is the single definition that will govern for all Title VII swap dealer regulation purposes.

We further ask that the Commission clarify that the Final Definition is not intended to override existing market practice as it relates to futures or to futures commission merchants ("**FCMs**"). Specifically, futures positions are not required to be held through a registered FCM unless the customer is "located in the United States"—a domicile-based definition. The application of a different definition would unnecessarily disrupt the futures markets. Similarly, we believe that a comparable domicile-based test should be applied to the holding of cleared swaps positions. In particular, cleared swaps positions should only be required to be held through a registered FCM where the customer is domiciled in the United States. We believe that this approach is operationally and logistically sound and that it facilitates portfolio margining to the extent available. We believe this is consistent with the Commission's intent, as evidenced by the statement in the Commission's recent rulemaking on intermediary registration that the Commission intends to maintain a distinction between the definition of "U.S. person" for purposes of swap dealer registration and regulation and the domicile-based test for FCM and

[20] This section is responsive to Question 1 of the Proposed Interpretive Guidance.

[21] *See, e.g.*, Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136, 2208 (Jan. 13, 2012) (to be codified at 17 C.F.R. § 45.8(g)(3)) ("If both counterparties are non-SD/MSP counterparties, and only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty . . . ."); Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35,200, 35,229 (June 12, 2012) (to be codified at 17 C.F.R. § 46.5(a)(5)) ("[I]f only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.").

[22] Proposed Interpretive Guidance at 41,218.

[23] Proposed Exemptive Order at 41,114.

introducing broker purposes.[24] However, in order to increase market certainty, we believe that such a statement should be incorporated into the Final Definition.

Recommendation: The Commission should delete the statement that the definition of a "U.S. person" is not limited to the list of entities enumerated.[25]

In introducing the problematic "U.S. person" definition, the Proposed Interpretive Order provides that "the term 'U.S. person' would include, but not be limited to" a long list of enumerated entities.[26] This open-ended language creates additional legal uncertainty as to which entities are U.S. persons and exposes counterparties to unnecessary regulatory risk. We do not think it is appropriate to structure such a critical definition in this way, as certainty of application is essential for successful implementation of Title VII requirements. Further, since the definition of "U.S. person" in the Proposed Interpretive Guidance is quite broad, it is unclear what other kinds of relationships or entities the Commission could intend to capture. Therefore, we believe that the phrase "not be limited to" and the legal uncertainty and regulatory risk it creates should be eliminated in the Final Interpretive Guidance.

Recommendation: A swap counterparty should be responsible for determining its own U.S.-person status.[27]

As noted above, we believe that the ultimate responsibility of determining a swap counterparty's U.S.-person status should fall to the counterparty itself. We believe that this is the best allocation of compliance requirements among regulated entities for several reasons. First, as noted above, the determination of U.S.-person status will likely rely on information not already captured and reported during a swap transaction. Thus, it must be newly gathered and applied as part of the new swap regulatory requirements. Individual counterparties are much better situated to seek out and analyze the requisite information about themselves than a third-party swap counterparty would be. Further, to the extent that the necessary information to determine U.S.-person status is sensitive and potentially covered by privacy laws, this information would not need to be shared outside the entity to which it belongs. Instead, that entity would need only analyze the information according to the applicable definition and report the results.

Requiring a counterparty to determine its own U.S.-person status also brings with it the benefits of consistency and efficiency. As previously noted, requiring multiple swap dealers to seek out and interpret the necessary information to determine a counterparty's U.S.-person status could (and likely would, at least in the short term) result in the same counterparty being assigned a different status for different transaction. Undoubtedly, the

[24] *See* Registration of Intermediaries (Aug. 17, 2012) (pending publication in the *Federal Register)*.

[25] This section is responsive to Question 1 of the Proposed Interpretive Guidance.

[26] Proposed Interpretive Guidance at 41,218.

[27] This section is responsive to Question 14 of the Proposed Interpretive Guidance.

entity best situated to determine the U.S.-person status of a counterparty—the counterparty itself—would analyze all the necessary information once, preserving the privacy of that information, and report the same result to all swap dealers with whom it transacts. Similarly, counterparties that are not Swap Entities may not have the necessary information to determine the U.S.-person status of their counterparties, whether or not those counterparties are Swap Entities. Thus, such non-Swap Entities will also need to rely on the information provided to them by their counterparties.

Recommendation: In the alternative, the Commission should define a market participant's responsibilities to determine its counterparty's U.S.-person status in a manner similar to the external business conduct standards, allowing for reasonable reliance on counterparty representations.[28,29]

Several prongs of the Commission's proposed definition of "U.S. person" depend on information that will be difficult, if not impossible, for a market participant to obtain and assess directly. For example, prong (iv) of the Commission's proposed definition includes "any commodity pool, pooled account, or collective investment vehicle . . . of which a majority ownership is held, directly or indirectly, by a U.S. person(s)," which requires the market participant to know the direct and indirect ownership of any commodity pool, pooled account or collective investment vehicle with which it transacts.

The Commission's business conduct standards, as finalized, require Swap Entities to "implement policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the swap dealer prior to the execution of the transaction that are necessary for conducting business with this counterparty."[30] The requirements further provide that

> A swap dealer or major swap participant may rely on the written representations of a counterparty to satisfy its due diligence requirements under this subpart, unless it has information that would cause a reasonable person to question the accuracy of the representation. If agreed to by the counterparties, such representations may be contained in counterparty relationship documentation and may satisfy the relevant requirements of this subpart for subsequent swaps offered or entered into with a counterparty, provided

[28] This section is responsive to Questions 1 and 14 of the Proposed Interpretive Guidance.

[29] Many SIFMA members may be swap dealers, and in that capacity they may transact with a number of counterparties. For ease of exposition, throughout this letter we use the generic term "swap dealer" to refer to the entity whose Title VII obligations we wish to address and the generic term "counterparty" to refer to the other side of the relevant transaction.

[30] Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734, 9823 (Feb 17, 2012) (to be codified at 17 C.F.R. § 23.402(b)).

> however, that such counterparty undertakes to timely update any material changes to the representations.[31]

We ask the Commission to affirmatively state that obligations with respect to a counterparty's U.S.-person status will be eligible for the same treatment.

Reliance on counterparty representations will be the only practical way for many market participants to know whether their counterparties are U.S. persons. Allowing them to rely on counterparty representations would prevent overly burdensome due diligence obligations that might otherwise arise. This is particularly the case when considering the potential "look through" obligations that market participants may face as a result of the proposed U.S. person definition. So long as determination of a counterparty's status could be related to the "direct or indirect ownership" of that counterparty, an accurate determination will require that the assessing market participant look through the baseline corporate organization to subsequent levels of ownership and control interests. In some instances, the necessary information may be unavailable, non-public or otherwise sensitive. In addition, allowing market participants to rely on counterparty representations would ensure consistent classification and, thus, treatment among counterparties.

Furthermore, there is no regulatory reason why a market participant needs access to this information. Rather, the market participant need only demonstrate compliance with obligations that inhere where the counterparty is a U.S. person. Reliance on representations of the relevant counterparty should be sufficient (although not necessary) to satisfy this requirement. We note that, to the extent individual market participants maintain appropriate records and feel comfortable determining the status of counterparties without such representations, nothing in the business conduct standard approach would prohibit individual diligence efforts without representations. As mentioned above, we believe that during the Interim Period, to the extent that counterparties make representations to regulated entities during the Interim Period, those representations should govern the U.S. person interpretation. If counterparty representations are not available during the Interim Period, however, the determination of a counterparty's U.S.-person status will fall to the market participant.

Recommendation: For the purposes of any individual swap, the determination of whether a counterparty to that swap is a U.S. person or a non-U.S. person should be made at the inception of the swap based on the most recent updated representation from the counterparty, which should be renewed by the counterparty once per calendar year.[32]

Because it incorporates the concepts of direct and indirect majority ownership, the Commission's proposed definition of "U.S. person" looks at an entity's status at a given point in time. However, the ownership of a counterparty may change over the course of a

[31] *Id.* (to be codified at 17 C.F.R. § 23.402(d)).

[32] This section is responsive to Questions 1 and 14 of the Proposed Interpretive Guidance.

given swap transaction. For example, under prong (iv) of the Commission's currently proposed definition of "U.S. person," the U.S.-person status of a commodity pool could change every time new investors are admitted or existing investors redeem their investments. Requiring a Swap Entity to maintain ongoing due diligence investigations into the status of all counterparties (even by way of counterparty representations) and to respond accordingly immediately would be extremely burdensome, if not impossible. Indeed, the burdens would dwarf the incremental benefits to the policy goals of Title VII. In addition, if the change in status required a change in regulatory treatment of the transaction, such as posting of margin, that change could alter the economics of the transaction in a manner not contemplated by the parties at the swap's inception.[33] As a result, we believe that for the purpose of an individual swap, the U.S.-person status of the parties should not be considered to change over the lifetime of the swap.

Further, we believe that the determination of a counterparty's status should be made at the inception of the swap relationship, based on the last representation given by that counterparty. However, we suggest that the counterparty should be obligated to notify the Swap Entity once each calendar year if there has been any change in its U.S.-person status. The Swap Entity would be able to rely on the representation until it is renewed or changed by the counterparty, provided that the Swap Entity does not have information that would cause a reasonable person to question the accuracy of the representation.[34]

To provide Swap Entities with sufficient time to process a change of counterparty status and implement any necessary changes, we believe that any change in counterparty status should only apply to swaps executed 90 days after the counterparty notifies the Swap Entity of its change in status. This would ensure that the Swap Entity, as well as its counterparty, are afforded sufficient time to account for this change in the counterparty's status through amendments to documentation, data capture and internal compliance and other systems.

C. Issues Presented by the Proposed Definition of "U.S. Person"

If the Commission declines to incorporate the definition of "U.S. person" suggested above, the practical issues presented by the currently proposed definition should be addressed in order to clarify and facilitate regulated entities' efforts to comply.

[33] Elsewhere the Commission has indicated that changing the margin requirements for existing swap transactions "would be unfair to the parties and disruptive to the markets." Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23,732, 23,734 (proposed Apr. 28, 2011).

[34] Business Conduct Standards at 9823.

Recommendation: The Commission should clarify that prong (ii)(B) of the proposed definition of "U.S. person" is not meant to capture an entity merely because it is guaranteed by a U.S. person.[35]

Prong (ii)(B) of the proposed definition of "U.S. person" includes entities "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."[36] This language was likely meant to capture partnerships and other situations where limited liability may be unavailable. As drafted, however, the definition might be read to capture entities guaranteed by a U.S. person as well. This reading seems inconsistent with the treatment of guarantees by U.S. persons in the rest of the Proposed Interpretive Guidance and is likely not the result intended by the Commission. For example, the Proposed Interpretive Guidance states that "a foreign affiliate or subsidiary of a U.S. person would be considered a non-U.S. person, even where such an affiliate or subsidiary has certain or all of its swap-related obligations guaranteed by the U.S. person."[37] Because of the inconsistencies created by the language, we believe that the Commission should clarify that entities whose swap-related obligations are guaranteed by U.S. persons should not be considered U.S. persons merely by virtue of those guarantees and should instead be read to refer to partnerships where the partners do not have limited liability and at least one such partner is a U.S. person.

Recommendation: Commodity pools organized outside the United States should be permitted to assess on an annual basis whether they are U.S. persons by virtue of being majority owned by U.S. persons. Publicly offered and listed commodity pools organized outside the United States should be excluded from the definition of "U.S. person."[38]

Commodity pools, pooled accounts and collective investment vehicles would face significant operational and logistical difficulties in assessing whether they are U.S. persons by virtue of being majority owned by U.S. persons. Monitoring the level of a commodity pool's non-U.S. investors on an ongoing basis, as arguably could be required under prong (iv) of the Commission's proposed definition, would be overly burdensome for the commodity pool (and its advisor) if not, in some cases, impossible. Such a requirement could also result in the U.S.-person status of a commodity pool changing very frequently, resulting in different treatment of the commodity pool by its counterparties—potentially on a transaction-by-transaction basis. Such a result would prove disruptive to the functioning of the commodity pool and overly burdensome for the commodity pool's counterparties. Therefore, we suggest that a commodity pool organized outside the United States should be required to assess its U.S.-person status on

[35] This section is responsive to Question 1 of the Proposed Interpretive Guidance.

[36] Proposed Interpretive Guidance at 41,218.

[37] *Id.*

[38] This section is responsive to Question 1a of the Proposed Interpretive Guidance.

an annual basis, based on the composition of its investors as of the beginning of each calendar year.

Prong (iv) is particularly problematic for commodity pools that are publicly offered outside the United States and listed on foreign exchanges. These commodity pools are generally unable to control the proportion of their owners that are U.S. persons and thus would be unable to control their status as a U.S. person. Therefore we recommend that they be excluded from the Final Definition.

Recommendation: The Commission should include a threshold of required ownership by U.S. persons so that entities with only *de minimis* U.S. person ownership are excluded.[39]

As noted above, the scope of the definition of "U.S. person" is not immediately apparent, particularly with respect to the "indirect owner[ship]" language in prong (ii) of the proposed definition. We believe the Commission should eliminate this concept from the Final Definition. Regardless of the Commission's decision on this point, however, it should establish more bright-line ownership principles to help regulated entities determine who is covered. Specifically, it should define the ownership requirement of U.S.-person status objectively, establishing a numerical threshold, so as to definitively exclude entities that are owned by U.S. persons only to a *de minimis* extent. *De minimis* ownership would not appear to raise the jurisdictional nexus required under Section 2(i) of the CEA.

Recommendation: The Commission should not include in the definition of "U.S. person" a non-U.S. person that is controlled by, or under common control with, a U.S. person.[40]

Question 1c in the Proposed Interpretive Guidance asks whether the Commission should "interpret the term [U.S. person] to include a concept of control under which a non-U.S. person who is controlled by or under common control with a U.S. person would also be considered a U.S. person."[41] We emphatically believe that it should not. We do not believe that the fact that a non-U.S. person is controlled by, or under common control with, a U.S. person is sufficient to satisfy the CEA Section 2(i) jurisdictional nexus that would not apply Title VII requirements to swap activities outside the United States unless those activities "have a direct and significant connection with activities in, or effect on, commerce of the United States."[42]

[39] This section is responsive to Question 1 of the Proposed Interpretive Guidance.

[40] This section is responsive to Question 1c of the Proposed Interpretive Guidance.

[41] Proposed Interpretive Guidance at 41,218.

[42] *Id.* at 41,217.

Recommendation: The Commission should delete prong (v) from the definition of "U.S. person."[43]

The Proposed Interpretive Guidance includes in prong (v) of the U.S. person definition commodity pools "the operator of which would be required to register as a commodity pool operator under the CEA."[44] We believe that our suggested prong (iii) is a more appropriate way to capture commodity pools that are U.S. persons, and that any additional commodity pools included in the definition of "U.S. person" through the proposed prong (v) do not have a sufficient nexus to the United States to allow regulation under Section 2(i) of the CEA. As a result, we believe that prong (v) of the Commission's proposed definition should be deleted.

Recommendation: The Commission should exclude supranational organizations from the definition of "U.S. person."[45]

As proposed, the definition of "U.S. person" does not include an exclusion for supranational organizations.[46] The nature of these organizations, however, suggests that they could be subject to regulation by every regime in which they operate, absent a specific exemption in each of these jurisdictions. Therefore, to promote international comity and harmonization of international swap regulation, we believe that supranational organizations should be excluded from the definition of "U.S. person."

[43] This section is responsive to Question 1 of the Proposed Interpretive Guidance.

[44] Proposed Interpretive Guidance at 41,218.

[45] This section is responsive to Question 1 of the Proposed Interpretive Guidance.

[46] This would exclude from the definition of "U.S. person" the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Inter-American Development Bank, the Bank for Economic Cooperation and Development in the Middle East and North Africa, the Inter-American Investment Corporation, the Council of Europe Development Bank, the Nordic Investment Bank, the Caribbean Development Bank, the European Investment Bank, the European Investment Fund and the Bank for International Settlements, as well as any other similar international organizations and all agencies, affiliates and pension plans of these entities.

D. Non-U.S. Affiliate Conduit

Recommendation: Qualifying as a non-U.S. affiliate conduit does not provide a sufficient nexus to the United States to justify treatment different from other non-U.S. counterparties, and therefore the non-U.S. affiliate conduit concept should be removed from the Guidance.[47]

Unlike the treatment of transactions between non-U.S. swap dealers and other U.S. counterparties, the Proposed Interpretive Guidance proposes to apply Transaction-Level Requirements (as defined in the Proposed Interpretive Guidance) to swaps between a non-U.S. swap dealer and a non-U.S. affiliate conduit, which it defines as swaps in which:

> (i) a non-U.S. counterparty is majority owned, directly or indirectly, by a U.S. person;
>
> (ii) the non-U.S. counterparty regularly enters into swaps with one or more other U.S. affiliates or subsidiaries of the U.S. person; and
>
> (iii) the financials of such non-U.S. counterparty are included in the consolidated financial statements of the U.S. person.[48]

These entities, as counterparties, are treated differently from other non-U.S. entities, in that non-U.S. swap dealers transacting with non-U.S. affiliate conduits must comply with either Title VII requirements or local requirements deemed comparable by the Commission.

We believe that the proposed definition is inconsistent with Section 2(i) of the CEA, as the concept of non-U.S. affiliate conduit goes beyond the limitation on the Commission's jurisdiction. Section 2(i) of the CEA restricts the Commission's regulation of activities outside the United States to "those activities [that] have a direct and significant connection with activities in, or effect on, commerce of the United States" or are meant to evade Title VII.[49] This represents the legislatively intended limit to the Commission's extraterritorial jurisdiction with respect to swap regulation, and we believe that many, if not most, non-U.S. affiliate conduits would not satisfy this requirement.

Furthermore, we believe that the burdens on non-U.S. swap dealers when dealing with non-U.S. affiliate conduits are too significant, especially where substituted

[47] This section is responsive to Question 22 of the Proposed Interpretive Guidance.

[48] Proposed Interpretive Guidance at 41,229.

[49] Proposed Interpretive Guidance at 41,217.

compliance is not available, to justify any benefit.[50] In foreign jurisdictions where substituted compliance is not available, designating a counterparty to be a non-U.S. affiliate conduit would have the effect of requiring all non-U.S. swap dealers transacting with that counterparty to comply with Title VII's Transaction-Level Requirements. The burdens of this requirement could likely result in non-U.S. swap dealers no longer doing business with entities deemed to be non-U.S. affiliate conduits. This would negatively affect commercial parity among firms: if one entity is deemed to be a non-U.S. affiliate conduit while a second, similarly structured entity is not, the U.S.-affiliated parent of the first entity would likely experience a loss in business as counterparties shifted their transactions elsewhere, while the U.S.-affiliated parent of the second entity could benefit from the consequent change in market conditions.

We recognize that the Commission's desire to regulate activities pertaining to non-U.S. affiliate conduits arises from its interest in protecting U.S. markets from undue risk undertaken abroad. The Commission may be concerned that swap dealers subject to Title VII may attempt to avoid their new regulatory obligations by shifting the majority of their activities out of the United States. We believe, however, that this concern is best addressed through the Commission's anti-evasion authority.

Recommendation: In the alternative, the Commission should replace the non-U.S. affiliate conduit definition provision that the conduit "regularly enter into swaps" with a provision regarding the counterparty's direct transfer of risk of a swap to its U.S. affiliate.[51]

As proposed, the second prong of the non-U.S. affiliate conduit definition requires that the entity be one that "regularly enters into swaps with one or more other U.S. affiliates or subsidiaries of the U.S. person."[52] To the extent that the "regular" requirement for non-U.S. affiliate conduits is designed to capture risk transfer to U.S. persons,[53] however, the prong is too vague to serve appropriately the Commission's risk-mitigating aims. Among other things, it does not account for the purpose of the interaffiliate swap, the relative amount of the conduit's risk transferred, the nature of the transferred risk, or whether some or all of the risk is transferred. As a result, we believe that, should the Commission retain the non-U.S. affiliate conduit concept, it should replace this prong of the definition with language that requires that the conduit "regularly enters into swaps with one or more other U.S. affiliates or subsidiaries of the U.S. person *for the purpose of transferring to that U.S. person all risk of swap activity.*"

[50] We note that to the extent the Commission has a tangential interest in these transactions, that interest can be satisfied via Part 45 reporting requirements.

[51] This section is responsive to Question 22 of the Proposed Interpretive Guidance.

[52] Proposed Interpretive Guidance at 41,229.

[53] *Id.*

Recommendation: The Commission should remove the concept of "indirect" majority ownership from the definition of non-U.S. affiliate conduit.[54]

Alternatively, if the Commission chooses to retain the concept of a non-U.S. conduit affiliate, it should remove the concept of "indirect" majority ownership from the definition. As in the context of the U.S. person definition, the concept of indirect majority ownership is imprecise, and its application for non-U.S. affiliate conduits is particularly unclear. Because non-U.S. affiliate conduits are, by definition, foreign entities, even swap dealers who are quite comfortable with the general applications of Title VII may struggle to determine the level of ownership that rises to indirect ownership. Further, the jurisdictional nexus between non-U.S. affiliate conduits under indirect U.S. ownership and the Commission's regulatory aims seems too tenuous to satisfy the high CEA Section 2(i) threshold. Consequently we believe that, should the Commission continue to assert its supervisory interests with respect to non-U.S. affiliate conduits, it should remove indirect majority ownership from the definition.

Recommendation: The Commission should clarify that swap dealers may rely on a counterparty's representations as to its non-U.S.-affiliate conduit status.[55]

As in the case of the non-U.S. person definition, some elements of the non-U.S. affiliate conduit definition cannot be easily determined by the swap dealer. Therefore, we believe that swap dealers should be able to rely on counterparty representations in their determination of whether a swap counterparty is a non-U.S. affiliate conduit.

Allowing swap dealers to rely on the representations of counterparties as to their non-U.S.-affiliate conduit status would prevent the overly burdensome due diligence obligations that might otherwise arise. This is particularly the case when considering the direct or indirect majority ownership prong of the definition. In some instances, the necessary information may be unavailable, non-public or otherwise sensitive, and a swap dealer would not otherwise require access to this information as a regular aspect of its swap activities. Further, the current definition of non-U.S. affiliate conduit relates to a non-U.S. counterparty's interaffiliate swap activity, information to which the non-U.S. swap dealer would not have access. For these reasons, we believe that reliance on representations of the relevant counterparty should be sufficient to satisfy this requirement. We note, however, that the burden of providing these representations to their non-U.S. swap dealer or MSP ("**Non-U.S. Swap Entity**") counterparties will likely discourage non-U.S. persons from transacting with registered Non-U.S. Swap Entities, moving additional swap business away from Commission oversight.

[54] This section is responsive to Question 22 of the Proposed Interpretive Guidance.

[55] This section is responsive to Question 22 of the Proposed Interpretive Guidance.

Recommendation: For the purposes of any individual swap, the determination of whether a counterparty to that swap is a non-U.S. affiliate conduit should be made at the inception of the swap based on the most recent updated representation from the counterparty, which should be renewed by the counterparty once per calendar year.[56]

Because it incorporates the concepts of direct and indirect majority ownership, as well as the counterparty's interaffiliate swap transactions, the definition of non-U.S. affiliate conduit looks at an entity's status at a given point in time. However, the ownership of a counterparty may change over the course of a given swap transaction. Similar issues were previously discussed in connection with prong (iv) of the currently proposed definition of "U.S. person," under which the U.S.-person status of a commodity pool could change every time new investors are admitted or existing investors redeem their investments. Requiring a Swap Entity to maintain ongoing due diligence investigations into the status of all counterparties (even by way of counterparty representations) and immediately to respond accordingly would be extremely burdensome, if not impossible. Indeed, the burdens would dwarf the incremental benefits to the policy goals of Title VII. In addition, if the change in status required a change in regulatory treatment of the transaction, such as posting of margin, such a change could alter the economics of the transaction in a manner not contemplated by the parties at the swap's inception. Further, the current definition of non-U.S. affiliate conduit relates to a non-U.S. counterparty's interaffiliate swap activity. Requiring a non-U.S. swap dealer to monitor its counterparty's interaffiliate swap activity in order to satisfy Title VII would present non-U.S. swap dealers with a practical impossibility, and compliance could be on a good-faith basis at best. As a result, we believe that for the purpose of an individual swap, the non-U.S. affiliate conduit status of the parties should not be considered to change over the lifetime of the swap.

Further, we believe that the determination of a counterparty's status should be made at the inception of the swap relationship. However, we suggest that a counterparty should be obligated to notify the Swap Entity once each calendar year if there has been any change in its status. The Swap Entity would be able to rely on the representation until it is renewed or changed, provided that the Swap Entity does not have information that would cause a reasonable person to question the accuracy of the representation.[57]

To provide Swap Entities with sufficient time to process a change of counterparty status and to implement any necessary changes, we believe that any change in counterparty status should only apply to swaps executed with that counterparty 90 days after the counterparty notifies the Swap Entity of the change in status. This would ensure that the Swap Entity is afforded sufficient time to account for this change in counterparty status through amendments to documentation, data capture and internal compliance and other systems.

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[56] This section is responsive to Question 22 of the Proposed Interpretive Guidance.

[57] Business Conduct Standards, *supra* note 30 at 9823.

II. Swap Dealer and MSP Registration

A. Registration and Aggregation Issues and Comments

Recommendation: A person should not be required to aggregate the swap dealing transactions of its affiliates to determine the applicability of Title VII to that entity's swap dealing activities.[58]

The swap dealer *de minimis* threshold calculation, as described in the Final Entity Definition Rules, requires that a person aggregate the notional value of its swap dealing transactions with those entered into by affiliates.[59] The Proposed Interpretive Guidance clarifies that non-U.S. persons are only required to aggregate swap dealing positions with those of their non-U.S. affiliates.[60]

We believe that the aggregation requirement effectively disregards the legal independence of entities, instead equating their shared corporate parenthood with an implied coordinated swap dealing strategy and approach. While, for example, a non-U.S. bank and its non-U.S. affiliate broker-dealer may be under common control, the two entities may be operating completely independently. Perhaps for this reason, there is no similar aggregation requirement for many other comparable registration requirements, such as broker-dealer registration.

We understand that the aggregation requirement is meant to prevent evasion of the swap dealer registration rules. In the Final Entity Definition Rules, the Commission states that "[t]he final rules use a control standard in connection with the *de minimis* notional thresholds as a means reasonably designed to prevent evasion of the limitations of that exception."[61] While we recognize the importance of anti-evasion provisions, we believe that the Commission's extant anti-evasion capacities are sufficient to guard against such abuses, without requiring common-control aggregation.

When combined with the expansive registration requirements, aggregation is particularly problematic. For example, a non-U.S. entity that engages in a *de minimis* amount of swap dealing activity for which it is guaranteed by a U.S. person may be required to register as a swap dealer if it has a non-U.S. affiliate with swap positions guaranteed by a U.S. affiliate. This appears far short of the nexus required by Section 2(i) of the CEA.

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[58] This section is responsive to Questions 3c and 5 of the Proposed Interpretive Guidance.

[59] 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, 30,631 (May 23, 2012) (to be codified at 17 C.F.R. pts. 1 and 240) ("**Final Entity Definition Rules**").

[60] Proposed Interpretive Guidance at 41,219.

[61] Final Entity Definition Rules at 30,631, n.437.

Finally, we note that the aggregation requirement first appeared in the Final Entity Definition Rules, without having been included in the proposed definitions. As a result, market participants have not been provided an opportunity to comment on the idea of aggregation. Had market participants been given this opportunity, SIFMA would have strenuously objected to the requirement as a whole for the reasons discussed above.

Recommendation: Entities should not be required to aggregate swap dealing positions with registered Swap Entity affiliates.[62]

As noted above, the swap dealer *de minimis* threshold calculation presented in the Final Entity Definition Rules requires that a person aggregate the notional value of its swap dealing transactions with those entered into by affiliates.[63] The Proposed Interpretive Guidance further explains that, in determining whether a non-U.S. person's swap dealing transactions exceed the *de minimis* threshold, a non-U.S. person must include the aggregate notional value of any swap dealing transactions between U.S. persons and any of its non-U.S. affiliates under common control as well as any swap dealing transactions of any of its non-U.S. affiliates under common control where the obligations of such affiliate are guaranteed by a U.S. person.[64] This applies regardless of whether the affiliate is a registered swap dealer or MSP.

We believe that entities should not be required to aggregate swap dealing positions with any registered Swap Entity affiliates. If all non-U.S. entities under common control are required to aggregate their swap activities, the determination that any single entity in the group of affiliates is required to register effectively operates as a mandate that *all* such affiliates register. This would have the effect of requiring a number of smaller, internationally based entities to register, even if they operate completely independently of their larger affiliate entities, by virtue of the affiliation. This result seems unnecessarily burdensome for these smaller entities and appears to be beyond the scope of Title VII's extraterritorial reach, as these entities will likely not have a direct and significant connection with United States commerce.

[62] This section is responsive to Questions 3c and 5 of the Proposed Interpretive Guidance.

[63] Final Entity Definition Rules at 30,744("*De minimis exception.* [T]he swap positions connected with those [swap] dealing activities into which the person—or any other entity controlling, controlled by or under common control with the person—enters over the course of the immediately preceding 12 months . . . .").

[64] Proposed Interpretive Guidance at 41,219.

Recommendation: A non-U.S. person that transacts swaps only with non-U.S. counterparties and Non-U.S. Branches should not be required to aggregate its positions with affiliates.[65]

Under the Proposed Interpretive Guidance, non-U.S. persons are generally permitted to exclude the notional value of swap dealing transactions with Non-U.S. Branches from their aggregation calculations.[66] Non-U.S. affiliates, if they engage in a swap dealing business with U.S. persons, including Non-U.S. Branches, are required to aggregate their swap dealing activities with their affiliates for the purpose of the *de minimis* calculation. This could result in a requirement that a non-U.S. swap dealer transacting only with a Non-U.S. Branch, which swaps are excluded from the *de minimis* calculation for that swap dealer, register by virtue of the swap dealing activities of its affiliates under common control.

This result seems contrary to the rationale supporting the exclusion of swap transactions with Non-U.S. Branches and would create unnecessary compliance burdens for a non-U.S. entity not otherwise engaged in transactions with counterparties who trigger Title VII compliance requirements. Consequently, we believe that if the extent of a non-U.S. swap dealer's engagement with U.S. persons is limited to swaps transacted with Non-U.S. Branches, that dealer should be exempt from registration, regardless of the *de minimis* calculations or swap dealing activities of its affiliates under common control.

Recommendation: In determining whether its swap dealing activities exceed the *de minimis* threshold, a U.S. person should aggregate only with its U.S. affiliates.[67]

The Proposed Interpretive Guidance requires non-U.S. persons to aggregate their swap dealing activity only with their non-U.S. affiliates. However, the Proposed Interpretive Guidance is silent regarding the aggregation of swap dealing transactions entered into by U.S. persons. We believe that, in order to ensure a consistent approach, the Commission should require U.S. persons to aggregate only with U.S. affiliates under common control.

Recommendation: A non-U.S. person should not be required to include swaps with Non-U.S. Branches towards its MSP calculation.[68]

In the Proposed Interpretive Guidance, the Commission specifically excludes from a non-U.S. person's *de minimis* threshold calculation all swap transactions with Non-U.S. Branches. This exclusion "is intended to address the concerns of non-U.S. persons who may be required to register as a swap dealer, notwithstanding the fact that their dealing

[65] This section is responsive to Question 3c of the Proposed Interpretive Guidance.

[66] Proposed Interpretive Guidance at 41,222, Question 4.

[67] This section is responsive to Question 3c of the Proposed Interpretive Guidance.

[68] This section is responsive to Questions 3e and 4 of the Proposed Interpretive Guidance.

activities with U.S. persons as counterparties are limited to foreign branches of registered U.S. swap dealers."[69] There is no parallel exclusion, however, for the MSP registration calculation. Because the jurisdictional nexus established when non-U.S. swap participants transact with Non-U.S. Branches is similarly remote, the same exclusions should apply. Therefore, we believe that swap transactions with a Non-U.S. Branch counterparty should be excluded from the calculation of a non-U.S. person's MSP registration threshold.

Recommendation: Registration should not be required solely as a result of being guaranteed by a U.S. person or being affiliated with a non-U.S. person that is guaranteed by a U.S. person.[70]

The Proposed Interpretive Guidance

> requir[es] a non-U.S. person to register with the Commission as a swap dealer when the aggregate notional value of its swap dealing activities with U.S. persons, or of its swap dealing activities with non-U.S. persons where the dealing non-U.S. person's obligations are guaranteed, or its ability to pay or perform its obligations thereunder are otherwise formally supported, by a U.S. person, exceed the *de minimis* level of swap dealing. . . .[71]

We believe that a non-U.S. entity should not have to register as a swap dealer solely as a result of being guaranteed by a U.S. person or being affiliated with a non-U.S. person that is guaranteed by a U.S. person. Although the Commission has a legitimate interest in regulating swap dealing activities that have a direct and significant connection with U.S. commerce, the connection between a non-U.S. swap dealing entity and its U.S. person guarantor creates too tenuous a nexus to justify registration on the basis of this relationship alone. The tenuous nexus is even more apparent where a non-U.S. person is not itself guaranteed by a U.S. person but is nonetheless required to register because its non-U.S. person affiliate happens to be guaranteed by a U.S. person.

Recommendation: In the alternative, only guarantees by a U.S. person for which there is a material likelihood of payment by that U.S. person should contribute towards the *de minimis* threshold.[72]

The Proposed Interpretive Guidance requires that swaps that a non-U.S. person enters into in a dealing capacity with non-U.S. counterparties, for which the non-U.S. person is

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[69] Proposed Interpretive Guidance at 41,219.

[70] This section is responsive to Question 3 of the Proposed Interpretive Guidance.

[71] Proposed Interpretive Guidance at 41,221.

[72] This section is responsive to Question 3 of the Proposed Interpretive Guidance.

guaranteed by a U.S. person, count towards a non-U.S. person's *de minimis* threshold calculation. Presumably, this is because the Commission believes that such a guarantee imports risk to the United States and establishes the nexus required by Section 2(i) of the CEA. As stated above, we do not agree that this is the case. However, if the Commission chooses to require counting of such guaranteed swaps, we believe that the Commission's rationale for doing so requires only counting guaranteed swaps for which there is a material likelihood that the U.S. person guarantor will have to pay amounts due on the swap.

Performance of a swap may be guaranteed for a number of reasons. In addition to providing a party with increased comfort that its counterparty will be able to pay amounts due on the swap, guarantees are used to satisfy regulatory requirements, to manage capital treatment across an entity and to avoid negative credit rating consequences. In these situations, although a U.S. person may guarantee a non-U.S. person's performance, there may be no material increased likelihood to the U.S. person guarantor and no expectation that the U.S. person guarantor will be required to pay amounts due on the swap to the non-U.S. person's counterparty.

We believe that guarantees entered into for these purposes, or where the chance of payment by the U.S. guarantor is otherwise remote, should not be counted towards a non-U.S. person's *de minimis* threshold. To implement this recommendation, the Commission could establish a standard for determining that the likelihood of payment is remote, such as a comparison of the aggregate contingent liability of the U.S. person guarantor to the net equity of that guarantor in order to determine whether there is a material risk of payment by the guarantor.[73]

Recommendation: Any *de minimis* threshold aggregation requirements should not apply until sufficient time after the Final Interpretive Guidance has been published in the *Federal Register*.[74, 75]

Entities should not be required to undertake any aggregation calculations until sufficient time has passed after the Final Interpretive Guidance has been published. Without such relief, entities would be required to register based on rules that may change from the Proposed Interpretive Guidance to the Final Interpretive Guidance and thus may not be fully ascertainable at the time registration is required. In addition, these concepts require entities to collect information that may not be readily available, and that may require them to create new, or modify existing, systems to process this information, all of which will require sufficient time to be implemented smoothly and successfully.

[73] For further discussion, see comment letter submitted by The Institute of International Bankers to the Commodity Futures Trading Commission on the subject of the cross-border application of certain swaps provisions of the Commodity Exchange Act (Aug. 27, 2012) (*available at* http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234).

[74] This section is responsive to Question 3 of the Proposed Interpretive Guidance.

[75] As noted above, we believe the aggregation requirement is generally inappropriate.

Specifically, we request that entities be allowed to conduct the swap dealer *de minimis* analysis on a legal entity basis for a period of time. We make this request for several reasons. First, the Proposed Interpretive Guidance includes provisions relating to the scope of the aggregation requirement. Entities will not be able to rely on these statements until the Final Interpretive Guidance is published. Second, aggregation may require many smaller affiliates and subsidiaries of swap dealers to register as swap dealers by virtue of the swap dealing activities of their larger affiliates. Because of the relatively late introduction of the aggregation requirement, these entities have had a very short amount of time to prepare for swap dealer registration and regulation. Finally, relief on the aggregation requirement would have the practical benefit of phasing in the effectiveness of Title VII requirements starting with the swap dealers with the most significant nexus to the United States and, later, possibly expanding the scope of swap dealer registration more broadly.

We note that, even with the relief suggested above, the novel nature of the Title VII regime and the rapid timeline on which it is being implemented will give rise to significant complications. As a result, while our members intend to comply with registration and other regulatory requirements, including any aggregation requirements that are in place, firms may need to request no-action relief where additional time is needed for compliance.

Recommendation: Swap activity undertaken in respect of a legacy portfolio in run-off should not be included in an entity's aggregation calculation and should not itself trigger a registration requirement.[76]

Many SIFMA members are in the process of consolidating U.S.-facing swap dealing activities worldwide into one entity or a few entities that they will register as swap dealers, to comply more efficiently and effectively with Title VII. However, it may not be possible or economically efficient for all entities that wish to terminate or restructure their swap dealing activities ("**Transitioning Entities**") to novate, or to otherwise transfer or terminate their entire legacy swap portfolios, particularly since parties cannot compel such terminations or novations. However, it is possible, and more likely, that such portfolios will be left in run-off and risk-reduced or terminated as the occasion arises. As a result, Transitioning Entities will likely occasionally need to enter into swap transactions in respect of such portfolios.

We believe that such swaps-related activity is not part of the active swap dealing activity that the Commission seeks to regulate through swap dealer registration and regulation. However, counting such activity as part of aggregation calculations and registration requirements could have the effect of requiring Transitioning Entities that are actively seeking to end their swap activities to register as swap dealers during their wind-down period—the burdensome result that Transitioning Entities are seeking to avoid by terminating their swap activities. This is particularly the case if entities remain required

[76] This section is responsive to Question 3 of the Proposed Interpretive Guidance.

to aggregate their swap dealing activity with registered swap dealer affiliates. Therefore, we believe that transactions undertaken in respect of a legacy portfolio run-off should be excluded from aggregation and registration requirements and should not itself trigger a registration requirement.

Recommendation: The Commission should clarify that guaranteed swap positions are attributed to the guarantor for purposes of the MSP calculation.[77]

The Proposed Interpretive Guidance indicates that swaps between a non-U.S. person, where obligations of such non-U.S. person are guaranteed by a U.S. person, should be attributed only to the U.S. person in determining who must register as an MSP.[78] In providing only this example, the Proposed Interpretive Guidance creates ambiguity as to the treatment of guarantees between other types of entities, such as where a U.S. person is guaranteed by a non-U.S. person or where a non-U.S. person is guaranteed by a non-U.S. person. We believe that the Commission should clarify that, in these and other cases, guaranteed swap positions are attributed to the guarantor for purposes of the MSP calculation.

B. Booking and Solicitation Issues and Comments

Recommendation: The Commission should not require a person to register as a swap dealer by virtue of risk transfers achieved through interaffiliate swaps.[79]

We believe that the Commission should only require a person to register as a swap dealer if that person is a direct booking entity for swaps with third-party counterparties. As a result, an internal risk-transfer relationship in which a swap is transacted between a counterparty and a swap dealer, followed by an interaffiliate swap between that swap dealer and its affiliate, should be treated as two distinct legal transactions that do not independently create Title VII compliance requirements for the affiliate beyond what is otherwise required of interaffiliate swaps.

Requiring a central booking entity, or any other affiliate, to register as a swap dealer based solely on its interaffiliate swap transactions would have the effect of tying registration requirements to firms' internal risk management strategies. This result seems intrusive into the internal affairs of the affected firms, without providing any additional benefit to the counterparties, whose rights and remedies relate only to the client-facing swap dealer. In addition, this treatment would discourage the use of central booking entities achieved through interaffiliate swaps for risk management purposes, and instead incentivize fragmentation of positions across affiliated legal entities. This would significantly hamper the ability to manage risk across a multinational enterprise, resulting

[77] This section is responsive to Question 3e of the Proposed Interpretive Guidance.

[78] Proposed Interpretive Guidance at 41,221.

[79] This section is responsive to Questions 3 and 3d of the Proposed Interpretive Guidance.

in increased systemic risk, increased costs to counterparties and, potentially, the movement of capital, risk expertise and jobs overseas.

This approach would resolve an inconsistency in the treatment of back-to-back arrangements and interaffiliate swaps between the Proposed Interpretive Guidance and the Final Entity Definition Rules. The Guidance suggests that use of a central booking model could require registration of both the affiliate engaging in a swap with a counterparty and the central booking entity to which the position is transferred through an interaffiliate swap.[80] Effectively, this requires registration of the central booking entity based on an interaffiliate swap. The Final Entity Definition Rules, however, specifically exclude all swaps between majority-owned affiliates from the swap dealer determination.[81] The disparate approach towards interaffiliate swaps for the purpose of the swap dealer determination as described in the Final Entity Definition Rules and in the Proposed Interpretive Guidance gives rise to fundamental confusion regarding the treatment of these transactions. We believe that an entity should only be required to register as a swap dealer based on transactions directly with third-party counterparties.

Recommendation: The Commission should clarify that a U.S. person that solicits, on a fully disclosed agency basis, swaps that are booked into a non-U.S. affiliate does not have to register as a swap dealer.[82]

The Proposed Interpretive Guidance clearly states that when a non-U.S. affiliate or subsidiary of a U.S. person operates as a disclosed agent for a U.S. central booking party, only the U.S. booking entity would be required to register as a swap dealer.[83] Although the Guidance proposes to apply a reciprocal rule for U.S. agents of non-U.S. swap dealers, it does not fully specify that U.S. agents will not be required to register as a result of their swap activities undertaken on an agency basis.[84]

We believe that the Commission should clarify that a disclosed U.S. agent of a non-U.S. swap dealer will not be required to register by virtue of transactions booked by the non-U.S. swap dealer. As noted above, we believe that directly booked swaps (including those swaps booked via an agent) should be attributed only to the booking entity/principal for the purpose of the swap dealer definition and its *de minimis* threshold,

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[80] Proposed Interpretive Guidance at 41,222.

[81] Final Entity Definition Rules, *supra* note 59 at 30,606.

[82] This section is responsive to Questions 3 and 3d of the Proposed Interpretive Guidance.

[83] Proposed Interpretive Guidance at 41,231.

[84] *See* Proposed Interpretive Guidance at 41,222 ("A similar analysis applies when a non-U.S. person is the booking entity . . . to swaps. . . . [E]ven if the U.S. branch, agency, affiliate or subsidiary of a non-U.S. person engages in solicitation or negotiation in connection with a swap entered into by a non-U.S. person, the Commission proposes to interpret section 2(i) of CEA such that the Dodd-Frank Act requirements, including the registration requirement, applicable to swap dealers also apply to the non-U.S. person.")

and that this provision should be interpreted uniformly with respect to all central booking entities.

III. Entity-Level and Transaction-Level Requirements

A. Treatment of Non-U.S. Branches as Swap Counterparties

Recommendation: From the perspective of their counterparties, Non-U.S. Branches should be treated as non-U.S. persons.[85]

Although Non-U.S. Branches are included in the proposed definition of "U.S. person" and are themselves subject to regulation as U.S. persons, from the perspective of their counterparties they are treated as non-U.S. persons in several circumstances. For example, non-U.S. persons are not required to include the notional value of dealing transactions with Non-U.S. Branches in determining whether the *de minimis* threshold has been reached. In addition, the Proposed Interpretive Guidance provides that a Non-U.S. Swap Entity is not subject to Transaction-Level Requirements when engaging in swaps with a Non-U.S. Branch, effectively treating the Non-U.S. Branch as a non-U.S. counterparty.[86]

We agree with this general approach and believe the Commission should clarify the way a counterparty to a Non-U.S. Branch should treat that Non-U.S. Branch by stating that a Non-U.S. Branch will be considered a non-U.S. person from the perspective of any swap counterparty. Such treatment would minimize the disparate treatment of Non-U.S. Branches as counterparties by, for example, treating a transaction between two Non-U.S. Branches the same as a transaction between a Non-U.S. Swap Dealer and a Non-U.S. Branch.[87]

B. Division into Entity-Level and Transaction-Level Requirements

Recommendation: All forms of swap reporting, including SDR Reporting and Large Trader Reporting, should be categorized as Transaction-Level Requirements.[88]

Under the Proposed Interpretive Guidance, swap data repository reporting ("**SDR Reporting**") and Large Trader Reporting (as defined in the Proposed Interpretive Guidance) are classified as Entity-Level Requirements (as defined in the Proposed

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[85] This section is responsive to Questions 12, 13 and 25 of the Proposed Interpretive Guidance.

[86] Proposed Interpretive Guidance at 41,228 ("Accordingly, the Commission proposes to interpret section 2(i) in a manner so as to require non-U.S. swap dealers and non-U.S. MSPs to comply with Transaction-Level Requirements for all of their swaps with U.S. persons, other than foreign branches of U.S. persons, as counterparties.")

[87] *Id.* at 41,232, Question 25; Proposed Exemptive Order at 41,112, n.19.

[88] This section is responsive to Questions 10 and 11 of the Proposed Interpretive Guidance.

Interpretive Guidance).[89] Real-time reporting, however, is classified as a Transaction-Level Requirement. As mentioned in the August 13th Letter, we believe it is appropriate for all reporting requirements to be treated as Transaction-Level Requirements, since they all operate on a transaction-by-transaction basis.

SDR Reporting is done on a swap-by-swap basis at the time the transaction is initiated and throughout the life of the swap. Since both the application and the enforcement of the SDR Reporting requirement will be addressed on the transaction level, we believe this requirement is more appropriately categorized as a Transaction-Level Requirement. Further, SDR Reporting is conceptually more aligned with the Commission's expressed view of Transaction-Level Requirements. Transaction-Level Requirements "relate to both risk mitigation and market transparency."[90] All forms of swap reporting both increase market transparency and serve risk mitigating functions, but we believe that swap reporting is "less closely connected to risk mitigation of the firm as a whole and thus [is] more appropriately applied on a transaction-by-transaction basis."[91] Real-time public reporting is designed to increase regulatory transparency and "support[] the fairness and efficiency of markets."[92] Like real-time public reporting, which is categorized as a Transaction-Level Requirement,[93] swap data recordkeeping and the reporting and recordkeeping requirements set forth in Parts 45 and 46 of the Commission's regulations provide a means to increased market transparency.

Recommendation: Position limits and anti-manipulation rules should be categorized as Transaction-Level Requirements.[94]

As we noted in our August 13th Letter, the Proposed Interpretive Guidance does not categorize position limits and anti-manipulation rules as either Entity-Level or Transaction-Level Requirements. Although these rules are part of the Title VII compliance requirements more generally, the Commission has not described their relationship to the rest of the Title VII regulatory regime. This creates uncertainty as to their application and implementation.[95]

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[89] Proposed Interpretive Guidance at 41,224.

[90] *Id.* at 41,225.

[91] *Id.* at 41,225–26.

[92] *Id.* at 41,227.

[93] *Id.*

[94] This section is responsive to Questions 10 and 11 of the Proposed Interpretive Guidance.

[95] We also note that there are a number of self-effective Title VII provisions, not necessarily restricted in application to Swap Entities, that are not categorized as either Entity-Level or Transaction-Level Requirements. We believe that the Commission should consider the appropriate categorization of these provisions to allow for increased certainty for swap participants.

Position limits and anti-manipulation rules "have a closer nexus to the transparency goals of the Dodd-Frank Act, as opposed to addressing the risk of a firm's failure."[96] Since both position limits, specifically, and anti-manipulation rules, more broadly, represent the Commission's efforts "to diminish, eliminate, or prevent excessive speculation and market manipulation"[97] and to enhance market stability and transparency, they satisfy the market-transparency goals of the Transaction-Level category. Further, like clearing and margin requirements, which are categorized as Transaction-Level, anti-manipulation rules can be best enforced on a transaction-by-transaction basis. To the extent that position limits speak to firm-oriented risk mitigation efforts, they are more similar to the Transaction-Level Requirements of clearing and margining than to Entity-Level Requirements such as capital adequacy and chief compliance officer requirements. Therefore, we believe that both position limits and anti-manipulation rules should be categorized in the Final Interpretive Guidance as Transaction-Level Requirements.

C. Application of Transaction-Level Requirements

Recommendation: U.S. swap dealers should be eligible for substituted compliance for Transaction-Level Requirements to the same extent as non-U.S. swap dealers and Non-U.S. Branches.[98]

The Proposed Interpretive Guidance contemplates that Transaction-Level requirements would not apply to transactions between Non-U.S. Swap Entities and non-U.S. person counterparties other than those guaranteed by U.S. persons and non-U.S. affiliate conduits. The Proposed Interpretive Guidance further contemplates that substituted compliance for Transaction-Level Requirements would be available to Non-U.S. Swap Entities for those transactions with non-U.S. counterparties for which Title VII would apply and for Non-U.S. Branches for swaps with all non-U.S. counterparties.[99] The Guidance does not, however, extend substituted compliance treatment to U.S. swap dealers transacting with the same non-U.S. persons when the U.S. swap dealer is operating from a location in the United States. We believe that, to increase the equality of treatment of U.S. swap dealers and non-U.S. swap dealers operating in the United States, transactions undertaken between U.S. swap dealers and non-U.S. counterparties should be eligible for substituted compliance for Transaction-Level Requirement compliance. Exempting non-U.S. swap dealers operating in the United States from Transaction-Level Requirements in some circumstances facing non-U.S. persons and applying substituted compliance in others, while requiring U.S. swap dealers to comply with Title VII requirements in those same circumstances, would put U.S. swap dealers operating in the United States at a competitive disadvantage. Compliance with

[96] Proposed Interpretive Guidance at 41,226.

[97] Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626, 71,627 (Nov. 18, 2011) (to be codified at 17 C.F.R. pts. 1, 150 and 151).

[98] This section is responsive to Question 28 of the Proposed Interpretive Guidance.

[99] Proposed Interpretive Guidance at 41,228.

Transaction-Level Requirements when transacting with non-U.S. counterparties will create similar operational difficulties for both U.S. swap dealers and non-U.S. swap dealers operating in the United States. Consequently, to mitigate the competitive inequalities that result from disparate treatment of entities operating out of the United States depending on whether they are U.S.- or foreign-based, we believe that the Final Interpretive Guidance should allow U.S. swap dealers operating in the United States to benefit from the availability of substituted compliance for Transaction-Level Requirements when transacting with non-U.S. counterparties.

Recommendation: The Commission should treat Part 43 real-time reporting in the same way as external business conduct. In particular, real-time reporting should not apply to Non-U.S. Swap Entities or Non-U.S. Branches for transactions with non-U.S. persons.[100]

The Proposed Interpretive Guidance makes it clear that external business conduct standards do not apply to Non-U.S. Swap Entities and Non-U.S. Branches dealing with non-U.S. persons. Rather, the Commission has noted that "sales practice concerns related to swaps between non-U.S. persons taking place outside the United States implicate fewer U.S. supervisory concerns and, when weighed together with the supervisory interests of foreign regulatory regimes, may not warrant application of these requirements."[101]

Because real-time reporting is a requirement intended to benefit U.S. markets in particular, we believe that requiring Non-U.S. Swap Entities or Non-U.S. Branches to satisfy the requirement would be inappropriate for transactions where the counterparty is not a U.S. person. Real-time reporting is intended to "provide important information for risk management purposes and bring greater efficiency to the marketplace—to the benefit of the individual counterparties."[102] Swaps with non-U.S. persons are too remote for real-time reporting to promote greater efficiency in U.S. markets. For swaps transacted between Non-U.S. Swap Entities and other non-U.S. persons, the supervisory interests of the Commission are remote, while the supervisory interests of one or more foreign regulatory regimes will be much more apparent. Consequently, real-time reporting, like other external business conduct standards, should not apply to Non-U.S. Swap Entities or Non U.S. Branches except where they transact with U.S. persons as their counterparties.[103]

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[100] This section is responsive to Question 11b of the Proposed Interpretive Guidance.

[101] Proposed Interpretive Guidance at 41,229.

[102] *Id.* at 41,228.

[103] To the extent that the Commission agrees with this recommendation, Part 45 timing requirements for counterparties that are exempt from Part 43 real-time reporting requirements would need to be calibrated accordingly, such as through the current T+1 trade reporting to the Global Trade Repository.

Recommendation: The Commission should not apply the external business conduct standards to swaps between a U.S. Swap Entity and a non-U.S. person.[104]

In the Proposed Interpretive Guidance, the Commission "proposes to interpret section 2(i) to not require non-U.S. swap dealers and non-U.S. MSPs to comply with [external business conduct] requirements for swaps with a non-U.S. counterparty (whether or not guaranteed by a U.S. person)."[105] The Commission has noted that "[b]roadly speaking, [business conduct standards] are designed to enhance counterparty protection by significantly expanding the obligations of swap dealers and MSPs towards their counterparties."[106] The Commission's valid interests in counterparty protections are much less implicated when the counterparty is a non-U.S. person. As a result, we believe that the external business conduct requirements should not apply to transactions between a U.S. Swap Entity and a non-U.S. person.

Recommendation: The Commission should take into account the issue of foreign jurisdictions' privacy laws.[107]

As we noted in our August 13th Letter, additional time is needed for the Commission and market participants to address concerns arising from client confidentiality requirements under the local law of certain non-U.S. jurisdictions, some of which may even apply to transactions with U.S. persons. This is a complicated issue that requires consultation with local regulators. At least two dozen jurisdictions have been identified where local law prohibits the disclosure of client names to non-local regulators that do not currently have an information-sharing treaty or agreement in place with the local regulator, some of which cannot be satisfied by counterparty consent. One solution could be to mask client identities, consistent with the approach taken in the OTC Derivatives Supervisors Group global trade repository.

As this delicate issue requires more time for the Commission to consider and to develop possible alternative solutions, we suggest that at least during the term of the Exemptive Order, all entities (including Swap Entities and FCMs) should be permitted to mask client information from SDR Reporting, Large Trader Reporting and any other similar requirements, provided that the failure to do so would violate non-U.S. legal requirements. During this time, the Commission should work with foreign regulators to address these problems. To the extent that these problems are not solved before reporting is required for U.S. persons, market participants may need to ask for additional relief from specific reporting requirements, such as for Large Trader Reporting and reporting for historical swaps.

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[104] This section is responsive to Question 18 of the Proposed Interpretive Guidance.

[105] Proposed Interpretive Guidance at 41,229.

[106] *Id*. at 41,227.

[107] This section is responsive to Questions 17 and 26 of the Proposed Interpretive Guidance.

D. Emerging Market Exemption from Transaction-Level Requirements

Recommendation: The Commission should clarify that the use of the Emerging Market Exemption is not limited to "emerging markets" in the colloquial sense and should rename it as the "Foreign Ancillary Activity Exemption."[108]

The Proposed Interpretive Guidance indicates that the Emerging Market Exemption applies to all markets "where foreign regulations are not comparable."[109] Although the Guidance refers to these markets as "emerging markets," the Commission may also not make a comparability determination in markets not typically considered to be "emerging" in an informal sense.

We believe, therefore, that the Commission should clarify that this exemption is available for any market in which comparable regulation is not in effect. Colloquially, whether a market is considered an "emerging market" may be determined with reference to industrialization; the BRIC countries (Brazil, Russia, India, and China) are often held out as examples of emerging markets. By the standards presented in the Proposed Interpretive Guidance, however, even fully "developed" markets may be eligible for the Emerging Market Exemption, based on the state of their swap regulations at the time the relevant Title VII requirements come into effect. Since the Commission's concerns of protecting the U.S. swaps market from the risks of unregulated swap markets are equally implicated whether a U.S. swap dealer transacts in an "emerging" or in a "developed" market, the Commission should clarify that all markets without comparable swap regulatory regimes are captured within this exemption, and rename the exemption as the "Foreign Ancillary Activity Exemption."

Recommendation: The Emerging Market Exemption should be available to transactions that non-U.S. swap dealers enter into with non-U.S. persons guaranteed by U.S. persons and with non-U.S. affiliate conduits.[110]

By its terms, the Emerging Market Exemption is intended to apply to "U.S. swap dealers' swap dealing activities through branches or agencies in emerging markets."[111] The Proposed Interpretive Guidance gives no indication, however, as to whether and how the exemption would apply to the swap activities of non-U.S. swap dealers. This leads to a situation in which Non-U.S. Branches engaging in swaps with certain non-U.S. counterparties (including non-U.S. affiliate conduits) would be able either to use substituted compliance or to use the Emerging Market Exemption for those transactions, while non-U.S. swap dealers transacting in the same market with the same counterparty would not have the option to apply the Emerging Market Exemption. Although both

[108] This section is responsive to Question 10 of the Proposed Interpretive Guidance.

[109] Proposed Interpretive Guidance at 41,230.

[110] This section is responsive to Question 10 of the Proposed Interpretive Guidance.

[111] Proposed Interpretive Guidance at 41,230.

substituted compliance and the Emerging Market Exemption are framed in terms of the foreign regime's comparability, as determined by the Commission, by mentioning only Non-U.S. Branches in its description, the Emerging Market Exemption implicitly excludes non-U.S. swap dealers from its availability.

We believe that the Emerging Market Exemption should be available to the same extent that substituted compliance is available to promote competitive equality. In jurisdictions where substituted compliance is not available, both Non-U.S. Branches and non-U.S. swap dealers should be able to take equal advantage of the Emerging Market Exemption. Otherwise, non-U.S. swap dealers would be subject to full Title VII requirements by virtue of the counterparty's status when transacting with non-U.S. persons 1) who are guaranteed by a U.S. person or 2) who act as non-U.S. affiliate conduits. Meanwhile, Non-U.S. Branches interacting with those same counterparties may be exempt from any regulatory requirements other than home-jurisdiction requirements.

Recommendation: The Emerging Market Exemption should be available to two Non-U.S. Branches' transactions with each other in an "emerging market" as well as to transactions between a Non-U.S. Branch and a non-U.S. swap dealer operating in the relevant market.[112]

Under the Proposed Interpretive Guidance, Non-U.S. Branches that face each other in swap transactions in an emerging market would not be able to use the Emerging Market Exemption, as the U.S.-person status of each would trigger compliance with Transaction-Level Requirements for the other.[113] This creates the anomalous result that in markets where either Non-U.S. Branch would be eligible for the exemption when facing a non-U.S. person, neither can use the exemption when facing each other. Therefore, we believe that it would be more appropriate to permit two Non-U.S. Branches, when facing each other, to apply the Emerging Market Exemption.

Further, as we believe that the exemption should be available to non-U.S. swap dealers transacting in non-U.S. markets more generally, we believe that the exemption should also be available for non-U.S. swap dealers facing Non-U.S. Branches in these jurisdictions. This interpretation would ensure better consistency of treatment across similarly situated entities without undue regulatory involvement in foreign jurisdictions.

[112] This section is responsive to Question 19 of the Proposed Interpretive Guidance.

[113] Proposed Interpretive Guidance at 41,230.

Recommendation: The "Emerging Market Exemption" threshold of 5% should be increased to 15%.[114]

As described in the Proposed Interpretive Guidance, the "Emerging Market Exemption" allows Non-U.S. Branches to engage in a limited volume of swap dealing activity in foreign markets where the applicable home-jurisdiction regulations are not comparable to U.S. regulations. This exemption is available because "the Commission understands that U.S. swap dealers' swap dealing activities through branches or agencies in emerging markets in many cases may not be significant but may be nevertheless an integral element of their global business," and that requiring full compliance with U.S. regulations would be too burdensome.[115] This exemption still assumes that the affected swap dealers will be both subject to and able to comply with whatever home-jurisdiction law applies; it merely excuses the requirement to satisfy a comparability determination for a small percentage of swaps executed in foreign markets.

While we agree with the Commission that such an exemption is critical to the international operations of U.S. swap dealers, we believe that the current 5% threshold for this exemption is too low. Instead, we believe the emerging market exemption should be available to any U.S. swap dealer whose aggregate notional value of swaps in the relevant markets does not exceed 15% of that dealer's total swap activities. We recognize that the Commission intends to establish bright-line limits on the amount of business a U.S. swap dealer may conduct in a non-comparable jurisdiction in order to shield U.S. markets against the risks that arise from dealing in these markets. Nonetheless, we believe that U.S. markets will be sufficiently insulated from these risks if U.S. swap dealers are permitted to effect up to 15% of their total swap value in jurisdictions falling under the Emerging Market Exemption.

Recommendation: The Commission should clarify how the Emerging Market Exemption threshold is calculated.[116]

The Proposed Interpretive Guidance indicates that the 5% threshold for the Emerging Market Exemption should be determined by comparing the aggregate notional value of the swaps of all Non-U.S. Branches in such emerging markets ("**Exempted Emerging Market Transactions**") to the total aggregate notional value of *all* swaps of the U.S. swap dealer (together, the "**Emerging Market Ratio**"). This definition presents a number of issues on which we believe the Commission should provide further clarity:

1) Substituted compliance is determined on a requirement-by-requirement basis. As such, it is unclear how to treat, for purposes of the Emerging Market Exemption, a transaction in a jurisdiction where some requirements have been found

[114] This section is responsive to Question 19 of the Proposed Interpretive Guidance.

[115] Proposed Interpretive Guidance at 41,230.

[116] This section is responsive to Question 10 of the Proposed Interpretive Guidance.

comparable and others have not. We believe that transactions in such jurisdictions should not be treated as transactions done pursuant to the Emerging Market Exemption. Otherwise, the Emerging Market Exemption will become effectively unusable.

For example, the European Union's current swap regulatory proposals do not envision a trade execution requirement similar to the Title VII requirement that all swaps required to be cleared be executed on a designated contract market or swap execution facility, unless no such facility makes the swap available to trade. We do not believe that swap activity in the European Union should be considered "emerging market" activity, solely because of the absence of this trade execution requirement in the European Union.

Further, we believe that excluding markets with at least some comparable swap regulations from the Exempted Emerging Market Transactions portion of the threshold calculation will more closely capture the kinds of markets the Commission intended with this provision. A comparability determination with respect to even a few rules indicates that the jurisdiction in question has a relatively high level of regulatory supervision and infrastructure. Markets with that level of regulatory supervision are not "emerging" in the Title VII sense and therefore swaps in those markets should not be considered Emerging Market Transactions.

2) We believe that swap dealers should be able to comply voluntarily with the full range of Title VII requirements in a jurisdiction where no comparability determinations have been made and, by doing so, should not have to count such swaps as Exempted Emerging Market Transactions that must fall below the threshold. As noted above, the purpose of the threshold limitation in the Emerging Market Exemption is to protect the U.S. markets from risk that might arise by virtue of a U.S. person operating in an unregulated market. If a U.S. person chooses to satisfy Title VII requirements for its transactions in markets where jurisdictional requirements are not as robust, any fear of additional risk should be fully assuaged, since the U.S. person will be operating as though fully subject to the U.S. regime. Consequently, any swaps transacted in non-comparable foreign jurisdictions where the U.S. swap dealer satisfies Title VII requirements should be excluded from the count of that dealer's Exempted Emerging Market Transactions.

   We note that this approach would likely give the affected entities some autonomy over which jurisdictions' swaps would comply with the full Title VII requirements and which swaps would be considered Exempted Emerging Market Transactions. We believe that this autonomy is appropriate, as it allows regulated entities to manage more efficiently the logistical burdens that compliance in each jurisdiction presents.

3) We believe that the Emerging Market Ratio's numerator (the Exempted Emerging Market Transactions) should include only those swaps entered into in a *dealing* capacity in a foreign market, while the Emerging Market Ratio's denominator should include all swaps entered into by the Non-U.S. Branch. The primary purpose of the Title VII's regulation of swap dealers is to regulate activities undertaken in a dealing capacity. Swaps entered into for non-dealing reasons present a different set of risks from those associated with swaps entered into in a dealing capacity. Therefore, we believe that swaps not entered into in a dealing capacity, including swaps for which a counterparty has elected the end-user exception to the clearing requirement for swaps,[117] are beyond the primary scope of Title VII regulation and should be excluded from the Exempted Emerging Market Transactions figure in the Emerging Market Exemption threshold calculation.

4) The Commission should clarify when the calculation period for the Emerging Market Threshold begins and ends. In particular, the Commission should specify over what period of time the percentage of swaps done in non-comparable jurisdictions must be compared to the entity's total swaps in order to perform the threshold calculation. We believe that the availability of the exemption should be determined annually, based on quarterly calculations of the Emerging Market Ratio. In order to qualify for the Emerging Market Exemption, the annual average Emerging Market Ratio must fall below the specified threshold. An interim ratio should be calculated quarterly, however, and the availability of the exemption should cease at the conclusion of any two consecutive quarters where the Emerging Market Ratio has exceeded the specified threshold, regardless of the ultimate annual ratio for that year.

5) The Commission should further clarify the effects of breaching the threshold in any given measurement period. Because the exact means of calculating the Emerging Margin Exemption threshold are unclear, it is similarly unclear whether a single instance of exceeding the threshold will completely eliminate the availability of exemption in subsequent measurement periods. We believe that it should not be interpreted so stringently. Rather, we believe that Non-U.S. Branches should be permitted to "cure" an immaterial breach of the threshold by contributing additional capital to the relevant Non-U.S. Branch to offset the additional potential risk posed by the breach of the threshold.

[117] End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42,560, 42,590 (Jul. 19, 2012) (to be codified at 17 C.F.R. pt. 39).

Recommendation: The Commission should clarify that the Emerging Market Exemption permits reliance on local standards for all swaps, including swaps with U.S. persons, swaps with non-U.S. affiliate conduits and swaps that are guaranteed by U.S. persons.[118]

The Proposed Interpretive Guidance does not specify whether the Emerging Market Exemption would be applicable to Non-U.S. Branches in their transactions with U.S. persons, non-U.S. affiliate conduits and counterparties guaranteed by U.S. persons. As noted elsewhere, relief from compliance with various provisions of Title VII is not as meaningful if the relief is not uniformly available. The benefit of the Emerging Market Exemption is that it excuses certain counterparties operating in emerging markets to a small extent from the operational and logistical efforts required to come into compliance with the full range of Title VII obligations. If that relief is only partially available, the affected entities may find the application of different requirements to different transactions too onerous to be practical. Consequently, the most stringent requirements applicable to any swaps transacted in emerging markets may realistically come into effect for all swaps transacted in emerging markets.

We therefore believe that the Commission should clarify that all swaps in an emerging market may be regulated according to local standards, in order to give the exemption its intended value. We believe that this should be the case even where the swap is transacted between a Non-U.S. Branch and a U.S. person. There are transactions for which a Non-U.S. Branch is a more appropriate counterparty for a U.S. person, and foreign law may be a more appropriate regulatory framework. Specifically, for swaps related to foreign currencies, country- or region-specific commodities, or indices of these instruments, home-jurisdiction regulation will likely provide better risk mitigation than less well-tailored provisions. Further, to the extent the Commission is concerned about evasive regulatory arbitrage, we believe its anti-evasion provisions should provide adequate protections.

E. Application of Entity-Level Requirements

Recommendation: The Commission should clarify that firms may exercise discretion in the designation of principals and in the reporting duties of the chief compliance officer.[119] In addition, for non-U.S. swap dealers, designation as an "associated person" and requirements related to persons who solicit swaps for that swap dealer should only apply to those who solicit swaps from U.S. persons other than Non-U.S. Branches.

Under the swap dealer and MSP registration rules, all entities applying for registration must submit a "fingerprint card for each principal of the applicant who is a natural person."[120] Further, the internal business conduct standards require that a chief

[118] This section is responsive to Questions 12, 15 and 19 of the Proposed Interpretive Guidance.

[119] This section is responsive to Question 10 of the Proposed Interpretive Guidance.

[120] Registration of Swap Dealers and Major Swap Participants, 77 Fed. Reg. 2613, 2618 (Jan. 19, 2012) (to be codified at 17 C.F.R. pts. 1,3, 23 and 170).

compliance officer must report "to each entity's board or senior officer."[121] We believe that firms should be able to exercise discretion as to which persons within their structures will be required to file the forms required of principals, as well as to the persons to whom the chief compliance officer may report. In the case of large, non-U.S. firms that have a smaller U.S. swap dealing presence, the appropriate principals for swap dealing activities may be only a certain subset of persons within the larger entity's structure. Further, the requirement to file a Form 8-R and submit fingerprint cards for the full complement of people who are considered "principals" of the larger entity may be quite over-inclusive and needlessly burdensome. For the purpose of regulating swap transactions that have a direct and significant connection with U.S. commerce, only those principals who are directly involved with the U.S.-facing swap trading activities[122] are relevant. Consequently, we believe that only those persons should be considered principals.

Similarly, the senior officer and board of a large non-U.S. entity may be relatively unfamiliar with the U.S. swap dealing activities undertaken by the relevant U.S. swap dealing division, and thus may be unable to supervise those activities or effectively to interpret compliance reports submitted by the chief compliance officer. This supervision would be more appropriately assigned to a senior official within the swap-dealing division of the organization, rather than formally delegated to the board and senior officer of the legal entity. Consequently, we believe that firms should be permitted to self-designate with respect to these Entity-Level Requirements, allowing them to tailor the requirements of principal registration and chief compliance officer reporting more closely and particularly to their swap dealing activities. This would satisfy the Commission's legitimate supervisory interests in these activities without straining the larger corporate structures or making time-consuming demands on senior officers who are not sufficiently familiar with their U.S. swap dealing subdivisions to provide effective oversight.

In addition, Swap Entities must count as "associated persons" all persons who participate in "the solicitation or acceptance of swaps" as well as those persons' supervisors,[123] and the activities that give rise to this designation are subject to the daily trading records requirements of internal business conduct standards. In the cross-border context, we believe that "associated person" and the requirements related to that designation should only apply to those persons who solicit or accept swaps with U.S. counterparties other than Non-U.S. Branches.

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[121] 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. 20,128, 20,158 (Apr. 3, 2012) (to be codified at 17 C.F.R. pts. 1, 3 and 23).

[122] By "U.S.-facing swap trading activities," in this context, we mean transactions with a U.S. person other than a Non-U.S. Branch.

[123] 7 U.S.C. § 1a(4)(A).

IV. Substituted Compliance

Recommendation: The Commission's concept of "substituted compliance," as proposed, is unnecessarily narrow and does not accord with generally accepted notions of comity.[124] The Commission should adopt an approach to cross-border transactions that is consistent, not only with international notions of comity and coordination, but also with its own precedent.

The Proposed Interpretive Guidance includes the concept of "substituted compliance" in recognition of the need to "take account of the legitimate sovereign interests of other nations . . . ."[125] However, this concept, as proposed, is markedly different from the Commission's past approach to recognition of foreign laws and falls short of meeting the Commission's goals of international comity.

Specifically, substituted compliance under the Proposed Interpretive Guidance involves a determination by the Commission of the comparability of the rules relating to swaps activity on a rule-by-rule basis. In contrast, the Commission, in a rule published last year on the registration of foreign boards of trade, adopted a more traditional approach to exempting non-U.S. entities from U.S. registration requirements.[126] Indeed, the Commission expressly noted that its determination of the comparability of the foreign regulatory regime, to which the foreign board of trade applying for registration is subject, will not be a "line by line" examination of the foreign regulator's approach to supervision of the foreign board of trade it regulates. Rather, it would be a principles-based review, pursuant to which the Commission would look to the totality of the regulation to determine whether that regime supports and enforces regulatory objectives in the oversight of the foreign board of trade and the clearing organization that are substantially equivalent to the regulatory objectives supported and enforced by the Commission in its oversight.

Consistent with this approach, the Commission should conduct principles-based reviews of foreign regulatory regimes by directly engaging with foreign regulators. We believe that this approach is consistent with the Commission's goals of international comity and could lead to more favorable comparability determinations, where the Commission finds that the foreign regime's values and objectives are comparable. This could be achieved in various ways, including memoranda of understanding and directly engaging with foreign regulators.

The approach taken by the Proposed Interpretive Guidance, however, combined with its extraordinarily broad definition of "U.S. person," puts the Commission in the position

[124] This section is responsive to Question 26 of the Proposed Interpretive Guidance.

[125] Proposed Interpretive Guidance at 41,223.

[126] Registration of Foreign Boards of Trade, 76 Fed. Reg. 80,674 (Dec. 23, 2011) (to be codified at 17 C.F.R. pt. 48).

of passing judgment on virtually every relevant rule of other jurisdictions relating to swap regulation. It also potentially requires globally active Swap Entities to comply with multiple and, at times, competing regulatory requirements. For these reasons, the Commission should adopt an approach to cross-border swap transactions that is consistent not only with international notions of comity and coordination, but also with its own precedent. In doing so, the Commission should look to its own approach in connection with determinations of comparability of foreign regulatory regimes applicable to foreign boards of trade as an example.

Recommendation: Substituted compliance for Transaction-Level Requirements should be available for swaps of Non-U.S. Branches and Non-U.S. Swap Entities with U.S.-person counterparties.[127]

The Proposed Interpretive Guidance does not permit substituted compliance of Transaction-Level Requirements for Non-U.S. Branches and Non-U.S. Swap Entities for their transactions with U.S. counterparties. If substituted compliance is limited by counterparty type, however, Non-U.S. Branches and Non-U.S. Swap Entities will have to build systems to comply with U.S. requirements, significantly reducing the benefit of substituted compliance. For example, if Non-U.S. Branches and Non-U.S. Swap Entities are required to comply with daily trading record requirements and record their phone lines for conversations with U.S. persons, as a practical matter, the swap dealer may have to record conversations with all counterparties.[128]

The Commission should craft a solution that addresses this issue, but that would not provide competitive advantages based on the organization of the Swap Entity, including whether the Swap Entity is U.S.- or non-U.S. based and whether the Swap Entity operates through overseas branches or overseas broker-dealer subsidiaries. Specifically we believe that the Commission's endorsement of the home-jurisdiction regime's functional equivalence through a substituted compliance determination should support the availability of substituted compliance for all swaps transacted by Non-U.S. Branches and Non-U.S. Swap Entities operating from outside the United States.[129]

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[127] This section is responsive to Question 26 of the Proposed Interpretive Guidance.

[128] As we recommend above, we believe that all swap data reporting requirements should be categorized as Transaction-Level Requirements. Substituted compliance for these requirements is particularly important because of privacy, secrecy and blocking statutes in various jurisdictions that prohibit Non-U.S. Branches and Non-U.S. Swap Entities from reporting certain swap data to anyone other than local supervisory authorities. We believe that all information reported by Non-U.S. Branches and Non-U.S. Swap Entities should be submitted to home jurisdictions' prescribed repositories, following the appropriate procedures. To the extent that the Commission desires access to this reported information, that access should be negotiated and granted by way of a memorandum of understanding or similar arrangement between the Commission and the relevant foreign supervisors.

[129] To the extent that substituted compliance is currently not permitted for Entity-Level requirements for transactions with U.S. persons, we believe that the same logic should apply so as to permit substituted compliance for U.S. persons in that case.

Recommendation: The Commission should clarify which law is "substituted" for U.S. law under "substituted compliance."[130]

As the Proposed Interpretive Guidance notes, the swap market is global.[131] Consequently, swap transactions may involve market participants with connections to several jurisdictions. For example, a Singaporean branch of a U.S.-registered Spanish swap dealer may engage in a swap transaction with a German person. The Proposed Interpretive Guidance is not clear which jurisdiction should be "substituted" for U.S. regulatory requirements under substituted compliance in such circumstances. As the various swap regulatory regimes develop worldwide, dealers transacting in a range of jurisdictions will likely acquire facility with a number of different jurisdictions' regulations, as well as a sense of which regimes are most appropriately applied to which types of foreign transactions. Consequently, we believe that the Commission should clarify that, where ambiguity exists and two or more jurisdictions could reasonably exercise authority over the transaction, a Swap Entity has discretion to determine which of the possible jurisdictions' laws will be substituted for U.S. law.

Recommendation: The Commission should not impose its requirements on non-U.S.-person registrants until the accompanying non-U.S. regulatory regimes are fully formed.[132]

The Proposed Exemptive Order offers delayed implementation of some Title VII requirements for Swap Entities operating in regimes where swap regulations are not yet fully formed. The Order provides that:

> with respect to transaction-level requirements of the CEA (and Commission regulations promulgated thereunder), the relief would allow non-U.S. swap dealers and non-U.S. major swap participants, as well as foreign branches of U.S. swap dealers and major swap participants, to comply only with those requirements as may be required in the home jurisdiction . . . for swaps with non-U.S. counterparties.[133]

The relief is due to expire 12 months from the publication of the Proposed Exemptive Order in the *Federal Register*, regardless of whether the Commission has made a substituted compliance determination. It is unclear how comparability will be determined for non-U.S. jurisdictions where swap regulatory regimes are proposed but not finalized. Accordingly the Commission should wait to impose its requirements on non-U.S. registrants until such non-U.S. regulatory regimes are fully formed.

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[130] This section is responsive to Question 26 of the Proposed Interpretive Guidance.

[131] Proposed Interpretive Guidance at 41,234.

[132] This section is responsive to Question 29 of the Proposed Interpretive Order.

[133] Proposed Exemptive Order at 41,110.

Recommendation: In the alternative, the Commission should develop a process to extend exemptive relief where potentially comparable foreign requirements are proposed but not yet final, or where the Commission has not completed comparability determinations.[134]

The Proposed Exemptive Order provides that exemptive relief for Non-U.S. Swap Entities will expire 12 months after it is published in the *Federal Register*. Non-U.S. Swap Entities, however, may intend to apply for substituted compliance, but may operate in jurisdictions where final rules have not yet come into effect, or for which the Commission has not made a comparability determination. In those circumstances, the Non-U.S. Swap Entities may be subject to U.S. regulations for the period of time between the end of relief and the finalization of home-jurisdiction regulations, plus the length of time it takes for the Commission to make an accompanying comparability determination.

As noted in our August 13th Letter, we believe that Non-U.S. Swap Entities should remain subject to the Final Exemptive Order's relief until substituted compliance is available, rather than having to build the technological, operational and compliance systems required to comply with U.S. law for a short interim period. This should be the case so long as that period of time is anticipated to be reasonably brief and the Commission anticipates a possibility that the finalized regulations will be sufficiently comparable.

Further, we believe that the Commission should provide for an interim process in which Non-U.S. Swap Entities may present, as part of their compliance plans, the enacted legislation or regulation regarding swap regulation, along with the anticipated effectiveness dates and scope of home-jurisdiction regulations not yet finalized. Based on these presentations, the Commission could exercise discretionary authority to extend exemptive relief for a reasonable period of time. This extension would allow for smoother transitions, both for regulated entities and the markets in which they operate. It would also provide for better harmonization among U.S. and non-U.S. swap regulations.

In particular, we propose that the Commission allow a non-U.S. entity, group of entities or a foreign regulator to, at any time, apply to the Commission for a six-month extension, during which the non-U.S. entities would remain exempt from Title VII requirements, in anticipation of the finalization of home-jurisdiction swap regulations and the requisite comparability analyses. Upon receipt of this application, the Commission would be required to respond within 30 days to notify the applicant of the Commission's determinations. This process would allow the Commission to make reasonable allowances for the transition time required by 1) non-U.S. entities that may be subject to a range of swap regulations internationally, 2) non-U.S. jurisdictions that are beginning to create swap regulatory regimes and 3) the Commission itself, which must evaluate those regimes for comparability as they come into existence.

[134] This section is responsive to Question 29 of the Proposed Interpretive Guidance.

We recognize that extension of the exemption period will not be appropriate in those instances where no legislation exists and finalization of home-country regulations is too remote. In those circumstances, the expiration of the 12-month relief period should coincide with the full effectiveness of the U.S. regulations for the affected Non-U.S. Swap Entities.

V. Treatment of Non-Swap Entities

Recommendation: Non-Swap Entities should be entitled to the same treatment and relief as Swap Entities.[135]

As we noted in our August 13th Letter, Certain Title VII requirements, including SDR Reporting and Large Trader Reporting, apply to swap counterparties that are not Swap Entities. However, the Proposed Interpretive Guidance does not permit Non-U.S. Non-Swap Entities the same substituted compliance and other treatment as is allowed for Non-U.S. Swap Entities. In addition, the Proposed Exemptive Order would not extend the same relief to Non-Swap Entities as it does to Swap Entities. This leads to a particularly problematic result with respect to SDR Reporting: a swap between a non-U.S. person and a non-U.S. branch of a registered swap dealer or MSP will be eligible for exemptive relief, whereas the same non-U.S. person engaging in a transaction with a non-U.S. branch of a U.S. bank that is not a registered swap dealer or MSP will not be eligible. To avoid this anomalous result, we ask the Commission to clarify that the Final Exemptive Order and final cross-border guidance will apply equally to Non-Swap Entities to and Swap Entities.

VI. Exemptive Order and Compliance Plan Draft

A. SDR and Large Trader Reporting Requirements

Recommendation: The relief granted to Non-U.S. Swap Entities with respect to SDR Reporting and Large Trader Reporting for swaps with non-U.S. counterparties should be available, regardless of whether the Non-U.S. Swap Entity is affiliated with a U.S. swap dealer.[136]

The Proposed Exemptive Order provides that, during the pendency of the order, Non-U.S. Swap Entities that are not affiliates or subsidiaries of a U.S. swap dealer may delay compliance with the SDR Reporting and Large Trader Reporting requirements for swaps with non-U.S. counterparties.[137] This relief does not extend to transactions with U.S.

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[135] This section is responsive to Question 17 of the Proposed Interpretive Guidance and the Commission's request for comment on all aspects of the Proposed Exemptive Order. Proposed Exemptive Order at 41,116.

[136] This section is responsive to the Commission's request for comment on all aspects of the Proposed Exemptive Order. *Id.*

[137] *Id.* at 41,119.

counterparties. As noted elsewhere, requiring Non-U.S. Swap Entities to bifurcate their compliance requirements with respect to counterparties effectively requires that Non-U.S. Swap Entities come into compliance with the full breadth of SDR Reporting and Large Trader Reporting requirements immediately upon effectiveness of the rules, denying them the benefit of any transition period.

Therefore, as we argued in our August 13th Letter, we believe that the proposed relief for non-U.S. swap dealers should apply to swaps with all counterparties. The Proposed Exemptive Order relief is intended to afford Non-U.S. Swap Entities "additional time to prepare for the application of the Entity-Level Requirements."[138] Particularly with respect to SDR Reporting, the Commission has recognized the importance of allowing registrants to phase in their compliance in a way that does not substantially undermine regulatory objectives.[139] Separating the applicable SDR Reporting compliance requirements by counterparty necessitates that the affected Non-U.S. Swap Entities address all logistical and process-related obstacles to compliance in the first instance, rather than permitting them to take advantage of the envisioned transition period.

At a minimum, the existing proposed relief for Non-U.S. Swap Entities should apply regardless of whether the Non-U.S. Swap Entity in question has an affiliate that is a U.S. swap dealer. If the U.S. affiliates of Non-U.S. Swap Entities are considered in determining the availability of exemptive relief, non-U.S. subsidiaries or affiliates of similarly situated parent firms may be subject to different regulatory treatment, even in a situation where the home-jurisdiction swap activities are comparable. Further, the presence of a U.S. affiliate in the larger corporate structure that includes a non-U.S. swap dealer does not suggest that the non-U.S. swap dealer will be any better equipped or prepared to comply with SDR Reporting and Large Trader Reporting. Different legal entities, in many cases, use different technology systems to satisfy different sets of local requirements. Because SDR Reporting and Large Trader Reporting will have to be satisfied with respect to individual transactions, these requirements likely cannot be satisfied with a single firm-wide solution. Rather, each individual entity will have to come into compliance individually. Thus, the fact that a non-U.S. swap dealer has a U.S.-registered swap dealer affiliate that will have to comply with SDR and Large Trader Reporting does not suggest that implementation of the requirement will be smoother for such non-U.S. swap dealer.

[138] *Id.* at 41,112.

[139] *Id*.

B. Length of Proposed Exemptive Relief

Recommendation: The end of the Proposed Exemptive Order's relief should be tied to the publication of the Final Exemptive Order, rather than that of the proposal, in the *Federal Register*.[140]

As proposed, the relief offered by the Proposed Exemptive Order would expire 12 months after the publication of the Proposed Exemptive Order in the *Federal Register*.[141] The full scope of the available relief will not become apparent, however, until the relief is finalized and the Final Exemptive Order is published in the *Federal Register*. Consequently, as we argued in our August 13th Letter, we believe that the expiration of the relief should be determined relative to the publication of the Final Exemptive Order. To the extent that the Final Exemptive Order differs from the Proposed Exemptive Order, affected entities would be deprived of the benefit of a one-year transition period.

Since the full range of exemptive relief will not become evident until the Final Exemptive Order is published, we believe that the transition time provided by the relief can only be meaningful if measured from that final date. The proposed timing could present a scenario in which compliance requirements come into effect only shortly before the exemptive relief expires. An abbreviated exemptive relief period could deprive Swap Entities of the benefits that the proposed exemptive order seeks to provide.

C. Compliance Plans

Recommendation: The Commission should clarify that the initial compliance plans required to apply for Exemptive Order relief need only provide a basic indication of a non-U.S. entity's desire to seek substituted compliance and that indications should be made at the level of the Commission's eight rulemaking categories (as opposed to the Commission's 38 individual rulemaking areas) and should relate only to those categories that are relevant to the G-20 Commitments, i.e., Comprehensive Regulation of Swap Dealers and MSPs, Clearing, Trading, Data and Enforcement.[142]

The Proposed Exemptive Order conditions exemptive relief on registration and filing within 60 days of registration, "a compliance plan addressing how [the swap dealer] plans to comply, in good faith, with all applicable requirements under the CEA and related rules and regulations upon the effective date of the Cross-Border Interpretive Guidance."[143] As proposed, the compliance plan would need to contain an indication of whether the Non-U.S. Swap Entity intends to seek a comparability determination and, where the entity intends to comply with home-jurisdiction requirements, a description of

[140] This section is responsive to Appendix 4, Question 1 of the Proposed Interpretive Guidance.

[141] Proposed Exemptive Order at 41,110.

[142] This section is responsive to Question**s** 26 and 29 of the Proposed Interpretive Guidance.

[143] Proposed Exemptive Order at 41,113.

those requirements.[144] Both of these requirements presuppose a level of development for home-jurisdiction swap regulatory regimes which is likely an unreasonable expectation for the time frame allotted. Most foreign regimes' swap regulations are not as fully formed as are those of the United States, and without a robust and complete foreign regulatory regime, Non-U.S. Swap Entities will be effectively unable to provide compliance plans satisfying the Commission's desired level of detail before the appointed deadline.

We therefore request, as in our August 13th Letter, that the Commission clarify the purpose of and its expectation around the compliance plan. We believe that the primary purpose of the compliance plan requirement is to notify the Commission of those provisions for which a swap dealer intends to seek substituted compliance to allow the Commission to begin its comparability analysis wherever possible. Since the compliance plans are separate from the required applications for comparability determinations, we do not interpret the compliance plan requirements to be as detailed or specific as those for comparability determinations, particularly given the short time frame in which compliance plans must be submitted and the fact that many foreign jurisdictions have not yet finalized their swap regulatory regimes. Rather, we interpret the compliance plans to require a more general description of the laws and provisions for which regulated entities plan to seek substituted compliance. We therefore believe that the compliance plan should operate at the level of the Commission's eight rulemaking categories[145] as opposed to the Commission 38 individual rulemaking areas. We also believe that the compliance plan should relate only to those categories that are relevant to the G-20 Commitments, i.e. Comprehensive Regulation of Swap Dealers and MSPs, Clearing, Trading, Data and Enforcement.

Further, the Commission has indicated that the plans should be updated as new foreign regulatory regimes emerge,[146] further buttressing our view that initial compliance plans need not undertake a detailed analysis of foreign regulatory regimes. We believe that these updates should also not undertake a thorough analysis of the specific provisions as proposed or finalized, but rather call the Commission's attention to the availability of these new foreign laws and notify the Commission of a Non-U.S. Swap Entity's intent to seek substituted compliance for these provisions. To minimize the issues arising from timing gaps between jurisdictions, applicants should be permitted to file such plans on the basis of proposed rules and update the plans accordingly upon finalization of such rules. This reading of the compliance plan requirement would allow Non-U.S. Swap Entities to meet the required deadlines for filing the necessary documentation to apply for exemptive relief, while taking a more realistic view towards the type and quality of information that will be available by the required deadline.

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[144] *Id.*

[145] These categories are Comprehensive Regulation of Swap Dealers and MSPs, Clearing, Trading, Data, Particular Products, Enforcement, Position Limits and Other Titles.

[146] Proposed Exemptive Order at 41,113, n.22.

Consequently, we believe that compliance plans should take the form of notice filings in which Non-U.S. Swap Entities notify the Commission of their intent to seek comparability determinations, as foreign regulators finalize the applicable home-jurisdiction requirements.

VII. Other Issues

Recommendation: The Commission should coordinate its cross-border Title VII regulations with the SEC, the prudential regulators and foreign regulators.

The regulated entities that will have to comply with both the Final Interpretive Guidance and the Final Exemptive Order will likely be subject to other regulators' rules. Without explicit efforts among regulators to harmonize the requirements and compliance timing, affected entities could be subject to three or more different sets of requirements for the same aspects of their swaps business. In addition to being extremely burdensome, there are a number of swap transaction requirements, such as clearing, where only one requirement can practically be satisfied for a given transaction. This means that requirements may conflict or, even where they do not, that the most stringent of the multiple possible regulators will effectively establish the baseline for any given provision, depriving regulated entities of any comparative relief intended by any of their other regulators.

We believe that coordination with the SEC is critical. Title VII divides jurisdiction of the over-the-counter derivatives market between the Commission and the SEC. As part of this division of jurisdiction, Congress explicitly requires the Commission and the SEC to consult and coordinate with each other to the extent possible.[147] In addition, Congress required that the Commission and the SEC jointly adopt the foundational Title VII rules, such as those defining "swap" and "swap dealer." In doing so, Congress expressed its intent that any rules governing the regulatory scope of the entities and any products subject to Title VII requirements should be defined by these two regulators together.

Rules clarifying the cross-border impact of Title VII are effectively part of the "swap" and "swap dealer" definitional rules in that, like those rules, the clarification of the cross-border impact of Title VII defines which entities and transactions are subject to Title VII and which are not. Congress explicitly required that the Commission and the SEC coordinate on these foundational rules that define the scope of Dodd-Frank, yet the Commission has proposed the Proposed Interpretive Guidance and the Proposed Exemptive Order alone. The impact of disparate regulatory actions could be profound: a concept as fundamental as what entities are defined as U.S. persons could be subject to different interpretations by the two regulatory agencies. Thus, we believe that the Commission and the SEC must develop their views of the cross-border application of Title VII jointly.

[147] *See* Section 712 of the Dodd-Frank Act.

Coordination with the prudential regulators is similarly critical, as responsibility for swap dealer capital and margin requirements is divided, based on an entity's primary regulator, between the Commission and the prudential regulators. Differing cross-border application of margin and capital rules could, thus, lead to competitive inequalities between otherwise similarly situated swap dealers.

Finally, because the Proposed Interpretive Guidance and the Proposed Exemptive Order define the extraterritorial effects of the Commission's swaps regulation, direct coordination with international regulators is imperative. Direct communication with foreign regulators will allow both sets of regulators to take full account of the other's perspectives in the regulatory process, and will best allow each party to observe the basic principles of comity while protecting their respective jurisdictions from the systemic risks presented by underregulation or misregulation of the global swaps market.

ANNEX B

Table of Questions to Which Recommendations Respond

The page numbers in the "Page in Letter" column are hyperlinks to the appropriate section of the letter.

Question in Proposal*	Statement	Page in Letter
Definition of "U.S. Person" During the Interim Period		
Question 1	The Commission should include as part of the Final Exemptive Order a workable, uniform definition of "U.S. person" that will apply until 90 days after the final definition of "U.S. person" is published.	A-8
Definition of "U.S. Person" in the Final Interpretative Guidance		
Question 1	The Commission should adopt a simpler, more easily applied definition of "U.S. person" in the Final Interpretive Guidance.	A-10
	The Commission should clarify that the final definition of "U.S. person" included in the Final Interpretive Guidance will function as the single definition for all swap dealer regulation purposes. However, this definition of "U.S. person" should not override existing practice either in the futures market or with respect to clearing by futures commission merchants.	A-14
	The Commission should delete the statement that the definition of a "U.S. person" is not limited to the list of entities enumerated.	A-15
	In the alternative, the Commission should define a market participant's responsibilities to determine its counterparty's U.S.-person status in a manner similar to the external business conduct standards, allowing for reasonable reliance on counterparty representations.	A-16
	For the purposes of any individual swap, the determination of whether a counterparty to that swap is a U.S. person or a non-U.S. person should be made at the inception of the swap based on the most recent updated representation from the counterparty, which should be renewed by the counterparty once per calendar year.	A-17

* Refers to Proposed Interpretive Guidance unless otherwise noted.

Question in Proposal*	Statement	Page in Letter
Question 14	A swap counterparty should be responsible for determining its own U.S.-person status.	A-15
	In the alternative, the Commission should define a market participant's responsibilities to determine its counterparty's U.S.-person status in a manner similar to the external business conduct standards, allowing for reasonable reliance on counterparty representations.	A-16
	For the purposes of any individual swap, the determination of whether a counterparty to that swap is a U.S. person or a non-U.S. person should be made at the inception of the swap based on the most recent updated representation from the counterparty, which should be renewed by the counterparty once per calendar year.	A-17
Issues Presented by the Proposed Definition of "U.S. Person		
Question 1	The Commission should clarify that prong (ii)(B) of the proposed definition of "U.S. person" is not meant to capture an entity merely because it is guaranteed by a U.S. person.	A-19
	The Commission should include a threshold of required ownership by U.S. persons so that entities with only *de minimis* U.S. person ownership are excluded.	A-20
	The Commission should delete prong (v) from the definition of "U.S. person."	A-21
	The Commission should exclude supranational organizations from the definition of "U.S. person."	A-21
Question 1a	Commodity pools organized outside the United States should be permitted to assess on an annual basis whether they are U.S. persons by virtue of being majority owned by U.S. persons. Publicly offered and listed commodity pools organized outside the United States should be excluded from the definition of "U.S. person."	A-19
Question 1c	The Commission should not include in the definition of "U.S. person" a non-U.S. person that is controlled by, or under common control with, a U.S. person.	A-20

Question in Proposal*	Statement	Page in Letter
Non-U.S. Affiliate Conduit		
Question 22	Qualifying as a non-U.S. affiliate conduit does not provide a sufficient nexus to the United States to justify treatment different from other non-U.S. counterparties, and therefore the non-U.S. affiliate conduit concept should be removed from the Guidance.	A-22
	In the alternative, the Commission should replace the non-U.S. affiliate conduit definition provision that the conduit "regularly enter into swaps" with a provision regarding the counterparty's direct transfer of risk of a swap to its U.S. affiliate.	A-23
	The Commission should remove the concept of "indirect" majority ownership from the definition of non-U.S. affiliate conduit.	A-24
	The Commission should clarify that swap dealers may rely on a counterparty's representations as to its non-U.S.-affiliate conduit status.	A-24
	For the purposes of any individual swap, the determination of whether a counterparty to that swap is a non-U.S. affiliate conduit should be made at the inception of the swap based on the most recent updated representation from the counterparty, which should be renewed by the counterparty once per calendar year.	A-25
Registration and Aggregation Issues and Comments		
Question 3	Registration should not be required solely as a result of being guaranteed by a U.S. person or being affiliated with a non-U.S. person that is guaranteed by a U.S. person.	A-29
	In the alternative, only guarantees by a U.S. person for which there is a material likelihood of payment by that U.S. person should contribute towards the *de minimis* threshold.	A-29
	Any *de minimis* threshold aggregation requirements should not apply until sufficient time after the Final Interpretive Guidance has been published in the *Federal Register*.	A-30
	Swap activity undertaken in respect of a legacy portfolio in run-off should not be included in an entity's aggregation calculation and should not itself trigger a registration requirement.	A-31
Question 3c	A person should not be required to aggregate the swap dealing transactions of its affiliates to determine the	A-26

Question in Proposal*	Statement	Page in Letter
	applicability of Title VII to that entity's swap dealing activities.	
	Entities should not be required to aggregate swap dealing positions with registered Swap Entity affiliates.	A-27
	A non-U.S. person that transacts swaps only with non-U.S. counterparties and Non-U.S. Branches should not be required to aggregate its positions with affiliates.	A-28
	In determining whether its swap dealing activities exceed the *de minimis* threshold, a U.S. person should aggregate only with its U.S. affiliates.	A-28
Question 3e	A non-U.S. person should not be required to include swaps with Non-U.S. Branches towards its MSP calculation.	A-28
	The Commission should clarify that guaranteed swap positions are attributed to the guarantor for purposes of the MSP calculation.	A-32
Question 4	A non-U.S. person should not be required to include swaps with Non-U.S. Branches towards its MSP calculation.	A-28
Question 5	A person should not be required to aggregate the swap dealing transactions of its affiliates to determine the applicability of Title VII to that entity's swap dealing activities.	A-26
	Entities should not be required to aggregate swap dealing positions with registered Swap Entity affiliates.	A-27
Booking and Solicitation Issues and Comments		
Question 3	The Commission should not require a person to register as a swap dealer by virtue of risk transfers achieved through interaffiliate swaps.	A-32
	The Commission should clarify that a U.S. person that solicits, on a fully disclosed agency basis, swaps that are booked into a non-U.S. affiliate does not have to register as a swap dealer.	A-33
Question 3d	The Commission should not require a person to register as a swap dealer by virtue of risk transfers achieved through interaffiliate swaps.	A-32
	The Commission should clarify that a U.S. person that solicits, on a fully disclosed agency basis, swaps that are booked into a non-U.S. affiliate does not have to register as a swap dealer.	A-33

Question in Proposal*	Statement	Page in Letter
Treatment of Non-U.S. Branches as Swap Counterparties		
Question 12	From the perspective of their counterparties, Non-U.S. Branches should be treated as non-U.S. persons.	A-34
Question 13	From the perspective of their counterparties, Non-U.S. Branches should be treated as non-U.S. persons.	A-34
Question 25	From the perspective of their counterparties, Non-U.S. Branches should be treated as non-U.S. persons.	A-34
Division into Entity-Level and Transaction-Level Requirements		
Question 10	All forms of swap reporting, including SDR Reporting and Large Trader Reporting, should be categorized as Transaction-Level Requirements.	A-34
	Position limits and anti-manipulation rules should be categorized as Transaction-Level Requirements.	A-35
Question 11	All forms of swap reporting, including SDR Reporting and Large Trader Reporting, should be categorized as Transaction-Level Requirements.	A-34
	Position limits and anti-manipulation rules should be categorized as Transaction-Level Requirements.	A-35
Application of Transaction-Level Requirements		
Question 11b	The Commission should treat Part 43 real-time reporting in the same way as external business conduct. In particular, real-time reporting should not apply to Non-U.S. Swap Entities or Non-U.S. Branches for transactions with non-U.S. persons.	A-37
Question 17	The Commission should take into account the issue of foreign jurisdictions' privacy laws.	A-38
Question 18	The Commission should not apply the external business conduct standards to swaps between a U.S. Swap Entity and a non-U.S. person.	A-38
Question 26	The Commission should take into account the issue of foreign jurisdictions' privacy laws.	A-38
Question 28	U.S. swap dealers should be eligible for substituted compliance for Transaction-Level Requirements to the same extent as non-U.S. swap dealers and Non-U.S. Branches.	A-36

Question in Proposal*	Statement	Page in Letter
Emerging Market Exemption from Transaction-Level Requirements		
Question 10	The Commission should clarify that the use of the Emerging Market Exemption is not limited to "emerging markets" in the colloquial sense and should rename it as the "Foreign Ancillary Activity Exemption."	A-39
	The Emerging Market Exemption should be available to transactions that non-U.S. swap dealers enter into with non-U.S. persons guaranteed by U.S. persons and with non-U.S. affiliate conduits.	A-39
	The Commission should clarify how the Emerging Market Exemption threshold is calculated.	A-41
Question 12	The Commission should clarify that the Emerging Market Exemption permits reliance on local standards for all swaps, including swaps with U.S. persons, swaps with non-U.S. affiliate conduits and swaps that are guaranteed by U.S. persons.	A-44
Question 15	The Commission should clarify that the Emerging Market Exemption permits reliance on local standards for all swaps, including swaps with U.S. persons, swaps with non-U.S. affiliate conduits and swaps that are guaranteed by U.S. persons.	A-44
Question 19	The Emerging Market Exemption should be available to two Non-U.S. Branches' transactions with each other in an "emerging market" as well as to transactions between a Non-U.S. Branch and a non-U.S. swap dealer operating in the relevant market.	A-40
	The "Emerging Market Exemption" threshold of 5% should be increased to 15%.	A-41
	The Commission should clarify that the Emerging Market Exemption permits reliance on local standards for all swaps, including swaps with U.S. persons, swaps with non-U.S. affiliate conduits and swaps that are guaranteed by U.S. persons.	A-44

Question in Proposal*	Statement	Page in Letter
Application of Entity-Level Requirements		
Question 10	The Commission should clarify that firms may exercise discretion in the designation of principals and in the reporting duties of the chief compliance officer. In addition, for non-U.S. swap dealers, designation as an "associated person" and requirements related to persons that solicit swaps for that swap dealer should only apply to those who solicit swaps from U.S. persons.	A-44
Substituted Compliance		
Question 26	The Commission's concept of "substituted compliance," as proposed, is unnecessarily narrow and does not accord with generally accepted notions of comity. The Commission should adopt an approach to cross-border transactions that is consistent not only with international notions of comity and coordination, but also with its own precedent.	A-46
	Substituted compliance for Transaction-Level Requirements should be available for swaps of Non-U.S. Branches and Non-U.S. Swap Entities with U.S.-person counterparties.	A-47
	The Commission should clarify which law is "substituted" for U.S. law under "substituted compliance."	A-48
Question 29	The Commission should not impose its requirements on non-U.S.-person registrants until the accompanying non-U.S. regulatory regimes are fully formed.	A-48
	In the alternative, the Commission should develop a process to extend exemptive relief where potentially comparable foreign requirements are proposed but not yet final, or where the Commission has not completed comparability determinations.	A-49
Treatment of Non-Swap		
Question 17	Non-Swap Entities should be entitled to the same treatment and relief as Swap Entities.	A-50
Exemptive Order General Request for Comment	Non-Swap Entities should be entitled to the same treatment and relief as Swap Entities.	A-50

Question in Proposal*	Statement	Page in Letter
SDR and Large Trader Reporting Requirements		
Exemptive Order General Request for Comment	The relief granted to Non-U.S. Swap Entities with respect to SDR Reporting and Large Trader Reporting for swaps with non-U.S. counterparties should be available, regardless of whether the Non-U.S. Swap Entity is affiliated with a U.S. swap dealer.	A-50
Length of Proposed Exemptive Relief		
Proposed Interpretive Guidance Appendix 4, Question 1	The end of the Proposed Exemptive Order's relief should be tied to the publication of the Final Exemptive Order, rather than that of the proposal, in *the Federal Register*.	A-52
Compliance Plans		
Question 26	The Commission should clarify that the initial compliance plans required to apply for Exemptive Order relief need only provide a basic indication of a non-U.S. entity's desire to seek substituted compliance and that indications should be made at the level of the Commission's eight rulemaking categories (as opposed to the Commission's 38 individual rulemaking areas) and should relate only to those categories that are relevant to the G-20 Commitments, i.e., Comprehensive Regulation of Swap Dealers and MSPs, Clearing, Trading, Data and Enforcement.	A-52
Question 29	The Commission should clarify that the initial compliance plans required to apply for Exemptive Order relief need only provide a basic indication of a non-U.S. entity's desire to seek substituted compliance and that indications should be made at the level of the Commission's eight rulemaking categories (as opposed to the Commission's 38 individual rulemaking areas) and should relate only to those categories that are relevant to the G-20 Commitments, i.e., Comprehensive Regulation of Swap Dealers and MSPs, Clearing, Trading, Data and Enforcement.	A-52