



August 28, 2012

Via Electronic Submission: <http://comments.cftc.gov>

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

Re: Proposed Interpretive Guidance and Policy Statement on Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act: RIN 3038-AD57

Dear Sir or Madam:

Managed Funds Association (“MFA”)¹ and Alternative Investment Management Association² (“AIMA”, and together with MFA, “we”) welcome the opportunity to provide comments to the Commodity Futures Trading Commission (the “Commission”) on its “Proposed Interpretive Guidance and Policy Statement on Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act” (the “Proposed Guidance”).³ We support the Commission’s efforts “to minimize the potential for the recurrence of the type of financial and operational stresses that contributed to the 2008 financial crisis”⁴ by ensuring appropriate regulation of the over-the-counter (“OTC”) derivatives markets as well as U.S. and non-U.S. market participants with a direct and significant effect on the U.S.⁵ We also appreciate the

¹ Managed Funds Association represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent and fair capital markets. MFA, based in Washington, DC, is an advocacy, education and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and all other regions where MFA members are market participants.

² AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector – including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, accountants and lawyers. Our membership comprises over 1,200 corporate bodies in over 40 countries.

³ 77 Fed. Reg. 41214 (July 12, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-16496.pdf>.

⁴ Proposed Guidance at 41216.

⁵ See *id.* at 41217.

Commission's willingness to provide clarity regarding the extraterritorial application of the Title VII requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**").

While we applaud the Commission's desire to respond to market participants' inquiries and alleviate market uncertainty related to the cross-border scope of Title VII,⁶ we believe that the Proposed Guidance has created new questions and uncertainty, and that, in its application, the Proposed Guidance would inappropriately subject certain non-U.S. market participants and transactions to U.S. regulatory requirements. We are particularly concerned about the implications for commodity pools, pooled accounts and collective investment vehicles (collectively, "**Funds**") organized outside the United States (collectively, "**Non-U.S. Funds**").

In addition, we appreciate the Commission's coordination with its counterparts at the Securities and Exchange Commission ("**SEC**") as well as other international regulators on OTC derivatives reform generally. In light of the expectation that the SEC and other international regulators will similarly issue proposals related to the cross-border application of their regulations, we urge harmonization with respect to the extraterritorial scope of all these regimes. In particular, we encourage international coordination of substituted compliance regimes to ensure appropriate recognition of comparable regulatory frameworks, alleviate duplicative regulation, and minimize transaction and compliance costs to the extent possible.

To be helpful to the Commission's goals, we would like to take this opportunity to make certain recommendations related to the Proposed Guidance, the "U.S. person" definition⁷ and the application of each to Non-U.S. Funds. We are hopeful that these recommendations will assist the Commission in issuing final interpretive guidance on the cross-border application of Title VII that will provide certainty to market participants, ensure the continued robustness of the derivatives markets and further the progress of international harmony and consistency.

⁶ See *id.* at 41216-17.

⁷ See *id.* at 41218, where the Commission proposes to interpret "U.S. person" to include, but not be limited to:

- (i) any natural person who is a resident of the United States;
- (ii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in each case either:
 - (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States, or
 - (B) 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;
- (iii) any individual account (discretionary or not) where the beneficial owner is a U.S. person;
- (iv) any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which majority ownership is held, directly or indirectly, by a U.S. person(s);
- (v) any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the [Commodity Exchange Act ("**CEA**")];
- (vi) a pension plan for the employees, officers, or principals of a legal entity with its principal place of business inside the United States; and
- (vii) an estate or trust, the income of which is subject to United States income tax regardless of source.

I. Proposed Rulemaking vs. Proposed Guidance

We understand that by issuing the Proposed Guidance, rather than a proposed rule, the Commission is providing market participants with clarity around cross-border issues, while not creating a binding precedent that would “establish or modify any person’s rights and obligations under the CEA or the Commission’s regulations promulgated thereunder”.⁸ However, we respectfully request that the Commission reconsider this approach. We agree with Commissioners Sommers⁹ and O’Malia¹⁰ and believe that it is more appropriate to address the content of the Proposed Guidance in the form of a rulemaking. First, the Proposed Guidance introduces an innovative approach to defining the extraterritorial scope of the Dodd-Frank Act swaps provisions as well as a mechanism for dealing with recognition of foreign regulatory frameworks, both of which fit better within a process governed by binding rules. Second, introducing the content of the Proposed Guidance in the form of rules would provide added legal certainty to market participants and other stakeholders such as foreign regulators.¹¹ Third, a proposed rule would be beneficial in that it would require the Commission to conduct, and the public to receive, a comprehensive cost-benefit analysis of the guidance¹² in order to properly assess its market impact in the United States and globally. Lastly, providing a proposed rule ensures that, if in the future the Commission determines to alter its views on the scope of the

⁸ *Id.* at 41217.

⁹ *See id.* at 41239, where Commissioner Sommers states that, “we should be proposing a rule defining the cross-border application of Dodd-Frank that is harmonized with the SEC’s approach, both in substance and in timing. Unfortunately we are not doing that. Instead, we are proposing Interpretive Guidance that ultimately has the effect of a rule.”

¹⁰ *See id.* at 41241, where Commissioner O’Malia states that, “[t]he Commission’s artful use of the terms ‘expect’ and ‘expectation’ in the Proposed Guidance does not disguise the fact that it is requiring applicants to satisfy significant ongoing monitoring and compliance obligations in order to maintain its comparability finding. If the Commission wanted to require a non-U.S. swap dealer or non-U.S. MSP applicant to submit these additional documents in connection with such applicant’s ongoing registration-related obligations, the Commission should have included these requirements in the swap dealer and MSP registration rulemaking, which the Commission finalized in January of this year. Instead, the Commission is issuing today’s Proposed Guidance in a manner that is outside of the requirements set forth in the Administrative Procedure Act.”

¹¹ For example, Article 13 of Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (“**EMIR**”), introduces a mechanism to avoid duplicative and conflicting rules. Specifically, Article 13 allows for certain EMIR requirements to be deemed to be fulfilled if one of the counterparties to a transaction is established in a third country and “the legal, supervisory and enforcement arrangements of a third country” are equivalent to those under EMIR and “are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country”. EMIR empowers the European Commission, with the assistance of the European Securities and Markets Authority, to adopt implementing acts on the basis of assessing “requirements equivalent to those laid down” in EMIR. It would appear that introducing the content of the Commission’s Proposed Guidance in the form of binding rules could provide for a smoother equivalence assessment process with its clear focus on requirements and their enforceability.

¹² Section 15(a)(1) of the CEA requires that: “[b]efore promulgating a regulation under [the CEA] or issuing an order (except as provided in paragraph (3)), the Commission shall consider the costs and benefits of the action of the Commission.”

cross-border issues, market participants will have appropriate notice of such changes and an opportunity to comment.

II. Proposed “U.S. Person” Definition

The definition of “U.S. person” contained in the Proposed Guidance raises a number of issues, uncertainties and questions as to its application to Non-U.S. Funds, as summarized below. As discussed herein, the Commission could resolve a majority of these concerns by adopting a modified version of the “U.S. person” definition used in Regulation S adopted under the U.S. Securities Act of 1933, as amended (the “**Securities Act**”).¹³ Consequently, in response to Question 1(b) in the Proposed Guidance,¹⁴ we would support the interpretation of “U.S. person” in accordance with the Regulation S definition, subject to certain clarifications, as explained in more detail below. In the event that the Commission does not proceed with adopting the Regulation S definition as we recommend, below are the issues we believe that it must address before adopting final guidance.

A. *Issues with the Proposed “U.S. person” Definition*

(1) Prong (iv) – Ownership Test

This prong of the definition looks to the percentage of direct or indirect ownership percentage of U.S. persons. We question whether defining a Non-U.S. Fund as a “U.S. person”, because of the proportion of U.S. investors, is consistent with the stated aims of the Dodd-Frank Act. In our view, since an ownership test alone is not indicative of whether the activities of a Non-U.S. Fund would have a direct and significant effect on the U.S. financial system. In addition, we are concerned about the “look-through” created by basing “U.S. person” status of Funds on indirect as well as direct ownership. As a practical matter, it is often extremely difficult, if not impossible, to establish indirect ownership status with certainty (*e.g.*, the status of members of fund-of-funds, pension plans or shareholders in a listed entity).

In addition, with respect to requiring Funds to ascertain the “U.S. person” status of their direct investors, we urge the Commission to clarify that Funds may rely on representations from investors as to their “U.S. person” status. The Commission should not require Funds to verify independently such status as the investors themselves (and not the Funds) have the necessary information, and thus, are in the best position, to make such determinations.

(2) Prong (v) – CPO Registration Test

This prong of the “U.S. person” definition makes the overall treatment of Non-U.S. Funds by the Proposed Guidance more stringent than for foreign banks, dealers and other

¹³ 17 C.F.R. §230.901 et seq. *See also* Appendix A to this letter for the Regulation S definition of “U.S. person”.

¹⁴ Proposed Guidance at 41218, where the Commission asks “[s]everal commenters have suggested that the Commission adopt the definition of ‘U.S. person’ in the SEC’s Regulation S. Should the Commission interpret the term ‘U.S. person’ in a similar manner notwithstanding that Regulation S has a different focus?”

corporations as well as for foreign subsidiaries of U.S. banks. In particular, the Proposed Guidance specifically excludes foreign subsidiaries of U.S. banks, dealers and other corporations from the Dodd-Frank Act entity-level¹⁵ and transaction-level requirements,¹⁶ even if their U.S. parent guarantees their obligations.¹⁷ By contrast, prong (v) specifically includes all Non-U.S. Funds “the operator of which would be required to register as a commodity pool operator under the CEA”. Following the recent rescission of Commission Rule 4.13(a)(4)¹⁸ and the Dodd-Frank Act’s extension of the Commission’s regulatory ambit to global swap markets, operators of Non-U.S. Funds that are active in swaps and do not meet the *de minimis* test will be required to register as CPOs, even if the Non-U.S. Fund has no U.S. investors. Therefore, many Non-U.S. Funds will become “U.S. persons” by virtue of their operator’s CPO status.

Registered CPO status of a Fund operator is not by itself indicative of any material nexus of the Fund to the U.S. While we realize that the Commission already has oversight of CPOs and will subject them to stringent regulation, including receiving substantial information about their activities through Form CPO-PQR, regulating an operator’s activity as a CPO should not equate to subjecting a Non-U.S. Fund to the panoply of Title VII regulations without other indicators of a more substantial U.S. nexus.

In our opinion, defining a Non-U.S. Fund as a “U.S. person” because the operator is a registered CPO is inconsistent with the stated aims of the Dodd-Frank Act, which are to “promote the financial stability of the United States by improving accountability and transparency in the financial system”. We do not think that the Dodd-Frank Act provides any justification for more onerous treatment for Non-U.S. Funds than for foreign banks, dealers and/or corporations or foreign subsidiaries of U.S. banks. If foreign dealer entities that are wholly-owned, majority-owned or partly-owned by “U.S. persons” are not themselves “U.S. persons”, the same treatment should apply to Non-U.S. Funds. We respectfully urge the Commission to apply the definition consistently to different types of foreign entities.

¹⁵ See *id.* at 41224, which provides that the entity-level requirements are: (i) capital adequacy; (ii) chief compliance officer; (iii) risk management; (iv) swap data recordkeeping; (v) swap data reporting (“**SDR Reporting**”); and (vi) physical commodity swaps reporting (“**Large Trader Reporting**”).

¹⁶ See *id.* at 41225, which provides that the transaction-level requirements are: (i) clearing and swap processing; (ii) margining and segregation for uncleared swaps; (iii) trade execution; (iv) swap trading relationship documentation; (v) portfolio reconciliation and compression; (vi) real-time public reporting; (vii) trade confirmation; (viii) daily trading records; and (ix) external business conduct standards.

¹⁷ See *id.* at 41218, where the Commission states that it, “[u]nder this interpretation, the term “U.S. person” generally means that a foreign branch or agency of a U.S. person would be covered by virtue of the fact that it is a part, or an extension, of a U.S. person. By contrast, 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.”

¹⁸ Commission Rule 4.13(a)(4) exempted commodity pool operators (“**CPOs**”) from registering with the Commission if all investors in the funds were “qualified eligible persons” or certain types of “accredited investors”.

(3) Prong (ii) – Organizational and Liability Tests

a. With respect to prong (ii)(A), we are concerned about the use of principal place of business for purposes of determining “U.S. person” status. Thus, we respectfully request that the Commission modify the Proposed Guidance to clarify that the “U.S. person” status of Funds depends only on the jurisdiction of organization or incorporation.

b. Prong (ii)(B) determines “U.S. person” status based on whether one or more of the direct or indirect owners responsible for the liabilities of such entity are a “U.S. person”. We understand that the Commission intended this prong to apply to general partnerships where one or more of the general partners are a “U.S. person”. Another plausible reading of this prong is that the Commission intended it to address entities for which a “U.S. person” guarantees its obligations. If either of these interpretations is what the Commission intended to capture, we would request that the Commission modify this prong of the Proposed Guidance to reflect this intention and interpretation. In the alternative, we would appreciate it if the Commission could eliminate the “indirect” ownership test within this prong. As mentioned above in relation to prong (iv), it is exceedingly difficult for Funds to determine the “U.S. person” status of all of its indirect owners. Therefore, we ask that the Commission look only to “direct” owners for this prong as well.

(4) Changes to “U.S. person” Status

The Commission’s interpretation of the term “U.S. person” provides a non-exclusive list of the entities that fall within the definition.¹⁹ We understand that the inclusion of the “include, but not be limited to” language preserves flexibility for the Commission to otherwise deem an entity to be “U.S. person” if its activities have a direct and significant effect on the U.S. However, if the Commission were to modify its interpretation by including other entities outside of the enumerated list, such modification could create new uncertainty in the derivatives markets and with respect to other international derivatives reforms. To preserve the Commission’s flexibility while providing the intended certainty to global market participants, we would appreciate it if the Commission could explicitly clarify the process for determining, and phased-in compliance for, other types of entities that it deems to be “U.S. persons” in the future. In particular, we recommend that at such time the Commission update the “U.S. person” term in the interpretive guidance and provide affected market participants one year to comply with the related entity-level and transaction-level requirements.

Similarly, an entity’s “U.S. person” status may change over time if, for example, a commodity pool’s investment manager is currently exempt from registration as a CPO, but due to increased trading in commodities or swaps, the manager becomes subject to CPO registration in the future. Such a commodity pool would need a phase-in period prior to being subject to the full Title VII requirements. As a result, we would recommend that when such changes of status

¹⁹ Proposed Guidance at 41218, where the Commission interprets the term “to include, but not be limited to” certain types of entities.

occur, the Commission provide the commodity pool and its affected counterparties with one year to comply with the related entity-level and transaction-level requirements.²⁰ This concern seems particularly relevant to prongs (iv) and (v) of the proposed definition which may change with some regularity (especially in the case of prong (iv)), whereas the other proposed prongs seem likely to be static.

(5) Imposition of Certain Transaction-Level Requirements on Non-U.S. Funds

We are concerned about the applicability to Non-U.S. Funds of the “U.S. person” definition as it relates to certain Title VII requirements. Defining Non-U.S. Funds as “U.S. persons” would make the Funds responsible for fulfilling certain entity-level and transaction-level requirements under the Dodd-Frank Act, when they transact with non-U.S. banks and dealers that are not registered swap dealers (“SDs”) or major swap participants (“MSPs”).

For example, with respect to reporting to swap data repositories (“SDRs”), we believe the Commission’s intent in Final §45.8 (Determination of which counterparty must report)²¹ was to ensure that SDs and/or similar sell-side market participants would generally fulfill the reporting obligation, and that the buy-side market participants, whose trades would nevertheless be reported to SDRs, would not bear the burden of separately creating a reporting infrastructure, connecting to SDRs, etc. However, the combination of: (1) §45.8(e),²² which states that the U.S. person is the reporting counterparty for a transaction between two non-SD/non-MSP counterparties where only one is a U.S. person; and (2) the classification of SDR Reporting under the Proposed Guidance as an entity-level requirement, has led to some confusion.

Similarly, we note that the Commission’s final rule on “Real-Time Public Reporting of Swap Transaction Data”²³ includes a different standard for identifying the “reporting party”, which does not include any reference to “U.S. person”. Rather, where neither counterparty is an SD or MSP, the real-time reporting rules require the parties to designate which party shall be the “reporting party”. Further, as opposed to the SDR Reporting requirement, the Commission has identified the real-time reporting requirement as a transaction-level requirement.

²⁰ Please note that MFA has made a similar request to the Commission in a comment letter requesting interpretive guidance relating to regulatory treatment of funds whose trading may begin to exceed the quantitative gross futures and swaps market exposure and margin restrictions, dated August 27, 2012, available at: <https://www.managedfunds.org/wp-content/uploads/2012/08/MFA-Letter-to-CFTC-for-Transition-Period-Section-4-13a3-guidance-final-8-27-12.pdf>.

²¹ See Commission final rulemaking on “Swap Data Recordkeeping and Reporting Requirements”, 77 Fed. Reg. 2207 (January 13, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-01-13/pdf/2011-33199.pdf>.

²² See *id.* §45.8(e) reads “Notwithstanding the provisions of paragraphs (a) through (d) of this section, if both counterparties to a swap are non-SD/MSP counterparties and only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty.”

²³ 77 Fed. Reg. 1182 (January 9, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-01-09/pdf/2011-33173.pdf>.

Therefore, for both the SDR Reporting and the real-time reporting requirements, we ask the Commission to clarify explicitly that, where the reporting obligation would fall upon a buy-side market participant that is a “U.S. person” because they are entering into a swap with a sell-side market participant that is not a “U.S. person” (or otherwise registered as an SD or MSP with the Commission), the buy-side market participant may delegate this responsibility to its sell-side counterparty. Similar analysis and clarifications may be required for other entity-level and transaction-level requirements.

B. Effect of the Proposed “U.S. person” Definition on Non-U.S. Funds

We commend the Commission for delving into these issues and trying to provide a “U.S. person” definition that quantifies what activities create a sufficient U.S. nexus such that an entity should constitute a “U.S. person”. However, in light of the foregoing issues, we recommend that solely for purposes of the cross-border guidance,²⁴ the Commission modify the Proposed Guidance to instead adopt the definition of “U.S. person” in Regulation S of the Securities Act²⁵ or language that is substantially similar, as discussed in Question 1(b) in the Proposed Guidance.²⁶ First, the Regulation S definition eliminates the problems or inconsistencies referred to above because it does not include a majority ownership or CPO registration test; rather, it looks to a composite of factors that together determine the level of activity within, or nexus to, the U.S. Second, market participants have long recognized the Regulation S definition as one that provides a simple and rational way to determine “U.S. person” status. Third, the Regulation S definition is one for which market participants already have well-established policies, procedures and operational systems relating to the status of investors and counterparties.

We realize that the Regulation S definition is currently used in a different context than intended by the cross-border guidance, and therefore, might require some amendments and clarifications to function as needed. In particular, we understand that, while in practice whether Non-U.S. Funds would constitute U.S. persons under the Regulation S definition is dependent upon a facts and circumstances, a literal reading of that definition might exclude many Non-U.S. Funds from being U.S. persons. We want to emphasize that our intention is not to have all Non-U.S. Funds avoid regulation but rather to avoid unnecessarily duplicative regulation. Therefore, we believe that, where Non-U.S. Funds are outside of the “U.S. person” definition under Regulation S such that the Title VII requirements would not apply, those Funds should be subject to comparable foreign regulation, given the nature and the domicile of the counterparties with which they are likely to trade. Where no comparable foreign regulation exists for a Non-U.S. Fund, and no substituted compliance is available based on the status of the Non-U.S. Fund’s counterparty, then the Commission should consider whether it is appropriate to apply the transaction-level requirements where the activities of the Non-U.S. Funds would have a direct and significant effect on the U.S financial system.

²⁴ We would not recommend use by the Commission of the Regulation S “U.S. person” definition in other contexts without first analyzing and determining that use of such definition is appropriate.

²⁵ See supra note 13.

²⁶ See supra note 14.

We believe that such an approach ensures: (1) that all the persons or entities covered by the “U.S. person” definition have significant and clearly definable ties to the U.S.; (2) that all parties and swaps are subject to suitable regulation; and (3) consistency with the stated objectives of the Dodd-Frank Act - namely oversight of U.S. and non-U.S. market participants with a direct and significant effect on the U.S. financial system - as well as minimizing overlap with overseas regulation.

III. International Harmonization

We greatly appreciate and support the goal of the Commission and other international regulators to implement their G20 commitments, “coordinate and harmonize international reform efforts”, and address issues created by the different paces of international regulation.²⁷ As a general matter, we strongly support an internationally coordinated approach to regulation that ensures consistent regulation, reflects the global nature of the derivatives markets and promotes competition and innovation. In addition, we understand the need to ensure that where a market participant’s activities have a direct and significant effect on a jurisdiction, that market participant is subject to adequate regulation in that jurisdiction. However, we are increasingly concerned that the duplicative scope of the various international reforms will create substantial regulatory conflicts that if not resolved, could impair the derivatives markets.

For example, if a U.S. swap dealer desires to enter into a swap with a non-U.S. person, or a non-U.S. swap dealer desires to enter into a swap with a U.S. person, the Proposed Guidance would require the swap dealers to comply with the relevant entity-level and transaction-level requirements.²⁸ However, the non-U.S. person and non-U.S. swap dealer will likely also be subject to regulation in their home jurisdiction. Given that we expect international derivatives regulations to be of similar scope to Title VII, if the regulations that apply in the foregoing example are not substantially identical, the result would be overlapping and duplicative regulation of the parties and the trade.

We appreciate that, as a failsafe to prevent duplicative regulation and in consideration of international comity principles, the Commission has proposed a substituted compliance process for certain activities between non-U.S. persons and: (1) non-U.S. swap dealers or MSPs, or (2) foreign branches, agencies or affiliates of U.S. swap dealers or MSPs.²⁹ Unfortunately, with limited exception,³⁰ the Proposed Guidance does not permit substituted compliance in the

²⁷ Proposed Guidance at 41216.

²⁸ *See id.* at 41219, where the Commission states that “[o]nce required to register as a swap dealer or MSP, the person becomes subject to all of the requirements imposed on swap dealers or MSPs under Title VII”.

²⁹ *See id.* at 41229, where the Commission states that it “believes that a cross-border policy that allows for flexibility in the application of the CEA, while ensuring the high level of regulation contemplated by the Dodd-Frank Act and avoiding potentially conflicting regulations is consistent with principles of international comity.”

³⁰ *See id.* at 41228, where the Commission asserts that for purposes of SDR Reporting and Large Trader Reporting, it will permit substituted compliance with respect to swaps between a non-U.S. swap dealer/MSP and a non-U.S. counterparty.

example described above. Therefore, we urge the Commission to modify the Proposed Guidance to permit all parties to seek substituted compliance, with the understanding that, if the parties or trade are not subject to comparable regulation in another jurisdiction, the Commission will require the Title VII requirements to apply.

We also respectfully request that the Commission and international regulators focus on addressing the details of how substituted compliance will work in practice. The Proposed Guidance provides some information about the Commission's comparability determinations and the ongoing coordination between the Commission and foreign supervisors;³¹ however, a number of questions remain. For example, in the case of trade execution requirements, other foreign regulators have chosen to implement such a requirement with a different scope than that of the Commission³² or they have elected not to propose a trade execution requirement.³³ Market participants need greater clarity about such cases, where foreign regulators have intentionally chosen to vary their regulatory requirements from that required by Title VII of the Dodd-Frank Act, and thus, it is not an issue of duplicative regulation. Although the Commission and other regulators will make independent comparability determinations, these processes and the results of these determinations are interconnected, therefore, a global understanding among regulators and greater transparency to market participants is important.

As a result, we strongly encourage the Commission to continue to maintain an open dialogue with the SEC and their global counterparts and actively work toward developing harmonized regulations not only that have a complementary scope, but also that have comparable and coordinated substituted compliance processes to address issues of overlapping or intentionally divergent requirements that do arise. As the Commission knows, substantive and practical differences in international regulations and their implementation may unintentionally and adversely impact the derivatives markets and hamper trading by parties that seek in good faith to comply with the various regulatory requirements applicable to them.

We recognize that it is not solely the responsibility of the Commission, the SEC or U.S. policymakers to ensure that international coordination and harmonization of OTC derivatives

³¹ See *id.* at 41232-34.

³² See Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC, dated October 20, 2011, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0656:FIN:EN:PDF>, which is proposing to require sufficiently liquid OTC derivatives to be traded on exchanges or organized trading facilities.

³³ See the Hong Kong Monetary Authority and the Securities and Futures Commission joint "Consultation paper on the proposed regulatory regime for the over-the-counter derivatives market in Hong Kong" ("**Hong Kong Consultation**"), dated October 2011, at 32, available at: <http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/openFile?refNo=11CP6>; Monetary Authority of Singapore "Consultation Paper on Proposed Regulation of OTC Derivatives", dated February 2012 ("**Singapore Consultation**"), at 23, available at: http://www.mas.gov.sg/~media/resource/publications/consult_papers/2012/13%20February%202012%20Proposed%20Regulation%20of%20OTC%20Derivatives.ashx, which each state that they have determined not to implement a trading mandate at this time.

regulation proceeds in a thoughtful and expedient manner; therefore, we have made similar comments to regulators and policymakers in others jurisdictions as well.³⁴ We want to emphasize that ensuring that regulations are consistent wherever possible, will serve both the global development of the market as well as the ability of all regulators to oversee it effectively.

We thank the Commission for the opportunity to provide comments on the Proposed Guidance. We would welcome the opportunity to discuss our views in greater detail. Please do not hesitate to contact Stuart J. Kaswell or Carlotta King of MFA at (202) 730-2600 and Jiří Król or Matthew Jones of AIMA at +44 (0) 20 7822 8380 with any questions the Commission or its staff might have regarding this letter.

Respectfully submitted,

/s/ Stuart J. Kaswell

/s/ Jiří Król

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Alternative Investment Management
Association

³⁴ See AIMA's response to CPPSS-IOSCO's "Consultation on the application of the 2004 CPSS-IOSCO Recommendations for Central Counterparties to OTC derivatives CCPs and considerations for trade repositories in OTC derivatives markets" dated 24 June 2010: <http://www.aima.org/download.cfm/docid/2CED9CAC-FBDE-4D20-9C7B0800A3D3334D>; MFA's "Response to Proposed Regulation of OTC Derivatives, Central Counterparties and Trade Repositories", dated November 11, 2010, available at <https://www.managedfunds.org/wp-content/uploads/2011/11/Final-MFA-White-Paper-EC-Derivatives-Proposed-Regulation.pdf>; AIMA's submission to the European Commission and U.S. Treasury concerning extra-territorial effects in the European Union and U.S. regulation of derivatives dated 5 July 2011: http://www.aima.org/objects_store/joint_ta_letter_re_extra_territoriality_-_5_jul_2011.pdf; MFA comment letter on the Hong Kong Consultation dated November 29, 2011, available at <https://www.managedfunds.org/wp-content/uploads/2011/11/Hong-Kong-OTC-Derivatives-Regulatory-Regime-Final-MFA-Letter.pdf>; AIMA's response on the Hong Kong Consultation Paper dated 7 December 2011, available at: http://www.aima.org/objects_store/aima_response_to_sfc_consultation_on_otc_derivatives-7_december_2011.pdf; AIMA's response on the Singapore Consultation dated 26 March 2012, available at http://www.aima.org/objects_store/aima_response_to_mas_consultation_on_otc_derivatives_reform.pdf; MFA comment letter on the Singapore Consultation dated March 26, 2012, available at: <https://www.managedfunds.org/wp-content/uploads/2012/03/MAS-OTC-Derivatives-Consultation-Paper-Final-MFA-Letter-3-26-2012.pdf>.

Appendix A

Rule 902(k)(1) of Regulation S under the Securities Act defines “U.S. person” as:

- (i) Any natural person resident in the United States;
- (ii) Any partnership or corporation organized or incorporated under the laws of the United States;
- (iii) Any estate of which any executor or administrator is a U.S. person;
- (iv) Any trust of which any trustee is a U.S. person;
- (v) Any agency or branch of a foreign entity located in the United States;
- (vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;
- (vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and
- (viii) Any partnership or corporation if:
 - (A) Organized or incorporated under the laws of any foreign jurisdiction; and
 - (B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the [Securities] Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in §230.501(a)) who are not natural persons, estates or trusts.

Rule 902(k)(2) of Regulation S under the Securities Act further clarifies that the following are not “U.S. persons”:

- (i) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;
- (ii) Any estate of which any professional fiduciary acting as executor or administrator is a U.S. person if:
 - (A) 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
 - (B) The estate is governed by foreign law;

(iii) Any trust of which any professional fiduciary acting as trustee is a U.S. person, if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

(iv) An employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country;

(v) Any agency or branch of a U.S. person located outside the United States if:

(A) The agency or branch operates for valid business reasons; and

(B) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located; and

(vi) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.