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February 6, 2013

Ms. Melissa Jurgens
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: *Further Proposed Guidance regarding Compliance with Certain Swap Regulations (RIN 3038–AD85)*

Dear Ms. Jurgens:

The Investment Company Institute ("ICI")[1] and ICI Global[2] appreciate the opportunity to provide comments on the further guidance regarding compliance with certain swap provisions proposed by the Commodity Futures Trading Commission ("CFTC" or "Commission").[3] The Commission has not adopted final guidance on the cross-border application of the swaps provisions and is continuing to consider several approaches. In this regard, the CFTC is seeking comment on two areas – the definition of "U.S. person" and aggregation of affiliates' swaps for purposes of the de minimis test. In this letter, ICI and ICI Global focus on the Commission's proposed revisions to the

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $14.2 trillion and serve over 90 million shareholders.

[2] ICI Global is the global association of regulated funds publicly offered to investors in leading jurisdictions worldwide. ICI Global seeks to advance the common interests and promote public understanding of global investment funds, their managers, and investors. Members of ICI Global manage total assets in excess of US $1 trillion.

[3] *See Further Proposed Guidance regarding Compliance with Certain Swap Regulations,* 78 FR 909 (Jan. 7, 2013), *available at* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-31734a.pdf ("Further Proposed Guidance"). In conjunction with the Further Proposed Guidance, the CFTC issued a final order granting market participants temporary conditional relief from certain provisions of the Commodity Exchange Act ("CEA"). *See Final Exemptive Order regarding Compliance with Certain Swap Regulations*, 78 FR 858 (Jan. 7, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-01-07/pdf/2012-31736.pdf ("Final Order"). *See also Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act*, 77 FR 41214, *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-16496.pdf (July 12, 2012) ("Proposed Guidance").

definition of "U.S. person." Although we appreciate the Commission's efforts to address some of the concerns we expressed with the definition in the Proposed Guidance, we believe the definition needs to be further modified as discussed in detail below.[4]

U.S. Person Definition

The CFTC is proposing alternatives for two aspects of the definition of the term "U.S. person" in the Proposed Guidance: the first – (ii)(B) – relates to U.S. owners that are responsible for the liabilities of a non-U.S. entity; and the second – (iv) – relates to commodity pools and funds with majority U.S. ownership.

U.S. Owners Responsible for Liabilities of Non-U.S. Entity

The CFTC proposes to limit item (ii)(B) of the definition to a legal entity that is directly or indirectly majority-owned by one or more natural persons or a legal entity that meets prong (i) or (ii) of the definition of the term "U.S. person" in the Final Order,[5] in which such U.S. person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity. We support this proposed clarification. The revisions proposed by the CFTC confirm our view that funds would be excluded under item (ii)(B) of the definition of U.S. person because the liabilities of fund investors are limited to their investment in the fund.[6] Moreover, we believe this proposed definition would be superfluous and unnecessary with respect to commodity pools, pooled accounts, and collective investment vehicles because item (iv) of the proposed definition would specifically address these entities if they are majority-owned by U.S. persons.

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[4] *See* Letter from Karrie McMillian, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to David Stawick, Secretary, CFTC, dated Aug. 23, 2012 ("August 2012 ICI and ICI Global Letter").

[5] The Final Order defines a "U.S. person" as any person identified by the following five criteria: (i) A natural person who is a resident of the United States; (ii) A 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 that is (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or (B) effective as of April 1, 2013 for all such entities other than funds or collective investment vehicles, having its principal place of business in the United States; (iii) A pension plan for the employees, officers or principals of a legal entity described in (ii) above, unless the pension plan is primarily for foreign employees of such entity; (iv) An estate of a decedent who was a resident of the United States at the time of death, or a trust governed by the laws of a state or other jurisdiction in the United States if a court within the United States is able to exercise primary supervision over the administration of the trust; or (v) An individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in (i) through (iv) above. *See Final Order*, *supra* note 3, at 863.

[6] In the August 2012 ICI and ICI Global Letter, we stated that, although it was not clear what the CFTC meant by owners who are "responsible for the liabilities" of such entities, we were of the view that non-U.S. funds would not be captured by this definition because liabilities of investors in funds are limited to their investment in the fund.

Commodity Pools and Collective Investment Vehicles with Majority U.S. Ownership

The CFTC also is proposing an alternative under which any commodity pool, pooled account, investment fund or other collective investment vehicle would be deemed a U.S. person if it is (directly or indirectly) majority-owned by one or more natural persons or legal entities that meet prong (i) or (ii) of the definition of the term "U.S. person" in the Final Order.[7]

Moreover, the alternative would clarify that a pool, fund or other collective investment vehicle that is publicly-traded will be deemed a U.S. person only if it is offered, directly or indirectly, to U.S. persons.[8] According to the CFTC, it is proposing this clarification to address concerns expressed by commenters (including ICI) that ownership verification is particularly difficult for pools, funds and other collective investment vehicles that are publicly-traded. Although this revised proposed definition would be helpful in excluding funds that are traded on a secondary market, it does not fully address our concerns expressed in the August 2012 ICI and ICI Global Letter. In particular, the wording of the proposed alternative may not exclude from the definition non-U.S. regulated funds that are publicly-offered only to non-U.S. persons but do not "trade" in a secondary market.

As we have discussed previously, these non-U.S. regulated funds that are not publicly-traded in the secondary market also cannot verify (for purposes of determining majority ownership) whether fund shareholders are U.S. persons even though their shares are not offered to U.S. persons. Ownership verification is equally difficult for many "publicly-offered" funds as for "publicly-traded" funds because of the manner in which many regulated fund shares are sold and recorded on the fund books. Investors in non-U.S. regulated funds that are publicly-offered only to non-U.S. persons typically purchase shares through intermediaries (not directly from the fund), and these shares are registered and held in nominee/street name accounts by the recordkeeper.[9] When shares are held through these types of omnibus accounts, the fund manager/operator (and its administrator/recordkeeper) typically does not have information regarding the underlying investors who are the customers of the intermediary.[10] In

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[7] The alternative also would include a modification to clarify that it applies regardless of whether the collective investment vehicle is organized or incorporated in the United States.

[8] The alternative prong (iv) would be as follows: "A commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (ii) and that is directly or indirectly majority-owned by one or more persons described in prong (i) or (ii), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly-traded but not offered, directly or indirectly, to U.S. persons."

[9] *See* OECD, *The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles* (April 2010).

[10] Omnibus accounts are held on the books of a fund in the name of the financial intermediary (*e.g.,* a financial institution or insurance company), acting on behalf of its customers. An omnibus account includes the shares of multiple investors (sometimes numbering in the thousands) and represents the aggregate share balance of all the subaccounts for these investors. Omnibus accounts also include intermediary-controlled individual accounts in which the fund has no relationship or contact with the customer, as well as other institutional customers for which the fund lacks direct knowledge of the beneficial owners of the shares.

fact, there may be multiple layers of omnibus intermediaries through which the ultimate investors may hold shares.[11] Moreover, certain jurisdictions may prohibit disclosure by intermediaries of beneficial owner information such as, for example, personal addresses that may constitute "personal data," under EU data protection laws. For these reasons, a fund manager/operator (and its administrator/recordkeeper) would not be able to verify whether underlying investors are U.S. persons in a non-U.S. fund that is publicly-offered only to non-U.S persons.

Therefore, we request that the Commission add in the definition "publicly-offered or" before "publicly-traded" so that a pool, fund or other collective investment vehicle will not be deemed a U.S. person if it is publicly-offered or publicly-traded but not offered, directly or indirectly, to U.S. persons.[12] Alternatively, the Commission could remove "publicly-traded" to exclude a pool, fund or other collective investment vehicle that is not offered by the fund or its agents to U.S. persons from the definition of "U.S. person." We believe these changes would be consistent with the CFTC's intention to "capture collective investment vehicles that are created for the purpose of pooling assets from U.S. investors and channeling these assets to trade or invest in line with the objectives of the U.S. investors, regardless of the place of the vehicle's organization or incorporation."[13] The Commission appears to have intended to exclude funds not targeting U.S. persons from the definition of "U.S. person," but limiting the scope of funds to those that are "publicly-traded" would not achieve completely that goal.

As we discussed in the August 2012 ICI and ICI Global Letter, we believe the definition should look to whether the commodity pool, pooled account, or collective investment vehicle is attempting to target the U.S. market or U.S. investors and should appropriately be subject to U.S. laws. By focusing on the directed activities of the fund and its manager/operator and not activities that are beyond the control of the fund or its fund manager/operator, we believe the CFTC could readily determine those funds that have a significant connection to the United States or to U.S. commerce and should be subject to the CEA.

Moreover, in the August 2012 ICI and ICI Global Letter, we noted that a definition focusing on the "offer to U.S. persons" would be workable and that systems are already in place to comply with the standard.[14] This approach also would provide certainty to counterparties at the outset of a swap

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[11] An intermediary's omnibus account with the fund may include other omnibus accounts for which the intermediary provides services and keeps records. The fund manager/operator (and its administrator/recordkeeper) would not have transparency or information about the beneficial investors that are customers of intermediaries held in omnibus accounts.

[12] We believe the CFTC's phrase "offered, directly or indirectly," in the exclusion to the definition is intended to prevent an entity attempting to circumvent the conditions of the definition. We assume that this phrase is not intended to preclude the use of intermediaries as described above in circumstances where funds have compliance policies and procedures to avoid making offers to U.S. persons.

[13] *See Proposed Further Guidance*, *supra* note 3, at 913.

[14] As noted in the August 2012 ICI and ICI Global Letter, Regulation S could provide helpful guidance in analyzing whether a commodity pool, pooled account, or collective investment vehicle makes an "offer" to a "U.S. person." Regulation

transaction regarding which laws would govern. Therefore, both counterparties would be able to plan for, and address, the consequences of the "U.S. person" determination for their swaps transactions. For example, under our recommended definition, a non-U.S. fund that fits within the definition of U.S. person and its counterparties would understand that any swaps transactions entered into would be subject to CEA requirements as required by the CFTC. If, however, the determination of a "U.S. person" could evolve over time because of changes in the investor base that were beyond the control of a fund or its manager/operator, the counterparties would have to tackle the difficult issue of how swaps that were entered into before the fund became a "U.S. person" would now have to comply with CEA requirements.

Other Funds of Registered or Required to be Registered Commodity Pool Operators

We also remain concerned about the aspect of the Proposed Guidance that would deem any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator ("CPO") under the CEA to be a "U.S. person."[15] As proposed, this prong of the "U.S. person" definition could include a non-U.S. fund that does not itself trigger its operator's registration as a CPO. If the CFTC takes this approach, these non-U.S. funds could be considered "U.S. persons" solely because they are operated by a registered CPO, which had to register as a CPO as a result of its commodity interest trading activities apart from those funds.

We do not believe the CFTC intended such a broad and unnecessary extension of its jurisdiction. We, therefore, urge the CFTC to clarify that a U.S. person would not include a non-U.S. fund that would not otherwise be deemed a U.S. person solely because it is operated by a registered CPO. In fact, we believe this provision is unnecessary given the other prong of the definition that addresses commodity pools, pooled accounts, and collective investment vehicles. We recommend that the CFTC remove this prong of the definition.

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S addresses when a securities "offering" that takes place outside of the United States would not have to comply with the registration requirements under the Securities Act of 1933. Regulation S looks at the totality of a non-U.S. fund's offering, including whether the non-U.S. fund directly or indirectly is actively seeking to market its securities to U.S. investors, to determine whether the offering occurs outside the United States. Global fund managers have long structured their activities to reflect the requirements of Regulation S to remain offshore and have policies and procedures in place to avoid making public offers to U.S. persons. Non-U.S. regulated funds very commonly use the definition of "U.S. person" under Regulation S in their offering documents and procedures to prevent public offers and sales to U.S. persons.

[15] *See* August 2012 ICI and ICI Global Letter, *supra* note 4.

We recognize the Commission's efforts to work with international regulators regarding the cross-border application of derivatives regulations to avoid imposing, at best, duplicative and, at worst, conflicting regulatory requirements on counterparties. We also appreciate the Commission's further proposed guidance regarding which funds should be considered U.S. persons. We believe, however, that further modifications to the proposed revisions are necessary to achieve the Commission's goal of regulating activities that have a "direct and significant" connection with the United States, which is required under the Dodd-Frank Act. If you have any questions on our comment letter, please feel free to contact the undersigned or Giles Swan at 011-44-203-009-3103, Sarah Bessin at 202-326-5835 or Jennifer Choi at 202-326-5876.

Sincerely,

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