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Submitted via website
http://comments.cftc.gov/Public Comments/ReleaseswithComments.aspx

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

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

Dear Ms. Jurgens:

On July 12, 2012, the Commodity Futures Trading Commission ("CFTC") promulgated in the Federal Register its proposed interpretive guidance and policy statement ("Proposed Guidance") regarding the cross-border application of the swap provisions of the Commodity Exchange Act ("CEA") as added by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[1] On January 7, 2013, the CFTC proposed further guidance on certain specific aspects of the Proposed Guidance ("Further Proposed Guidance").[2] The Proposed Guidance and the Further Proposed Guidance are intended, in part, to assist market participants in determining when a person's swap positions may require application of clearing, trade execution and certain reporting and recordkeeping provisions under the CEA to cross-border swaps involving one or more counterparties that are not swap dealers or major swap participants.

Invesco Advisers, Inc. ("Invesco") is a registered investment adviser that, along with its affiliates, provides a comprehensive range of investment strategies and vehicles to retail, institutional and high net worth clients. As of December 31, 2012, Invesco, along with its affiliates, had over $688 billion in total

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

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

assets under management. Of that total, approximately $215 billion represents clients domiciled outside the United States.

We believe that the CFTC has improved the definition of "U.S. person" first articulated in the Proposed Guidance with the changes made in the Further Proposed Guidance. Invesco would like to offer comments about prong (iv) of the U.S. person definition in the Further Proposed Guidance to cure what we believe is an unintended ambiguity.

In addition, Invesco urges the CFTC to take this occasion, while it is conducting an in-depth analysis of the U.S. person definition and the underlying principles of international comity that underlie this determination, to re-examine and clarify the way in which the CFTC interprets the presence of U.S. residents in collective accounts organized and operated outside of the United States ("non-U.S. Funds") for purposes of commodity pool operator ("CPO") or commodity trading adviser ("CTA") registration. Indeed, because the Further Proposed Guidance leaves intact prong (v) of the U.S. person definition in the Proposed Guidance, which includes in the definition "[a]ny 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," failure of the CFTC to address the issue of when U.S. person ownership in a non-U.S. Fund requires the pool operator to register as a CPO leaves a significant interpretive gap remaining in the definition of U.S. person as it applies to commodity pools and is fundamentally inconsistent with, and undermines the benefits of, the CFTC's proposed changes to prong (iv).

Invesco urges the CFTC to implement a U.S. person definition for Funds (as defined below) that relates solely to whether the Fund targets its offering to natural person residents of the United States or other U.S. legal entities.

A. Clarification of Revised Prong (iv).

Revised prong (iv) of the definition of U.S. person describes as U.S. persons any "commodity pool, pooled account, investment fund, or other collective investment vehicle" ("Fund") that is directly or indirectly majority owned by one or more natural or legal U.S. persons, without regard to whether the Fund is organized in the United States or outside the United States, but excludes any Fund that is "publicly-traded but not offered, directly or indirectly, to U.S. persons." The CFTC stated in the Further Proposed Guidance that it believes by including the concept of excluding Funds that are publicly traded from the definition of U.S. person, it has alleviated the concern that investment managers, such as Invesco, may have related to ownership verification concerning the shareholders of such Funds.

Invesco is concerned that this definition leaves an unintended gap, by using the limited term "publicly traded" rather than "publicly offered." There are Funds that are publicly offered outside the United States but not traded as such on a secondary market. There is no reason that the fact that these Funds are not publicly traded should leave them within the U.S. person definition. We encourage the CFTC to change the wording of prong (iv) to state "except any commodity pool, pooled account, investment fund or other collective investment vehicle that is not offered, directly or indirectly, to U.S. persons, *including such vehicles that are traded on a secondary market.*"[3] This would solidify the approach that, so long as the Fund is not being offered to U.S. persons, there is no need to try to determine how many underlying investors may be living in the United States.

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[3] Invesco interprets "indirectly" in this context to refer to efforts intended to circumvent the offering restrictions.

Invesco agrees with the comments in the Investment Company Institute and ICI Global letter submitted in reference to the Proposed Guidance.[4] The August 2012 ICI letter explored many of the hurdles faced by non-U.S. Funds in reference to whether they have United States residents as shareholders. Invesco's affiliates manage and operate Funds for which it is impossible to penetrate through to the individual shareholders and determine where they live, for the same reasons the ICI outlined in the letter. We believe, as the August 2012 ICI letter recommended, that the standard to implement is whether the Fund is offered to natural person residents of the United States or other U.S. legal entities.

As described by the ICI in the August 2012 ICI letter, Invesco and its affiliates, like most investment managers with a presence both inside and outside the United States, have measures in place to comply with U.S. securities laws such as Regulation S, as well as investment-related laws and regulations in the other countries where they do business. We and our affiliates outside of the United States make decisions about whether to offer products to residents of the United States and other countries as part of our product development and marketing programs. Funds that are not offered in certain countries carry legends that indicate those restrictions, Fund salespeople are trained accordingly, and web information carries information about offering restrictions as well. When global investment management firms articulate jurisdictional restrictions on their Funds, they enforce those restrictions at the time of purchase.

Invesco believes that the proposed change to prong (iv), as clarified, is a critical improvement in the definition of U.S. person as it applies to commodity pools. The proposed change properly focuses on matters a commodity pool and its sponsors can control, which is how and where the pool is offered.

We note that, even where a non-U.S. Fund does not offer shares to U.S. persons, non-U.S. person investors in a Fund may later relocate to the United States. Funds making a continuous offering often do not have the ability to cut off additional purchases. We do not believe that sales in such situations should be considered an offering to U.S. persons.

B. Conforming Prong (v)

We contend, however, this improvement in prong (iv) will be meaningless unless, at the same time, the CFTC either eliminates or conforms prong (v). That prong applies the U.S person definition to "[a]ny commodity pool, pooled account or collective investment vehicle the operator of which would be required to register as a commodity pool under the CEA." Depending on how industry participants must treat the presence of U.S. residents in their Funds, prong (v) could apply a standard of U.S. ownership that is entirely different from, and inconsistent with, the principles stated in prong (iv), and thus effectively make U.S. persons of many of the Funds that would be excluded from the definition by the changes to prong (iv).

Invesco encourages the CFTC, in this context, to develop a consistent interpretation of when a non-U.S. Fund is a U.S. person for purposes of CPO or CTA registration. Allowing a "commodity pool" to avoid becoming a U.S. person under prong (iv) of the definition in the Proposed Guidance and Further Proposed Guidance would not alleviate the burden on non-U.S. Funds if ownership by U.S. residents,

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[4] Letter from the Investment Company Institute and ICI Global to the CFTC (August 23, 2012) (the "August 2012 ICI letter").

even in *de minimis* amounts, were viewed as requiring the Fund operator to register as a CPO, and thus bring the Fund back in under prong (v).

As an illustration of the contradiction, CFTC and staff statements about U.S. person ownership in the context of CPO and CTA registration and exemptions often speak in terms of "no U.S. person" ownership.[5] Invesco believes that because of the issues described above, and as a general expression of extraterritorial policy, this is an unworkable and unwise standard. Taking such a "zero tolerance" view to the extreme, however illogical, the operator of a non-U.S. Fund that does not offer shares to U.S. residents but has a single U.S. person shareholder would be required to register as a CPO (and its adviser as a CTA). Once the CPO/CTA registration takes place, as a consequence of prong (v), such Funds would be U.S. persons, and any counterparty trading with the Fund would be forced to treat the Fund as a U.S. person under various commodity interest trading, reporting and clearing regulations.

We do not believe that this is an appropriate application of the principles of international comity at the heart of the Dodd-Frank Act, either in connection with swaps regulation or CPO and CTA regulation in general. Moreover, such an approach to U.S. ownership is entirely at odds with the proposed changes to prong (iv), which consider passive U.S. ownership of less than a majority to be "negligible."[6] Accordingly, we urge the CFTC to: (1) address and revise prong (v) in a manner that conforms to the overall approach and (2) adopt a reasonable approach to U.S. ownership for CPO and CTA regulation as well that focuses on selling efforts rather than the ultimate residence of investors.

One way of accomplishing this is to eliminate prong (v), as it is duplicates prong (iv), which deals with the same issue. Alternatively, to the extent the CFTC wishes to capture in the U.S. person definition pools operated by a registered CPO in situations other than, but consistent with, prong (iv), prong (v) could be rewritten to state "any commodity pool, pooled account, or collective investment vehicle the operator of which *is* registered as a commodity pool operator under the CEA, *other than those collective vehicles excluded from the definition under prong (iv).*" The additional text, shown in italics, clarifies that pools operated by registered CPOs would be added to the U.S. person definition through prong (v) only because of registration for reasons consistent with prong (iv). This language would serve the purpose to make the definition internally consistent, but is not the only way to accomplish this goal.

However, while either of these approaches would solve the problem for purposes of swap regulation, unless the CFTC also addresses the U.S. person issue within the context of CPO and CTA regulation, we would still be left with a fundamentally inconsistent CFTC approach with respect to CPO and CTA extraterritorial jurisdiction. A position that a single U.S. investor results in CPO/CTA registration for non-U.S. funds is especially problematic because operators of non-U.S. funds may not have the benefit of the *de minimis* trading tests available under CFTC Rules 4.5 and 4.13(a)(3). That is, the operator of non U.S. fund with, as the CFTC often states, a single swap or futures contract, far below the *de minimis* limits, could find itself to be a commodity pool operator without the ability to claim an

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[5] The CFTC's Office of General Counsel has taken various no-action positions to this effect. *See, e.g.*, CFTC Staff Letter 76-21, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,222 (August 15, 2976). This no-action approach was later codified in CFTC Rule 3.10(c). *See* 17 C.F.R. §3.10(c) (2012); Exemption from Registration for Certain Foreign Persons, 72 Fed. Reg. 63,976 (November 14, 2007).

[6] Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, *supra* note 2, at 912 ("[T]he majority-ownership criterion would avoid capturing those entities that have negligible U.S. ownership interests.").

exclusion or exemption. Therefore, we urge the CFTC to take a consistent and rational approach in that context also. We ask the CFTC to consider that extraterritorial reach may come with a significant cost to the CFTC's relationships with its fellow securities regulators across the globe. Additionally, the protection afforded to U.S. resident,shareholders by the local regulators of non-U.S. Funds often matches that of the CFTC, particularly in areas like regulatory risk oversight. It is also worth considering what reverse measures might be taken by non-U.S. regulators, subjecting U.S. Funds to their jurisdiction should an investor move to France or Germany or Japan.

Invesco believes that even if the CFTC's regulatory concerns related to investors in commodity pools differ from those it applies to swap dealer regulation, the CFTC should consider for both regulatory purposes the same logical arguments related to the difficulties in tracking the movements of investors who were living outside the United States when they initially invested in a non-U.S. Fund.

We also believe that where a non-U.S. Fund has taken reasonable steps to prohibit offering to U.S. residents (such as by compliance with Regulation S), requiring the operator of the Fund to track later movement of either the shares or the individual owners to the United States is operationally impossible. The resulting potential ownership by U.S. residents does not justify assertion of CFTC jurisdiction over the Fund or its service providers. This view is supported by the Dodd-Frank Act's amendments to the definition of U.S. person added with new Rule 203(m)-1[7] to the Investment Advisers Act of 1940, which is also largely an investor protection regulatory scheme. The new rule assists the Securities and Exchange Commission in the regulation of private fund advisers, and states in the Note to Rule 203(m)-1(d)(8) that the status of an investor as a U.S. person occurs at the point in time when the person becomes a client.[8]

Hypothetically, it would present a conundrum if once a non-U.S. Fund manager became aware of a U.S. person investor in a non-U.S. Fund, the manager were required to make a difficult, and arguably unreasonable, choice. The manager could place itself under the jurisdiction of a U.S. regulator, thereby jeopardizing its relationships with its non-U.S. regulated brokers and counterparties, and possibly placing itself under confusing and conflicting regulation by the CFTC and its home regulator.On the other hand, in order to preserve its right to be regulated exclusively by its home regulator, the manager could forcibly divest any shareholders who subsequently move to the United States after investing in the Fund. In a converse scenario, U.S. Fund managers would not want to have to choose between subjecting themselves to European or Asian country regulations or forcibly divesting their shareholders who move to Europe or Asia after investing in a U.S. Fund. Those decisions, whether made in the face of CFTC regulations or regulations from other nations, restrain free trade and commerce.

This "hypothetical conundrum" described above is, in reality, not hypothetical at all. In today's global environment, all Funds face the situation where one or more of their investors movefrom one country to another after investing in a Fund. For swaps regulation and CPO/CTA regulation alike, the industry needs assurance that the presence of a "negligible" percentage of U.S. resident investors will neither require a Fund manager to register as a CPO (or CTA) nor transform a non-U.S. Fund into a U.S. person for purposes of swap regulation.

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[7] 17 C.F.R. §275.203(m)-1 (2012).

[8] *Id.* ("Note to paragraph (d)(8): A client will not be considered a United States person if the client was not a United States person at the time of becoming a client.")

It would also be helpful to the industry for the CFTC to clarify that the manager of a non-U.S. Fund is not required to attempt to determine the residency of investors who are outside the manager's fund books and records.

In summary, we respectfully urge the CFTC to: (1) clarify its change to the definition of prong (iv) of the definition of U.S. person articulated in the Further Proposed Guidance; (2) eliminate or adjust prong (v) so as not to undermine prong (iv) and (3) clarify its approach toward U.S. person ownership of non-U.S. Funds for purposes of CPO and CTA regulation consistent with the overall approach it is now taking with respect to extraterritorial reach of its jurisdiction.

Sincerely,

John M. Zerr
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