



## Coalition for Derivatives End-Users



CENTER FOR CAPITAL MARKETS  
COMPETITIVENESS



December 19, 2016

Christopher Kirkpatrick  
Secretary  
U.S. Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street N.W.  
Washington, DC 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]***

On behalf of our respective memberships, American Bankers Association, Coalition for Derivatives End-Users, Financial Services Roundtable, the International Swaps and Derivatives Association, National Association of Corporate Treasurers, Securities Industry and Financial Markets Association, and the U.S. Chamber of Commerce Center for Capital Markets Competitiveness (collectively, the “Undersigned”)<sup>1</sup> are pleased to provide comments to the U.S. Commodity Futures Trading Commission (the “CFTC”) on its proposed rule titled *Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants* (the “Proposed Cross-Border Rule”).<sup>2</sup> The Undersigned represent diverse constituencies within the global swaps market including thousands of market participants ranging from commercial end-users to swap dealers to asset managers to financial entities, as well as market infrastructure providers (such as derivatives clearing organizations and swap execution facilities) and various service providers.

Although the Undersigned may have separately filed their own detailed comments on the Proposed Cross-Border Rule, we have joined together in this letter to express our sincere and unified

<sup>1</sup> Descriptions of the Undersigned are set forth in the Annex to this letter.

<sup>2</sup> 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).

concerns with the newly introduced foreign consolidated subsidiary (“FCS”) concept in the Proposed Cross-Border Rule. We urge the CFTC to reconsider its proposed approach in using the FCS concept for broad cross-border application beyond the CFTC’s cross-border margin rule<sup>3</sup> and specifically in using that concept as part of the swap dealer and major swap participant (“MSP”) registration threshold calculations. In short, we believe that the FCS concept as proposed would (i) have a detrimental impact on U.S. swaps market participants, particularly Main Street businesses seeking to prudently hedge their commercial and market risks when they do business in foreign jurisdictions; (ii) represent an unprecedented approach to regulating financial markets that is inconsistent with principles of international comity; and (iii) be excessively costly to implement without resulting in a commensurate reduction in systemic risks to U.S. financial markets. Accordingly, we respectfully request that the CFTC refrain from moving forward with the application of the FCS concept as described or alluded to in the Proposed Cross-Border Rule.

#### DETRIMENTAL IMPACT ON U.S. SWAPS MARKET PARTICIPANTS

By including the swap transactions of FCSs within swap dealer and MSP registration threshold calculations, foreign counterparties with no other connections or nexus to the United States would seek to avoid transacting swaps with FCSs. In practice, commercial end-user FCSs would find that they have limited counterparty options and reduced liquidity, while swap dealing FCSs would find themselves at a competitive disadvantage when dealing with local counterparties. Left with fewer counterparties with which to transact swaps related to their foreign risk exposures, swaps market participants caught within the broad definition of the FCS concept would be unable to prudently and efficiently hedge those exposures. Thus, the FCS concept would deepen the already fragmented nature of the global swaps market, resulting in fractured and shallow pools of market liquidity and increased concentrations of risk. This fragmentation would disrupt the foreign commercial activities and traditional hedging mechanisms employed by FCSs.

Main Street businesses would be hurt most by the proposed FCS concept since they would be put at an unfair, competitive disadvantage *vis-à-vis* their non-U.S. competition in those local markets. Because of the FCS concept, U.S.-based end-users would have fewer options for hedging. In some cases, the FCS concept could make hedging cost-prohibitive for U.S.-based end-users when they operate in foreign markets.

#### UNPRECEDENTED REGULATORY APPROACH IS COUNTER TO PRINCIPLES OF INTERNATIONAL COMITY

The proposed application of the FCS concept—both as it applies to the registration and supervision of foreign counterparties that fall within the definition of FCS and to the potential registration and supervision of a foreign entity that is neither a non-U.S. guaranteed affiliate, nor an FCS, simply because it transacts with an FCS (except where the swap is executed anonymously on a CFTC-registered or exempt exchange and cleared)—lacks precedent within financial markets. No other regulatory regime has sought to require registration and supervision of foreign entities with no

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<sup>3</sup> See 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).

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. The Proposed Cross-Border Rule would ignore the sovereignty and existing foreign laws and regulations established by foreign nations, effectively overriding local foreign control over their local businesses.

THE PROPOSAL WOULD BE EXCESSIVELY COSTLY WITH NO COMMENSURATE REDUCTION IN RISK

The Proposed Cross-Border Rule completely re-writes the scope of the CFTC's Cross-Border Guidance<sup>4</sup> with little regard for its content, with which all market participants have spent significant financial resources (in the billions of dollars) over the last several years working to comply. In addition, the application of the FCSs concept to registration and supervision would add enormous costs to FCSs and to the foreign counterparties that still seek to transact with these entities. Moreover, the Proposed Cross-Border Rule does not provide a complete picture of the costs associated with implementing the FCS concept (or the proposal generally) since it does not fully address the significant impacts on the broader economy and significant uncertainty remains regarding the application of the FCS concept on CFTC transaction-level requirements.<sup>5</sup> Concentrating market risks, eliminating counterparty pools, reducing market liquidity, and increasing costs associated with prudent risk management would unnecessarily hinder U.S. business growth and negatively affect the U.S. economy without any tangible reduction in systemic risk.

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The Undersigned appreciate the opportunity to comment on the Proposed Cross-Border Rule and would again urge the CFTC to review the detailed comments raised in the respective comment letters of the Undersigned.

Yours sincerely,

American Bankers Association  
Coalition for Derivatives End-Users  
Financial Services Roundtable  
International Swaps and Derivatives Association  
National Association of Corporate Treasurers  
Securities Industry and Financial Markets Association  
U.S. Chamber of Commerce Center for Capital Markets Competitiveness

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<sup>4</sup> See Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (Jul. 26, 2013)

<sup>5</sup> See 81 Fed. Reg. at 71,951, n. 41.

## ANNEX

The **American Bankers Association** is the voice of the nation's \$16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$12 trillion in deposits and extend more than \$8 trillion in loans.

The **Coalition for Derivatives End-Users** ("Coalition") represents end-user companies that employ derivatives to manage risks. Roughly 300 companies and business associations have been active in the Coalition on both legislative and regulatory matters and our message is straightforward: financial regulatory reform measures should promote economic stability and transparency without imposing undue burdens on derivatives end-users, who are the engines of the economy. Imposing unnecessary regulation on derivatives end-users, parties that did not contribute to the financial crisis, would fuel economic instability, restrict job growth, decrease productive investment and hamper U.S. competitiveness in the global economy.

As *advocates for a strong financial future*<sup>TM</sup>, the **Financial Services Roundtable** ("FSR") represents nearly 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for \$54 trillion in managed assets, \$1 trillion in revenue, and 2 million jobs.

Since 1985, the **International Swaps and Derivatives Association** ("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](http://www.isda.org).

The **National Association of Corporate Treasurers** ("NACT") is an organization of treasury professionals from several hundred of the largest public and private companies with operations in the United States. The mission of NACT is to facilitate dialogue among corporate treasurers and their colleagues, opening valuable connections and introducing new approaches and better solutions. Through peer networking, conferences, career services, advocacy, regional meetings, webinars, and tele-discussions, NACT members share ideas on a wide spectrum of corporate finance topics. These include corporate banking relationships, capital markets, investment opportunities, retirement plans and benefits, risk management, use of derivatives, insurance, large-, medium- and small-company issues, international challenges and many more. For more information, visit [www.nact.org](http://www.nact.org).

The **Securities Industry and Financial Markets Association** ("SIFMA") is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1

million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$20 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

The **U.S. Chamber of Commerce** (the “Chamber”) is the world’s largest federation of businesses and associations, representing the interests of more than three million U.S. businesses and professional organizations of every size and in every economic sector. These members are both users and preparers of financial information. The Chamber created the **Center for Capital Markets Competitiveness** (“CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve these goals, the CCMC has supported the development of robust financial reporting systems and encouraged efforts to improve standards and reduce complexity.