February 6, 2013

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

Re: Comment Letter on the Further Proposed Guidance Regarding Compliance with Certain Swap Regulations (RIN 3038-AD85)

Dear Ms. Jurgens:

The Securities Industry and Financial Markets Association ("**SIFMA**"), The Clearing House Association ("**The Clearing House**") and The Financial Services Roundtable ("**The Roundtable**")[1] (together, the "**Associations**") appreciate the Commodity Futures Trading Commission's (the "**Commission's**") recent efforts to clarify the scope of its swap regulatory regime and to phase in compliance with that regime, through the Commission's Final Exemptive Order Regarding Compliance with Certain Swap Regulations (the "**Final Exemptive Order**").[2] We also appreciate the Commission's commitment to ongoing dialogue with market participants on this topic, as evidenced by the Commission's Further Proposed Guidance Regarding Compliance with Certain Swap Regulations (the "**Further Proposed Guidance**").[3]

In this letter, we attempt to contribute to this ongoing dialogue in two ways. First, in Annex A, we provide detailed commentary on the Commission's specific proposals in

[1] Further information about the Associations is available in Annex C.

[2] Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013) (to be codified at 17 C.F.R. Ch. I).

[3] Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013).

the Further Proposed Guidance. In summary, we do not support the proposed clarifications to two prongs of the proposed U.S. person definition. We believe that both the concept of indirect majority ownership and the concept of "bearing unlimited responsibility" for obligations and liabilities are ambiguous and, even if clarified, create significant and unachievable compliance burdens in determining a party's U.S.-person status. In addition, we do not support the proposed alternative interpretation of the aggregation requirement in the Further Proposed Guidance, which requires aggregation of swap transactions of non-U.S. persons with U.S. affiliates—a significant departure from the aggregation requirements under the Final Exemptive Order and the Commission's Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions (the "**Proposed Interpretive Guidance**").[4] We also comment on a number of questions raised by the Commission as part of the Further Proposed Guidance.

Second, in Annex B, we provide an update to SIFMA's original comments[5] on the Proposed Interpretive Guidance in light of the positive steps that the Commission has taken in the form of the Final Exemptive Order and no-action relief since we provided those comments.[6] In Annex B, we describe where the Commission's actions have largely addressed our concerns. We also make further recommendations where, even in light of treatment of the relevant topic in the Final Exemptive Order or no-action relief, problems

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

[5] *See* letter submitted by SIFMA to the Commodity Futures Trading Commission on the subject of Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57) (Aug. 27, 2012) (available at http://www.sifma.org/issues/item.aspx?id=8589940053) (the "**August 27th, 2012 Letter**"); *see also* 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, 2012 Letter**").

Comments submitted by The Clearing House with respect to the Exemptive Order Regarding Delayed Compliance with Certain Swap Regulations (Aug. 13, 2012) are available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58366&SearchText=the%20clearing%20house. *See also* comments submitted by the Clearing House regarding Proposed Interpretive Guidance and Policy Statement on Cross-Border Application of Certain swaps Provisions of the Commodity Exchange Act (Aug. 27, 2012) (available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58457&SearchText=the%20clearing%20house).

Comments submitted by The Roundtable regarding CFTC July 12 Exemptive Order Regarding Compliance With Certain Swap Regulations (Aug. 13, 2012) are available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58368&SearchText=financial%20services. *See also* comments submitted by the Roundtable regarding Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (Aug. 27, 2012) (available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58545&SearchText=financial%20services).

[6] Please note that Annex B is an update to SIFMA's original comments, not those of all the Associations.

remain. Finally, for those topics that the Commission has not addressed since the Proposed Interpretive Guidance—such as substituted compliance, the emerging market exemption and the reclassification of Entity-Level requirements to Transaction-Level requirements—we reiterate briefly our previous comments.

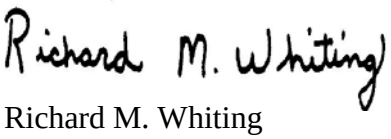
* * *

We thank the Commission for its consideration of our comments. Please feel free to contact the Associations should you wish to discuss this letter.

Respectfully submitted,

Kenneth E. Bentsen, Jr.
Executive Vice President
Public Policy and Advocacy
SIFMA

Alex Radetsky
Vice President and Associate General Counsel
The Clearing House



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Financial Services Roundtable

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- In response to the Commission's question, we believe that the Commission should not apply the proposed alternative aggregation requirement, or any other aggregation requirement, differently to a non-U.S. person based on whether the non-U.S. person is guaranteed by a U.S. person. More generally, we believe that a guarantee by a U.S. person is not a sufficient nexus for jurisdiction under Section 2(i) of the Commodity Exchange Act.

B. Definition of "U.S. Person"

- The final definition of "U.S. person" must be simple, objective and determinable.

- The U.S. person definition should not look to an entity's principal place of business.

- The Commission should seek to decrease regulatory uncertainty by consolidating all elements relevant to the U.S.-person status of any specific type of legal entity to one prong of the definition. The currently proposed definition is particularly problematic in this regard with respect to funds.

- The Commission should not adopt a U.S. person definition that includes a prong similar to prong (iv) of the definition in the Further Proposed Guidance.

- If the Commission chooses to include an ownership standard in the definition of "U.S. person," it should require direct majority ownership.

- The final U.S. person definition should not adopt proposed prong (ii)(B) from the Further Proposed Guidance, which would look to the ambiguous standard of whether an entity is owned by a U.S. person that "bears unlimited responsibility for the obligations and liabilities of the legal entity."

I. Issues Presented by Further Proposed Guidance

A. Aggregation of Affiliates' Swaps for Purposes of the *De Minimis* Test

Recommendation: The Commission should not adopt its proposed alternative aggregation requirement.

In the Further Proposed Guidance, the Commission proposes an alternative aggregation requirement under which a non-U.S. person, in determining whether its swap dealing transactions exceed the *de minimis* threshold, would include the aggregate notional value of swap dealing transactions entered into by all of its affiliates under common control (*i.e.*, both U.S. and non-U.S. affiliates), but not the aggregate notional value of swap dealing transactions of any non-U.S. affiliate under common control that is registered as a swap dealer.[7]

We believe that the Commission should not adopt this proposal. Neither the Proposed Interpretive Guidance[8] nor the Final Exemptive Order[9] requires non-U.S. persons to include the swap dealing transactions of any of its U.S. affiliates under common control in determining whether a non-U.S. person is engaged in more than a *de minimis* level of swap dealing.[10] As stated in the Proposed Interpretive Guidance, "since the focus is on the level of activity conducted by non-U.S. persons, swap dealing transactions of affiliated U.S. persons should not be included."[11] We see no reason why the Commission should change its view on this topic.

More generally, as we have commented in the past,[12] we do not believe that aggregation of swap activities across affiliates should be required. Most importantly, we do not believe that any person, whether U.S. or non-U.S., should be required to aggregate swap dealing activity with registered swap dealer affiliates, whether the swap dealer is a U.S. person or a non-U.S. person.[13] If entities are required to aggregate swap activities

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[7] Further Proposed Guidance at 911. In addition, under this version of aggregation, a non-U.S. person would not be required to include the aggregate notional value of swap dealing transactions of any of its non-U.S. affiliates under common control where the counterparty to such affiliate is also a non-U.S. person.

[8] Proposed Interpretive Guidance at 41,220.

[9] Final Exemptive Order at 869.

[10] For the purposes of the Final Exemptive Order, this relief is available only where the non-U.S. person is engaged in swap dealing activities with U.S. persons as of December 21, 2012. Final Exemptive Order at 868.

[11] Proposed Interpretive Guidance at 41,220.

[12] August 27th, 2012 Letter at A-26.

[13] We note that the Commission staff has already deemed it appropriate to provide non-aggregation relief to U.S. persons in at least one context. *See* CFTC Letter No. 12-71, No-Action Relief: U.S. Bank Wholly Owned by Foreign Entity May Calculate De Minimis Threshold Without Including Activity From Its Foreign Affiliates (Dec. 31, 2012), available at
(…continued)

with swap dealer affiliates, the determination that any single entity in the group of affiliates is required to register effectively operates as a mandate that *all* affiliates register. This would have the effect of requiring a number of smaller entities to register, even if they operate completely independently of their larger affiliate entities, solely by virtue of the affiliation. This result seems unnecessarily burdensome for these smaller entities. In addition, for non-U.S. entities, this 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 U.S. commerce.

We understand that the Commission's aggregation requirements are generally meant to prevent market participants from distributing swap dealing activity among affiliates to avoid registration. We believe that it would be very burdensome and costly for a market participant to do this as a way of avoiding registration. Moving swap dealing business to a new affiliate, or creating a new affiliate to undertake swap business, requires significant legal, technological and operational investment. In addition, fragmenting swap business among affiliates may make it harder for a multinational institution to manage risk efficiently. Instead, to the extent affiliates are created globally, their creation is often a function of requirements under local laws or business practices and is not ideal for the institution itself. As a result, while we understand the Commission's concern that financial institutions will distribute swaps business among affiliates, we believe it is unlikely in practice and that a wide-ranging aggregation requirement will cause more harm than good. If, in a rare and unique circumstance, the Commission believes that a market participant is evasively distributing swap dealing activity to avoid registration, the Commission can use its anti-evasion authority.

For these reasons, we do not believe that a person should be required to aggregate the swap dealing activity of its affiliates to determine the applicability of Title VII to that entity's swap dealing activities.[14] As discussed below,[15] if the Commission declines our request to remove the aggregation requirement altogether, we urge the Commission to grant permanently to both U.S. and non-U.S. persons at least the relief granted in the Final Exemptive Order, with certain modifications.

(continued…)

http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-71.pdf. As stated above, we believe that the Final Interpretive Guidance should provide relief from aggregation for both U.S. and non-U.S. entities with their U.S. and non-U.S. swap dealer affiliates.

[14] *See* Annex B at B-11.

[15] *Id.* at B-12.

Recommendation: In response to the Commission's question, we believe that the Commission should not apply the proposed alternative aggregation requirement, or any other aggregation requirement, differently to a non-U.S. person based on whether the non-U.S. person is guaranteed by a U.S. person. More generally, we believe that a guarantee by a U.S. person is not a sufficient nexus for jurisdiction under Section 2(i) of the Commodity Exchange Act.

In proposing the alternative aggregation requirement in the Further Proposed Guidance, the Commission seeks comment on whether a guarantee of a non-U.S. person by a U.S. person should alter the aggregation rules for that non-U.S. person.[16] As we have commented previously,[17] we do not believe that a guarantee by a U.S. person should alter the swap dealer *de minimis* calculation. The connection between a non-U.S. person and its U.S. person guarantor creates too tenuous a nexus to justify differential treatment, including registration, on the basis of this relationship alone.

More generally, we believe that a guarantee by a U.S. person is not a sufficient nexus for jurisdiction under Section 2(i) of the Commodity Exchange Act (the "**CEA**"). Performance of a swap may be guaranteed for a number of reasons that should not necessarily implicate U.S. jurisdiction. For example, guarantees are used to satisfy both U.S. and foreign regulatory requirements, manage capital treatment across an entity and 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 importation of risk to the United States through the guarantee and, therefore, no nexus for purposes of Section 2(i) of the CEA. To the extent that the Commission is concerned about the importation of risk into the United States, we believe that this concern is appropriately addressed, without the need to assert jurisdiction under Section 2(i) of the CEA, where the guarantor is subject to prudential oversight, such as where the guarantor is a prudentially regulated entity or a registered swap dealer. To the extent the Commission believes that guarantees are being used to evade registration requirements, the Commission should use its anti-evasion authority under the CEA.

B. Definition of "U.S. Person"

Recommendation: The final definition of "U.S. person" must be simple, objective and determinable.

The definition of "U.S. person" is the lynchpin of the Commission's cross-border analysis. The extent to which the Commission's swap-related rules apply to a person or transaction depends on the U.S.-person status of that person or of the counterparties to that transaction. As a result, it is critical that a person be able to look to a simple, objective and determinable U.S. person definition to determine its status and the status of

[16] Further Proposed Guidance at 912.

[17] August 27th, 2012 Letter at A-29.

its counterparties. 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.

Unfortunately, we believe that the definitions of "U.S. person" that the Commission has proposed to this point are ambiguous and unworkably broad and will lead to significant legal uncertainty. Market participants will be unable to determine whether they, or their counterparties, are "U.S. persons" and, as a result, which swap-related rules apply to their transactions. To avoid this uncertainty, market participants will move swap activity away from institutions with any relationship to the United States, even if that relationship is not sufficient to create a jurisdictional nexus under the CEA. This pattern of behavior to avoid legal uncertainty was evidenced prior to the October 12, 2012 and December 31, 2012 dates on which various Commission requirements came into effect, in the wake of significant uncertainty as to their application. A complex, overbroad and vague permanent U.S. person definition has the potential to be even more harmful due to its permanence. In the sections below, we provide detailed recommendations on ways the Commission can fix the problems with the currently proposed definition.

Given the importance of the Commission's cross-border analysis, we believe that any final cross-border guidance should be structured as a formal rulemaking subject to a careful cost-benefit analysis. In particular, this cost-benefit analysis should appropriately weigh any costs imposed on market participants as a result of implementing an overly broad and complex U.S. person definition against the perceived benefits associated with regulating these entities. As described above, any definition of "U.S. person" that is unnecessarily vague and difficult to interpret will impose significant compliance burdens on market participants.

Recommendation: The U.S. person definition should not look to an entity's principal place of business.

We appreciate the Commission's consideration of our concerns regarding the inclusion of a "principal place of business" prong in the definition of "U.S. person." In particular, due to the problems we have previously described, we appreciate that the "principal place of business" prong of the U.S. person definition in the Final Exemptive Order will not be effective until April 1, 2013 and, even then, will not apply to funds or collective investment vehicles.[18]

We continue to believe, however, that an entity's principal place of business should not be considered in determining that entity's U.S.-person status. As stated by the Commission, the term "U.S. person" is defined "by reference to the extent to which swap activities or transactions involving one or more such person have the relevant [direct and significant] effect on U.S. commerce."[19] We do not believe that the "principal place of

[18] Final Exemptive Order at 864.

[19] Proposed Interpretive Guidance at 41,218.

business" prong satisfies this jurisdictional nexus, but do believe that it will require significant information collection efforts with the potential for substantial operational difficulty.

While we are grateful to the Commission for phasing in prong (ii)(B) of the definition in the Final Exemptive Order (the "**Exemptive Order Definition**") to allow market participants sufficient time to implement this element, we believe that it is problematic to alter the Exemptive Order Definition during the limited pendency of the Exemptive Order. This could lead to further confusion among market participants, particularly if the final definition of "U.S. person" (the "**Final Definition**") differs from the Exemptive Order Definition, thereby requiring market participants to amend their information gathering and reporting procedures twice in less than a year. We would therefore urge the Commission to remove the "principal place of business" prong prior to its effectiveness in April.

Finally, while the Exemptive Order Definition does not apply the "principal place of business" prong of the U.S. person definition to funds or collective investment vehicles, those entities are not carved out of proposed alternative prong (ii) in the Further Proposed Guidance. As the Commission does not describe this omission in detail, it is unclear whether it is purposeful or accidental.

Recommendation: The Commission should seek to decrease regulatory uncertainty by consolidating all elements relevant to the U.S.-person status of any specific type of legal entity to one prong of the definition. The currently proposed definition is particularly problematic in this regard with respect to funds.

The U.S. person definition in the Proposed Interpretive Guidance and the modifications suggested in the Further Proposed Guidance introduce significant regulatory uncertainty for funds that could be avoided by using consistent terminology within the definition and by consolidating the fund-related provisions into a single prong of the definition.

The U.S. person definition in the Proposed Interpretive Guidance includes three prongs that may implicate funds. Specifically:

- prong (ii) includes "any … **fund, or any form of enterprise similar to any of the foregoing**, in each case that is either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States (legal entity) 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";

- prong (iv) includes "**any commodity pool, pooled account, or collective investment vehicle** (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person(s)"; and

- prong (v) includes "**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."

The Final Exemptive Order definition does not include prongs (iv) or (v), and includes a modified version of prong (ii) that explicitly carves out funds and collective investment vehicles from the "principal place of business" prong that becomes effective on April 1, 2013.

The Further Proposed Guidance includes proposed revisions to two of the U.S. person definition prongs that would implicate funds:

- prong (ii) includes "any… **fund or any form of enterprise similar to any of the foregoing**, in each case that is either (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States or (B) directly or indirectly majority-owned by one or more persons described in prong (i) or (ii)(A) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity (other than a limited liability company or limited liability partnership where partners have limited liability)"; and

- prong (iv) includes "**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."

The result is a confusing patchwork of unclear language, with many ambiguities, that funds must work through to determine whether they are "U.S. persons." For example, it is unclear which entities the Commission is trying to differentiate by using "fund" in some contexts, "commodity pool, pooled account, investment fund or other collective investment vehicle" in other contexts and "commodity pool, pooled account or collective investment vehicle" in yet other contexts. In addition, as described above, it is unclear whether by including "fund" in the newly proposed prong (ii) of the definition, the Commission is attempting to signal that the exclusion from the "principal place of business" provision for "funds or collective investment vehicles" will not apply in the final definition.

As a result, as stated in our August 27th, 2012 Letter,[20] we believe that in formulating the final U.S. person definition, the Commission should seek to decrease regulatory uncertainty by requiring funds,[21] including those that qualify as commodity pools, pooled

[20] August 27th, 2012 Letter at A-12.

[21] Including, for this purpose, special purpose vehicles ("**SPVs**").

accounts or collective investment vehicles, to consider only one prong of the U.S. person definition in determining whether they are a U.S. person. For these reasons, we continue to believe that the Commission should adopt the following prong of the U.S. person definition to enable funds[22] to determine whether they are U.S. persons:

> 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 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.

Recommendation: The Commission should not adopt a U.S. person definition that includes a prong similar to prong (iv) of the definition in the Further Proposed Guidance.

We believe that the proposed prong (iv) in the Further Proposed Guidance retains a number of problems and should not be adopted in its proposed form. Prong (iv) of the proposed definition of "U.S. person" in the Proposed Interpretive Guidance includes as a U.S. person "any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person(s)."[23] As we commented in our August 27th, 2012 Letter,[24] this prong relies problematically on the concept of indirect ownership and poses particular concerns for non-publicly traded commodity pools that are not offered to U.S. persons. As a result, we do not think any form of this prong should be adopted as part of the Final Interpretive Guidance.

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[22] We note that there are complicated issues that arise with respect to the determination of ownership of an SPV. SIFMA's securitization group would be happy to discuss these issues with the Commission in greater detail.

[23] Proposed Interpretive Guidance at 41,218.

[24] August 27th, 2012 Letter at A-12–13.

Arguably, such a commodity pool, pooled account, or collective investment vehicle that is organized outside the United States could be required to monitor its level of U.S. person ownership on an ongoing basis, which would be overly burdensome and, in some cases, impossible. Moreover, to compute its U.S. person ownership, a commodity pool, pooled account or collective investment vehicle would need to look to interests held by any indirect owner. We believe that indirect ownership by U.S. persons does not constitute a sufficient jurisdictional nexus to cause the investment vehicle to be a U.S. person. Thus, we believe that proposed alternative prong (iv) would place an enormous burden on commodity pools, pooled accounts or collective investment vehicles to assess and monitor their direct and indirect owners, with no corresponding regulatory benefit.

The exception in proposed alternative prong (iv) looks to whether the commodity pool, pooled account or collective investment vehicle is publicly-traded and is not offered, directly or indirectly, to U.S. persons. Instead, we believe that this exception should be broadened to include non-publicly traded commodity pools, pooled accounts or collective investment vehicles in a manner consistent with Regulation S under the Securities Act of 1933. For these reasons, we would urge the Commission to exclude any commodity pool, pooled account or collective investment vehicle that is not offered, directly or indirectly, to U.S. persons, regardless of whether the commodity pool, pooled account or collective investment vehicle is publicly-traded.

Recommendation: If the Commission chooses to include an ownership standard in the definition of "U.S. person," it should require direct majority ownership.

While, for the purposes of the Final Exemptive Order, the ownership of an entity is not relevant in determining whether an entity is a U.S. person,[25] we understand that the Commission is considering whether to incorporate an ownership threshold into one or more prongs of the Final Definition. If the Commission chooses to do so,[26] we believe that the Commission should establish bright-line ownership principles to help regulated entities determine whether they would fall within the scope of the definition of "U.S. person." Specifically, as we have stated before, we believe that the Commission 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.[27]

[25] Other than for the purposes of prong (v) of the Exemptive Order Definition, which requires a determination of whether the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prongs (i) through (iv) of the Exemptive Order Definition. *See* Final Exemptive Order at 863.

[26] We note, however, that any ownership standard could give rise to certain concerns, including the frequency with which an entity must meet or exceed the ownership standard to be considered a "U.S. person."

[27] August 27th, 2012 Letter at A-20.

The Commission has proposed a threshold of majority ownership in alternative prong (iv) of the Further Proposed Guidance, which provides that "[f]or purposes of this alternative prong (iv), majority-owned would mean the beneficial ownership of 50 percent or more of the equity or voting interests in the collective investment vehicle."[28] We believe that a majority-ownership threshold should require direct ownership of *more than* 50% of the equity or voting interests of an entity. Where a beneficial owner holds 50% or less of equity or voting interests, that owner does not exercise effective control over the entity.

Furthermore, to the extent an ownership standard is used, we believe that the Commission should allow entities organized outside the United States to assess on an annual basis whether they are U.S. persons by virtue of being majority-owned by U.S. persons.[29] Many entities, including commodity pools, 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 non-U.S. investors on an ongoing basis, as arguably could be required under alternative prong (iv) of the Further Proposed Guidance, would be overly burdensome for an entity (and, in the case of an entity like a commodity pool, its advisor) if not, in some cases, impossible. Such a requirement could also result in the U.S.-person status of an entity changing very frequently, resulting in different treatment by counterparties—potentially on a transaction-by-transaction basis. Therefore, should the Commission choose to adopt any ownership standard, we suggest that an entity organized outside the United States should be required to assess its U.S.-person status on an annual basis, based on the composition of its investors as of the beginning of each calendar year.

Recommendation: The final U.S. person definition should not adopt proposed prong (ii)(B) from the Further Proposed Guidance, which would look to the ambiguous standard of whether an entity is owned by a U.S. person that "bears unlimited responsibility for the obligations and liabilities of the legal entity."

Prong (ii)(B) of the proposed definition of "U.S. person" in the Proposed Interpretive Guidance 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."[30] When the Proposed Interpretive Guidance was released, we believed that 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

[28] Further Proposed Guidance at 913.

[29] In the context of SPVs and other collective investment vehicles, we believe that the entity's U.S.-person status should be determined once, at the time of the initial securities issuance. Otherwise, depending on the way in which ownership of the entity is determined, entities and their counterparties may face a nearly impossible task of assessing ownership.

[30] Proposed Interpretive Guidance at 41,218.

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."[31]

In the Commission's Further Proposed Guidance, the Commission proposed the following alternative prong (ii):

> (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 either (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States or (B) directly or indirectly majority-owned by one or more persons described in prong (i) or (ii)(A) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity (other than a limited liability company or limited liability partnership where partners have limited liability).[32]

As we have commented previously, we believe that prong (ii)(B) of the Commission's proposed U.S. person definition in the Proposed Interpretive Guidance, with its onerous "look-through" requirement and confusing reference to "owners that are *responsible for the liabilities* of [an] entity," should be removed from the Final Definition.[33] For similar reasons, we do not believe that the Commission should adopt the alternative proposed prong (ii)(B) for the purposes of the Final Definition.

Specifically, we continue to believe that the concept of indirect majority ownership, which requires market participants to parse through the baseline corporate organization to subsequent levels of ownership and control, should be removed from the Final Definition. 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.

In addition, we urge the Commission not to include in its Final Definition prong (ii)(B), which relates to a non-U.S. entity in which one or more U.S. entities bear "unlimited responsibility for the obligations and liabilities"[34] of such non-U.S. entity. Even though the Further Proposed Guidance clarifies that prong (ii)(B) would not include a limited liability company or limited liability partnership where the partners have limited

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[31] *Id.*

[32] Further Proposed Guidance at 912.

[33] August 27th, 2012 Letter at A-12–13.

[34] Further Proposed Guidance at 912.

liability—a change we believe is helpful—the standard of "bearing unlimited responsibility" is inherently unclear and vague. As an example, it is not clear whether a general partner in a general partnership or the provider of an unlimited guarantee that covers all of the obligations of an entity would be subject to this standard. Given this lack of clarity, the imposition of this standard would likely cause counterparties to refrain from providing the representations upon which swap dealers or other counterparties may rely. As a consequence, swap dealers or other market participants could be put in the position of having to conduct intrusive due diligence of upstream corporate structures (which structures are susceptible to change over time) that go beyond the scope of what is reasonable in the context of normal swap counterparty interactions. As such, this standard is one for which it will be extremely difficult, if not impossible, for market participants to assess in relation to their counterparties. From a policy point of view, based on our experience, we do not believe that market participants have utilized unlimited liability corporate structures as a means of avoiding Dodd-Frank requirements. As such, we do not believe that a specific standard is called for to address abusive avoidance practices and that the costs of imposing such a standard clearly outweigh the benefits.

ANNEX B

Update to Previous Recommendations in Light of the Final Exemptive Order and Related No-Action Relief

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

A. Definition of "U.S. Person" in the Final Interpretive Guidance

- The Commission should adopt the definition of "U.S. person" in the Final Exemptive Order, with a modification, as its permanent definition of "U.S. person" for the purposes of the Final Interpretive Guidance.

- If the Commission chooses to adopt a different Final Definition, the Commission should provide a transition period of at least 180 days from publication of that Final Definition until the Final Definition becomes effective to ensure an orderly transition.

- A swap counterparty should be responsible for determining its own U.S.-person status. The Commission should continue to allow reasonable reliance on counterparty representations as to a counterparty's U.S.-person status and should incorporate this information into an entity's Legal Entity Identifier.

- 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.

- The Commission should consider our other previous comments on the definition of "U.S. person" in the Proposed Interpretive Guidance.

B. Non-U.S. Affiliate Conduit

- We understand that the Commission is currently considering how to finalize the Proposed Interpretive Guidance, including the definition and concept of non-U.S. affiliate conduits. As a result, we wish to reiterate briefly our recommendations to the Commission on this topic.

II. Swap Dealer and MSP Registration

A. Registration and Aggregation Issues and Comments

- The Commission should clarify that the Final Definition of "U.S. person" 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 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.

- If aggregation is required, the Commission should adopt the exclusion from aggregation in the Final Exemptive Order on a permanent basis, with certain modifications.

- The Commission should clarify what it means to be "engaged in swap dealing activities with U.S. persons as of the effective date of the Final Order."

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

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

- The Commission should clarify that guaranteed swap positions are attributed to the guarantor for purposes of the MSP calculation, other than where the U.S. guarantor is subject to U.S. capital rules.

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

- In determining whether a swap between Non-U.S. Branches is a *bona fide* transaction, the Commission should delete prong (i) of the test in the Final Exemptive Order.

- In determining whether a swap between a non-U.S. swap dealer and a Non-U.S. Branch is *bona fide* with the Non-U.S. Branch, the Commission should look to whether the swap is booked in the Non-U.S. Branch.

- Any non-U.S. person should be entitled to treat a Non-U.S. Branch as a non-U.S. person when entering into a *bona fide* transaction with that Non-U.S. Branch.

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.

- Anti-manipulation rules, position limits and the CEA Section 2(e) prohibition on off-exchange swaps with non-ECPs should be categorized as Transaction-Level Requirements.

C. Application of Entity-Level and Transaction-Level Requirements

- We understand that the Commission is currently considering how to finalize the Proposed Interpretive Guidance, including the application of Entity-Level and Transaction-Level Requirements. As a result, we wish to reiterate briefly our recommendations to the Commission on this topic.

D. Emerging Market Exemption from Transaction-Level Requirements

- We understand that the Commission is currently considering how to finalize the Proposed Interpretive Guidance, including with respect to the emerging market exemption. As a result, we wish to reiterate briefly our recommendations to the Commission on this topic.

IV. Substituted Compliance

- We understand that the Commission is currently considering how to finalize the Proposed Interpretive Guidance, including with respect to substituted compliance. As a result, we wish to reiterate briefly our recommendations to the Commission on this topic.

V. Other Issues

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

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

A. Definition of "U.S. Person" in the Final Interpretive Guidance

Recommendation: The Commission should adopt the definition of "U.S. person" in the Final Exemptive Order, with a modification, as its permanent definition of "U.S. person" for the purposes of the Final Interpretive Guidance.

We appreciate the Commission's consideration of our comments[35] and concerns with respect to the definition of "U.S. person" in the Proposed Interpretive Guidance and Proposed Exemptive Order, as well as the adoption of a simplified definition of "U.S. person" for the purposes of the Final Exemptive Order. We believe that the Exemptive Order Definition is clear and workable, and it allows a given entity to determine with sufficient clarity whether it is a U.S. person.[36]

We ask that the Commission adopt the Exemptive Order Definition, with a modification, as the Final Definition. In particular, as described in detail above, we believe that an entity's principal place of business should not be considered in determining that entity's U.S.-person status. As a result, we would urge the Commission to remove the "principal place of business" prong from the Exemptive Order Definition for the purposes of the Final Definition.

We believe that the Exemptive Order Definition is sufficiently broad to meet the Commission's regulatory interests with respect to U.S. markets, yet limited enough to avoid unnecessary overreach and precise enough to allow regulated entities to determine with confidence and specificity their regulatory obligations. Furthermore, adopting a Final Definition that is closely related to the Exemptive Order Definition currently in effect will enable market participants to adapt their compliance operations more easily, leading to a smoother transition to implementation of the final requirements.

Recommendation: If the Commission chooses to adopt a different Final Definition, the Commission should provide a transition period of at least 180 days from publication of that Final Definition until the Final Definition becomes effective to ensure an orderly transition.

To the extent the Final Definition differs from the Exemptive Order Definition, we believe that an interim period that lasts at least 180 days following the publication of the

[35] *See, e.g.*, August 27th, 2012 Letter. Please note that the August 27th, 2012 Letter is available at http://www.sifma.org/issues/item.aspx?id=8589940053.

[36] In addition to the specific issues below, we note that the Commission has excluded from the Exemptive Order Definition the statement in the Proposed Interpretive Guidance that the definition of "U.S. person" is not limited to the list of entities enumerated. We believe that this adds significant clarity to the definition and urge the Commission to similarly exclude this statement from the Final Definition.

Final Definition (the "**Interim Period**") is critical to a smooth transition into full Title VII compliance. As recent months have shown, preparation for Title VII compliance will take a significant amount of time and will present a number of unforeseen obstacles. This has been evidenced, for example, by low adherence rates to ISDA's Dodd-Frank Protocol. Thus, an Interim Period is essential to ensure an orderly transition to full compliance by market participants. Implementing a definition of "U.S. person" that is different from the Exemptive Order Definition, particularly a definition as complicated and unprecedented as the one in the Proposed Interpretive Guidance, will be a time-consuming and burdensome task that cannot be completed quickly after the Final Definition is published.

Swap dealers and major swap participants ("**MSPs**") (together, "**Swap Entities**") are familiar with the Exemptive Order Definition, a version of which was published in October 2012.[37] Further, as described above, the Exemptive Order Definition is clear and workable, which will enable Swap Entities to determine with confidence and specificity their regulatory obligations during the Interim Period, while preparing to comply with the Final Definition.

During the Interim Period, Swap Entity registration requirements should be based on the Exemptive Order Definition. Specifically, we believe that only those entities that engage in swap dealing activities above the *de minimis* threshold with U.S. persons meeting the Exemptive Order Definition should be required to register with the Commission as Swap Entities during the Interim Period. Further, we believe that other substantive Title VII swap provisions also should be based on the Exemptive Order Definition during the Interim Period.

Recommendation: A swap counterparty should be responsible for determining its own U.S.-person status. The Commission should continue to allow reasonable reliance on counterparty representations as to a counterparty's U.S.-person status and should incorporate this information into an entity's Legal Entity Identifier.

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, 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

[37] Final Exemptive Order at 863 ("Therefore, for purposes of the Final Order, the Commission will apply a definition of the term "U.S. person" based upon the counterparty criteria set forth in CFTC Letter No. 12–22."); s*ee also* CFTC Letter No. 12-22, Time-Limited No-Action Relief: Swaps Only With Certain Persons to be Included in Calculation of Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception and Calculation of Whether a Person is a Major Swap Participant (Oct. 12, 2012), available at http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-22.pdf.

counterparties are much better situated to seek out and analyze the requisite information about themselves than a third-party swap counterparty would be.

- Second, if each swap dealer is required to each seek out and interpret the necessary information to determine a counterparty's U.S.-person status, it is likely that the same counterparty could be assigned a different status for different transactions with different dealers. In contrast, if the requirement fell on the entity best situated to determine the U.S.-person status of a counterparty—the counterparty itself—the same status could be reported to all swap dealer counterparties.

- Finally, 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, an entity would need only analyze the information according to the applicable definition and report the results.

We are grateful to the Commission for its thoughtful consideration of our members' concerns on this issue[38] and for permitting reasonable reliance on counterparty representations as to a counterparty's U.S.-person status for the purposes of the Final Exemptive Order.[39] We believe that reliance on counterparty representations will, for the vast majority of transactions, be the only practical way for many market participants to know whether their counterparties are U.S. persons, particularly if "indirect ownership" is included in the U.S. person definition. As a result, we support a safe harbor that would allow swap dealers to reasonably rely on the representations of a counterparty as to that counterparty's "U.S. person" status.

However, as demonstrated by the low adherence rates to ISDA's Dodd-Frank Protocol, counterparties are reluctant to provide swap dealers with representations, particularly where there remains legal uncertainty. The primary way to solve this problem, as described above, is through a Final Definition that is clear and workable. Furthermore, we believe it would be ideal for the Commission to incorporate an entity's U.S.-person status into data available to all market participants, such as through the entity's legal entity identifier ("**LEI**") that must be reported pursuant to the Commission's swap data reporting rules.[40] This would allow all market participants to look to one source for an entity's U.S.-person status, rather than requiring individual representations from each counterparty.

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[38] Final Exemptive Order at 864.

[39] *Id*.

[40] 17 C.F.R. pt. 45.6.

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.

Because it incorporates the concepts of direct and indirect majority ownership, the proposed definition of "U.S. person" in the Proposed Interpretive Guidance 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. For example, under prong (iv) of the proposed definition, 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.[41] 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.[42]

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.

[41] 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).

[42] Business Conduct Standards at 9,823.

Recommendation: The Commission should consider our other previous comments on the definition of "U.S. person" in the Proposed Interpretive Guidance.

In our comments to the Commission on the Proposed Interpretive Guidance, we provided a number of additional suggestions with respect to the U.S. person definition that we wish to reiterate briefly here. Specifically, we believe that:

- 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), which includes as a "U.S. person" a commodity pool "the operator of which would be required to register as a commodity pool operator under the CEA"; and

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

Further details on each of these requests are available in our August 27th, 2012 Letter.[43]

B. Non-U.S. Affiliate Conduit

We understand that the Commission is currently considering how to finalize the Proposed Interpretive Guidance, including the definition and concept of non-U.S. affiliate conduits. As a result, we wish to reiterate briefly our recommendations to the Commission on this topic. Specifically, we believe that:

- 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; and

[43] August 27th, 2012 Letter at A-20–21.

- 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.

Further detail with respect to these recommendations is available in the August 27th, 2012 Letter.[44]

II. Swap Dealer and MSP Registration

A. Registration and Aggregation Issues and Comments

Recommendation: The Commission should clarify that the final definition of "U.S. person" 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.

We are grateful to the Commission for clarifying in the Final Exemptive Order that the Exemptive Order Definition applies to all Commission regulations promulgated under Title VII's swap provisions but does not override CEA provisions (and Commission regulations promulgated thereunder) relating to the futures markets.[45] 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 similarly clarify that the Final Definition 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 similarly 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

[44] *Id.* at A-22–25.

[45] Final Exemptive Order at 864–65.

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 introducing broker purposes.[46] However, in order to increase market certainty, we believe that such a statement should be incorporated into the Final Definition.

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.

As described in our previous comments, we continue to believe that 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. Such an 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 operate 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."[47] 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.

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 with an opportunity to comment on the idea of aggregation. Had market participants been given this opportunity, we would have strenuously objected to the requirement as a whole for the reasons discussed above.

Recommendation: If aggregation is required, the Commission should adopt the exclusion from aggregation in the Final Exemptive Order on a permanent basis, with certain modifications.

We are grateful to the Commission for granting temporary relief to non-U.S. persons from the requirement to aggregate the swap dealing activities of certain of their affiliates. In particular, for the purposes of the Final Exemptive Order, in determining whether a

[46] *See* Registration of Intermediaries, 77 Fed. Reg. 51,898, 51,899 (Aug. 28, 2012).

[47] 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 note 437 (May 23, 2012) (to be codified at 17 C.F.R. pts. 1 and 240) ("**Final Entity Definition Rules**").

non-U.S. person is engaged in more than a *de minimis* level of swap dealing, a non-U.S. person that is engaged in swap dealing activities with U.S. persons as of December 21, 2012 may exclude and not consider the aggregate notional value of:

- any swap dealing transaction of its U.S. affiliates under common control; and
- if any of its affiliates under common control is registered as a swap dealer, any swap dealing transaction of any of its non-U.S. affiliates that (i) is engaged in swap dealing activities with U.S. persons as of December 21, 2012 or (ii) is registered as a swap dealer.[48]

Should the Commission decline our request to remove the aggregation requirement altogether, we urge the Commission permanently to grant both U.S. and non-U.S. persons at least the relief granted in the Final Exemptive Order. In granting this relief, we ask the Commission to clarify that, for these purposes, "under common control" should be read to include an affiliate that controls, is controlled by, or is under common control.[49] We also note that under the Proposed Interpretive Guidance, exclusion of the requirement to aggregate with U.S. person affiliates is not contingent on a non-U.S. person engaging in swap dealing activities with U.S. persons as of December 21, 2012.[50] Given the uncertainty regarding the meaning of this phrase, as discussed below, we would urge the Commission to remove this requirement from the Final Interpretive Guidance.

Finally, as stated above, we do not believe that entities should be required to aggregate swap dealing positions with any registered Swap Entity affiliates. Thus, while we support the relief on this point in the Final Exemptive Order, we believe it should be expanded.

Recommendation: The Commission should clarify what it means to be "engaged in swap dealing activities with U.S. persons as of the effective date of the Final Order."

The Final Exemptive Order grants temporary relief from the aggregation requirements, as described above, only if the non-U.S. person was "engaged in swap dealing activities with U.S. persons as of the effective date of [the Final] Order."[51] The Commission does not provide additional clarity regarding the meaning of this requirement, including how regular the swap dealing activities must be and when the last swap dealing activity had to occur. This lack of clarity makes it difficult for market participants to be sure that they qualify for the provided relief.

[48] Final Exemptive Order at 869.

[49] As that phrase is used in Regulation 1.3(ggg)(4)(i).

[50] Proposed Interpretive Guidance at 41,220.

[51] Final Exemptive Order at 869.

We believe that it would be appropriate for the Commission to state that any legal entity that held itself out as a swap dealer prior to December 21, 2012 should be deemed to have been "engaged in swap dealing activities with U.S. persons as of the effective date of the Final Order." We believe this should be structured as a safe harbor, such that entities that do not meet the above standard could, through their specific facts and circumstances, conclude that they were nonetheless "engaged in swap dealing activities with U.S. persons as of the effective date of [the Final] Order."

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.

The Proposed Interpretive Guidance and the Final Exemptive Order require non-U.S. persons[52] to aggregate their swap dealing activity only with non-U.S. affiliates. However, the Commission 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: 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.

We thank the Commission for considering our comments with respect to guarantees of swaps and, as a result, not requiring non-U.S. persons, during the pendency of the Final Exemptive Order, to include swaps with non-U.S. counterparties in swap dealer *de minimis* calculations solely because the non-U.S. person is guaranteed by a U.S. person.

As discussed in detail above, 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, and we urge the Commission to confirm this interpretation for the purposes of the Final Interpretive Guidance. 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.

As a result, we recommend that the Commission permanently adopt the aggregation interpretation from the Final Exemptive Order in the Final Interpretive Guidance.

[52] In the case of the Final Exemptive Order, the non-U.S. person must be engaged in swap dealing with U.S. persons as of December 21, 2012. *Id* at 868.

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.

Under the Proposed Interpretive Guidance and the Final Exemptive Order, non-U.S. persons are generally permitted to exclude the notional value of swap dealing transactions with non-U.S. branches of U.S. swap dealers ("**Non-U.S. Branches**") from their aggregation calculations.[53] Non-U.S. affiliates, if they engage in 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, subject to the temporary relief provided under the Final Exemptive Order and described above. Under the Proposed Interpretive Guidance, 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: A non-U.S. person should not be required to include swaps with Non-U.S. Branches towards its MSP calculation.

In the Final Exemptive Order, the Commission helpfully clarified that a non-U.S. person's swap transactions with Non-U.S. Branches are excluded from the calculation of that non-U.S. person's MSP registration threshold.[54] We urge the Commission to include this clarification in the Final Interpretive Guidance.

Recommendation: The Commission should clarify that guaranteed swap positions are attributed to the guarantor for purposes of the MSP calculation, other than where the U.S. guarantor is subject to U.S. capital rules.

The Final Exemptive Order restated that when a non-U.S. person's swaps are guaranteed by a U.S. person, such swaps would be attributed to the U.S. guarantor and not the potential non-U.S. MSP.[55] The Final Exemptive Order did not address other guarantee arrangements, such as when a U.S. person's swap activity is guaranteed by

[53] Proposed Interpretive Guidance at 41,222, Question 4; Final Exemptive Order at 879. The Final Exemptive Order stipulates that the Non-U.S. Branch must be registered as a swap dealer or represent that it intends to register with the Commission as a swap dealer by March 31, 2013.

[54] Final Exemptive Order at 879.

another U.S. person. Therefore, we ask the Commission to clarify in the Final Interpretive Guidance that guaranteed swap positions are attributed to the guarantor for purposes of the MSP calculation. We do not believe, however, that such guaranteed swap positions should be attributed to a U.S. guarantor where the U.S. guarantor is subject to U.S. capital rules.

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.

We appreciate the Commission's attempt to clarify the treatment of booking entities in the Final Exemptive Order by stating that "a non-U.S. person should not be required to include in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission regulation 1.3(ggg)(4), any swap to which it is not a party because the swap is entered into by an affiliated central booking entity."[56] We are not entirely clear as to the meaning of this provision, however, and ask that the Commission further clarify the treatment of booking entities and their affiliates in the Final Interpretive Guidance.

Specifically, we believe that the Commission should confirm, in the Final Interpretive Guidance, that a person need only register as a swap dealer if that person is a direct booking entity for swaps with third-party counterparties. In particular, 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 in increased systemic risk, increased costs to counterparties and, potentially, the movement of capital, risk expertise and jobs overseas.

(continued…)

[55] Final Exemptive Order at 866, n.66.

[56] *Id.* at 868.

Our recommendation 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 Proposed Interpretive 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.[57] 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.[58] 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.

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.[59] Although the Proposed Interpretive 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.[60]

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 or principal for the purpose of the swap dealer definition and its *de minimis* threshold, and that this provision should be interpreted uniformly with respect to all central booking entities. In addition, agent and similar activity may be subject to Commission supervision under other requirements, such as through registration of an entity as an

[57] Proposed Interpretive Guidance at 41,221–22.

[58] Final Entity Definition Rules at 30,606.

[59] Proposed Interpretive Guidance at 41,231.

[60] *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.").

introducing broker or designation of an individual as an associated person of a swap dealer.

III. Entity-Level and Transaction-Level Requirements

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

Recommendation: In determining whether a swap between Non-U.S. Branches is a *bona fide* transaction, the Commission should delete prong (i) of the test in the Final Exemptive Order.

The Commission requires that a swap between two Non-U.S. Branches meet three specific criteria in order to benefit from the Final Exemptive Order's relief. Specifically, a swap between two Non-U.S. Branches benefits from the relief only if: (i) the personnel negotiating and agreeing to the terms of the swap are located in the jurisdiction of such Non-U.S. Branch; (ii) the documentation of the swap specifies that the counterparty or "office" for the U.S. person is such Non-U.S. Branch; and (iii) the swap is entered into by such Non-U.S. Branch in its normal course of business. The Commission states that if the swap between two Non-U.S. Branches does not meet this test, it will be treated as a swap of the U.S. person and not as a swap of the Non-U.S. Branch, and the swap will not be eligible for relief from Transaction-Level Requirements.[61]

We believe that the Commission should delete prong (i) of its test. Personnel that negotiate and agree to the terms of a swap may be located outside of the Non-U.S. Branch that books the trade for a variety of valid reasons. For example, consider a registered U.S. swap dealer that operates Non-U.S. Branches in London and Hong Kong. Traders in Hong Kong are employed to transact with clients in their native language during regular trading hours. However, the registered swap dealer may designate the London branch to book trades of other branches when those branches are closed for trading. Under this scenario, a trader in Hong Kong might negotiate and agree to the terms of a swap with a local counterparty, but the trade might be booked into the London branch because the negotiation and agreement is finalized outside the trading hours of the Hong Kong branch.

As this example illustrates, prong (i) of the Final Exemptive Order should not be determinative of whether a swap between Non-U.S. Branches is a *bona fide* transaction between those Branches. Instead, where the documentation of the swap specifies that the counterparty or office for the U.S. person is the Non-U.S. Branch and the swap is entered into by the Non-U.S. Branch in its normal course of business, we believe that this would sufficiently demonstrate that the swap is a *bona fide* transaction between the two Non-U.S. Branches. We believe that additional concerns that the Commission may have regarding transactions between Non-U.S. Branches that satisfy prongs (ii) and (iii), should be addressed through its anti-evasion capacities.

[61] *Id*. at 41,233, n.123.

Recommendation: In determining whether a swap between a non-U.S. swap dealer and a Non-U.S. Branch is *bona fide* with the Non-U.S. Branch, the Commission should look to whether the swap is booked in the Non-U.S. Branch.

In the Final Exemptive Order, the Commission suggested additional requirements that it is considering in the determination of whether a swap between a non-U.S. swap dealer and a Non-U.S. Branch is *bona fide* with the Non-U.S. Branch.[62] These requirements include, for example: (i) that the Non-U.S. Branch is the location of employment of the employees negotiating the swap for the U.S. person or, if the swap is executed electronically, the employees managing the execution of the swap; (ii) that the U.S. person treats the swap as a swap of the Non-U.S. Branch for tax purposes; (iii) that the Non-U.S. Branch operates for valid business reasons and is not only a representative office of the U.S. person; and (iv) that the branch is engaged in the business of banking or financing and is subject to substantive regulation in the jurisdiction where it is located.[63] The Commission has requested comment on whether it is appropriate to include these or other requirements in the determination of when a swap is with the Non-U.S. Branch.

We believe that the only dispositive factor in determining whether a swap between a non-U.S. swap dealer and a Non-U.S. Branch is *bona fide* with the Non-U.S. Branch is whether the swap is booked in the Non-U.S. Branch. As a result, we believe that the Commission's suggested additional requirements are unnecessary.

First, as stated above, we believe that the Commission should delete prong (i) because employees that negotiate and agree to the terms of a swap may be located outside of the Non-U.S. Branch that books the trade for a variety of valid reasons.

Second, the income from a swap transaction that is booked in a Non-U.S. Branch is subject to taxation in the local jurisdiction in which the Non-U.S. Branch is resident (*i.e.*, a territorial income tax system). Although the United States is among those countries that also tax the income of the Non-U.S. Branch, a foreign tax credit is generally allowed for income taxes paid locally. While an in-depth discussion of matters such as tax sourcing, tax transfer pricing and foreign tax credits is beyond the scope of this letter, and the technical meaning of the Commission's proposed "tax" prong is not entirely clear, we believe that the fact that the Non-U.S. Branch is subject to local income tax on its transactions demonstrates that such swap transactions are *bona fide* with the Non-U.S. Branch. Furthermore, fundamental rules of taxation and tax transfer pricing require items of income and expense to be allocated to the Non-U.S. Branch based on arm's length

[62] We note that, in the Final Exemptive Order Release, the Commission "clarifies that relief from the Transaction-Level Requirements is available to a swap between a foreign branch of a U.S. registrant and a non-U.S. SD. That is, for purposes of this relief, the non-U.S. SD may treat the foreign branch as a non-U.S. person." Final Exemptive Order at 873. However, the technical language of the Final Exemptive Order itself is not as clear. To the extent similar language is used in the Final Interpretive Guidance, we ask the Commission to clarify this view in the text of that guidance or any related order.

[63] Final Exemptive Order at 873.

principles and fair market valuations, which provide a safeguard to ensure that the income and expense from any transaction is properly reflected on the books and records of the Non-U.S. Branch. Consequently, the tax treatment of Non-U.S. Branches should inform the Commission that Non-U.S. Branches are not "representative offices," and that swaps between any type of counterparty and the Non-U.S. Branch are *bona fide* with the Non-U.S. Branch when transactions are booked in the Non-U.S. Branch.

Third, we believe that the Commission should look to well-established U.S. banking law defining a foreign branch of a U.S. bank. Regulation K, which is issued by the Board of Governors of the Federal Reserve System (the "**Federal Reserve**"), governs the international and foreign activities of U.S. banking organizations. Under Regulation K, a Non-U.S. Branch is defined as "an office of an organization (other than a representative office) that is located outside the country in which the organization is legally established and at which a banking or financing business is conducted."[64] A Non-U.S. Branch is authorized to engage in a list of permissible activities, including activities that are not permissible for a U.S. branch. For example, a Non-U.S. Branch may underwrite and deal in the sovereign securities of the national government of the country where the branch is located, [65] and it may invest in debt securities eligible to meet local reserve or other requirements, regardless of whether the debt securities are investment grade.[66] Authorizing a Non-U.S. Branch to engage in these activities ensures that the Non-U.S. Branch is able to compete on an even playing field with other foreign banks in the jurisdiction in which it is located. In addition, prior notice to the Federal Reserve is required in order to establish a Non-U.S. Branch and all changes relating to a Non-U.S. Branch must be reported to the Federal Reserve.[67] As a result, we believe that the comprehensive regulation of Non-U.S. Branches under Regulation K ensures that Non-U.S. Branches operate for valid reasons. Further, the requirement that a Non-U.S. Branch is not a representative office seems superfluous. The definition of a Non-U.S. Branch under Regulation K makes it clear that a Non-U.S. Branch is not a representative office; it is a separate and distinct designation by the Federal Reserve in which banking or financing business is conducted from a location outside the U.S. Using this regulatory regime as a guide, we believe that Non-U.S. Branches that engage in swap transactions would not be, by definition, considered "representative offices."

Finally, in addition to being regulated by the Federal Reserve, Non-U.S. Branches also are subject to substantive regulation and supervision in their local jurisdiction. In particular, the activities of a Non-U.S. Branch are governed by local law, including licensing requirements and, potentially, local derivatives rules (when adopted) that could be the subject of a substituted compliance finding by the Commission. Although the nature and scope of the local banking regulations differ by jurisdiction, many non-U.S.

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[64] 12 C.F.R. 211.3(k), 211.4(a).

[65] *Id.* at 211.4(a)(2).

[66] *Id.* at 211.4(a)(3).

[67] *Id.* at 211.3(b), (c).

jurisdictions require Non-U.S. Branches to comply with local laws to the same extent that U.S. regulators impose U.S. laws and regulations on U.S. branches of foreign banks. These requirements include transaction-based rules, reserve requirements, local lending or credit exposure limits and supervision or examination requirements. Thus, we believe that it would be overly burdensome and unnecessary to require a Non-U.S. Branch to demonstrate that it is subject to substantive regulation in the jurisdiction where it is located for the purposes of determining whether each swap entered into by that Non-U.S. Branch is *bona fide* with that branch.

For these reasons, we believe that the Commission's proposed prongs (i) through (iv) are unnecessary. We believe that the only relevant factor that the Commission should consider in determining whether a swap is *bona fide* with a Non-U.S. Branch (as defined under Regulation K) is whether the swap has been booked into the Non-U.S. Branch. Indeed, the trade confirm would reflect that the swap is booked with the Non-U.S. Branch. We believe that this would provide a clear and simple test for determining whether a swap is *bona fide* with a Non-U.S. Branch. Should the Commission suspect that swaps are being booked into a Non-U.S. Branch for evasive reasons, this concern would be best addressed through the Commission's anti-evasion authority.

Recommendation: Any non-U.S. person should be entitled to treat a Non-U.S. Branch as a non-U.S. person when entering into a *bona fide* transaction with that Non-U.S. Branch.

We appreciate the Commission's helpful clarification in the Final Exemptive Order that a non-U.S. swap dealer may treat a Non-U.S. Branch as a non-U.S. person for the purposes of the Exemptive Order relief.[68] We believe that all non-U.S. persons entering into *bona fide* transactions with Non-U.S. Branches should be entitled to treat those Non-U.S. Branches as non-U.S. persons, and we urge the Commission to adopt this explicit clarification in the Final Interpretive Guidance.[69]

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.

In the Final Exemptive Order, the Commission noted that it intends to consider any reclassification of Entity-Level and Transaction-Level requirements, including for the reasons raised by various commenters, in connection with further guidance on cross-

[68] Final Exemptive Order at 873.

[69] We think it is important that the Commission clarify that non-U.S. central counterparties ("**CCPs**") are non-U.S. persons and that they may treat a Non-U.S. Branch as a non-U.S. person for purposes of determining whether the non-U.S. CCP is required to register with the Commission as a derivatives clearing organization. We understand that at least one non-U.S. CCP is refusing to allow a Non-U.S. Branch to clear swaps on its platform because of this lack of clarity.

border issues.[70] As a result, we wish to reiterate our view that all forms of swap reporting, including swap data repository reporting ("**SDR Reporting**") and Large Trader Reporting (as defined in the Proposed Interpretive Guidance) should be categorized as Transaction-Level Requirements. Under the Proposed Interpretive Guidance, SDR Reporting and Large Trader Reporting are classified as Entity-Level Requirements, while real-time reporting is classified as a Transaction-Level Requirement.[71] 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." 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." Real-time public reporting is designed to increase regulatory transparency and "support[] the fairness and efficiency of markets." [72] Like real-time public reporting, which is categorized as a Transaction-Level Requirement, 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: Anti-manipulation rules, position limits and the CEA Section 2(e) prohibition on off-exchange swaps with non-ECPs should be categorized as Transaction-Level Requirements.

Neither the Proposed Interpretive Guidance nor the Final Exemptive Order categorizes anti-manipulation rules, position limits or the CEA Section 2(e) prohibition on off-exchange swaps with non-eligible contract participants ("**non-ECPs**") as either Entity-Level or Transaction-Level Requirements. Although these rules are or will be 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.[73]

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[70] *Id*. at 869.

[71] Proposed Interpretive Guidance at 41,224–25.

[72] *Id*. at 41,225–26.

[73] 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.

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."[74] These rules represent the Commission's efforts "to diminish, eliminate, or prevent excessive speculation and market manipulation"[75] 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.

Similarly, we believe that regulation of position limits should be treated as a Transaction-Level requirement, when those rules come into effect. 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 anti-manipulation rules and position limits should be categorized in the Final Interpretive Guidance as Transaction-Level Requirements.

Finally, the CEA Section 2(e) prohibition on off-exchange swaps with ECPs applies transaction-by-transaction. As a result, it should be categorized in the Final Interpretive Guidance as a Transaction-Level Requirement.

C. Application of Entity-Level and Transaction-Level Requirements

We understand that the Commission is currently considering how to finalize the Proposed Interpretive Guidance, including the application of Entity-Level and Transaction-Level Requirements. As a result, we wish to reiterate briefly our recommendations to the Commission on this topic. Specifically, we believe that:

- 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 continue to take into account the issue of foreign jurisdictions' privacy laws; and

[74] Proposed Interpretive Guidance at 41,226.

[75] 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).

- 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 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.

Further detail with respect to these recommendations is available in the August 27th, 2012 Letter.[76]

D. Emerging Market Exemption from Transaction-Level Requirements

We understand that the Commission is currently considering how to finalize the Proposed Interpretive Guidance, including with respect to the emerging market exemption. As a result, we wish to reiterate briefly our recommendations to the Commission on this topic. Specifically, we believe that:

- 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; and

- 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.

Further detail with respect to these recommendations is available in the August 27th, 2012 Letter.[77]

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[76] August 27th, 2012 Letter at A-36–38, A-44.

IV. Substituted Compliance

We understand that the Commission is currently considering how to finalize the Proposed Interpretive Guidance, including with respect to substituted compliance. As a result, we wish to reiterate briefly our recommendations to the Commission on this topic. Specifically, we believe that:

- 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; and

- 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.

Further detail with respect to these recommendations is available in the August 27th, 2012 Letter.[78]

V. 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 must 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

(continued…)

[77] *Id.* at A-39–44.

[78] *Id.* at A-46–50.

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.[79] 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 finalized the Final Exemptive Order and proposed the Proposed Interpretive Guidance alone. The impact of disparate regulatory actions could be profound: b 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.

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 defines 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 both parties to observe the basic principles of comity while protecting their respective jurisdictions from the systemic risks presented by under-regulation or misregulation of the global swaps market.

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[79] Dodd-Frank Wall Street Reform and Consumer Protection Act § 712, Pub. L. No. 111-203, 124 Stat. 1376–2223 (2010).

Furthermore, such communication will allow regulators to remain aware of timing and implementation concerns across jurisdictions. Because global coordination of swaps regulations is vital to ensure a robust and workable global swaps framework, aligning compliance timing across jurisdictions is essential to prevent market distortions and undue risk. The Commission has set a high standard of swap regulations that will surely inform regulatory regimes abroad. If the U.S. swap regulations become effective well before comparable or similar regulations in other jurisdictions, U.S. market participants—and the U.S. swaps market more generally—may be put at a significant disadvantage. We believe that comprehensive coordination must take precedence over ambitious effectiveness dates that do not align well with the development of other jurisdictions' regimes. Consequently, we encourage the Commission to consider extending the expiration date of the Final Exemptive Order in the event that the swaps regimes in other jurisdictions are not yet sufficiently developed to accommodate meaningful comparison to the U.S. regime.

For these reasons, we appreciate the Commission's continued efforts to coordinate its cross-border Title VII regulations with the SEC, the prudential regulators and foreign regulators and urge the Commission to continue in these efforts.

ANNEX C

About the Signatories

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, DC, is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

Established in 1853, **The Clearing House** is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively employ over 2 million people and hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S. See The Clearing House's web page at www.theclearinghouse.org.

The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine and account directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.