Sarah A. Miller
Chief Executive Officer
E-mail: smiller@iib.org

INSTITUTE OF INTERNATIONAL BANKERS

299 Park Avenue, 17th Floor
New York, N.Y. 10171
Direct: (646) 213-1147
Facsimile: (212) 421-1119
Main: (212) 421-1611
www.iib.org

August 16, 2013

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

Re: Exemptive Order Regarding Compliance With Certain Swap Regulations, RIN 3038-AE05 (the "July Order")[1]

Secretary Jurgens:

The Institute of International Bankers (the "Institute") welcomes the opportunity to provide comments to the Commodity Futures Trading Commission (the "Commission") with respect to the July Order. The Institute appreciates the Commission's prior efforts to phase in the cross-border implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in an orderly manner through the publication of appropriate transitional relief in January 2013 (the "January Order").[2] As the Commission notes, further transitional relief is necessary in order to avoid market disruptions and to facilitate market participants' transition to the new Dodd-Frank swaps regime, including the final cross-border guidance (the "Final Guidance")[3] adopted by the Commission on July 12, 2013. However, we believe that there are certain respects in which additional transitional relief beyond that contained in the July Order would promote the Commission's objective of avoiding both short- and long-term market disruption. Additionally, clarification with respect to the prospective nature of the Final Guidance would help to avoid unintended instances of retroactive application of Commission requirements.

[1] 78 Fed. Reg. 43,785 (July 22, 2013).

[2] 78 Fed. Reg. 858 (Jan. 7, 2013).

[3] 78 Fed. Reg. 45,292 (July 26, 2013).

I. Extension of Transition Periods Under the July Order

We have included below our suggestions that the Commission provide additional transitional relief with respect to four key areas addressed under the July Order: (a) the definitions of "U.S. person", "guaranteed affiliate" and "affiliate conduit"; (b) swap dealer and major swap participant ("MSP") registration; (c) mandatory clearing and (d) substituted compliance.

A. Definitions of U.S. Person, Guaranteed Affiliate and Affiliate Conduit

Under the July Order, market participants may continue to apply the same definition of "U.S. person" from the January Order for a period of 75 days following publication of the Final Guidance. As a result, beginning on October 10, 2013, market participants will be required to apply the definition of "U.S. person" set forth in the Final Guidance. The definition under the Final Guidance differs in several key respects from the currently applicable definition, including:

- The inclusion of funds and other collective investment vehicles (together, "Funds") within the "principal place of business" test under prong (iii);
- The addition of a majority ownership test for Funds, excluding Funds publicly offered only to non-U.S. persons, under prong (vi); and
- The addition of a test for entities directly or indirectly majority-owned by U.S. persons with unlimited liability, under prong (vii).[4]

Because it was not clear in the period leading up to the adoption of the Final Guidance that the Commission would ultimately adopt these prongs to the definition (or adopt these prongs with the specific terms and conditions contained in the Final Guidance), market participants have not had an opportunity to obtain the information from counterparties or investors, or develop the operational systems or documentation, necessary to comply with the new additions to the U.S. person definition described above.

As an initial matter, many entities will need time to determine whether they themselves would be considered U.S. persons under the Final Guidance. For instance, as the Commission acknowledges, the application of the "principal place of business" test to Funds "may require consideration of additional factors beyond those applicable to operating companies," in part because the formation and structure of Funds involves "a great deal of

---

[4] Final Guidance at 45,316-17.

variability."[5] The Final Guidance provides a number of illustrative examples and description of factors involved in making the principal place of business determination for a Fund, but also specifically states that the Commission "does not intend to establish bright line tests" for making such a determination.[6] Due to these complexities, many Funds will require additional time to properly consult with U.S. counsel in order to assess their status under the Final Guidance, and also may need time to consult with Commission staff.

The addition of a majority ownership test for Funds under the Final Guidance will also require Funds to obtain information from their investors that they have not previously sought. As we discuss in Part III.A below, this task will be especially burdensome (if not impossible) for existing funds. Newly formed funds, meanwhile, will need to make appropriate adjustments to their subscription documentation and establish procedures for monitoring investors' U.S. person status. Investors, meanwhile, will also have to determine their own U.S. person status; especially for investors that are Funds, this will not be a simple endeavor, as noted above.

Likewise, the addition of the prong for foreign companies majority-owned by U.S. persons with unlimited responsibility for the company's obligations and liabilities will, for a more limited class of companies, require a thorough analysis of their ownership structure and the legal regime governing their manner of incorporation. This is particularly the case for companies organized in jurisdictions that were not specifically addressed by the examples cited in the Final Guidance, as well as companies with more complicated direct and indirect ownership structures.

In addition to the U.S. person definition, market participants will need to ascertain their status as a "guaranteed affiliate" or "affiliate conduit" in order to apply certain rules under the Final Guidance. Because the Commission's test for whether an entity is a guaranteed affiliate goes beyond simply contractual guarantees,[7] such a determination will require additional time. Indeed, as with U.S. person status for Funds as described above, some market participants may find it necessary to consult U.S. counsel in order to reach a sound legal conclusion regarding their potential status as a guaranteed affiliate.

---

[5] Id. at 45,309.

[6] Id. at 45,311.

[7] See id. at 45,355.

Similarly, status as an affiliate conduit under the Final Guidance depends on a four part test which will require a careful factual and legal analysis of an entity's corporate status, financial and accounting controls, and relationship with its affiliates.[8]

The foregoing discussion addresses only the need for market participants to assess their own U.S. person, guaranteed affiliate or affiliate conduit status under the Final Guidance. As a practical matter, however, market participants (especially non-U.S. swap dealers and MSPs) will also need to assess the status of their counterparties. For example, non-U.S. swap dealers will need to know if a given counterparty or its guarantor is a U.S. person for purposes of applying transaction-level requirements to swaps with that counterparty. However, due to the complicated nature of the U.S. person definition under the Final Guidance, most market participants will not have the information readily available to them that would enable them to determine their counterparty's or their counterparty's guarantor's U.S. person status.[9] The same is true for information required to make a determination as to affiliate conduit status. In order to fulfill their obligations, market participants will therefore need to obtain representations from their counterparties with respect to such statuses.

Accordingly, we expect that the industry will develop standard documentation, or modify existing standard documentation, to address the new U.S. person definition, as well as the guaranteed affiliate and affiliate conduit interpretations. Such a documentation initiative can take a significant period of time to complete; market participants must develop standard contract language, and must engage in bilateral or multilateral efforts to obtain agreement with their counterparties. For instance, prior Dodd-Frank documentation initiatives (such as the August 2012 and March 2013 ISDA Dodd-Frank Protocols) took several months to unfold. While an initiative intended to facilitate compliance with the Final Guidance may be relatively more limited in the scope of matters to be addressed, it is our view that substantial additional time beyond the July Order's current October 10, 2013 deadline is still likely to be necessary. Furthermore, market participants that are newly defined as U.S. persons, guaranteed affiliates or affiliate conduits will need time to complete existing industry standard documentation in order to come into compliance with Dodd-Frank.

Finally, even once a market participant has determined its U.S. person, guaranteed affiliate or affiliate conduit status, provided representations to its counterparties through industry standard documentation, and completed existing documentation (if it now has such a status), its counterparties will need time to modify their static data systems in order to account for the change (if any) in the market participant's status. Counterparties will also need to modify their policies, procedures and controls, and train their personnel, in order to ensure compliance with

---

[8] Id. at 45,359. The same considerations also apply to determination of foreign branch status, as discussed in Part II.A below.

[9] The data that market participants have captured about their counterparties' guarantors is often not sufficient to determine the U.S. person status of those guarantors.

Dodd-Frank with respect to new U.S. persons and, when applicable, guaranteed affiliates and affiliate conduits.

Accordingly, we respectfully request that the Commission extend the relief granted with respect to the U.S. person definition under the July Order until December 21, 2013, plus an additional transitional period until March 31, 2014 for market participants to come into compliance with newly applicable requirements. We also respectfully request that the Commission grant parallel relief with respect to application of the guaranteed affiliate and affiliate conduit tests until December 21, 2013, plus an additional transitional period until March 31, 2014 for market participants to come into compliance with any newly applicable requirements, subject to any earlier substituted compliance determination with respect to such entities. We believe that such extensions would promote legal certainty and provide the necessary time for market participants to implement modifications to documents, systems, policies, procedures, controls and training in order to comply with the Final Guidance's new U.S. person definition and the new tests for guaranteed affiliates and affiliate conduits.

B. Swap Dealer and MSP Registration Calculations

Under the July Order, market participants may continue to apply the registration calculation and aggregation provisions from the January Order for a period of 75 days following publication of the Final Guidance. The January Order allows non-U.S. persons to exclude swaps with non-U.S. counterparties or foreign branches of U.S. swap dealers for purposes of the swap dealer *de minimis* and MSP threshold calculations. Additionally, qualifying non-U.S. persons are not required to aggregate swaps with their U.S. affiliates or, for non-U.S. persons affiliated with a registered swap dealer, swaps with other qualifying non-U.S. affiliates for purposes of the swap dealer *de minimis* calculation.

However, beginning on October 10, 2013, the registration provisions under the Final Guidance will apply. These provisions will introduce a number of new tests for market participants to take into account. For example, non-U.S. persons will need to determine whether their non-U.S. counterparties are guaranteed affiliates of U.S. persons in order to perform the swap dealer *de minimis* and MSP threshold calculations.[10] As described above, this step is more time-consuming than it might appear.

Moreover, beginning on October 10, 2013, all entities will be required to aggregate their swap dealing activities with those of all affiliates that are not registered swap dealers, regardless of U.S. person status.[11] Thus, the Final Guidance anticipates that when an affiliate group reaches the swap dealer *de minimis* threshold, one or more affiliates would be

---

[10] Final Guidance at 45,326.

[11] Id. at 45,323.

required to register so that the unregistered affiliates remain below the threshold.[12] In order for affiliated groups to come into compliance with this requirement, certain entities will need to cease dealing activities and novate existing swaps to their registered affiliates. These changes will require counterparties to agree to novation. In some cases, existing registrants will also need to obtain licenses in foreign jurisdictions in order to do business in those jurisdictions in connection with the counterparties whose relationships have been moved to them. If, instead, a previously unregistered entity decides to register with the Commission, that entity will in most cases need the approval of local regulatory authorities before it can do so.

Accordingly, we respectfully request that the Commission extend the relief granted with respect to the swap dealer and MSP registration calculation and aggregation requirements under the July Order until December 21, 2013, plus an additional transitional period until March 31, 2014 for market participants to come into compliance with newly applicable requirements. Consistent with the relief requested above with respect to the U.S. person definition and guaranteed affiliate or affiliate conduit status, this additional time is necessary in order to allow market participants to make sufficient determinations and take essential steps to ensure a smooth transition to the Dodd-Frank regulatory regime.

C. Mandatory Clearing

The July Order provides transitional relief from most transaction-level requirements to non-U.S. swap dealers established in Australia, Canada, the European Union, Hong Kong, Japan or Switzerland (the "Enumerated Jurisdictions") until the earlier of December 21, 2013 or 30 days following the issuance of a relevant substituted compliance determination. However, the July Order delays compliance with mandatory clearing only until October 10, 2013, even where substituted compliance may ultimately be available.[13]

For the reasons described in this letter, additional time will be needed for market participants to assess, and come into compliance with the requirements associated with, Funds that will be U.S. persons under the Final Guidance, the new foreign branch tests, the new guaranteed affiliate test and the new affiliate conduit test. Thus, expedited application of the mandatory clearing requirement based on these new tests would not be practicable.

At the same time, we note that the commitments made by dealers as part of the OTC Derivatives Supervisors' Group ("ODSG"), as cited by the Commission in the July Order,[14] mean that an additional transition period for compliance with the mandatory clearing requirement is unlikely to present any material additional risk to the U.S. financial system. Most

---

[12] Id.

[13] See Division of Clearing and Risk, Notice Regarding Expiration of Cross-Border Exemptive Relief from the Clearing Requirement (July 31, 2013), available at http://www.cftc.gov/PressRoom/Press Releases/pr6657-13.

[14] See July Order at 43,789-90.

clearable inter-dealer swaps are already being cleared. Those buy-side market participants that have the requisite documentation and infrastructure needed to clear their swaps are generally doing so. In this regard, it is important for the Commission to recognize that the negotiation of clearing documentation and the establishment of clearing infrastructure is an extremely time-consuming process that draws upon a limited range of experienced firm personnel and capable middleware vendors. Thus, the rushed implementation of mandatory clearing is more likely to deny market access than it is to drive a meaningful increase in clearing volumes.

We also observe that the Commission's inter-affiliate clearing exemption recognizes that for jurisdictions that have already codified mandatory clearing requirements – the European Union, Japan and Singapore – transitional relief until March 2014 is appropriate.[15] Such transition relief would also be consistent with the accord reached by the Commission with the European Commission on July 11, 2013.[16] We continue to believe that such recognition of material progress toward mandatory clearing by other jurisdictions is warranted.

Accordingly, for the reasons described above, we respectfully request that the Commission extend the July Order's relief with respect to the clearing requirement for swaps between (1) a non-U.S. swap dealer established in one of the Enumerated Jurisdictions and (2) any non-swap dealer, non-U.S. counterparty to which mandatory clearing would apply under the Final Guidance until March 31, 2014.

D. Transition to Substituted Compliance

In the July Order, the Commission acknowledged that it has received requests for substituted compliance determinations with respect to the Enumerated Jurisdictions.[17] Consequently, the July Order grants relief with respect to certain entity-level and transaction-level requirements for non-U.S. swap dealers and MSPs established in, and foreign branches of U.S. swap dealers and MSPs located in, those jurisdictions until December 21, 2013 or 30 days following an applicable substituted compliance determination.

We appreciate the Commission's recognition of the importance of international comity and look forward to the issuance of substituted compliance determinations as the Commission deems appropriate. However, it is important that any such determinations provide suitable transitional periods to allow foreign jurisdictions to implement their rules. Accordingly,

---

[15] See Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 Fed. Reg. 21,750 (Apr. 11, 2013).

[16] See Cross-Border Regulation of Swaps/Derivatives Discussions between the Commodity Futures Trading Commission and the European Union – A Path Forward (July 11, 2013), available at http://www.cftc.gov/ucm /groups/public/@newsroom/documents/file/jointdiscussionscftc_europeanu.pdf.

[17] July Order at 43,788.

we respectfully request that any substituted compliance determinations issued by the Commission provide for the following:

- if the determination is made with respect to pending legislation in the foreign jurisdiction, additional transitional relief until at least March 31, 2014 to provide sufficient time for the enactment of that legislation, at which point the Commission would be in a better position to evaluate when and if its rules should apply;

- if legislation has been enacted but agency rulemaking remains pending, additional transitional relief until at least 30 days after such rules are due under the legislation, at which point the Commission would be in a better position to evaluate when and if its rules should apply; and

- if rulemaking is completed but is pending implementation, additional transitional relief until the date that such rules are to go into effect.

Given the Commission's statements in the release accompanying the July Order, as well as discussions with foreign regulators, many market participants expect that substituted compliance determinations are likely to be issued with respect to requirements in their home jurisdictions. However, in the event that substituted compliance is not granted by the Commission or the Commission includes a condition to its grant of substituted compliance, affected non-U.S. swap dealers and MSPs will need additional time beyond the 30 days contemplated by the July Order to come into compliance with the Dodd-Frank requirements or the conditions to the substituted compliance determination. 30 days is in some cases shorter by an order of magnitude than the implementation period contemplated by the Commission when it initially adopted the rules that will apply absent a substituted compliance determination. Therefore, we respectfully request that, in the event such a determination is not granted, the Commission provide a transition period to affected registrants of at least 90 days, or such longer period that is consistent in length with the period that the Commission granted to registrants to come into compliance when the relevant rule was initially adopted.[18]

II. Additional Transition Periods

We have identified below four key areas for which transitional relief was not provided under the July Order, but for which we believe relief is necessary in order to prevent serious market disruption and facilitate good faith compliance with Dodd-Frank: (a) the bona fide "foreign branch" test, (b) guidance regarding U.S. branches of non-U.S. swap dealers and

[18] For instance, when it initially adopted its chief compliance officer rules, the Commission provided swap dealers and MSPs with either a 180-day or 360-day transition period depending on their current regulatory status. Accordingly, if the Commission decides not to grant substituted compliance with respect to those rules, we suggest that the Commission provide affected registrants with a similar 180-day or 360-day transition period, as appropriate.

MSPs, (c) large trader reporting and (d) the application of the legal entity identifier ("LEI") recordkeeping requirements to certain non-U.S. swap dealers and MSPs.

A. Bona Fide "Foreign Branch" Test

In its discussion accompanying the release of the July Order, the Commission stated that, for purposes of applying the July Order, market participants must use the term "foreign branch" and the interpretation of when a swap is considered to be with a foreign branch as set forth in the Final Guidance.[19] The Final Guidance interprets a foreign branch specifically as a branch subject to certain banking regulations that maintains accounts and accrues profit and loss separately from the home office and is subject to substantive banking regulation in the host jurisdiction.[20] The Final Guidance also describes five factors that generally must be present for a swap to be bona fide with the foreign branch, including that the employees negotiating and executing the swap are located in the foreign branch and that payments and deliveries under the swap are made through the foreign branch in accordance with the swap's documentation.[21]

While some of these prongs were briefly discussed by the Commission in the release accompanying the January Order, other prongs—most notably the one pertaining to payments and deliveries—were not included in the January Order's discussion and were therefore not even subject to public comment. In addition, the exact parameters established by the "foreign branch" test, including the scope of employees required to be located abroad, was not clear until the adoption of the Final Guidance. As a result, market participants have not had an opportunity to modify their operational systems and relationship documentation to reflect the terms of the Final Guidance's foreign branch tests. In this regard, the adoption of the new foreign branch tests will require industry coordination, particularly with respect to standard documentation, similar to that needed for the U.S. person definition as described above. Clarification of the tests through Commission staff guidance may also be necessary before market participants can implement them.

Accordingly, we respectfully request that the Commission grant relief with respect to the interpretation and application of "foreign branch" status under the Final Guidance until December 21, 2013, plus an additional transitional period until March 31, 2014 for market participants to come into compliance with any newly applicable requirements, subject to any earlier substituted compliance determination with respect to such foreign branches. Such relief would be consistent with the relief requested above with respect to the U.S. person definition and guaranteed affiliate or affiliate conduit status, and is necessary to provide adequate time for

---

[19] July Order at 43,789 n.43.

[20] Final Guidance at 45,329.

[21] Id. at 45,330.

market participants to implement modifications to documents, systems and trading relationships in order to comply with the Final Guidance.

B. U.S. Branches of Non-U.S. Swap Dealers and MSPs

The Final Guidance states that the U.S. branch of a non-U.S. swap dealer or MSP will be subject to transaction-level requirements without the opportunity for substituted compliance, even though it is considered to be part of a non-U.S. person.[22] This application of requirements to U.S. branches for swaps with non-U.S. persons reflects a new interpretation of the branch concept that was not included in the Commission's proposed cross-border guidance,[23] its further proposed guidance,[24] or the January Order, and was therefore not subject to public comment.

As a result, non-U.S. swap dealers and MSPs are only now able to analyze the effect of such an expansion of transaction-level requirements. For example, non-U.S. swap dealers and MSPs established in the European Union will need to assess how they will comply with both U.S. and European requirements applicable to their U.S. branches, as it is contemplated that European rules will apply to those branches.[25] In this regard, additional relief similar to that granted by Commission staff in Letter 13-45 may be necessary to avoid the application of conflicting legal requirements. Consultation by the Commission with foreign regulators regarding such relief in the context of U.S. branches should be viewed as an integral component of the commitment to international coordination reflected in the Commission's "Path Forward" with the European Commission.[26] This consultation and coordination should not be limited to the European Union.

Once the conflicts raised by this new interpretation have been resolved by the Commission and foreign regulators, coming into compliance may require non-U.S. swap dealers and MSPs and their counterparties to modify systems, documentation, policies, procedures, controls and training in order to distinguish U.S. branch transactions from foreign branch transactions, both for the non-U.S. swap dealer or MSP and for its counterparties. For the foregoing reasons, we respectfully request that the Commission grant relief with respect to the

---

[22] Id. at 45,350 n.513.

[23] 77 Fed. Reg. 41,214 (July 12, 2012) (the "Proposed Guidance").

[24] 78 Fed. Reg. 909 (Jan. 7, 2013).

[25] See European Securities and Markets Authority, Consultation Paper 2013/892, Draft Regulatory Technical Standards on contracts having a direct, substantial and foreseeable effect within the Union and non-evasion of provisions of EMIR (July 17, 2013).

[26] See footnote 16 above.

application of transaction-level requirements to the U.S. branches of non-U.S. swap dealers and MSPs for swaps with non-U.S. counterparties under the Final Guidance until at least March 31, 2014, subject to such additional relief as the Commission determines to be appropriate in order to promote international comity and coordination.

C. Large Trader Reporting

Under the January Order, non-U.S. swap dealers and MSPs that are not part of an affiliate group in which the ultimate parent entity is a U.S. swap dealer, U.S. MSP, U.S. bank, U.S. financial holding company, or U.S. bank holding company ("Covered Registrants") were permitted to delay compliance with large trader reporting for swaps with non-U.S. counterparties.[27] In this respect, the January Order was intended to facilitate the transition to the substituted compliance regime envisioned by the Proposed Guidance, in which the Commission proposed to permit substituted compliance with comparable foreign regimes for large trader reporting for swaps between non-U.S. swap dealers or MSPs and non-U.S. counterparties.[28] However, under the Final Guidance, the Commission determined that substituted compliance would not be available with respect to large trader reporting[29] and no further transitional relief was granted under the July Order.[30] As described below, the Commission did not solicit public comment regarding this reversal nor the time period needed for Covered Registrants to come into compliance.

For several reasons, Covered Registrants could not have anticipated that they would not be eligible for substituted compliance with respect to large trader reporting under the Final Guidance. As noted above, the Commission had proposed to permit substituted compliance under the Proposed Guidance. None of the requests for comment in the Proposed Guidance suggested that the Commission was considering reversing this decision, nor are we aware of any comments advocating that the Commission make such a reversal. Moreover, market participants relied upon the Commission's own statements to the contrary. In the January Order, the Commission indicated that it would extend the relief granted under the January Order with respect to entity-level requirements, including large trader reporting, in order to conduct a review and evaluation of relevant substituted compliance submissions.[31] Covered Registrants

---

[27] January Order at 880.

[28] Proposed Guidance at 41,228.

[29] Final Guidance at 45,349.

[30] July Order at 43,788 n.27.

[31] See January Order at 861 (noting that the Commission "intends to consider extending the effectiveness of the exemptive relief at its expiration based on, among other things, whether and when substituted compliance with foreign regulatory requirements for non-U.S. persons is available"); see also July Order at 43,788 ("Given that the [Final Guidance] is being issued now, and that the Commission did not receive any submissions in support of

had no reason to believe that large trader reporting, alone among those regulations categorized as entity-level requirements under the January Order and the Proposed Guidance, would be excluded from this relief.

As the Commission acknowledged in the July Order,[32] Covered Registrants need time to come into compliance with a substituted compliance determination, which is what the Commission has effectively made—and denied—with respect to large trader reporting. Although foreign clearing members and non-U.S. swap dealers and MSPs that are part of a U.S. affiliated group have been in compliance with large trader reporting across all swaps, Covered Registrants are in a fundamentally different position because of their reliance on the January Order and the Commission's accompanying statements. Therefore, Covered Registrants must make operational and technological changes to their systems to report data for swaps with non-U.S. counterparties, which may not currently be stored in systems integrated with the large trader reporting system for U.S. counterparties. In addition, Covered Registrants must identify relevant non-U.S. counterparties, determine whether they are subject to local privacy, secrecy or blocking laws restricting disclosure of identifying information, obtain consent for disclosure for counterparties whose identifying information is protected, and seek and obtain from relevant non-U.S. regulators information to address data privacy restrictions with respect to counterparties in jurisdictions where restrictions on disclosure cannot be addressed through consent.[33] As a result, it is simply not possible for Covered Registrants to fully comply immediately.

Accordingly, we respectfully request that the Commission grant relief to Covered Registrants with respect to large trader reporting requirements for swaps with non-U.S. counterparties until March 31, 2014. We believe that such relief is necessary to provide adequate time for market participants to come into compliance with the Final Guidance.

D. LEI Recordkeeping

Under the July Order, Covered Registrants established in the Enumerated Jurisdictions may delay compliance with the regulatory reporting requirements of Parts 45 and 46 of the Commission's regulations with respect to swaps with non-U.S. counterparties until the earlier of December 21, 2013 or 30 days following the issuance of a relevant substituted compliance determination, on the condition that during the relief period: (1) the Covered

[s]ubstituted [c]ompliance [d]eterminations with sufficient time to review them and reach a final determination, the Commission has determined to temporarily delay compliance with [e]ntity-[l]evel [r]equirements in" the Enumerated Jurisdictions.").

[32] See July Order at 43,788 n.41; see also discussion in Part I.D above.

[33] See CFTC No-Action Letter No. 13-41 (June 28, 2013).

Registrant is in compliance with the swap data recordkeeping and reporting requirements of its home jurisdiction or (2) where no swap data recordkeeping requirements have been implemented in its home jurisdiction, the Covered Registrants complies with the recordkeeping requirements of Commission Regulations §§ 45.2, 45.6, 46.2 and 46.4.[34] In particular, Commission Regulations §§ 45.6 and 46.4 require the use of LEIs in all swap data recordkeeping, with respect to both the reporting counterparty and its counterparty.

Although the January Order did provide relief to Covered Registrants with respect to the regulatory reporting requirements, the recordkeeping conditions described above were not included. As a result, Covered Registrants did not anticipate that the LEI requirements would apply immediately to swaps with their non-U.S. counterparties, particularly as the Commission had indicated that substituted compliance may be available with respect to these requirements. Covered Registrants have therefore not had an opportunity to contact each of their non-U.S. counterparties to determine whether the counterparty has an LEI, obtain the counterparty's LEI for recordkeeping purposes if it has already been issued, and remind the counterparty of its obligation to obtain an LEI if it does not yet have one.

To address this issue, the Institute has submitted a request for temporary no-action relief to the Commission's Division of Market Oversight.

III. Prospective Application of Commission Requirements

We believe that it is the Commission's intent that its requirements should apply prospectively, such that transactions entered into prior to the effectiveness of those requirements would not be subject to new rules that could not have been anticipated at the time. Confirmation that this approach is intended by the Commission is extremely important, however, in order to provide legal certainty and avoid unnecessary market disruption. We have identified two key areas below where Commission action in this regard is particularly vital: (a) the application of the new U.S. person definition to existing Funds and (b) changes to the MSP threshold calculations.

A. Application of the U.S. Person Definition to Existing Funds

As discussed above, the new U.S. person definition under the Final Guidance will require Funds to determine whether they are majority-owned by U.S. persons. However, the vast majority of existing Funds will not have the ability to obtain this information from their investors because their original subscription documentation did not contain requests for representations pertaining to the Commission's new U.S. person definition, nor do Funds commonly have a right to demand such information from their investors once a Fund has closed.

---

[34] July Order at 43,794.

Therefore, we respectfully request that the Commission permit Funds in existence as of July 26, 2013 that were initially offered and sold in reliance on Regulation S under the Securities Act of 1933 to exclude existing investors from their majority ownership calculation under prong (vi) of the Final Guidance's U.S. person definition.

B. Registration Calculations

As discussed above, the new swap dealer and MSP registration calculations under the Final Guidance will require each market participant to determine its own status and that of its counterparties using the tests set forth in the Final Guidance, including with respect to U.S. persons, foreign branches and guaranteed affiliates. Market participants will also need to apply new guidance regarding aggregation for purposes of the swap dealer *de minimis* exception. We believe that the application of these new tests to the swap dealer *de minimis* calculation and any newly required aggregation on a prospective basis only is clear given the generally prospective nature of the swap dealer definition and the language in the January Order and the July Order providing that a non-U.S. person "is not required to include" in its SD *de minimis* calculations certain swaps entered into during the term of those orders. However, because MSP registration calculations are based on aggregate exposure across outstanding swaps, rather than the notional amount of particular swap transactions, the Commission should clarify that all activity conducted in reliance on the January Order and the July Order will not affect a market participant's MSP registration status following the expiration of the July Order's registration relief.

For example, a market participant should not be required to assess, for MSP purposes, whether a Fund with which it entered into a swap in March 2013 was a U.S. person as defined under the Final Guidance, nor to assess whether a swap entered into with the foreign branch of a U.S. swap dealer in May 2013 qualified as a swap "with a foreign branch" under the Final Guidance. Market participants do not have, and will not generally be able to obtain, the information necessary to make these and similar assessments. It is simply not fair or equitable for activities conducted in reliance on Commission exemptive relief to be relevant for registration determinations that must be made based on guidance adopted after that relief has been in effect.

Thus, while we believe that the Commission intended for changes brought by the Final Guidance to apply solely in a prospective manner, clarification of this intent is extremely important in the context of MSP registration. Accordingly, we respectfully request that the Commission confirm that the Final Guidance's interpretations regarding the MSP threshold calculations apply solely to activities conducted by a market participant following the expiration of the relief contained in paragraphs (3) and (4) of the July Order, and that the standards set forth in those paragraphs, as well as the January Order, apply to all activities conducted prior to such expiration.

* * *

The Institute appreciates the Commission's consideration of these matters. If the Commission or its staff has any questions regarding this letter, please do not hesitate to contact the undersigned at (212) 421-1611.

Respectfully submitted,

Sarah A. Miller
Chief Executive Officer
Institute of International Bankers