ISDA Safe, Efficient Markets

December 19, 2016

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: **Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, RIN 3038-AE54**

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("ISDA")[1] appreciates the opportunity to submit these comments in response to the notice of proposed rulemaking published by the U.S. Commodity Futures Trading Commission ("CFTC" or "Commission") regarding the Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants ("Proposal").[2] We support the Commission's decision to seek public comment to consider the appropriate rule-based framework for the cross-border application of its swap regulations under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or "Dodd-Frank").

We strongly support the Commission's initiatives to increase regulatory transparency and provide further direction and clarification as our members seek to comply with the new Dodd-Frank regulatory regime for swaps. We are appreciative of the Commission's decision to only apply anti-fraud and anti-manipulation provisions of its external business conduct rules[3] and not to apply the swap dealer ("SD") *de minimis* calculation to activities engaged in by U.S. personnel.

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[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 66 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.

[2] CFTC Proposed Rule, *Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants*, 81 Fed. Reg. 71946 (Oct. 18, 2016).

[3] *See* 17 C.F.R. § 23.410.

We are troubled, however, by the Commission's unexpected, unprecedented, and sweeping proposal to expand its cross-border jurisdiction. Specifically, the Proposal drastically expands the scope of the Commission's extra-territorial reach without addressing the very significant question of how, under section 2(i) of the Commodity Exchange Act ("CEA"),[4] the activities of Foreign Consolidated Subsidiaries ("FCSs") in a global market are deemed to have such a direct and significant impact on U.S. commerce that those activities would be considered subject to the Commission's regulatory oversight.[5] We also are concerned that the Commission makes such a determination even though many FCSs' operations are currently regulated by their local foreign country regulators and already are or soon will be subject to new OTC derivatives regulatory regimes implemented in other jurisdictions pursuant to G-20 commitments established in 2010.[6]

Our members strongly believe that to preserve strong and efficient derivatives markets, the Commission should not assert jurisdiction beyond what is intended under the Dodd-Frank Act. Instead, the Commission should provide criteria for identifying the types of non-U.S. activities that would have a direct and significant connection with U.S. activities or effect on U.S. commerce and then establish a comprehensive substituted compliance regime that would apply to these types of non-U.S. activities.

EXECUTIVE SUMMARY

Our analysis of the Proposal is divided into three parts. The first part of this letter recommends that the FCS construct be removed from any final rule adopted by the Commission for the following reasons:

(i) The FCS construct, if adopted, would be a jurisdictional overreach since the construct lacks the necessary nexus to U.S. activities or U.S. commerce;
(ii) The significantly adverse impacts that the proposed treatment of FCSs would have on virtually every market participant, including multinational commercial end-users;
(iii) The lack of transparency regarding other substantive requirements that would apply to FCSs; and
(iv) The absence of a sufficient cost-benefit analysis.

The second part of this letter recommends that the Commission establish an outcomes-based substituted compliance regime before considering whether to proceed with

[4] 7 U.S.C. § 2(i) (2016).
[5] The Proposal generally defines an FCS as a non-U.S. person that is consolidated for accounting and financial statement purposes under U.S. generally accepted accounting principles ("U.S. GAAP") with an ultimate parent entity, which is a "U.S. person" (as such term is also defined in the Proposal). *See* Proposal, 81 Fed. Reg. at 71947.
[6] The G-20 commitments were designed to "implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage." Communique issued from the meeting of the Group of Twenty Finance Ministers and Central Bank Governors held in Gyeongju, Korea (Oct. 23, 2010), available at: http://www.ibtimes.com/complete-text-g-20-seoul-communique-246992.

finalizing the Proposal. The lack of a substituted compliance regime would have a profound effect on the ability of U.S. entities to compete in global markets.

The third part of this letter provides comments on other aspects of the Proposal, including:

(i) Guaranteed Affiliates and Foreign Branches. We are supportive of the revisions to the definition of the term "guarantee" in the Proposal, which are in-line with the definition of that term as adopted by the U.S. Securities and Exchange Commission's ("SEC") in its cross-border rules and interpretive guidance ("SEC Cross-Border Rule").[7] We also believe that any final rule that the CFTC adopts regarding its cross-border jurisdiction should retain the SD *de minimis* calculation exceptions set forth in the CFTC's Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations ("2013 Cross-Border Guidance")[8] for non-U.S. persons executing swaps with: (1) foreign branches of U.S. SDs; (2) guaranteed affiliates that are registered SDs; and (3) guaranteed affiliates of non-financial entities.

(ii) Treatment of Conduits. The Commission should not include the conduit concept in its final rule as the use of this concept would impair the ability of non-U.S. entities to fully utilize their U.S. affiliates' risk management functions, especially given that there would already be a fully regulated SD in the chain of entities that is obligated to comply with the CFTC's rules.

(iii) Aggregation. We are concerned that because of the expansive scope of the FCS construct, the resulting increase in the number of entities required to count activity for SD *de minimis* calculation purposes (activity that is currently out of scope for such purposes), coupled with the requirement to aggregate with all other unregistered affiliates, would likely result in a large number of entities triggering a registration requirement despite participating in only a handful of swap transactions.

(iv) Arranging, Negotiating, or Executing Transactions Using U.S. Personnel. We believe that "ANE transactions"[9] do not have a direct and significant connection with activities in the United States and therefore should not be subject to the Commission's regulations. Should the Commission decide to

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[7] SEC Final Rule, *Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities*, 79 Fed. Reg. 47277 (Aug. 12, 2014 (republication), available at: https://www.federalregister.gov/a/R1-2014-1533. *See also* SEC Final Rule, *Security-Based Swap Transactions Connected with a Non-US Person's Dealing Activity that are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer* De Minimis *Exception*, 81 Fed. Reg. 8597 (Feb. 19, 2016), available at: https://www.federalregister.gov/a/2016-0317 ("SEC ANE Rule").

[8] *See Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45292 (Jul. 26, 2013), available at: https://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf. Comments in this letter are provided within the context of the Proposal and should not be viewed as our endorsement of the 2013 Cross-Border Guidance.

[9] The Commission defines "ANE transactions" as those swap transactions that "are arranged, negotiated, or executed using personnel located in the United States." Proposal, 78 Fed. Reg. at 71947.

subject these transactions to its jurisdiction in the final rule, we recommend that the Commission:

- as suggested in the Proposal, exclude ANE transactions from the SD *de minimis* calculation for purposes of the CFTC SD registration requirement;
- require only rules relating to fair dealing and prohibition on fraud, manipulation and other abusive practices in the CFTC's external business conduct rules[10] to apply to ANE transactions;
- specify the activities that should fall within the scope of ANE transactions;
- expressly state that no additional substantive requirements would apply to ANE transactions;
- exclude transactions involving algorithmic trading from the ANE transaction scope if non-U.S. SDs use personnel in the United States to identify the trading strategy carried out through algorithmic trading.

DISCUSSION

I. The FCS Construct Should Be Removed from the Proposed Registration Calculation Rules

The proposed FCS registration calculation construct represents an unnecessary expansion of the key tenets of the SD and major swap participant ("MSP") registration calculation provisions contained in the 2013 Cross-Border Guidance and should not be included in any final cross-border rule.

After the Commission proposed its Cross-Border Guidance in 2012,[11] the CFTC benefitted from robust and extensive public comment, including comments from a broad array of U.S. and non-U.S. market participants and foreign regulators, and convened an in-person meeting of its Global Markets Advisory Committee to discuss and debate key aspects of the Proposed Cross-Border Guidance.[12] At the end of that long deliberative process, the CFTC did not include any concepts which resemble the broad FCS construct in the 2013 Cross-Border Guidance. Instead, the CFTC opted to focus its analysis on the status of entities as U.S. persons (including foreign branches), non-U.S. persons, guaranteed affiliates, and conduit affiliates. Reversing that prior decision and issuing a final cross-border rule that includes the proposed FCS construct would amount to the

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[10] *See Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties*, 77 Fed. Reg. 9734 (Feb. 17, 2012); 17 C.F.R. § 23.410.

[11] *See* CFTC Proposed Interpretive Guidance and Policy Statement, *Cross-Border Application of Certain Swap Provisions of the Commodity Exchange Act*, 77 Fed. Reg. 41214 (July 12, 2012), available at: http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf ("Proposed Cross-Border Guidance").

[12] The CFTC's Global Markets Advisory Committee Meeting (Nov. 7, 2012); more information on this meeting is available at: http://www.cftc.gov/PressRoom/Events/opaevent_gmac110712.

CFTC making a wholesale change in its view of its legal authority and supervisory interest over a broad array of non-U.S. persons.

The FCS construct first appeared in the Commission's cross-border margin rules.[13] In those rules, the CFTC dramatically departed from its 2013 Cross-Border Guidance regarding the application of transaction-level rules by determining that it had a sufficient regulatory interest in risk mitigation to require a non-U.S. entity (with no U.S. guarantor) that had already registered as an SD to apply CFTC margin rules to all of its swaps simply because it happens to have a U.S. parent. It is one thing for the CFTC to broadly expand the reach of one of its transaction-level rules by using a non-U.S. SD's status as an FCS as the hook to apply CFTC margin rules to a non-U.S. entity, which had already chosen to submit to CFTC jurisdiction by registering as an SD. It is quite another thing for the CFTC to use a non-U.S. entity's status as an FCS as the hook to require it and its non-U.S. counterparties to register as SDs (and comply with all associated entity-level and transaction-level rules) when neither party would have otherwise submitted to Commission jurisdiction as a result of engaging in swap activity outside the United States with no U.S. guarantor, facing only other non-U.S. persons.

As more fully stated below, the proposed FCS construct vastly exceeds the Commission's jurisdictional limits, and dramatically departs from the 2013 Cross-Border Guidance without sufficient justification. Moreover, this proposed FCS construct imposes additionally burdensome requirements on non-U.S. persons, including commercial end-users, and disregards the sovereignty of foreign regulators to oversee their markets and market participants, all without increasing protections to U.S. parent companies. Our specific comments on the FCS construct are organized around four issues, which demonstrate that the construct should not be included in any final cross-border rule.

1. Failure to Overcome the Jurisdictional Limitation in CEA Section 2(i)

ISDA's first issue with the FCS construct is that it does not overcome the Congressional limitation on the CFTC's authority. That authority bans the CFTC from regulating cross-border activities and transactions unless those activities or transactions have a direct and significant connection with activities taking place in the United States [or] a "direct and significant effect on the commerce of the United States ..." or contravene the CEA or CFTC regulations.[14] CEA Section 2(i) does not authorize the Commission to regulate FCSs extraterritorially solely based on a chance (and not a legal obligation) that a U.S. parent may provide support when a foreign subsidiary defaults. We believe that the Commission is making an unjustified assertion, without proffering any event or data to support the expansion of its direct jurisdiction over swap transactions between two non-U.S. entities.

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[13] *See* Final Rule, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements*, 81 Fed. Reg. 34818 (May 31, 2016), available at: http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-12612a.pdf.

[14] 7 U.S.C. § 2(i). The Commission has not asserted that the FCS construct is intended to prevent contravention of its laws. For that reason, we do not address that aspect of CEA Section 2(i) in this letter.

It is unlikely that an FCS's activities would have any impact (let alone a direct and significant impact) on U.S. activities or U.S. commerce because, unless otherwise expressly agreed by contract or required by law, the FCS's ultimate U.S. parent is not legally bound to fulfill the FCS's obligations.[15] In other words, where one counterparty to a transaction is a non-U.S. subsidiary of a U.S. parent (and such parent has no legal obligation to support the subsidiary) and the other counterparty is a non-U.S. person with no connection to the United States, the nexus to the United States is so attenuated that this transaction should be removed from the stream of U.S. commerce and the FCS should not be required to count such a transaction toward CFTC registration requirements.

The nexus to the United States is even more attenuated for the counterparty of an FCS where the counterparty is a non-U.S. person, is not guaranteed by a U.S. person, and has no U.S. parent. There is no doubt that for such counterparty, the attenuated nexus to the United States does not amount to the direct and significant connection to the United States to justify submission to CFTC jurisdiction or alternatively, to permit the Commission to compel such counterparty to stop engaging in certain swap activities, especially considering that the activities are completely outside the United States. Aside from the questionable legal authority, there is no policy justification for requiring non-U.S. firms and their non-U.S. counterparties—that have no connection with U.S. activities and that are supervised by their local regulators—to start counting their swap transactions for purposes of SD or MSP registration.

Moreover, the proposed application of the FCS construct as it applies to the registration and supervision of foreign counterparties lacks precedent within financial markets. No other regulatory regime has sought to require registration and supervision of foreign entities with no other connection to the United States and its financial markets but for an accounting relationship with a U.S. entity. We believe that this proposed approach constitutes a regulatory overreach that violates general principles of international comity.

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[15] In its comment letter on the recently proposed rule on Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations issued by the Board of Governors of the Federal Reserve System ("Federal Reserve") earlier this year (81 Fed. Reg. 29169 (May 11, 2016)), ISDA noted that the U.S. GAAP financial consolidation standard more accurately reflects which subsidiaries would expose a Covered Entity parent to material risk and be relevant to the resolution of a Covered Entity than the Bank Holding Company Act ("BHCA") definition of control. This suggestion was made in the context of an insolvency or resolution regime and related strategies, which in the case of a large interconnected financial company, typically apply to the entire group, whose failure (as a group) would pose a significant threat to the financial stability of the global economy. Unlike in the context of an insolvency or resolution, the proposed cross-border regulation applies to regulations that would apply on an entity-by-entity basis (and not at the firm-wide or group level). Moreover, the U.S. parent company is subject to the U.S. regulatory regime, including specific capital requirements, and thus a potential risk associated with the FCS's swap dealing activity is already addressed through other mechanisms, including the consolidated capital requirements. *See* ISDA's Letter to the Federal Reserve regarding the Federal Reserve's Notice of Proposed Rulemaking: *Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions* (Aug. 5, 2016), available at: http://www2.isda.org/attachment/ODg5MQ==/USA_Aug_10.pdf.

The Proposal would ignore the sovereignty and existing foreign laws and regulations established by foreign nations, effectively overriding local foreign control over their local businesses. This is particularly worrisome because in this scenario the foreign nation has a much greater supervisory interest in that activity than does the United States, and in certain cases the U.S. requirements may be directly contradictory to local laws (for example, where the jurisdiction in question prohibits transmission of information to an outside regulator or where the local requirement is otherwise mutually exclusive with the U.S. requirement).

Absent a significant material change in the derivatives markets, the Commission has not explained why it has determined to change course on cross-border regulation of swap transactions. Not only would this change be a dramatic change of course from the CFTC's view of its statutory authority expressed in its 2013 Cross-Border Guidance,[16] it also represents a significant departure from the principles set forth in the Path Forward Agreement of July 2013 between the CFTC and the European Union ("Path Forward Agreement").[17] The Path Forward Agreement states that "EU registered dealers who are neither affiliated with, nor guaranteed by, U.S. persons, would be generally subject only to U.S. rules for their transactions with U.S. persons or U.S. guaranteed affiliates …."[18] The Path Forward Agreement appears not to have referenced an intent by the Commission or recognition by the European Commission that entire new classes of EU-based entities that are not currently registered with the CFTC would be required to submit to CFTC jurisdiction due to activity that takes place entirely outside the United States.[19]

Finally, we believe that the prudential regulators (rather than the Commission) have the direct authority to monitor the possibility of adverse effects on the U.S. parent due to the risk of default by the non-U.S. subsidiary. The existing regulatory tools, including consolidated capital requirements (such as enhanced capital and leverage standards), counterparty credit limits, and enhanced liquidity and risk management standards effectively prevent or minimize the remote risk that FCSs' swaps activities can impose on their U.S. parent companies. We note that in the SEC Cross-Border Rule, the SEC underscored the importance of utilizing these means. Specifically, the SEC noted:

> "[T]he Dodd-Frank Act provided general tools—not merely tools focusing on derivatives activities—to address the risks associated

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[16] *Id*. at 45318-19. The CFTC was very clear in the 2013 Cross-Border Guidance regarding its view of its statutory authority (authority that has not changed since 2013). In this regard, the CFTC stated, "Similarly, the Commission believes that all of the swap dealing activities of a non-U.S. person that is an affiliate of a U.S. person and that is guaranteed by a U.S. person (a "guaranteed affiliate"), or that is an "affiliate conduit" of a U.S. person, have the requisite statutory nexus and potential to impact the U.S. financial system . . . **However, under the Commission's interpretation of section 2(i), a more circumscribed registration policy applies to non-U.S. persons that are not guaranteed or conduit affiliates."** (emphasis added).

[17] *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/idc/groups/public/@newsroom/documents/file/jointdiscussionscftc_europeanu.pdf.

[18] *Id*. at 2.

[19] Although the Path Forward Agreement references the European Union, the same reasoning is also true for Asia.

> with U.S.-based financial groups as a whole, including the risks posed by such groups' non-guaranteed foreign affiliates engaged in financial services business. Such tools include globally consolidated capital requirements and globally consolidated liquidity and risk management standards. These tools address risks posed by guaranteed and non-guaranteed subsidiaries within U.S.-based financial groups, regardless of whether the subsidiaries are based in the United States or outside the United States."[20]

2. Overall Market Impact of the FCS Construct

The net result of the FCS construct would: (i) create competitive inequity for many market participants, including U.S. commercial end-users; (ii) diminish liquidity globally; and (iii) cause serious market distortions—all due to the breadth of the Commission's jurisdictional reach and the imposition of the CFTC's requirements on non-U.S. subsidiaries and non-U.S. entities that have no connection to the United States. If adopted in its current form, the Proposal would create the following long-term irreversible effects that would reshape how the derivatives markets function:

- U.S.-headquartered firms will have to register numerous non-U.S. entities as SDs. Dealing groups with a subsidiary structure would be particularly impacted, given the multitude of legal entities involved and the requirement to aggregate swap transactions across all of them.

- Non-U.S. entities would limit or eliminate trading with FCSs that are commercial end-users to avoid having to register as SDs.[21]

- Non-U.S. entities would limit or eliminate trading with FCSs, including FCSs that are already registered as SDs in order to avoid having to register as SDs. The Commission justifies this requirement on the basis that the default or insolvency of another non-U.S. counterparty could have a direct adverse effect on an FCS, which through the interconnection to its U.S. ultimate parent, could have knock-on effects, potentially leading to disruptions to the U.S. financial system. This explanation, however, is particularly unconvincing in the case of an FCS that is an SD given that the Commission already regulates the potential intermediary risk.

[20] SEC Cross-Border Rule, 79 Fed. Reg. at 47319.

[21] We acknowledge that the Proposal does not require other non-U.S. persons to include in their SD *de minimis* threshold calculation any transaction that is executed anonymously on a swap execution facility ("SEF"), designated contract market ("DCM"), or Foreign Board of Trade ("FBOT") and cleared through a registered or exempt derivatives clearing organization ("DCO"). We ask that the Commission clarify in the final rule that swaps that are not subject to the mandatory clearing determination and that are voluntarily traded on a SEF, DCM or FBOT are not required to be included in the *de minimis* calculation threshold. It is our understanding that very few Asian non-SDs are participants on SEFs due to the costly membership obligations placed on SEF participants.

- Non-U.S. market participants would potentially cease trading with U.S.-based institutions, particularly the non-U.S. affiliates of U.S.-based institutions, to avoid the compliance costs and burdens associated with analyzing and complying with relevant U.S. regulations, which are complex and would be completely new to most non-U.S. market participants. In light of the Proposal's significant impact on major non-U.S. financial institutions, we ask the CFTC to engage in constructive communication and coordination with foreign regulators.

  Due to a limited availability of non-U.S.-based counterparties that are willing to face an FCS, U.S.-based dealers would have a limited ability to hedge, which in turn would diminish their ability to offer products and liquidity to non-U.S. clients. The broader banking business would be impacted. U.S.-based dealers' limited product offering would impact their competitiveness with regards to bidding for other services, such as cash management and other treasury services. Similar impacts would be felt on large, structured transactions that may be originated through investment banking but may need a derivatives component piece for fulfillment.

- Corporations with a U.S. parent (that simply consolidate their financial statements with the U.S. parent) would have to hedge risk in bifurcated markets with diminished liquidity, leading to increased transaction costs that are going to be passed onto consumers. To the extent that end-users are swept into the FCS construct, they would face serious liquidity contractions as non-U.S. firms would be incentivized to abandon otherwise beneficial hedging transactions for fear of being captured by CFTC jurisdiction. In essence, the FCS construct would have the practical effect of punishing end-users by preventing them from mitigating, or making it extremely expensive to mitigate, certain types of commercial risk.

- Corporations with a U.S. parent may also run the risk of having a substantial net position in outstanding swaps and thus may have to register as MSPs and comply with the numerous Commission regulations, including mandatory clearing, capital and margin requirements and recordkeeping.

- Many existing compliance systems (that currently operate in accordance with the requirements of the 2013 Cross-Border Guidance) would have to be significantly overhauled to conform to this new FCS construct. In recent years, the industry has committed significant resources to comply with the current cross-border regime. To have the current regime so drastically changed would result in firms being required to yet again allocate scarce resources in the form of time and capital to reevaluate and rebuild their global booking models and execute new cross-border documentation.

  For instance, once the Commission issued its Proposed Cross-Border Guidance in 2012, firms active globally in the derivatives markets, either through primary booking entities, branches, or subsidiaries, undertook a massive effort to review,

evaluate and streamline global booking models to determine which entities fell within the scope of the Commission's jurisdiction and to ensure that the entities around the globe that were outside the scope of the Commission's jurisdiction were not unnecessarily required to register with the CFTC as SDs. Global booking models were realigned, new counterparty activity was moved between entities, and in some instances existing positions were novated. This effort was costly, time consuming, and continues to this day in ongoing monitoring and compliance systems. All of that work would be upended if firms' current SD *de minimis* calculation monitoring and compliance systems needed to be significantly amended (particularly in light of the aggregation rules and the ongoing uncertainty surrounding what the SD *de minimis* level actually will be on a permanent basis), and counterparty relationships and trading activity again modified and realigned to deal with significant rule changes.[22]

3. The Commission's Decision Regarding the FCS Construct Lacks Transparency

The Commission's intent to determine the extent of the application of other substantive rules to FCSs at a future time leaves market participants in the dark about the overall impact and scope of the Commission's Proposal and, as a result, deprives the industry of the ability to provide meaningful comment.

In the Proposal, the Commission notes that it "expects to address how other substantive Dodd-Frank requirements (including the trading and clearing mandates and reporting requirements) would apply to FCSs in cross-border transactions in subsequent rulemakings."[23] We disagree with this piecemeal approach.

The Commission's decision not to include these substantive determinations in the Proposal makes it virtually impossible for market participants to provide meaningful comment at this stage. It is unclear what future requirements would be imposed on FCSs or how FCSs might be further impacted given the breadth of the Proposal. Moreover, firms cannot effectively prepare to establish or modify a robust and comprehensive global compliance regime, because the Commission is acting in a piecemeal fashion. Firms would need to proceed in multiple steps and make subsequent, expensive readjustments to meet additional regulatory requirements.[24]

The CFTC's spotty approach to identifying which substantive obligations may or may not apply to an FCS or its counterparties (which also may be required to register as a result of activity occurring completely outside the United States) would lead to an overly

[22] Should the Commission decide to lower the registration threshold to USD 3 billion (by more than half), the drop would create even more of a compounded impact on FCSs. We also note that the 12-month look back requirement for SD registration could capture banks, in countries whose regulatory framework may not be comparable with the CFTC, without giving the firms time to change their business model and remove their activity with FCSs.

[23] Proposal, 81 Fed. Reg. at 71951, fn. 41.

[24] We also note that the applicability of the CFTC uncleared margin rules to the expanded FCS construct would result in cessation of OTC swap dealing between these FCSs and non-U.S. persons in these markets and for products where there is no centralized clearing or no local margin rules in place.

inefficient, excessively costly, and less effective implementation of new requirements.[25] A holistic approach to global compliance systems, taking into account all compliance obligations, is a much more effective way to build systems that will ensure compliance.

Accordingly, the Commission should give firms the opportunity to become aware of the entire universe of substantive rules that would apply to their operations before final adoption of the FCS construct.

4. The FCS Construct is Not Supported by a Sufficient Cost-Benefit Analysis

We believe that, at a time when market participants continue to work tirelessly to bring their global operations into compliance with varying regulatory regimes, the Commission should consider the impact that an unexpected radical shift in its regulatory approach would have on firms' compliance operations. Counterparties to a swap transaction will have to change their booking models, engage in new calculations for purposes of SD registration, register more entities, incur significant legal expense, and execute new counterparty documentation for cross-border representations and disclosures. Moreover, due to the breadth of the FCS construct, some non-U.S. firms affected by the Proposal would have no experience with the CFTC regulatory regime.[26]

All of these changes are why we are particularly concerned that the Commission, while analyzing individual provisions of the Proposal, does not address the most prominent cost: the overall impact of the FCS construct on swap trading in global markets. In addition, the Commission's analysis misses the following key data points.

- It lacks the necessary data to estimate with meaningful precision the number of U.S. FCSs and their non-U.S. counterparties (which do not have any direct nexus to activities in the United States) that would be required to register with the Commission.

- It does not discuss the benefits associated with mitigating risk to the U.S. financial system of requiring non-U.S. counterparties (other non-U.S. persons) of FCSs to register as SDs given that in many instances the FCSs would already be registered SDs.

- It has not reasonably estimated the cost of establishing duplicative compliance regimes (in addition, the Commission has not explained why the obligations and costs it proposes to impose are necessary in the case of entities and transactions that are already regulated under the laws of foreign jurisdictions).

[25] If the CFTC issues final rules that include the FCS construct, firms would be rushing to reevaluate, realign, and modify global booking models (as described above) at the same time firms would be modifying SD *de minimis* calculation monitoring and compliance systems.

[26] For these reasons, we ask that, in adopting any final rule, the Commission allow sufficient time (at least one year prior to the implementation date) for market participants to comply with the new regulatory framework.

- It does not include the increased costs to end-users due to the fact that non-U.S. dealers would limit their transactions with multinational commercial end-users in order to avoid exceeding the relevant registration thresholds. While the Commission concedes this point, we believe it should revisit this issue and further explain the undue costs and reduced liquidity to multinational commercial end-users, which are the backbone of the U.S. economy.

- It does not account for the significant costs and effort associated with essentially reversing key tenets of the 2013 Cross-Border Guidance, which have been the foundation of Dodd-Frank Title VII compliance programs and global firms' legal entity strategy planning for over four years.

- It does not account for the overall costs associated with building new booking models and operational systems to comply with the inconsistent rule regimes (e.g., the 2013 Cross-Border Guidance and the SEC's Cross-Border Rule).

- It does not consider a less costly alternative of establishing an outcomes-based substituted compliance regime.

The absence of these key data points prevents the Commission from providing a sufficient assessment of the overall costs and benefits of the Proposal, which is a prerequisite to the adoption of the final rule. Instead, the Commission asks the public to conduct such an analysis for the Commission.[27]

Accordingly, we ask that the Commission, prior to finalizing the Proposal, take a more comprehensive approach to the regulation of cross-border swap transactions, analyzing the overall impact of the Proposal on virtually every class of market participants, as well as the benefits of the existing laws of foreign jurisdictions and establishing a substituted compliance regime.

II. Lack of Substituted Compliance Makes the Cross-Border Proposal Unworkable

A crucial but unrecognized issue is that the Commission should only adopt a substituted compliance regime to activities that have a direct and significant effect on activities in, or commerce of, the United States. In other words, the Commission should not impose a substituted compliance regime on non-U.S. persons that are beyond the scope of the CFTC's jurisdiction in the first place.

Throughout our many comment letters and engagements with the Commission over the past few years, ISDA and its members have advocated one consistent theme: if cross-border swap transactions directly implicate the Commission's regulatory interests, then

[27] "The Commission invites comments regarding the nature and extent of any costs and benefits that could result from adoption of the Proposed Rule, and to the extent they can be qualified, monetary and other estimates thereof." Proposal, 81 Fed. Reg. at 71964.

for these transactions, the Commission should adopt a substituted compliance regime that considers the rules of other jurisdictions in their entirety, based on their outcomes, rather than a rule-by-rule analysis of each element of the foreign jurisdiction's regulatory framework. In other words, the Commission should review the rules of foreign jurisdictions with a view of whether the rules achieve the same policy outcomes. The necessity to build-out duplicative compliance systems for trading, reporting, recordkeeping and other requirements in overlapping jurisdictions would considerably increase operational costs, decrease the competitiveness of U.S. affiliated entities in relation to other foreign entities and would lead to market fragmentation and diminished liquidity.

Many foreign regulators have laid out the necessary regulatory framework for the Commission to undertake an outcomes-based review of the laws of these jurisdictions, allowing significant deference to its foreign counterparts as required by the Dodd-Frank Act.[28] For example, the European Union is close to implementing its G-20 reforms. The EU regulatory regime is expected to be comparable to the Commission's regulatory framework. Japan, another major regional participant, has moved promptly to implement its regulatory reforms. Japanese regulations now require mandatory clearing, trading, and reporting for certain contracts and impose margin requirements for uncleared swaps.[29] The European Securities and Markets Authority has recognized Japanese clearing houses and the Commission has granted them an exemption from registration. In Canada, trade repositories and derivatives data reporting rules and the margin rules for uncleared swaps are in effect and the Canadian Securities Administrators are expected to finalize their mandatory clearing rules in the near future. Australia, Singapore and Hong Kong have all had trade reporting regimes in place for some time, have recently finalized margin rules for uncleared swaps, and either have a clearing regime in place or are expected to implement one in the near future.

We note that in response to the Commission's proposed approach, foreign regulators are likely to take action to come up with an equally expansive cross-border framework, which would make a substituted compliance regime virtually unachievable. The concern about the Commission's lack of international coordination has again resurfaced among foreign regulators given the extra-territorial reach of the Proposal. Four years ago, appearing before a Congressional committee, regulators from the EU and Japan cautioned

[28] Section 752 of the Dodd-Frank Act requires the Commission to "consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation...of swaps ... [and] swap entities ...."

[29] For example, if a Japanese bank trades a 5 year JPY interest rate swap with a Japanese branch or subsidiary of a U.S. bank or broker/dealer in the inter-bank broker market, such swap transaction must be executed on an electronic trading platform, cleared through the Japan Securities Clearing Corporation (a DCO exempt central clearing counterparty), and reported to a trade repository managed by the Depository Trust & Clearing Corporation. A majority of the Japanese and U.S. dealers (as members of ISDA Japan) are concerned that the Commission is intending to apply duplicative CFTC rules that are comparable to the Japanese rules, in the absence of a substituted compliance regime.

that U.S. markets are at risk if the rules of foreign jurisdictions are not given due consideration.

Masamichi Kono, former Vice Commissioner for International Affairs, Financial Services Agency of Japan; Chairman of the Board, International Organization of Securities Commissions, testified at a U.S. House of Representatives hearing on December 13, 2012 before the House Subcommittee on General Farm Commodities and Risk Management:

> "[T]he risks of cross-border activities and transactions in OTC derivatives … need not be addressed by extraterritorial application of U.S. laws and regulations. Rather, the U.S. authorities could rely on foreign regulators upon establishing, of course, that the foreign regulators have the required authority and competence to exercise appropriate regulation and oversight over those entities and activities. This is … the most efficient and effective approach in line with the principles of international comity between sovereign jurisdictions."[30]

Patrick Pearson, then Head of the Financial Market Infrastructures Unit at the European Commission, echoed a similar view at that hearing:

> "Where we don't want to be is to have the same rules and requirements which are slightly different to apply to the same actors and to the same contracts. That is an unworkable situation. The contracts simply will not take place and everybody will lose. Citizens will lose, companies will lose—they can't hedge their risks—firms will lose because firms will arbitrate and will shift and rebook their trades to other jurisdictions. Nobody wins. And that is where we need to focus our attention on."[31]

Their views were reinforced by the Commission's commitment to international cooperation and coordination outlined in the Path Forward Agreement.[32] In that document, the regulators pledge to "not seek to apply the rules [of their jurisdiction] (unreasonably) in the other jurisdiction, but … rely on the application and enforcement of the rules by the other jurisdiction."[33]

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[30] *See* Statement of Masamichi Kono, Vice Commissioner for International Affairs, Financial Services Agency of Japan, Before the Subcommittee on General Farm Commodities and Risk Management, Committee on Agriculture, U.S. House of Representatives, (Dec. 13,2012), available at: https://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/pdf/hearings/kono121213.pdf.

[31] *See* Testimony of Patrick Pearson, European Commission, Internal Market and Services Directorate General, Before the Subcommittee on General Farm Commodities and Risk Management, Committee on Agriculture, U.S. House of Representatives, (Dec. 13, 2012), available at: https://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/pdf/hearings/pearson121213.pdf.

[32] *See* footnote 17 above.

[33] Path Forward Agreement, p. 2.

Accordingly, we ask the Commission to postpone finalizing the Proposal until it establishes a comprehensive substituted compliance regime.

III. ISDA's Comments on Other Aspects of the Proposal

ISDA's primary view is that, absent a fundamental change in the Commission's cross-border policy (which has not been announced by the Commission prior to the release of, or articulated in, the Proposal), the Commission should not further expand the scope of its extra-territorial reach. In addition, we offer specific comments and recommendations below regarding other aspects of the Proposal.

1. Guaranteed Entities and Foreign Branches of U.S. SDs

We are supportive of the Commission's intent to define key terms in a consistent manner and to apply these terms harmoniously throughout the Commission's cross-border framework. We are also supportive of the revised definition of the term "guarantee".[34] This revised definition is consistent with the SEC's definition and provides legal certainty.

In addition, we ask that the Commission in its final rule retain the SD *de minimis* calculation exceptions contained in the 2013 Cross-Border Guidance for non-U.S. persons executing swaps with: (1) foreign branches of U.S. SDs; (2) guaranteed affiliates that are registered SDs; and (3) guaranteed affiliates of non-financial entities.

The 2013 Cross-Border Guidance explains and supports our view. With respect to foreign branches and guaranteed affiliates, the Commission has explicitly stated:

> "The Commission believes that where the guaranteed affiliate of a U.S. person is registered as a swap dealer, or where the foreign branch is included within the swap dealer registration of U.S. home office, then it is appropriate to generally permit such non-U.S. [person] not to count its swap dealing transactions with those entities against the non-U.S. person's *de minimis* threshold, because in these cases one counterparty to the swaps is a swap dealer subject to comprehensive swap regulations and operating under the oversight of the Commission. The Commission understands that commenters are concerned that foreign entities, in order to avoid swap dealer status, may decrease their swap dealing business with foreign branches of U.S. registered swap dealers and guaranteed affiliates that are swap dealers."[35]

The Commission's analysis made sense here, particularly because it focused on the fact that the CFTC would already have oversight over the SD counterparty and the

[34] This definition "would include arrangements, pursuant to which one party to a swap has rights of recourse against a guarantor, with respect to its counterparty's obligations under the swap." Proposal, 81 Fed. Reg. at 71955, fn. 79; *see also* 17 C.F.R. §23.160(a)(2) (cross-border application of the Commission's margin requirements for uncleared swaps).

[35] 2013 Cross-Border Guidance, 78 Fed. Reg. at 45324.

transaction. Add to that the similar monitoring and supervision in place by the local regulators and the sound conclusion is that there is no need for incremental yet costly CFTC coverage and supervision by controlling trade counterparties with SD and MSP registration requirements.

Separately, we recommend that the Commission adopt the 5 percent market exception for foreign branches, affiliates and subsidiaries of a U.S. SD.[36] Under this exception, even if foreign regulations are not comparable to the Commission's regulations, foreign branches and other affiliates of a U.S. SD would be permitted to comply with the foreign regulations if the aggregate notional value of all swaps of the U.S. SD's foreign branches (or affiliates or subsidiaries) in such countries does not exceed 5 percent of the aggregate notional value of all of the U.S. SD's swaps. The exception would only apply to swap transactions that have a direct and significant connection to the U.S. activities or U.S. commerce, but because their notional value is so minimal they would not pose systemic risk to U.S. financial institutions.

Finally, the Commission should provide an exception to non-U.S. persons executing swaps with guaranteed affiliates of non-financial entities. As explained in the 2013 Cross-Border Guidance, this "exception is appropriate given that the risks to the U.S. financial markets are mitigated because the U.S. guarantor is a non-financial entity."[37]

2. The CFTC Should Not Consider the SD Conduit Concept

In its 2013 Cross-Border Guidance, the Commission included conduit affiliates in its guidance relating to SD *de minimis* calculations in order to capture activity conducted by entities outside the United States that transfer risk back into a non-CFTC registered affiliate in the United States. According to the CFTC's stated rationale in the 2013 Cross-Border Guidance, the Commission's goal was to require registration and regulation of an entity when there essentially is a chain of transactions resulting in risk making its way back into a U.S. entity. In this regard, the CFTC was clear in its expectation that entities that are conduit affiliates would not be affiliates of SDs.

In the preamble discussion to the Proposal, the Commission asks whether it should consider a new concept referred to as a SD conduit.[38] As described in the questions, a SD conduit would be a non-U.S. entity that engages in swaps with other non-U.S. entities ("outward facing swaps"), and transfers some or all of the risk to a fully-regulated CFTC-registered U.S. SD.[39] Essentially, the Commission is asking whether it should consider requiring registration and regulation of every non-U.S. affiliate of a U.S. SD that engages in the well-recognized and prudent process of internal risk management transactions with

[36] In the 2013 Cross-Border Guidance, this exception was specifically known as the "emerging markets exception."
[37] *Id.*
[38] *See* Proposal, 81 Fed. Reg. at 71958 (Request for Comment #3).
[39] *Id.*

its affiliated U.S. SD (the prudence of which the CFTC itself recognized in its discussion of inter-affiliate transactions in the CFTC's final margin rules).[40]

The Commission should not consider this SD conduit concept for any future rule proposals and should not expand this concept beyond the current conduit affiliate analysis in the 2013 Cross-Border Guidance. In its 2013 Cross-Border Guidance, the Commission wanted to make sure that there is a CFTC-regulated entity in the chain of entities transferring risk into a non-CFTC regulated U.S. entity.[41] This logic cannot be extended to any rule finalizing the Proposal because as described in the preamble questions, there would already be a fully-regulated U.S. SD in the chain of entities, and that U.S. SD would already be obligated to comply with every CFTC risk mitigation rule for every CFTC-regulated swap it transacts. Extending the conduit affiliate concept embodied in the 2013 Cross-Border Guidance into a new SD conduit concept would be another example of regulatory overreach with extraordinary costs and consequences, and little associated benefit.

In addition to the conduit concept, the SD conduit questions in the Proposal focus on the "outward facing swaps" of the non-U.S. affiliates of U.S. SDs.[42] The "outward facing swap" concept is not new; it appears in the Commission's analysis of the inter-affiliate clearing exemption and the inter-affiliate margin exemption, and is designed as an anti-evasion measure to prevent the transfer of risk from uncleared and unmargined swaps into a U.S. SD.[43] Those anti-evasion measures (along with the suite of rules generally applicable to U.S. SDs) ensure that any risk from such internal risk management transactions is already managed by the U.S. SD and ensure that it is not transferred to the U.S. SD on an uncleared or unmargined basis unless the Commission is satisfied (with limited *de minimis* exceptions) that the home country margin and clearing rules of the non-U.S. affiliate are comparable and comprehensive.

If the Commission recognizes the value of internal risk management transactions, and has satisfied itself that the risk of these transactions is properly managed by the extensive suite of rules the Commission has already put in place for SDs (including the anti-evasion provisions of the CFTC clearing and margin rules), we question whether the "outward facing swap" concept would incrementally reduce risks flowing back into the United States, because those risks are already sufficiently mitigated. As such, we do not believe it is necessary for the CFTC to cast an ever-widening net to ensnare non-U.S. affiliates of U.S. SDs when such affiliates may never trade with any external counterparties that are U.S. persons or guaranteed affiliates. This concept would amount to yet another very troubling example of regulatory overreach by taking the Commission's existing narrow and targeted focus on "outward facing swaps" from two key risk mitigation rules (margin and clearing), and drastically expanding the "outward facing swap" concept by broadly

[40] *See* Final Rule, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 81 Fed. Reg. 636, 674 (Jan. 6, 2016). *See also* CFTC Final Rule, *Clearing Exemption for Swaps between Certain Affiliated Entities*, 78 Fed. Reg. 21750, 21760 (Apr. 11, 2013) (noting that market participants need to efficiently allocate risks among affiliates and manage risk centrally).
[41] *See* 2013 Cross Border Guidance, 78 Fed. Reg. at 45357-59.
[42] *See* Proposal, 81 Fed. Reg. at 71958 (Request for Comment #3).
[43] *See* Margin Rule, 81 Fed. Reg. at 674; Inter-affiliate Clearing Exemption, 74 Fed. Reg. at 21760.

applying it to registration rules. ISDA members do not support such an expansion and believe that it would not pass muster under any meaningful cost-benefit analysis.

3. The Aggregation Requirement Should be Abandoned

Similar to the 2013 Cross-Border Guidance, the Proposal requires all non-U.S. SDs to aggregate their swap dealing transactions with persons under common control unless the affiliated person is itself a registered SD or MSP.[44] We are concerned that given the breadth of the FCS construct, many non-U.S. entities may become subject to SD registration even if they only have one U.S. customer. For that reason, we recommend that the Commission abandon the aggregation requirement in the final rule.

4. ANE Transactions

As we stated in our prior submissions, we believe that the location in the United States of personnel involved in specific aspects of a swap transaction between non-U.S. parties does not satisfy the jurisdictional test of CEA Section 2(i). The mere presence in the United States of personnel performing certain functions (which are not clearly specified in the Proposal) neither creates a direct and significant connection to U.S. activities or U.S. commerce, nor raises evasion concerns.

As a practical matter, personnel-based regulations interfere with a firm's ability to deploy expertise in the most effective manner, potentially increasing institutional risk. U.S.-based personnel could be precluded from participating in the structuring and risk management of transactions with a U.S. underling product. In addition, U.S.-based personnel may be required to relocate to other jurisdictions or the ANE transaction duties may be taken away from U.S.-based personnel, resulting in potential adverse effects on U.S. employment. We ask that the Commission fully assess the consequences of subjecting ANE transactions to CFTC jurisdiction prior to finalizing the Proposal.

In the alternative, should the Commission decline to remove ANE transactions from the scope of its jurisdiction, we ask that the Commission accept the following recommendations:

- As proposed by the Commission, the SD *de minimis* calculation should not apply to ANE transactions between two non-U.S. entities. Also, only rules relating to fair dealing, and prohibition on fraud, manipulation and other abusive practices within the CFTC's external business conduct rules should apply to these transactions. The Proposal, however, is silent on whether other substantive requirements, including clearing, swap processing, mandatory trade execution and real-time public reporting would apply to ANE transactions. The CFTC's final rule should expressly exempt ANE transactions from additional substantive requirements.

[44] *See* Proposal, 81 Fed. Reg. at 71957.

- We disagree with the Commission's analysis that arranging, negotiating, or executing swaps are functions that fall within the scope of the SD definition.[45] The SD definition generally focuses on whether a firm regularly makes a market in swaps or enters into swap transactions as an ordinary course of business for its own account.[46] This activity is different from a situation where occasionally, non-U.S. SDs use U.S. sales and trading personnel to execute trades outside the local market hours or to provide their clients the necessary expertise in the products available in the United States. Presently, ANE transactions are subject to the Commission's time-limited, no-action relief from compliance with the substantive requirements.[47]

- While the Proposal has reduced some ambiguity around the meaning of ANE, there still remains a significant degree of uncertainty associated with some types of activities conducted from the United States that may incidentally fall within the scope of ANE. Notwithstanding ISDA's recommendations above, should the Commission decide to further identify additional activities that may be considered ANE, then we ask that the Commission give market participants an opportunity to provide comment regarding such additional activities prior to making any final determination.

- We disagree that swap transactions involving algorithmic trading should be subject to the CFTC's external business conduct rules requirements[48] if the lead system personnel are located in the United States regardless of where the server is located. Parties may have system personnel located in the United States, but the transactions in question involve no human contact with the United States, as is the case with algorithmic/program driven trading. A non-U.S. person counterparty would not know who is responding on behalf of the other non-U.S. counterparty, let alone the location of system personnel. The CFTC's external business conduct rules should not apply in situations where parties execute a swap transaction without any reasonable basis to expect CFTC regulations would apply.

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[45] *See* Proposal, 81 Fed. Reg. at 71952.

[46] CFTC Final Rule, *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant,"* 77 Fed. Reg. 30596, 30692 (May 23, 2012).

[47] *See* CFTC Letter 16-64, (Aug. 4, 2016) available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-64.pdf. Given the high level of uncertainty that exists in the face of periodically expiring time-limited no-action relief, we believe that the Commission should issue no-action relief that is not time-limited, but that expires on a specified compliance date associated with a final Commission determination regarding the application of the substantive requirements to ANE transactions. It is only after the Commission addresses the comments received, finalizes its policy on these issues and provides for an appropriate implementation period that compliance with a final Commission determination can reasonably be expected.

[48] *See* 17 C.F.R. §§ 23.400-51.

CONCLUSION

The Commission's proposed approach to the cross-border regulation of swap transactions would have a profound effect on the U.S. and global swaps markets. Therefore, it is critical that any final rules adopted by the Commission regarding its cross-border jurisdiction address our members' concerns in order to avoid harmful disruptions to these markets. Specifically, we ask that the Commission:

- Remove the FCS construct;
- Adopt a considered cross-border framework that only captures cross-border swap transactions that have a direct and significant impact on U.S. activities or U.S. commerce;
- Prior to finalizing the Proposal, adopt an outcomes-based substituted compliance regime for activities that have a direct and significant impact on U.S. activities or U.S. commerce, taking into account comparable regulation of foreign jurisdictions;
- Retain the SD *de minimis* calculation exception for non-U.S. persons executing swaps with: (i) foreign branches of U.S. swap dealers; (ii) guaranteed affiliates that are registered swap dealers; and (iii) guaranteed affiliates of non-financial entities;
- Allow foreign branches and other affiliates of U.S. SDs and other U.S. affiliated entities to rely on the emerging market exception in the countries where foreign regulations may not be comparable with the United States; and
- Remove ANE transactions from the final rule as they do not have a direct and significant impact on activities in, or commerce of, the United States. In the alternative, exclude ANE transactions from the SD *de minimis* calculation as suggested in the Proposal and require that only rules relating to fair dealing, and prohibition on fraud, manipulation, and other abusive practices within the CFTC's external business conduct rules apply to these transactions.

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ISDA®

We appreciate the opportunity to provide our comments on the Proposal and look forward to working with the Commission as it continues to consider these important issues. Please feel free to contact me at your convenience.

Sincerely,

Katherine Tew Darras
General Counsel