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August 28, 2012

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

COMMENT

**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) and the Proposed Exemptive Order Regarding Compliance with Certain Swap Regulations (RIN 3038-AD85)**

Dear Mr. Stawick:

Allen & Overy LLP (**Allen & Overy**) is a global law firm that specializes in advising international financial institutions on their cross-border activities. Allen & Overy appreciates the opportunity to provide comment on the Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (the **Proposed Guidance**)<sup>1</sup> and the Proposed Exemptive Order Regarding Compliance with Certain Swap Regulations (the **Proposed Exemptive Order**)<sup>2</sup> issued by the Commodity Futures Trading Commission (the **CFTC**). Capitalized terms used herein but not otherwise defined shall have the meaning given in the Proposed Guidance or the Proposed Exemptive Order.

Allen & Overy welcomes the efforts by the CFTC in creating the first detailed framework that any regulator around the world has offered as to how to implement the G20 derivatives reforms across jurisdictional borders.

<sup>1</sup> Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214 (July 12, 2012), available at: <http://cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf>.

<sup>2</sup> Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 Fed. Reg. 41110 (July 12, 2012), available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16498a.pdf>.

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However, as a firm with one of the largest derivatives practices globally, we have concerns about the uncertainties, gaps and unintended consequences of the CFTC's Proposed Guidance. We support the views expressed in the Institute of International Bankers comment letter to the CFTC dated August 9, 2012, the International Swaps and Derivatives Association, Inc. comment letter to the CFTC dated August 10, 2012 and the Securities Industry and Financial Markets Association (SIFMA) and Global Financial Markets Association comment letters to the CFTC dated August 13, 2012. Our comments should be read in harmony with the previously submitted and future comments of other industry groups including those represented by our firm. This letter is intended to supplement those letters by offering technical and drafting comments on the Proposed Guidance and the Proposed Exemptive Order that are not, to our knowledge, made elsewhere.

## 1. Registration issues

### 1.1 Registration status of U.S. and non-U.S. agents of non-U.S. swap dealers

We echo SIFMA's request in its letter to the CFTC dated August 27, 2012 that the CFTC 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. However, we request that such clarification not be limited to U.S. agents of non-U.S. swap dealers, but instead ask that the CFTC clarify that any person (regardless of whether it is a U.S. or non-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 (assuming it does not itself meet the definition of swap dealer).

The Proposed Guidance clearly provides that when a foreign affiliate or subsidiary of a U.S. person operates as a disclosed agent for a U.S. central booking entity, only the U.S. booking entity would be required to register as a swap dealer unless the agent itself meets the definition of swap dealer.<sup>3</sup> Although the Proposed Guidance seems to apply a reciprocal rule in requiring non-U.S. swap dealers acting through U.S. agents to register as swap dealers, the Proposed Guidance does not clearly provide that any affiliate or subsidiary acting as such non-U.S. swap dealer's agent will not be required to register as a result of the disclosed agency relationship.<sup>4</sup>

### 1.2 Registration status of foreign affiliates and subsidiaries

We request that the CFTC clarify that the SDR Reporting requirement is not applicable to foreign affiliates or subsidiaries of a U.S. swap dealer if such foreign affiliates or subsidiaries themselves are not required to register with the CFTC.

Pursuant to the SDR Reporting requirement, a non-U.S. non-registrant would only be the reporting party if its counterparty to the swap is also a non-U.S. non-registrant.<sup>5</sup> The Proposed Guidance confirms, however, that the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the **Dodd-Frank Act**)<sup>6</sup> do not apply to swaps between two non-U.S. non-registrants, the exception being Large Trader Reporting.<sup>7</sup> We therefore assume that where the Proposed Guidance provides that "With respect to SDR Reporting, the Commission proposes to interpret section 2(i) so as to require

<sup>3</sup> Proposed Guidance at 41231.

<sup>4</sup> See *id.* at 41222 ("even 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." (emphasis added)).

<sup>5</sup> 17 C.F.R. § 45.8 and 17 C.F.R. § 46.5.

<sup>6</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (July 21, 2010).

<sup>7</sup> Proposed Guidance at 41234 ("Conversely, where a non-U.S. person enters into a swap with another non-U.S. person outside the United States, and where neither counterparty is required to register as a swap dealer or MSP, the Commission would not apply the Dodd-Frank Act requirements to such swaps."); *id.* n.139.

foreign affiliates or subsidiaries of a U.S. swap dealer to comply with the SDR Reporting requirement",<sup>8</sup> the CFTC intended only to include those foreign affiliates or subsidiaries of a U.S. swap dealer that are themselves required to become CFTC registrants.

In light of this confusion, it would be helpful if the CFTC would also clarify that for purposes of determining which Dodd-Frank Act requirements, if any, a non-U.S. entity has to comply with, it is irrelevant whether such non-U.S. entity is an affiliate or subsidiary of a U.S. entity.

## **2. Application of the Dodd-Frank Act requirements to non-U.S. non-registrants**

We encourage the CFTC to clarify that SDR Reporting and Swap Data Recordkeeping obligations do not apply to non-U.S. non-registrants regardless of whether the non-U.S. person they are facing is a registrant.

As set out in Section 1.2 above, SDR Reporting will not impose any reporting obligations on a non-U.S. non-registrant, as there are no circumstances where the non-U.S. non-registrant will be the reporting counterparty.

However, the position is less clear, for example, with respect to certain aspects of Swap Data Recordkeeping. The obligations pursuant to §§ 23.201 and 23.203 present less of a concern as they only apply to swap dealers and major swap participants. The recordkeeping provisions of §§ 45.2 and 46.2, however, do apply to non-registrants and therefore the CFTC should clarify that those provisions do not apply to non-U.S. non-registrants when facing a non-U.S. person, regardless of whether such non-U.S. person is a registrant.

The Proposed Guidance also suggests that with respect to a non-U.S. non-registrant's obligation to fulfill the SDR Reporting and Swap Data Recordkeeping requirements, such non-U.S. non-registrant can avail itself of substituted compliance.<sup>9</sup> However, substituted compliance would only be relevant for a registrant.<sup>10</sup> We request that the CFTC clarify this point in the Proposed Guidance.

## **3. Uncertainty regarding the distinction between Entity-Level Requirements and Transaction-Level Requirements**

We understand that a number of letters to the CFTC have commented on the appropriateness of the distinction between certain Entity-Level Requirements and Transaction-Level Requirements. In considering these distinctions, we encourage the CFTC to focus on and clarify the unintended consequences.

For example, when certain Entity-Level requirements (such as those related to Swap Data Recordkeeping) are referred to in Transaction-Level Requirements (such as the External Business Conduct Standards),<sup>11</sup> registrants will not know whether they are able to avail themselves of substituted compliance or exemptive relief in respect of those aspects of the Entity-Level Requirements, when it would otherwise have been available, which may defeat the intended consequences of the Proposed Guidance or Proposed Exemptive Order, as applicable.

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<sup>8</sup> *Id.* at 41231.

<sup>9</sup> *Id.* at 41235.

<sup>10</sup> See Proposed Exemptive Order at 41112-41113.

<sup>11</sup> See 17 C.F.R. § 23.402(g), as implemented by Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (February 17, 2012), available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-1244a.pdf>.

We would be pleased to provide further information or assistance at the request of the Commission or its staff. Please do not hesitate to contact John Williams (212-756-1131) or Deborah North (212-610-6408) at Allen & Overy if you should have any questions with regard to the foregoing.

Respectfully submitted,

*Allen & Overy LLP*