March 10, 2014

VIA ELECTRONIC MAIL

Ms. Melissa Jurgens
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
Washington, DC 20581

Re: Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States, 17 CFR Chapter 1

Dear Ms. Jurgens:

The Investment Adviser Association[1] appreciates the opportunity to comment on the applicability of Commodity Futures Trading Commission ("Commission" or "CFTC") regulations to activities in the United States of CFTC-registered swap dealers ("SDs") that are established in jurisdictions other than the United States.[2] We commend the Commission for deliberating on the matters addressed in the advisory issued by its staff, on November 14, 2013, with respect to these activities ("Staff Advisory").[3] We also welcome the Commission's efforts to work with its counterparts in Europe and elsewhere to provide much-needed pre-trade transparency to market participants. However, for the reasons set forth below, we request that the Commission not adopt the Staff Advisory as Commission policy.

The Staff Advisory was issued in response to concerns by certain swap market participants that the CFTC cross-border guidance may not specifically address swaps that are negotiated between a non-U.S. SD and non-U.S. counterparties acting through agents of the non-U.S. SD located in the United States. The Staff Advisory appears to be intended to address these concerns by requiring a non-U.S. SD (whether affiliates or not of a U.S. person)

[1] The Investment Adviser Association ("IAA") is a not-for-profit association that represents the interests of investment adviser firms registered with the Securities and Exchange Commission. Founded in 1937, the IAA's membership consists of more than 550 firms that collectively manage in excess of $12 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit our website: www.investmentadviser.org.

[2] See Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States, 79 Fed. Reg. 1347 (Jan. 8, 2014).

[3] See Division of Swap Dealer and Intermediary Oversight, Applicability of Transaction-Level Requirements to Activity in the United States (Nov. 14, 2013).

that regularly uses personnel or agents located in the U.S. to "arrange, negotiate, or execute swaps with non-U.S. persons" ("covered transactions") to comply with the CFTC regulations applicable on a transaction-by-transaction basis ("transactional requirements"). The Staff Advisory further states that this view applies to a covered transaction booked in a non-U.S. branch of the non-U.S. SD. Finally, the Staff Advisory does not permit substituted compliance with comparable regulations of foreign countries.

As discussed further below, we are concerned that the Staff Advisory may have negative unintended consequences for non-U.S. clients of asset management firms.[4] We believe the CFTC staff may not have sufficiently considered the potential costs and benefits of its Advisory for non-U.S. investors and their U.S. asset managers. In addition, we submit that the staff should have permitted substituted compliance. Finally, we respond to the Commission's request for comment regarding the range and types of U.S. activities that would subject non-U.S. SDs to CFTC regulation in this context.

The Staff Advisory may have negative implications for non-U.S. clients of U.S. asset managers.

We are concerned about the effect the requirements imposed by the Staff Advisory would have on non-U.S. investors, many of whom are clients of U.S. asset management firms or of non-U.S. asset management firms with affiliates or personnel in the U.S. It is typical for global swap desks at many SDs to provide non-U.S. clients with 24-hour access to U.S. swap markets and staff located in the U.S. The use of swap dealers with global operations facilitates global trading and manages time zone issues in a way that is seamless and benefits these clients. In addition, a U.S. asset manager or the U.S. affiliate of a non-U.S. manager may call U.S. personnel of a non-U.S. SD to request that a trade be placed, to gather current information on pricing, liquidity or other market color, or to ask servicing-related questions. These asset managers may also call U.S.-based personnel with expertise or knowledge of U.S. swaps markets based on existing relationships. For example, the asset manager may want to trade in swaps with a U.S. underlying asset on behalf of their non-U.S. clients where the expertise of U.S.-based personnel would be particularly valuable.

Moreover, non-U.S. clients engaging in swap transactions with non-U.S. SDs may have no expectation that their transactions would be subject to U.S. regulation. Indeed, it is

[4] We are also concerned that the Staff Advisory is inconsistent with the CFTC's jurisdictional limitations mandated by Congress. Section 2(i), added by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") [Public Law 111-203 (July 21, 2010)], states that the swaps provisions of the Commodity Exchange Act ("CEA") do "not apply to activities outside the United States unless those activities have . . . a direct and significant connection with activities in, or effect on, commerce of the United States . . . ." See 7 U.S.C. 2(i). This provision limits the authority of the CFTC with respect to extraterritorial application of the CEA's swaps provisions. We agree with other commenters that Section 2(i) requires the Commission to clearly articulate that the "direct and significant" standard has been satisfied in order to apply CFTC regulations to swap activities that take place outside the United States. However, the discussion in the Staff Advisory fails to address this standard.

possible that a non-U.S. SD may use U.S. personnel and the asset manager investing on behalf of non-U.S. clients may not know if and when these persons are involved. If the Staff Advisory is adopted, non-U.S. clients would be (in some cases unexpectedly) required to enter into specified protocols and have their transactions subject to a potentially additional layer of regulation that may impose additional costs and burdens on these clients. In the alternative, non-U.S. SDs may incur the expense of moving their personnel from the U.S to another location in North America (e.g., Canada) in order to address the implications of the Staff Advisory for their non-U.S. investors. Non-U.S. SDs may also incur the expense to hire dedicated personnel already located outside the U.S. to work during U.S. market hours to provide coverage of U.S. swap markets. Under either approach, these non-U.S. SDs would be faced with the burdens and costs of developing separate compliance systems and operations for swap transactions with non-U.S. counterparties. We are especially concerned that increased expenses for the SD would ultimately result in increased transaction costs and reduced services for our members' non-U.S. clients. Further, we are concerned that these issues may cause non-U.S. clients to avoid hiring U.S. asset managers due to perceived impediments involved in dealing with only non-U.S. personnel of non-U.S. SDs. Therefore, we urge the Commission to fully consider the potential costs and benefits that would result from imposing U.S. regulations on non-U.S. market participants (including investors) as contemplated by the Staff Advisory.

The Staff Advisory should have permitted substituted compliance.

To the extent the Commission determines that it should impose transactional requirements on non-U.S. SDs when entering into covered transactions, we urge the Commission to permit non-U.S. SDs to be able to rely on the CFTC's substituted compliance framework. Last year, the Commission provided interpretative guidance on the application of provisions relating to swaps in Title VII of the Dodd-Frank Act, and CFTC regulations adopted thereunder, to activities outside of the United States ("Guidance").[5] Specifically, the Guidance addresses which swap activities outside the United States are subject to CFTC jurisdiction under Section 2(i) of the CEA.

In issuing the Guidance, the Commission stated that "in exercising its authority with respect to swap activities outside the United States, the Commission will be guided by international comity principles."[6] In this regard, the Commission's Guidance also addresses the circumstances under which the transactional requirements could be satisfied through substituted compliance with applicable foreign regulation. Notably, the Guidance provides that substituted compliance should be available for transactional requirements with respect to swaps between a non-U.S. SD and a non-U.S. person, or should not apply at all, depending on

[5] See Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations 78 FR 45292 (July 26, 2013).

[6] See 78 FR at 45297.

whether or not such non-U.S. person is a guaranteed affiliate or affiliate conduit of a U.S. person.[7] According to the Commission, swap transactions "should be eligible for substituted compliance with respect to [transactional requirements], to the extent applicable, in light of the supervisory interest of the foreign jurisdiction in the execution and clearing of trades occurring in that jurisdiction."[8]

The Commission further stated that any approach to substituted compliance "would be expected to mitigate any burden associated with potentially conflicting foreign regulations and would generally be appropriate in light of the supervisory interests of foreign regulators in entities domiciled and operating in its jurisdiction."[9] As such, the Guidance provided by the Commission appears to indicate that substituted compliance should generally be available for foreign swap transactions involving solely non-U.S. counterparties and a non-U.S. SD.

We acknowledge the Commission's need to balance the important policy goals of the Dodd-Frank Act and take into consideration counterparty protection, transparency, systemic risk, liquidity, efficiency, and competition in the market. We also appreciate the CFTC's continued efforts to avoid having market participants subject to conflicting or duplicative regulations. However, we believe that the Staff Advisory is fundamentally inconsistent with these efforts. By not permitting substituted compliance for these foreign swap transactions, the guidance provided by the Staff Advisory reflects a lack of coordination with foreign regulators that would inevitably lead to less efficient use of regulatory resources and would likely subject the affected entities to potentially duplicative or conflicting regulations and increased costs of compliance. Moreover, the Staff Advisory appears to not consider the supervisory interest of foreign regulators with respect to swap transactions involving entities operating within its jurisdiction and the investor protection interests of such regulators with respect to its resident investors. Therefore, the IAA urges the Commission to recognize the supervisory interest of foreign regulators and permit substituted compliance of swap transactions involving non-U.S. counterparties and a non-U.S. SD.

Any Commission policy affecting non-U.S. investors should provide clarity with respect to the range and types of transactions that would be covered.

In light of the increasingly complex nature of the derivatives markets, especially with all the new regulations facing market participants, it is vital for the Commission to provide clarity with respect to its regulations and address areas of uncertainty for all market participants. The Staff Advisory sets forth the criteria that persons "regularly arranging, negotiating, or executing" swaps for or on behalf of an SD are "performing core, front-office

[7] See 78 FR at 45350-59.

[8] See 78 FR at 45327.

[9] See 78 FR at 45301.

activities of the SD's dealing business" that should be subject to CFTC transactional requirements. Neither the Guidance nor the Staff Advisory offer clarity in this regard.

We understand that the Staff Advisory may not intend to impose transactional requirements for activities in the U.S. that are nominal or tangential to foreign swap transactions.[10] However, we believe that the terms "arranging" and "negotiating" are overly broad and may encompass activities that are incidental to a swap transaction. We are also concerned that the terms "core" and "front-office" are too vague in this context and would result in differing interpretations by market participants. Activity-based regulations that are unclear often result in market participants avoiding the underlying activities altogether. As such, we believe that the adoption of these criteria by the Commission would have the unintended consequence of deterring activities by non-U.S. SDs in the U.S. that the CFTC may not have intended to be covered transactions.

Further, we note that trade compliance and governance are the responsibility of the counterparty to the transaction regardless of where the counterparty's agents or affiliates may be located. The IAA would therefore recommend that the Commission not use the criteria set forth in the Staff Advisory. At most, if the Commission determines to proceed with its "territorial" approach, it should limit covered transactions to only those where the principal activities of execution and/or clearing of the trade occur in the United States. We would suggest that limiting covered transactions in this manner would provide clarity for all market participants while considering the CFTC's supervisory interests of efficiency and competition in the market.

However, should the Commission determine to adopt the Staff Advisory, we would urge the Commission to clearly describes the types of activities in the U.S. that would subject transactions between non-U.S. SDs and non-U.S. counterparties to CFTC transaction-level requirements. In particular, we would urge the Commission to clarify that the sales activities of a non-U.S. SD conducted in the U.S. in connection with a swap transaction with a non-U.S. counterparty would not be deemed to be "arranging" or "negotiating" swaps and therefore would not be "core front office" activities. Moreover, we would suggest specifically excluding from covered transactions activities of U.S. personnel that relate to providing market and pricing information or other similar activities that would be incidental to the swap transaction.

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The IAA appreciates the Commission's consideration of our comments on the application of Commission regulations to transactions between non-U.S. SDs and non-U.S. counterparties. We encourage the Commission to continue to coordinate with other regulators

[10] We also do not believe that Congress intended that nominal or tangential activities that take place in the U.S. in connection with a swap transaction between a non-U.S. SD and a non-U.S. counterparty be deemed to have a "direct and significant connection" with commerce of the United States. See supra note 4.

in developing its cross border regulatory framework. Please contact the undersigned or Karen Barr, IAA General Counsel, at (202) 293-4222 if we may provide any additional information regarding our comments.

Sincerely,

/s/ Sanjay Lamba
Assistant General Counsel

cc: The Honorable Mark P. Wetjen, Acting Chairman
The Honorable Bart Chilton, Commissioner
The Honorable Scott D. O'Malia, Commissioner