Christopher Kirkpatrick December 19, 2016
Secretary of the Commission
Commodity Futures Trading Commission (CFTC or Commission)
Three Lafayette Centre
1155 21st Street NW.
Washington, DC 20581

RIN 3038–AE54

Comment on Proposed Rule: Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants (Cross Border Rule)[1]

Submitted electronically at http://comments.cftc.gov

Dear Mr. Kirkpatrick,

The Institute for Agriculture and Trade Policy (IATP)[2] appreciates this opportunity to comment on the Commission's above captioned proposed Cross Border Rule. IATP is particularly grateful to the Commission staff for its careful explanation of the definitions in the Cross Border Rule and for the Preamble Summary Tables to explain the proposed Rule's application to Foreign Consolidated Subsidiaries (FCSs) of U.S. Swap Dealers (SDs) and Major Swaps Participants (MSPs).

Summary

- The Commission should finalize the Cross Border Rule, despite the possibility that the rule will be subject to a resolution of disapproval, and hence nullification, under the Congressional Review Act, during the next session of Congress. Eight years after cross border trading losses in Over the Counter derivatives contracts triggered default cascades among and bailouts for major U.S. banks and the American Insurance Group, the proposed Cross Border Rule provides clear and comprehensive definitions for regulating OTC derivatives trading by SDs and MSPs. A finalized Cross Border Rule will provide a crucial U.S. benchmark for harmonizing cross-border OTC derivatives regulation with swaps trading rules in foreign jurisdictions.
- IATP agrees with the proposed definition of "U.S. Person," except for the Commission's decision not to include commodity pool operators, commodity trade advisors and commodity index fund traders in the definition of "U.S. Person."
- IATP agrees with the proposed definition of "Foreign Consolidated Subsidiary," because it is based on a sound and widely agreed financial accounting practice

that would enable the CFTC to monitor the foreign affiliate swaps of U.S. persons. Such monitoring will enable the CFTC to aggregate swaps trading data among affiliates and the U.S. parent to understand whether and to what extent foreign affiliate trades imperil the solvency of the U.S. parent, and possibly the U.S. financial system. Whether or not the U.S. parent of the FCSs explicitly guarantees payment against the FCS losses, either the parent bails out its FCS or other firms stop doing business with that parent, whose solvency would be in doubt, if it is failed to cover its FCS' losses

- IATP agrees with the Commission that swaps activities conducted by non-U.S. Persons in the United States fall under the CFTC's jurisdiction. To exempt such activities from Dodd Frank Act authorized rulemakings, as proposed by some industry lobbyists, would open up a vast regulatory loophole.
- The Commission's proposed cross-border application for SD registration is triggered by an annual notional value de minimis of $8 billion for the U.S. person and its foreign affiliates, subject to possible lowering to $3 billion. This level of de minimis may be appropriate for interest rate swaps. However, in the much smaller notional value commodity swaps market, even the $3 billion de minimis is far too high to deter excessive speculation in commodities, particularly if commodity pool operators, commodity trade advisors and commodity index traders are not included in the definition of "U.S. Person."
- IATP agrees with the Commission that all swaps positions of U.S. Persons, Foreign Consolidated Subsidiaries, and other non-U.S. Persons transacting swaps with a U.S. Person must be aggregated to determine whether the de minimis in swaps activities is achieved. If the de minimis threshold is achieved, that SD must register with the Commission and be subject to the requirements of registered SDs.
- IATP agrees with the Commission that all swaps positions of U.S. Persons, Foreign Consolidated Subsidiaries, and other non-U.S. Persons transacting swaps with a U.S. Person must be aggregated to determine whether a MSP must register with the Commission and be subject to the requirements of registered MSPs.
- IATP agrees with the Commission's proposal that SDs and MSPs apply business conduct standards to their cross border swaps trading, e.g. to verify the non- U.S. counterparty's eligibility to trade; to determine the suitability of a swap for the counterparty; and to otherwise enhance counterparty protections.

An Argument for Finalizing the Cross-Border Rule during the Obama administration

The CFTC has granted regulatory relief from swaps data reporting for non-U.S. SDs and MSPs in certain jurisdictions up through December 1, 2017.[3] As a result, the surveillance of data that would help enforce the proposed Cross Border Rule will be postponed. Given the dearth of swaps trading data reported to the Commission with standardized data elements, it has prudently limited the scope of this Cross Border Rule to SD and MSP

registration thresholds and business conduct standards (Federal Register, Vol. 81, No. 201, p. 71947).

Despite promises by the leadership of the next Congress to use the Congressional Review Act to abrogate all federal rules finalized during the last 60 legislative days of the current session of Congress (i.e. after about May 23),[4] the Commission should vote to finalize this proposed Cross Border Rule.

The proposed Rule represents a well-articulated continuation of the Commission's work to delineate how to provide oversight of swaps constructed and marketed by U.S. SDs but transacted by their FCSs or with other non-U.S. Persons. IATP commented in 2012 on the Commission's Guidance for Industry on cross-border swaps,[5] finalized in July 2013. We also commented in September 2015 on "Cross Border Application of Margin Requirements*:* RIN 3039—AC97"[6], supporting in particular the proposed definition of "Foreign Consolidated Subsidiary" and the reasoning for that definition, which is incorporated into this proposed Rule.

The Securities Industry and Financial Markets Association (SIFMA) sued the Commission unsuccessfully to compel the Commission to follow the rule-making requirements of the Administrative Procedures Act for developing non-binding Guidance for industry.[7] Notwithstanding industry's efforts to prevent the Commission from finalizing a Cross Border Rule, under Title VII of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act ("Dodd-Frank Act"), such a rule must be promulgated. The proposed Cross-Border Rule is not a 'midnight' regulation, since it retains many features of the 2013 Guidance, and is germane to the 2015 proposed rule on the cross-border application of margin collateral for uncleared swaps.

The Commission should finalize the proposed Cross-Border Rule, if only so that there is a historical and legal benchmark for the incoming Congress to abrogate under the Congressional Review Act. The costs of that abrogation, both in terms of SD and MSP specific damage and of risk to global financial stability may not be long in appearing.

IATP began a February 23, 2015 comment on cross-border regulation to the International Organization of Securities Commissions with the following quote:

> *The scale of misconduct in some financial institutions has risen to a level that has the potential to create systemic risks. Fundamentally, it threatens to undermine trust in financial institutions and markets, thereby limiting some of the hard-won benefits of the initial reforms.* Financial Stability Board Chairman Mark Carney, in a February 4, 2015 letter to G20 Finance Ministers and Central Governors.[8]

Nothing in the reporting about U.S. government investigations into Deutsche Bank's cross-border trading indicates that the scale of misconduct by Systematically Important Financial Institutions has diminished since then.[9]

Definitions

"U.S. Person"

IATP agrees, for the most part, with the definition proposed in the rule and with the reasoning for the prongs of that definition. We do not agree with the Commission's decision to not include Commodity Pool Operators and their Commodity Trade Advisors or Commodity Index Traders in the definition of "U.S. person."

The Commission writes, "The proposed U.S. person definition is generally consistent with the U.S. person interpretation set forth in the Guidance, with certain exceptions. Notably, the proposed definition does not include a commodity pool, pooled account, investment fund, or other collective investment vehicle that is majority-owned by one or more U.S. persons (''U.S. majority-owned fund prong'')." (FR, 71947) IATP does not understand the Commission's reasoning for exempting from the "U.S. Person" definition these entities and the Commodity Trade Advisor (CTA), Commodity Pool Operator and Commodity Index Trader (CIT) who trades with pool and/or investment fund assets. The cooperatively organized owners of commodity pools own shares each far too small to be captured by the Commission's "majority ownership" for defining "U.S. Person." Therefore, the Commission decided not to include the majority ownership test in the definition of U.S. Person (FR 71947). But the CTAs, CITs and CPOs that invest on behalf of that aggregate ownership may meet the registration thresholds for SDs regardless of the ownership structure of the funds invested by the CTAs, CITs and CPOs.

As the *Wall Street Journal* reported on January 26, "The market upheaval [in oil, stocks and currency prices] has provided near-ideal conditions for so-called commodity trade advisors or CTAs, hedge funds that use computer programs to guide how they trade."[10] ATS-exacerbated price volatility is very profitable for the still unregulated automated traders, yet the risks of hedge fund swaps activities are still poorly understood by regulators. The coordinator of the Financial Stability Oversight Council (FSOC) noted that hedge funds remain unregulated and that "no single regulator has all the information necessary to evaluate the complete risk of hedge funds." The FSOC working group on hedge funds "believes swap data repositories should continue working with the CFTC and standard-setting bodies to establish consistent standards for reporting swaps data."[11] The lack of standardization in the record keeping and reporting of commodity swaps makes the analysis of the risks posed by cross border swaps all the more difficult.

In deciding whether or not to include CPOs, CTAs and CITs in the definition of U.S. Person, the Commission should consider not just the ownership structure of those entities, and the gross notional value of their transactions. The Commission should consider whether FCS losses of the SDs with CTA, CIT and CPO trading desks pose solvency risks to their parents in highly stressed markets, e.g. during commodity "flash crashes." Surely, the global volume of commodity derivatives contract transactions is not too small to indicate the possibility of significant impacts to the U.S. economy from defaulting FCSs and other non-U.S. Persons. The World Federation of Exchanges reports, "Commodity

derivatives volumes increased 26 percent in 2015 [over 2014 volumes], exceeding 4.3 billion contracts traded. This growth meant that commodity futures surpassed single stock options to become the most traded class of derivative contract[s] in 2015."[12]

Perhaps the Commission believes that the notional value of cross-border commodity swaps to be too small to pose significant economic risks to the United States. The Commission has not reported commodity swaps data since October 28, 2015, though "SDR [Swaps Data Repository] data in the FX, equity and other commodity swaps will also be incorporated in the CFTC Swaps Report at a future date."[13] In the meantime, until and unless the SDRs cooperate to provide the Commission with near real time, comprehensive and uniformly reported commodity swaps data, the public will have to trust that the Commission's decision to exclude CPOs and commodity investment funds, including presumably indexed funds and CTAs from the definition of "U.S. Person," will not result in cross-border swap defaults that would pose a significant financial risk to the United States.

Absent further explanation for the exclusion of CPOs, CITs and CTAs from the definition of "U.S. Person," the Commission's reasoning for exclusion appears to be as follows: "The Commission understands that identifying and tracking a fund's beneficial ownership may pose a significant challenge in certain circumstances. Although the U.S. owners of such funds may be adversely impacted in the event of a counterparty default, the Commission believes that, on balance, the majority ownership test should not be included in the definition of U.S. person." (FR, 71947) While it is true that the ownership structure of a commodity pool or investment fund could be difficult for the Commission to determine, it does not follow that the CIT or CTA that provides the trading strategy and executes trades on behalf of the pool or investment fund should be excluded from the definition of "U.S. Person." IATP recommends that the definition of "U.S. Person" in the Cross Border Rule include "Commodity Trade Advisor" "Commodity Pool Operator" and "Commodity Index Trader" prongs to the "U.S. Person" definition.

Finally, because the CFTC is a member of the Regulatory Oversight Committee of the Global Legal Entity Identifier,[14] in the interest of international comity, the CFTC may wish to include, for purposes of illustration, a footnote about the applicability of the "U.S. Person" definition to the operation of the LEI.

"Foreign Consolidated Subsidiary"

IATP agrees with the Commission's proposed definition of "Foreign Consolidated Subsidiary" (FCS) and with the proposed test, according to U.S. Generally Accepted Accounting Principles, to determine the economic impact of swaps transacted by a non-U.S. person but that are reported in the consolidated financial reporting of the FCS's U.S. parent. Given the often myriad affiliates of U.S. SDs and MSPs, the FCS definition provides the bright-line test that the CFTC can use to determine which trading activities of which affiliates pose greater risks to the U.S. economy and therefore merit more intense surveillance and possible enforcement activities.

Regarding the "de-guaranteeing" of the coverage of FCS losses by U.S. parents to avoid the cross border rule,[15] IATP agrees with the Commission's view, citing a similar view by Moody's Ratings, that "the FCS's counterparties generally look to both the FCS and its U.S. ultimate parent for fulfillment of the FCS's obligations under the swap, even without any explicit guarantee." (FR 71950, footnote 39). We hope that Moody's Ratings and other credit rating agencies would punish every FCS or ultimate U.S. parent that failed to fulfill contractual obligations in its cross border swaps trading.

ANE Transactions

IATP is pleased that the Commission has taken into account our comments on non-U.S. Person swaps activities that take place in the United States (ANE transactions) (FR 71951-71952, footnotes 52-53). More important, however, is the Commission's careful, and in our view, irrefutable legal logic for explaining what IATP had regarded as self-evident about ANEs, but what SDs had criticized as "vague" in the Staff Advisory in response to SD queries about whether ANE transactions were subject to Commission rules. The bedrock definition for determining whether ANE Transactions are subject to CFTC jurisdiction are comprised by the characteristics of activities under the definition of "swap dealer." There is nothing "vague" about the terms used in the Cross Border Rule to characterize those activities, since such activities as the "arranging" of and "executing" swaps represent common industry practices, whether the "arranging" or "executing" is done by U.S. or non-U.S. persons.

As the Commission conclusively remarks, "it would undermine the policy objectives of the Dodd-Frank Act to deem persons that, in connection with their dealing activity, engage in ANE transactions or transactions arising from this activity to fall entirely outside the scope of the Dodd-Frank Act solely because the transactions involve two non-U.S. counterparties." (FR 71953). Only those Persons who seek to evade Dodd-Frank Act authorized regulatory activities or who seek to vitiate Title VII of the Dodd Frank Act could claim to find cause to doubt the CFTC's authority to regulate ANE transactions. Accordingly, the registration and business conduct requirements for SDs and MSPs in the Cross Border Rule must apply to ANE transactions in order to prevent regulatory evasion and achieve the Dodd-Frank Act objectives.

Finally, the Commission's proposed application of the Cross-Border Rule to the business conduct practices of SDs, whether U.S. Persons, or non-U.S. Persons, should act as a potent deterrent. The Commission notes, "As an anti-evasionary measure, a transaction would be viewed as falling within the scope of the Dodd-Frank Act if personnel located in the United States direct other personnel to arrange, negotiate, or execute the transaction for or on behalf of a dealing entity." (FR 71953) Evasion— by claim of indirect swaps arrangement, negotiation and/or execution, whether by personnel or by an algorithm in an Automated Trading System controlled by the FCS or ultimate U.S. parent— is precluded by the Commission's proposed application of the Cross Border Rule. The Commission's interpretation of ANE Transactions and its explanation of how the Cross Border Rule will be applied to them is pellucid and should be easily workable for market participants willing to comply with the Rule.

Cross-Border Application of the Swaps Dealer Registration Threshold

Our analysis of Commission aggregation requirements for U.S. Person SDs and their FCSs regarding the SD registration threshold must begin with a short remark on the de minimis level of the notional value of swaps threshold itself. IATP agrees with Better Markets' analysis of the Securities Exchange Commission's Securities Based Swaps (SBS) trading data, and the extrapolation of that analysis for setting a CFTC SD registration threshold. The Better Markets analysis suggests that that the CFTC's de minimis threshold for SD registration will be too high to prevent the aggregation of unregistered SDs trading from posing systemic financial risks. According to Better Markets, as of 2012, under the broader definition of a SBS dealer and under the phased-in $3 billion per year swaps transaction de minimis, 57 percent of SBS dealers would remain unregistered.[16] The swaps activity of an individual unregistered SD is very unlikely to pose systemic risks. However, the aggregate of unregistered SDs could pose the systemic risks that the Dodd Frank Act seeks to prevent.

On October 13, the Commission announced that, following CFTC staff analysis of swaps trading data in asset classes under its jurisdiction, the Commission was postponing for another year the phase-in of the $3 billion SD registration threshold. According to Chairman Tim Massad, staff analysis showed[17] that for interest rate and credit default swaps, the $3 billion threshold would not capture a significantly larger percentage of swaps trading in those asset classes than the current $8 billion registration threshold. Furthermore, he stated, another year to phase in the $3 billion threshold would allow the Commission to evaluate how its capital and margin collateral rules are working for SDs. Finally, he acknowledged that there were "shortcomings" in the commodity swaps data.[18]

As a result of the Commission's October 13 decision, IATP does not have any hope that the Commission will lower the SD registration de minimis threshold for SD commodity swaps, a much smaller asset class than SBS swaps, according to Bank Holding Company reporting to the Office of the Comptroller of Currency.[19] Because it is the smallest asset class in terms of notional value, a de minimis threshold that is not asset class sensitive will not measure market disruption for commercial hedgers resulting from unregistered SDs. As the Commission applies the Cross Border Rule to the SD registration threshold, the staff must be vigilant in determining which SDs and MSPs are transacting the cross border commodity swaps that are not centrally cleared. Bank for International Settlements data show a decline in the notional value outstanding of commodity swaps from $3.273 trillion at the end of June 2010 to $1.763 trillion and the end of June 2016.[20]

This decline may reflect an increase in exchange traded commodity derivatives contracts and an increase in central clearing of commodity swaps. However, an increase in the price of the underlying commodity,[21] can reverse that downward trend in swaps notional value quickly. Reversal is more likely, if the data reporting to the market delay advantages of trading Over the Counter without central clearing are perceived to be greater than the advantages of exchange trading and central clearing.

Application of the Registration Threshold for Swaps Trading to U.S. Persons, U.S. Guaranteed Entities, Foreign Consolidated Subsidiaries and Other Non-U.S. Persons

The Cross Border Rules states, "Under the Proposed Rule, a U.S. person would include all of its swap dealing transactions in its de minimis threshold calculation without exception." (FR 71955) The same no exceptions to the swaps aggregation requirement would apply to FCSs. IATP agrees with this aggregation requirement, subject to the aforementioned concern that the de minimis threshold is set too high to capture the dealing of unregistered SDs in commodity swaps. The Commission is rightly concerned that to establish a disparate aggregation requirement for FCSs could result in a "substantial regulatory loophole" (FR 71955) through which trades would be routed to avoid the swaps data aggregation and reporting requirements.

IATP believes that the proposed Cross Border Rule has been strengthened by the Commission's decision to apply the registration threshold to Other (than FCSs) Non-U.S. Persons that engage in swaps dealing with U.S. counterparties. The decision removes a "substantial regulatory loophole" (FR, 71956) in the cross-border Guidance. The Cross Border Rule exempts from aggregating swaps data towards calculating a de minimis registration threshold those Other Non-U.S. Persons whose swaps with U.S. counterparties are transacted anonymously on Swaps Execution Facilities (SEFs), Designated Contract Markets (DCMs) or Foreign Boards of Trade (FBOTs) and subsequently are cleared.

This exemption is coherent with the statutory purpose of Title VII of the Dodd Frank Act, because the clearing of swaps transacted with U.S. counterparties on SEFs, DCMs and FBOTs recognized by the Commission will prevent potential Other Non-U.S. Persons' defaults, credit events, liquidity crunches and other crises from negatively affecting the U.S. counterparties and hence the U.S. financial system in general. The exemption also has the not inconsiderable virtue of incentivizing Other Non-U.S. Persons to transact their business on regulated trading venues that meet the requirements to receive Commission equivalence determinations.

Aggregation Requirement

The proposed Cross Border Rule requires U.S. Persons, FCSs and Other Non-U.S. Persons to aggregate their swaps trading data towards determining which, if any, of the entities in an affiliated group under common control must register under the Rule. This approach to swaps data aggregation does not discriminate against any entity within the group and enables the affiliated group to determine which of its entities must register as an SD with the Commission and be subject to SD requirements. As the Commission notes, non-discriminatory data aggregation is required by the Commodity Exchange Act (FR, 71957). Furthermore, this non-discriminatory approach to aggregation is consistent with the efficient, comprehensive and transparent operation of the Aggregation Mechanism, as proposed in September 2014 by the Financial Stability Board.[22]

There is a great deal of legal and technical work to be done to operationalize the Aggregation Mechanism, not the least of which is international agreement on regulator

access to swaps data repositories and a template of common swaps data elements to be aggregated and made reportable to regulatory authorities. However, the Commission's proposed non-discriminatory approach to swaps data aggregation should appeal to those foreign regulators not willing to endanger global financial stability by seeking aggregation exemptions for their "national champions."

Cross-Border Application of the Major Swap Participant Registration Thresholds

The Cross Border Rule states, "Under the proposed rule, all of a U.S. person's swap positions would apply toward the MSP thresholds without exception." (FR 71958-71959). The same aggregation practice would for FCSs and other U.S. non-Persons towards calculating MSP thresholds. IATP supports this proposal. While defaults, credit events or liquidity crises in one MSP are unlikely to cause significant damage to the U.S. economy, the "risk of multiple market participants failing close in time" is plausible for physical commodities that are subject to geo-political events affecting the underlying asset, such as oil, or are vulnerable to plant or animal disease with widespread price repercussions in the underlying commodity. Furthermore, as the Commission notes (FR 71959), the insolvency other non-U.S. Persons can negatively impact not only the swaps positions of one or more MSPs, but also the U.S. financial system.

As with SD swaps traded on DCMs, SEFS and FBOTs and cleared, the Commission proposes to exempt from the MSP threshold calculation those MSP swaps traded on DCMs, SEFs and FBOTs. IATP agrees with the reasoning for this exemption, since trading and clearing on regulated entities provides protection against default by swaps counterparties, and incentivizes MSP to trade and clear their swaps on regulated entities.

Cross-Border Application of the External Business Conduct Standards for Swap Dealers and Major Swap Participants

The Commission proposes an extension of external business conduct standards for registered SDs and MSPs transacting swaps in the United States to applying those standards to the cross-border swaps of those SDs and MSPs. Such an application is necessary to ensure that non-U.S. counterparties are eligible to trade, that swaps recommended by a SD are suitable for the counterparty; and that counterparties are informed daily about the swap price for uncleared swaps, among other business conduct standards. (FR 71961) IATP agrees with this proposal, since its implementation by SDs and MSPs with their foreign counterparties provides one more layer of protection against foreign counterparty defaults, credit events, liquidity crises and other negative impacts on the United States.

(In response to question 1, FR 71962) The Commission explains its approach to U.S. and foreign customer protection in a footnote: "from the standpoint of risk, there is no difference between a swap with a U.S. SD/MSP and a swap with its foreign branch, the Commission believes that for purposes of the external business conduct standards, which are oriented toward customer protection, a foreign branch of a U.S. SD/MSP should be treated the same as a non-U.S. SD/MSP." (FR 71961, footnote 122) This approach to customer protection is not only non-discriminatory— and hence irreproachable by foreign

regulators— with respect to U.S. and foreign counterparties to a swap: it is prudent for the purpose of protecting U.S. parents and the U.S. financial system from accumulated losses resulting from a failure by U.S. SDs or MSPs to apply external business conduct standards to their foreign counterparties, e.g. regarding the suitability of a swap for a foreign counterparty or the counterparty's eligibility to trade.

Conclusion: with regard to the "Efficiency, Competitiveness, and Financial Integrity of the Markets"

IATP, as a non-market, public interest participant in this and other Commission rule-makings, cannot respond to many of the more detailed questions raised in the proposed Rule. However, we wish to close this letter by noting that finalization of the Cross Border Rule is necessary to institutionalize those regulatory reforms to make the United States a leader, rather than a laggard, in international financial market regulatory reform.

As remarked by Financial Stability Board Chairman Mark Carney in his August 31 letter to G20 leaders, "The **G20 reforms are working** (bold in the original). The system is providing more reliable financial services and has proven resilient in the face of recent shocks. As implementation progresses, the financial system is increasingly absorbing shocks, rather than amplifying them,"[23] as happened during the 2007-2009 crisis. Chairman Massad, in effect, seconded these remarks, in his December 6th speech to the Economics Club of New York, noting that the financial system absorbed, rather than amplified, the shock of the Brexit decision.[24]

However, the capacity of the financial system to act as a shock absorber, rather than a shock amplifier, comes at a cost to U.S. parent firms and their foreign affiliates. It is a price that Commission registered SDs and MSPs should willingly pay and encourage non U.S. Person counterparties to pay in order to sustain the financial integrity of the globally integrated derivatives markets. IATP strongly agrees with the Commission's statement that

> *On balance, the Commission believes that the proposed rule's approach is necessary and appropriately tailored to ensure that the purposes of the Dodd Frank swap regime and its registration requirements are advanced while still establishing a workable approach that recognizes foreign regulatory interests and minimizes competitive disparities and market inefficiencies to the degree possible. The Commission further believes that the proposed rule's cross border approach to the external business conduct standards will promote the financial integrity of the markets by fostering transparency and confidence in the major participants in the U.S. swap markets.* (FR 71969)

Whether or not the Congress repeals the Dodd-Frank Act, including parts of Title VII that are unpopular with SDs and MSPs, something very much like it and rules authorized by it will have to replace it. If the United States attempts to substitute a new variant of 'light touch' regulation based on broad principles for the highly specific, workable and data verifiable rules of which the proposed Cross Border Rule is an exemplar, we should not be surprised if the financial system again becomes an amplifier, rather than an absorber, of shocks.

Notwithstanding IATP's criticisms of the "U.S. Person" definition and the asset class insensitive de minimis threshold for the cross border application of SD registration, we strongly urge the Commission to finalize the Cross-Border Rule during the Obama administration. If Congress decides to target the Cross Border Rule for a resolution of disapproval, it will have to risk that the Congressional Review Act's "scorched earth" provision against "substantially similar" rulemaking[25], will leave the United States vulnerable to the risks of unregulated cross-border swaps trading. The very strategic limiting of the Cross Border Rule to its application to SD and MSP registration and to the application of external business conduct standards can hardly be characterized as regulatory overreach. Nor can the substantial similarity between this rule and the 2013 Guidance be used to characterize the proposal rule as a "midnight regulation."

IATP wishes to thank the Commission and the CFTC staff for its skilled and persistent work on this crucial rule. We empathize with the Commission as it weighs the many regulatory and political factors in deciding whether or not to finalize this rule.

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[1] http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-24905a.pdf

[2] IATP is a U.S. nonprofit, 501(c)(3) nongovernmental organization, headquartered in Minneapolis, Minn., with offices in Washington, D.C. and Berlin, Germany. Our mission states, "The Institute for Agriculture and Trade Policy works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems." To carry out this mission, as regards commodity market regulation, IATP has participated in the Commodity Markets Oversight Coalition (CMOC) since 2009, and the Derivatives Task Force of Americans for Financial Reform since 2010. IATP has submitted several comments on U.S. Commodity Futures Trading Commission rulemaking, and on consultation papers of the International Organization of Securities Commissions, Financial Stability Board, the European Securities and Markets Authority, and the European Commission's Directorate General for Internal Markets (now Directorate General for Financial Markets).

[3] http://www.cftc.gov/PressRoom/PressReleases/pr7489-16#PrRoWMBL

[4] Bob King and Nick Juliano, "Obama's agencies push flurry of 'midnight' actions," *Politico*, November 27, 2016. http://www.politico.com/story/2016/11/obama-regulations-231820

[5] http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58465&SearchText=Institute%20for%20Agriculture%20and%20Trade%20Policy

[6] http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2015-16718a.pdf

[7] Nikaforos Matthew and Jonas Robinson, "SIFMA v. CFTC Cross-Border Lawsuit Dismissed," *Derivatives in Review*, October 29, 2014. http://blogs.orrick.com/derivatives/2014/10/29/sifma-v-cftc-cross-border-lawsuit-dismissed-2/

[8] http://www.fsb.org/wp-content/uploads/FSB-Chair-letter-to-G20-February-2015.pdf

[9] E.g. Ed Caesar, "Deutsche Bank's $10 Billion Scandal," *The New Yorker*, August 29, 2016. http://www.newyorker.com/magazine/2016/08/29/deutsche-banks-10-billion-scandal

[10] http://www.wsj.com/articles/automated-hedge-funds-make-millions-in-januarys-market-selloff-1453721976

[11] Remarks by Deputy Assistant Secretary Jonah Crane at a Meeting of the Financial Stability Oversight Council, November 16, 2016. https://www.treasury.gov/press-center/press-releases/Pages/jl0612.aspx

[12] "WEF/IOMA Derivatives Survey 2015," April 2016, at 26. http://www.world-exchanges.org/home/index.php/research/wfe-research#d

[13] "Background," CFTC Weekly Swaps Report, http://www.cftc.gov/MarketReports/SwapsReports/Archive/index.htm

[14] https://www.leiroc.org/about/membersandobservers/index.htm

[15] E.g. Andrew Ackerman, "CFTC Attempts to Close Swaps Loophole for Large U.S. Banks," *Wall Street Journal*, June 9, 2015. http://www.wsj.com/articles/cftc-aims-to-close-swaps-loophole-for-large-u-s-banks-1433856763

[16] http://www.bettermarkets.com/sites/default/files/documents/CFTC-%20Supp%20CL-%20SD%2C%20MSP%20Def%20w%20attachment-%204-6-12_0.pdf

[17] http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis_1115.pdf

[18] Statement of Chairman Timothy Massad on Order Extending De Minimis Threshold Phase-In Termination Date, Commodity Futures Trading Commission, October 13, 2016. http://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement101316

[19] "Quarterly Report on Bank Trading and Derivatives Activities: Second Quarter 2016," Office of the Comptroller of Currency. https://www.occ.gov/topics/capital-markets/financial-markets/derivatives/dq216.pdf

[20] "Statistical release: OTC derivatives statistics at end June 2016," Bank for International Settlements. November 2016, at 13. http://www.bis.org/publ/otc_hy1611.pdf

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