By Electronic Mail

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Commodity Futures Trading Commission
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RE: Project KISS

Ladies and gentlemen:

The Financial Services Roundtable ("FSR")[1] respectfully submits these suggestions in response to the request for information (the "Request for Information")[2] by the US Commodity Futures Trading Commission (the "Commission") regarding the submission by the public of suggestions as to how the Commission's existing rules, regulations or practices could be applied in a simpler, less burdensome and less costly manner. We appreciate the opportunity to submit suggestions.[3]

For ease of reference, we have included a table of contents below setting forth the suggestions we have included herein.

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[1] The Financial Services Roundtable represents the largest integrated financial services companies providing banking, insurance, payment 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 for $54 trillion in managed assets, $1.1 trillion in revenue and 2.1 million jobs. Learn more at FSRoundtable.org.

[2] *See* Project KISS, 82 Fed. Reg. 21494 (May 9, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-05-09/pdf/2017-09318.pdf (as corrected by Project KISS, 82 Fed. Reg. 23766 (May 24, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-05-24/pdf/2017-10622.pdf) ("Request for Information"); *see also* U.S. Commodity Futures Trading Commission, KISS INITIATIVES, https://comments.cftc.gov/KISS/KissInitiative.aspx (last visited Sept. 25, 2017).

[3] For ease of review, this submission combines FSR's responses on all five of the topic areas on which the Commission has requested public suggestions in the Request for Information for Project KISS. We would be more than willing to provide additional information on any of the topics discussed herein.

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I. INTRODUCTION

FSR supports and appreciates the affirmative steps taken by the Commission to act on the Administration's request for federal agencies to carefully review and, when necessary, revise their regulations. Such a review process helps ensure that regulations maintain their intended purpose and are calibrated in a way that does not unduly burden market participants seeking to serve US consumers and businesses.

In terms of specific recommendations for improving the Commission's rules on registration, FSR urges the Commission to maintain the current *de minimis* threshold for swap dealer registration at US$8 billion, at least until further information can be collected to ensure that a lowering of the threshold to US$3 billion does not unduly capture smaller financial institutions that deal swaps on a limited basis in connection with lending transactions or only as a means to maintain certain bespoke business relationships. Although we generally believe that the current swap dealer *de minimis* threshold provides a workable standard, we would support efforts by the Commission to integrate measures which allow institutions with limited swaps exposure, or that clear a majority of their swaps transactions, to avoid the requirements to register as a swap dealer or major swap participant. Furthermore, we have included suggestions on reducing the scope of the Commission's registration requirements for certain introducing brokers and investment advisors, the latter of which are already subject to extensive regulation by the US Securities and Exchange Commission (the "SEC").

Our suggestions for improving the Commission's reporting requirements include providing targeted relief in respect of registrants' compliance with the Commission's voice recording requirements, compliance with which our members have uniformly noted is burdensome and at times technologically impractical. We also applaud, and urge the Commission to continue, the Commission's efforts to review and streamline its data collection requirements.

On the topic of clearing, we have highlighted areas in which additional guidance from the Commission is warranted, including to ensure that legacy transactions are not unnecessarily made subject to clearing requirements.

We have also included a variety of suggestions on the topic of trade execution. We generally support many of the ideas that the Commission has already outlined for improving the rules governing swap execution and registered swap execution facilities ("SEFs"). We strongly support Chairman Giancarlo's longstanding efforts to expand the methods of execution available to SEFs. Our submission also restates certain suggestions on expanding the Commission's role in the "made available to trade" or "MAT" process. We have also suggested certain incremental changes to the Commission's guidance on standards for straight-through-processing that, if implemented, would reduce the need for trade re-submissions and help improve market efficiency.

A common theme running throughout our suggestions herein is the need for a comprehensive review of the Commission's treatment of cross-border transactions. We believe that the Commission's existing guidance in this area captures vast amounts of trading activity that need not by scrutinized by US regulatory standards, especially when considering the requirement in the Commodity Exchange Act, as amended (the "CEA"), that foreign activities only be regulated by the Commission in cases where there exists a "direct and significant connection" with US commerce.[4] As set forth herein, we believe that much

[4] *See* 7 U.S.C. § 2(i).

can be done to better align the Commission's guidance and rules with the principle of international comity, by (i) expanding the areas in which the Commission could allow reliance on substituted compliance and (ii) reducing the scope of persons and institutions that are classified by the Commission as "US persons". We further request that the Commission release comparability determinations before any related US rules are scheduled to go into effect. We also support the Commission's continued coordination with non-US regulators regarding the implementation dates of key regulatory standards. We also urge the Commission to better harmonize its uncleared swap margin rules with those of foreign regulators by, for example, adding a *de minimis* exception applicable to transactions in non-netting jurisdictions and aligning initial margin ("IM") regulations.

FSR also supports a broader re-evaluation and re-calibration of the Commission's rules on margin and capital rules for swap dealers, which we believe are overly conservative. To this end, we also urge the Commission, in tandem with the Prudential Regulators (as defined herein), to fully exempt inter-affiliate swaps from IM requirements for uncleared swap transactions. Certain no-action relief in this area, such as CFTC Letter No. 16-71, which clarified that scope of products that can be included within an eligible master netting agreement, have been helpful; we have accordingly requested the Commission's codification of CFTC Letter No. 16-71, in addition to various other forms of existing no-action relief previously issued by the Commission.

Finally, our letter also includes a variety of suggestions on how the information supplied in the Risk Exposure Reports required under Rule 23.600 can be simplified and streamlined. For example, we suggest that the Commission confirm that Risk Exposure Reports may be limited to detailing material changes in a firm's risk profile and do not require a complete recitation of previously disclosed risks.

The discussion set forth below details our recommendations and areas where we believe the Commission's swap regulations can be streamlined and made more efficient and/or modified to address market inconsistencies and reduce burdens on market participants, while achieving the original purpose of the Dodd-Frank Act – to reduce systemic risk in the derivatives market.

II. REGISTRATION[5]

A. Swap Dealer Registration *De Minimis* Threshold.

Rule 1.3(ggg) provides that a person is not considered to be a swap dealer unless its swap dealing activity exceeds an aggregate gross notional threshold amount of US$3 billion (the "*de minimis* threshold") over the prior 12-month period, subject to a phase-in period (ending December 31, 2018) during which period the *de minimis* threshold is set at US$8 billion.[6] Each entity that does not independently exceed the *de minimis* threshold must also include the notional amount of swaps of any other affiliate (excluding those registered as swap dealers) controlling, controlled by or under common control with that entity in its *de*

[5] **The Commission has requested suggestions on how its existing rules, regulations or practices regarding the initiation and continuation of becoming regulated by the Commission as registered clearing, trading, data repository and intermediary entities could be applied in a simpler, less burdensome and less costly manner.**

[6] 17 C.F.R. § 1.3(ggg); *see* 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 (May 23, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-10562.pdf ("Definitions Release"); Order Establishing *De Minimis* Threshold Phase-In Termination Date, 81 Fed. Reg. 71605 (Oct. 18, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-10-18/pdf/2016-25143.pdf.

minimis calculation (*i.e.,* aggregation). The current *de minimis* threshold captures more than 100 entities provisionally registered as swap dealers, representing a large portion of the market.

1. *Permanently Retain the* De Minimis *Threshold for Swap Dealer Registration at US$8 Billion.*

Absent further action by the Commission, the *de minimis* threshold for swap dealer registration is currently set to decrease from US$8 billion, to US$3 billion, on December 31, 2018. Further, institutions impacted by the scheduled reduction will be forced to closely monitor, and potentially adjust (as necessary), their swap dealing activity during the next 15 months to determine whether they must register as swap dealers in 2019.

FSR strongly believes that a decrease in the de minimis threshold for swap dealer registration would impose unwarranted burdens, not only on certain market participants, but also on the Commission. For the reasons listed in our comment letter dated January 19, 2016 in respect of the Commission's Swap Dealer *De Minimis* Exception Preliminary Report (the "Preliminary Report"),[7] and as set forth below, we recommend that the Commission take action before the end of 2017, to permanently maintain the current swap dealer *de minimis* threshold at US$8 billion.

a. **Reducing the *De Minimis* Threshold Would Have Negative Impacts on the Swaps Market.** If the *de minimis* threshold is reduced (*i.e.,* to US$3 billion, as provided under Rule 1.3(ggg)), we believe that a number of firms may cease (or at least reduce) offering swaps to customers to avoid being regulated as a swap dealer. Indeed, anecdotal evidence already exists to support this proposition. In connection with the separate *de minimis* threshold for "special entities" (*i.e.,* US$25 million), a number of institutions ceased trading with special entities to avoid swap dealer registration, depriving those special entities, including certain public utilities, of additional liquidity and available counterparties.[8]

If the *de minimis* threshold were to drop to US$3 billion, small- to mid-sized banking enterprises and non-banking institutions (*e.g.,* insurance companies) may be impacted by such change to a greater degree than other types of entities. Subjecting such entities to regulation as swap dealers would not serve any of the policy objectives of swap dealer regulation or the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The Preliminary Report specifically noted that a drop in the swap dealer registration threshold from US$8 billion, to US$3 billion, would capture a significant number of market participants.[9] Although not expressly stated

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[7] Financial Services Roundtable, Comments on Swap Dealer *De Minimis* Exception Preliminary Report, Comment No. 60606 (Jan. 19, 2016), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60606 ("FSR Preliminary Report Comment Letter"); *see* Swap Dealer *De Minimis* Exception Preliminary Report: A Report by Staff of the U.S. Commodity Futures Trading Commission Pursuant to Regulation 1.3(ggg) (Nov. 18, 2015), *available at* http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis_1115.pdf ("Preliminary Report"); *see also* Swap Dealer *De Minimis* Exception Final Staff Report: A Report by Staff of the U.S. Commodity Futures Trading Commission Pursuant to Regulation 1.3(ggg) (Aug. 15, 2016), *available at* http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis081516.pdf ("Final Report").

[8] *See, e.g.,* M&T Bank, Comments on Swap Dealer *De Minimis* Exception Preliminary Report, Comment No. 60584 (Jan. 13, 2016), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60584 ("[d]ue to the lower *de minimis* threshold (*i.e.,* $25 million) applying to "special entities," M&T Bank no longer offers interest rate hedging services to such customers").

[9] Preliminary Report at p. 49; *see* Final Report at pp. 7-8, 20-21.

in the Preliminary Report or in the Commission's Swap Dealer *De Minimis* Exception Final Staff Report (the "Final Report"), it is evident that many of these institutions would be small- to mid-sized banking institutions. Capturing these firms threatens their ability to compete with larger financial institutions, which, in turn, would cause further concentration of risk among larger financial institutions. The change would also result in increased oversight responsibilities of the Commission, while only having a negligible impact on the amount of swap transactions subject to enhanced regulations.

b. **Reducing the *De Minimis* Threshold Would Not Advance the Policy Objectives of Swap Dealer Regulation.** The current gross notional test for swap dealer regulation ignores the value of an entity's swaps. As explained in our previous comment letters,[10] we do not see a benefit to requiring an entity that enters into a small number of swaps with a large notional amount, but with little exposure, to choose between exiting the market and registering as a swap dealer, nor do we believe that entities that are taking on very large exposures, without crossing a notional threshold, should be unregulated because they have concentrated risk in a small number of trades.

Utilizing a gross notional test for swap dealer regulation assumes that, as these numbers increase (in a vacuum), an entity's systemic risk also increases. This is not always the case, in particular where such entity is fully collateralized with little to no net exposure. In addition, to the extent that an entity's swaps are cleared, the swap with its counterparty is extinguished and the ongoing risk mitigation is performed by the clearing organization. Accordingly, if, as the Commission Staff (the "Staff") noted in the Preliminary Report, one of the principal goals of the Dodd-Frank Act and swap dealer regulation is to reduce systemic risk, applying any swap dealer test that does not give effect to the underlying economics of an entity's positions (or that includes cleared swaps in the calculation) should be reexamined. At the very least, if the *de minimis* threshold test were reduced to US$3 billion, we would urge the Commission to revisit the metrics for swap dealer determination to fold in an exposure threshold to the *de minimis* calculation and, in all events, consider expanding the scope of transactions that are excluded from the *de minimis* threshold calculation to permit small- to mid-sized banking firms to avoid unnecessary registration.

We acknowledge that swap dealer regulation also mandates various counterparty protections which could prove helpful under some circumstances. However, we believe that the potential cost of swap dealer regulation (discussed below) clearly outweighs any counterparty protection objectives that would be advanced by reducing the *de minimis* threshold. In addition, the Dodd-Frank Act allows sophisticated persons and entities that qualify as eligible contract participants ("ECPs") to choose to transact with non-registered counterparties. Subjecting additional market participants to swap dealer regulation may, in fact, upset existing customer relationships or force market participants to concentrate their transactions with regulated swap dealers. In addition, we note that transactions between non-swap dealers are not without regulation – the Commission requires market participants to maintain detailed records for such transactions and continues to have visibility with respect to such transactions as a result of the swaps reporting rules.

c. **Swap Dealer Regulation Is a Deterrent to Market Entry.** The cost of swap dealer registration is very high and necessitates a comprehensive review of any entity's organizational structure and current practices. In addition, upon registration, entities would incur additional costs and expenses associated with administering and ensuring compliance with swap dealer regulation going forward.

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[10] *See, e.g.,* FSR Preliminary Report Comment Letter; Financial Services Roundtable, Comment on Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", Comment No. 49879 (Oct. 17, 2011), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=49879.

The precise costs for registering as a swap dealer will vary by entity, but, given the information we have to date, we understand it costs millions of dollars to implement and maintain. Moreover, because small- to mid-sized entities would be subject to the same regulatory requirements and fixed implementation costs applicable to larger banking entities currently registered as swap dealers, smaller- to mid-sized banking entities may be at a competitive disadvantage in maintaining their registration status.

As demonstrated in the Preliminary Report (and reaffirmed in the Final Report), a drop in the swap dealer registration threshold from US$8 billion, to US$3 billion, would capture a significant number of market participants, causing them to either register as swap dealers or reduce services to the marketplace, **while subjecting only a small amount of additional transactions to swap dealer regulation**. For example, the Preliminary Report estimated that up to 83 additional entities could be subject to swap dealer registration if the *de minimis* threshold were to fall to US$3 billion, which would nearly double the entities subject to registration. **Reducing the *de minimis* threshold to US$3 billion, however, would capture less than one percent (1%) more notional activity in the interest rate swap and credit default swap ("CDS") asset classes.**[11] Thus, we believe that a drop in the *de minimis* threshold would create unnecessary and unreasonable burdens on market participants given the minimal gain in capturing additional market exposure.

2. *Amend the Commission's Regulations and Guidance to Broaden the Scope of Products Excluded from the Swap Dealer* **De Minimis** *Threshold Calculation for Insured Depository Institutions.*

The potential negative impacts of reducing the *de minimis* threshold for small- to mid-sized banking entities is further exacerbated by the current form of the insured depository institution ("IDI") exclusion.[12] For the reasons listed in our comment letter dated January 19, 2016 in respect of the Preliminary Report and as set forth below, we recommend that the Commission broaden the IDI exclusion in several ways.

- First, the IDI exclusion only applies where both (i) the swap counterparty is an IDI and (ii) the IDI is a lender (subject to certain provisions for syndicated loans). The IDI exclusion is not available, for example, where the swap is originated by a non-IDI affiliate of an IDI lender, nor is it available where the swap is originated by the IDI but the related loan is issued by one of its non-IDI affiliates (*e.g.,* a subsidiary of the IDI). There are a number of factors that may determine where a bank decides to book a loan or a swap, and we do not believe that banking institutions should be forced to enter into swaps exclusively from its IDI entity or face swap dealer regulation where there may be other legitimate reasons, regulatory or otherwise, for the bank to utilize a particular entity within its group to enter into swaps related to its lending activities.

- Second, we believe that the conditions of the IDI exclusion with respect to when the swap must be executed (*i.e.,* no earlier than 90 days before, and no later than 180 days after, the date of execution of the applicable loan agreement or draws of principal under the loan)[13] are too restrictive and arbitrary. As a practical matter, the timing for execution of a swap is, in many instances, determined solely by the borrower based on market conditions and current interest rates. Accordingly, rather than applying a strict time period in which the swap must be executed, we believe that the

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[11] We also note that, at a US$15 billion *de minimis* threshold, there would only be a decrease in coverage of less than one percent (1%) for notional activity and swap transactions in the interest rate swap and CDS asset classes, and less than four percent (4%) for unique counterparties. Preliminary Report at pp. 48-49; *see* Final Report at pp. 23-24.

[12] *See* 17 C.F.R. § 1.3(ggg)(5); *see also* Definitions Release, 77 Fed. Reg. at 30620-30624.

[13] *See* 17 C.F.R. § 1.3(ggg)(5)(i)(A).

conditions of the IDI exclusion should focus on the actual terms of the loan such that, as long as the terms of the swap hedge the exposure under the loan at any time during the life of the loan, the swap should qualify for the IDI exclusion.

- Third, we also believe that the IDI's minimum commitment percentage requirement (*i.e.,* at least ten percent (10%) of the maximum principal amount under the loan)[14] should be eliminated because, in widely syndicated loans, the lender may not be able to control its share of the loan.

- Finally, we believe the IDI exclusions should not be limited to loan obligations, but rather should be expanded to include other forms of credit financings (*e.g.,* letters of credit, leases, bank-qualified tax-exempt loans, credit-enhanced bonds), as well. We do not see a unique reason why other forms of credit financings should not be covered by the IDI exclusion when the service being provided and the product offered are so similar.

The restrictive nature of the IDI exclusion has the negative result of making many small- to mid-sized banking institutions count certain swaps as "swap dealing" activity. We believe that capturing these types of transactions does not further the policy objectives of swap dealer regulation, as the swaps in these instances are still merely additional products offered by a lender (or an affiliate of a lender) to mitigate interest or currency exposure to a borrower, notwithstanding that the IDI exclusion is unavailable.

3. *Retain and Improve Upon the Commission's 2013 Cross Border Guidance.*

FSR members have expressed concerns regarding the Commission's recent efforts in proposing amendments to the cross-border application of the Commission's external business conduct ("EBC") standards (the "EBC Rules") and the *de minimis* threshold for swap dealer registration (the "2016 Cross-Border Proposal").[15] The 2016 Cross-Border Proposal, if finalized, would require "foreign consolidated subsidiaries" ("FCS") of US persons to include all of their swap dealing transactions (with both US and non-US counterparties) towards their respective *de minimis* thresholds for swap dealer registration. While swaps between two non-US persons would be excluded from regulation by the Commission where neither party is consolidated with a US person (*i.e.,* an FCS) or benefits from a US person guarantee of its swap obligations (a "US Guaranteed Entity"), each such non-US person would still be required to include such swaps in its swap dealer *de minimis* threshold calculation, along with its swap dealing transactions entered

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[14] *See* 17 C.F.R. § 1.3(ggg)(5)(i)(D)(2).

[15] Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 Fed. Reg. 71946 (proposed Oct. 18, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-10-18/pdf/2016-24905.pdf ("2016 Cross-Border Proposal"). Under the 2016 Cross-Border Proposal, the requirements for calculating the swap dealer *de minimis* threshold calculation would remain largely the same as under the 2013 Cross-Border Guidance (as defined herein), and could generally be summarized as follows:

i. A US person would include all of its swap dealing transactions;

ii. A non-US person would include all swap dealing transactions for which it is a US Guaranteed Entity;

iii. An FCS would include all of its swap dealing transactions;

iv. A non-US person that is neither an FCS nor a US Guaranteed Entity would include all of its swap dealing transactions with counterparties that are US persons, US Guaranteed Entities or FCS, unless the swap is executed anonymously on a registered DCM, SEF or FBOT and cleared; and

v. All potential swap dealers, whether US or non-US persons, would aggregate their swap dealing transactions with those of persons controlling, controlled by or under common control with the potential swap dealer, to the extent that those affiliates are themselves required to include those swaps in their own *de minimis* threshold calculations, unless the affiliated person is a registered swap dealer.

into with any US person, US Guaranteed Entity or FCS. In general, we support the suggestions set forth by the Institute of International Bankers ("IIB") and the Securities Industry and Financial Markets Association ("SIFMA") in their joint comment letter in response to the 2016 Cross-Border Proposal (the "IIB-SIFMA Cross-Border Comment Letter"),[16] certain points of which we have reiterated below.

If finalized, the 2016 Cross-Border Proposal would expand the Commission's swaps regulations to cover, on a global basis, the activities of US multinational parent companies, their foreign branches and subsidiaries, and their foreign counterparties. We agree with the assertions in the IIB-SIFMA Cross-Border Comment Letter that the 2016 Cross-Border Proposal focuses more on closing perceived regulatory loopholes, than on appropriately considering the circumstances under which entities and structures present the "direct and significant" risk to the United States, which is the prerequisite for extraterritorial regulation under Section 2(i) of the CEA.[17]

With respect to the FCS designation, it is irrefutable that the would-be FCS entities are, in the vast majority of cases, already locally licensed and subject to local prudential and functional regulation – as highlighted in the IIB-SIFMA Cross-Border Comment Letter, conducting swap dealing operations through such a locally licensed and regulated entity is not the result of an effort to evade or avoid Commission regulation, but rather reflects local regulatory, tax, insolvency or other legal considerations. Furthermore, these would-be FCS entities are, generally speaking, subject to consolidated supervision and regulation by the Board of Governors of the Federal Reserve System (the "FRB") as subsidiaries of US bank holding companies. While the Commission has not indicated which of its regulations would apply to FCS entities apart from its uncleared swap margin rules, the reality is that imposing swap dealer registration on would-be FCS entities would encourage FCS to cease swap dealing activity, resulting in decreased liquidity in the FCS entities' home markets and accompanying increased costs for market participants (including US-headquartered companies) which would otherwise use swaps to hedge their risk in such markets. Further, all market participants would have to reach out to their counterparties to obtain a representation as to whether or not said counterparties are FCS entities. This would require the expenditure of significant time and resources.

Moreover, we agree with the statement made in the IIB-SIFMA Cross-Border Comment Letter that the treatment of FCS and their non-US person counterparties does not satisfy the requirement under Section 2(i) of the CEA, that extraterritorial swap activity rise to the level of having a "direct and significant" connection with activities in, or effect on, US commerce in order to be subject to Commission regulation.[18] In our view, transactions involving an FCS do not necessarily increase the risk to US affiliated entities.

Because the 2016 Cross-Border Proposal would create unnecessary compliance burdens for a non-US entity not otherwise engaged in transactions with counterparties who trigger compliance requirements under Title VII of the Dodd-Frank Act, we recommend that the Commission suspend its work on the 2016 Cross-Border Proposal, and instead focus on making incremental changes to the Commission's 2013 cross-border policy statement and interpretive guidance (the "2013 Cross-Border Guidance"),[19] in order to

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[16] Institute of International Bankers and Securities Industry and Financial Markets Association, Comment Letter on Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, Comment No. 61060 (Dec. 19, 2016), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61060 ("IIB-SIFMA Cross-Border Comment Letter").

[17] *See* IIB-SIFMA Cross-Border Comment Letter at p. 3; 7 U.S.C. § 2(i).

[18] *See* IIB-SIFMA Cross-Border Comment Letter at pp. 6-10; 7 U.S.C. § 2(i).

[19] *See* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf ("2013 Cross-Border Guidance").

promote legal certainty and tailor its existing framework as necessary to further the objectives of Section 2(i) of the CEA.

In determining whether a non-US entity's transactions merit registration as a swap dealer under Title VII of the Dodd-Frank Act, the Commission's 2013 Cross-Border Guidance directs that such entity aggregate the notional value of all swap dealing transactions entered into by its affiliates under common control. The resulting total is used to determine whether the entity's activities are above or below the limit for the *de minimis* exception to the "swap dealer" definition as set out by the Commission. The aggregation requirement is in keeping with Rule 1.3(ggg)(4), which was adopted as part of the Commission's final rule on the definitions of "swap dealer" and "major swap participant" ("MSP") under Title VII of the Dodd-Frank Act. For the reasons listed in our previous comment letters in respect of the Commission's cross-border guidance[20] and related exemptive relief,[21] and as set forth below, we recommend that the Commission minimize the extraterritorial reach of the swap dealer *de minimis* threshold calculation.

FSR strongly supports updating the "US person" and "guarantee" definitions set forth in the 2013 Cross-Border Guidance, to align with the analogous definitions used in the Commission's rules regarding the cross-border application of its uncleared swap margin requirements (the "Cross-Border Margin Rules").[22] In particular – and as discussed in our previous comment letter dated September 14, 2015 in respect of the Cross-Border Margin Rules (the "FSR Cross-Border Margin Rules Letter")[23] – we support (i) elimination of the majority ownership prong in the "US person" definition and (ii) the more limited interpretation of the term "guarantee" as finalized by the Commission in the Cross-Border Margin Rules. We also support carving multilateral organizations out of the Commission's US person definition.

a. **The Determination of Whether an Entity Is a "US Person" Should Not Be Made on the Basis of Majority Ownership by a US Person.** We believe that the "US person" definition under the Cross-Border Margin Rules – which does not include a majority ownership prong[24] – is more appropriate than the definition of "US person" contained in the 2013 Cross-Border Guidance, which would characterize an entity as a "US person" if (i) it were directly or indirectly majority-

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[20] Financial Services Roundtable, Comments on Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, Comment No. 58545 (Aug. 27, 2012), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58545; *see* Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214 (proposed July 12, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-16496.pdf.

[21] Securities Industry and Financial Markets Association, The Clearing House and Financial Services Roundtable, Comments on the Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, Comment No. 59136 (Feb. 6, 2013), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59136; *see* Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 909 (proposed Jan. 7, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-01-07/pdf/2012-31734.pdf.

[22] 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* https://www.gpo.gov/fdsys/pkg/FR-2016-05-31/pdf/2016-12612.pdf ("Cross-Border Margin Rules").

[23] Financial Services Roundtable, Comments on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, Comment No. 60488 (Sept. 14, 2015), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60488 ("FSR Cross-Border Margin Rules Letter"); *see* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 80 Fed. Reg. 41376 (proposed July 14, 2015), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-07-14/pdf/2015-16718.pdf.

[24] *See* 17 C.F.R. § 23.160(a)(10); Cross-Border Margin Rules, 81 Fed. Reg. at 34823-34824.

owned by one or more persons falling within the definition of "US person" contained in the 2013 Cross-Border Guidance and (ii) such US person(s) bear(s) unlimited responsibility for such entity's obligations and liabilities.[25] We believe that majority US person ownership alone is not indicative of whether the activities of a non-US fund with a non-US-based manager would have a direct and significant effect on the US financial system. Further, neither the SEC nor EU regulators have proposed exerting jurisdiction over an entity on the basis of control. Divergences between the Commission's "US person" definition and the "established" concept under the EU's analogous derivatives regulatory regime could yield duplicative and potentially conflicting application of derivatives rules if the Commission were to adopt a US person definition for funds on the basis of majority ownership, even where a substituted compliance determination is made.

The market has reacted by increasingly restricting US ownership of foreign funds to ensure they will not be held to multiple derivatives regulatory regimes. Were the Commission to retain the majority ownership concept in its "US person" definition under the 2013 Cross-Border Guidance, funds with significant US person ownership will continue to be placed at a significant disadvantage to foreign-owned firms.

b. **Multilateral Organizations Should Be Specifically Excluded from the Commission's "US Person" Definition.** The definition of "US person" in the 2013 Cross-Border Guidance captures the following entities: (i) the International Monetary Fund; (ii) the International Bank for Reconstruction and Development; (iii) the Inter-American Development Bank; (iv) the Asian Development Bank; (v) the African Development Bank; (vi) the United Nations; (vii) the agencies and pension plans of the foregoing; and (viii) any other similar international organizations, their agencies and pension plans (collectively, "Multilateral Organizations"). The SEC specifically excludes these Multilateral Organizations from its "US person" definition;[26] likewise, the European Market Infrastructure Regulation ("EMIR") explicitly exempts (subject to certain reporting requirements) multilateral development banks and certain other public sector entities.[27] In the interest of harmonizing derivatives regulatory requirements among US regulators and across various jurisdictions, we believe that these Multilateral Organizations should be excluded from the Commission's "US person" definition.

c. **The Commission's "Guarantee" Definition Should Be Limited to Situations in Which a Swap Counterparty Has Direct Rights of Recourse Against a US Person.** The Cross-Border Margin Rules limit the definition of "guarantee" to those financial support arrangements in which a swap counterparty has rights of recourse against a US person guarantor with respect to a non-US counterparty's obligations under the relevant swap transaction.[28] We believe that a "guarantee" definition limited to situations where a swap counterparty has direct recourse against a guarantor is sufficient insofar as the Commission is seeking to cover situations in which the risk is transferring back to the United States, because (i) transaction-level risk does not transfer back to the United States unless a non-US person has rights of recourse against a US person and (ii) entity-level risk is captured by other regulations promulgated under the Dodd-Frank Act and EMIR (*e.g.,* capital requirements). Thus, we support this more limited approach to the "guarantee" concept and believe

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[25] *See* 2013 Cross-Border Guidance, 78 Fed. Reg. at 45316-45317.

[26] *See* 17 C.F.R. § 240.3a71-3(a).

[27] *See* Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories, Title I, Art. 1(4), 2012 O.J. (L 201) 14.

[28] *See* 17 C.F.R. § 23.160(a)(2); Cross-Border Margin Rules, 81 Fed. Reg. at 34825.

it is preferable to the broader approach taken by the Commission in the 2013 Cross-Border Guidance.[29]

d. **The Commission Should Consider Amending the "US Person" Definition in the 2013 Cross-Border Guidance.** Finally, FSR strongly supports the absence of the prefatory phrase "includes, but is not limited to" (which is included in the Commission's US person definition under the 2013 Cross-Border Guidance) from the Cross-Border Margin Rules, and urge the Commission to consider aligning this aspect of its "US person" definition in the 2013 Cross-Border Guidance, with that finalized by the Commission for purposes of the Cross-Border Margin Rules. The deletion of this language would promote legal certainty within the market as to counterparties' regulatory status under the Commission's swaps rules.

4. *Exclude Cleared Swaps from the* De Minimis *Threshold Calculation.*

Cleared swaps, regardless of whether or not they are anonymous trades, should also be excluded from the *de minimis* calculation.[30] Trades cleared through a derivatives clearing organization ("DCO") are subject to regulatory requirements applicable to the clearing regime, which requires the posting of IM and variation margin ("VM"). Moreover, the counterparty credit risk of any such cleared trade is substantially reduced by centralizing the credit risk to the DCO. The cleared trades of a swap counterparty that is within the *de minimis* exception to the swap dealer definition (*i.e.,* a "*de minimis* dealer" or "DMD") is already subject to a robust regulatory regime. Further requiring such DMD to potentially register as a swap dealer as a result of its dealing in cleared trades is an unnecessary imposition of a costly regime that seeks to regulate what the cleared swaps regime is already regulating – systemic risk in the market. Because cleared swaps do not raise the same systemic risk concerns with respect to DMD counterparties as do swaps that are not centrally cleared, regardless of whether such cleared swaps are executed on an anonymous basis, we urge the Commission to exclude from the swap dealer *de minimis* threshold calculation ***all*** swaps which are cleared through a DCO.

B. Personnel of Introducing Broker Affiliates of a *De Minimis* Dealer ("DMD") Should Not Be Required to Register as Associated Persons by Virtue of Their Referring Swaps to the Wholly Owned Affiliate DMD.

Pursuant to the Dodd-Frank Act, the Commission amended the definition of "introducing broker" ("IB") in Rule 1.3(mm) to incorporate swap-related activities.[31] If a person falls within the IB definition, it is subject to registration as such under Section 4d of the CEA,[32] which requires, among other things, vetting of the applicant for IB registration, its principals and its associated persons ("APs") to confirm that none of these persons is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the CEA ("Statutory

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29 The Commission stated in the Cross-Border Guidance that it would broadly approach the "guarantee" concept to include, *inter alia*, keepwells and liquidity puts, certain types of indemnity agreements, master trust agreements and liability or loss transfer or sharing agreements. 2013 Cross-Border Guidance, 78 Fed. Reg. at 45320, n. 267.

30 *See* 2013 Cross-Border Guidance, 78 Fed. Reg. at 45325, 45351; *see also* 17 C.F.R. §§ 23.502(d), 23.503(c) (portfolio reconciliation and compression requirements shall not apply to a swap cleared by a DCO), 23.504(a)(1) (the swap trading relationship documentation requirements shall not apply to swaps executed on a DCM or to swaps executed anonymously on a SEF, provided that such swaps are cleared by a DCO).

31 *See* 17 C.F.R. § 1.3(mm); Adaptation of Regulations to Incorporate Swaps, 77 Fed. Reg. 66288 (Nov. 2, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-11-02/pdf/2012-25764.pdf ("Swaps Incorporation Rules").

32 *See* 7 U.S.C. § 6d(g).

Disqualification").[33] While an applicant for registration as an AP must take and pass the National Commodity Futures Examination (the "Series 3"), this Series 3 testing requirement is not applicable to APs whose activities are limited to swaps.[34]

On December 31, 2012, the Division of Swap Dealer and Intermediary Oversight ("DSIO") issued no-action relief from the requirement to register as an IB or commodity trading advisor ("CTA") for certain affiliates of a swap dealer or DMD ("CFTC Letter No. 12-70").[35] In issuing CFTC Letter No. 12-70, DSIO expressly recognized that swap dealers may deal in swaps through multiple affiliates, including another swap dealer (an "Agent SD") or an affiliate that is not registered with the Commission in any capacity (an "Agent Affiliate"). Specifically, CFTC Letter No. 12-70 noted that employees of an Agent SD or Agent Affiliate may engage in certain activities, in support of an affiliated swap dealer or affiliated DMD (the "Affiliate Dealer") in connection with a swap transaction to be entered into by such Affiliate Dealer (as counterparty to the swap), including the solicitation, negotiation, structuring, recommendation and/or acceptance as agent of swap transactions ("Affiliate Support Activities") on behalf of the Affiliate Dealer. DSIO's no-action relief in CFTC Letter No. 12-70 extended to the affiliates' employees where the employees engage in certain activity in support of and on behalf of the Affiliate Dealer. CFTC Letter No. 12-70 also included an announcement by DSIO of its interpretive position that an employee of a DMD who engages in certain activity on behalf of its employer, in connection with the employer entering into a swap, would not be considered by DSIO to be an IB. The Commission has separately clarified that, where an employee of a swap dealer's affiliate is authorized to negotiate swap transactions on behalf of the swap dealer, the Commission would not consider such affiliate to be an IB by virtue of the swap negotiation activities of its employee on behalf of the swap dealer.[36]

However, CFTC Letter No. 12-70 does not extend to personnel employed by a DMD's affiliate that is otherwise registered with the Commission (*i.e.,* employees of an affiliate IB). That is, if the Agent Affiliate offering such Affiliate Support Activities is registered as an IB as a result of other activity it conducts out of a different desk and different set of APs, even if the IB activity engaged in with respect to swaps is exclusively to facilitate the trading of its DMD or swap dealer affiliate, such IB affiliate would still be required to (i) register as APs the individuals acting in an IB capacity with respect to those swaps and (ii) comply with related guidelines and requirements. We feel as though the Commission's guidance in CFTC Letter No. 12-70 (x) fails to appreciate the burden and costs incurred by the Agent Affiliate registered as an IB in order to comply with the requirements for APs and (y) is inconsistent, given the fact that, if the desk facilitating the swaps trading were sitting with the DMD affiliate, it would not otherwise have to comply. DSIO's statements in support of issuing the no-action relief in CFTC Letter No. 12-70 with respect to Affiliate Support Activities apply to and are equally valid with respect to such affiliate IB personnel in respect of the AP registration requirement, and are not unique to Agent SDs or Agent Affiliates (each as defined in CFTC Letter No. 12-70). There is no compelling reason why this relief should not extend to a registered IB, so long as the activities of such AP are limited to Affiliate Support Activities.

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33 *See* 7 U.S.C. §§ 12a(2)-(3).

34 *See* NFA Registration Rule 401, Qualification Testing Requirement, *available at* https://www.nfa.futures.org/rulebook/rules.aspx?RuleID=RULE%20401&Section=8.

35 *See* CFTC Letter No. 12-70, Staff Positions – Relief for Certain Swap Dealers, *De Minimis* Dealers, Agent Affiliates and Associated Persons from Registration as an Introducing Broker under Section 4d or a Commodity Trading Advisor under Section 4m of the Commodity Exchange Act, and Interpretation that Certain Employees of *De Minimis* Dealers are not an Introducing Broker as Defined in Section 1a(31) of the Commodity Exchange Act (Dec. 31, 2012), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/12-70.pdf.

36 *See* Swaps Incorporation Rules, 77 Fed. Reg. at 66290, n. 16.

Further, the Commission has previously recognized that an individual acting as an AP of an IB functions in a different capacity from an individual acting as an AP of a swap dealer. For transactions executed by an IB, "the registrant is acting as an agent[,]" while, for transactions executed by a swap dealer, the registrant "is acting as a principal."[37] This distinction between acting as an agent for a customer as an IB and acting as a principal opposite a client as a swap dealers is also reflected in the definitions of APs for IBs and swap dealers. An AP of an IB is defined in Rule 1.3(aa)(2) to mean an employee (or agent) who is involved in "[t]he solicitation or acceptance of customers' orders[,]" with "order" being defined in Rule 1.3(kkkk) as "an instruction or authorization provided by a customer to [an IB] regarding trading in a commodity interest **on behalf of the customer**."[38] By contrast, an AP of a swap dealer is defined in Rule 1.3(aa)(6) to mean an employee (or agent) who is involved in "[t]he solicitation or acceptance of swaps[.]"[39] When an employee of an IB solicits or accepts swaps in the name of the affiliate DMD as principal to the swap transaction, he or she is not accepting customers' orders to be executed as agent on behalf of the customer. As a result, such employee would not be acting as an AP of the IB, notwithstanding the fact that such person is employed by a registered IB.[40] It follows, then, that an employee of a registered IB, who is engaged in the solicitation or acceptance of swaps in the name of an affiliate DMD: (i) should not be subject to registration as an AP of the IB, because the employee is not accepting customers' orders to be executed as agent on behalf of such customers; and (ii) could not be subject to registration as an AP of the actual swap dealing entity (*i.e.,* the affiliate DMD), due to such entity not being registered with the Commission by virtue of its not having exceeded the *de minimis* threshold for swap dealer registration.

Requiring IB personnel to register as APs when referring swaps to its wholly-owned affiliate DMD, creates an unintended burden for market participants, including the requirement to tape telephone calls if the firm has had revenue of more than US$5 million over the previous three (3) years. We believe that requiring IB personnel to register as APs negates the Dodd-Frank Act's statutory framework of reducing regulation of DMDs. If actual DMD employees are not subject to such regulatory requirements, our view is that it would be out of scope for the affiliated IB personnel to be subject to an enhanced set of registration requirements, especially in light of such IB personnel being subject to the same supervision and policies internally as the affiliated DMD personnel. We urge the Commission to extend the no-action relief outlined in CFTC Letter No. 12-70, to relieve IB personnel from the AP registration requirement in respect of their referral of swaps to a wholly-owned affiliate DMD.

C. Restore the CPO Registration Exemption for Investment Managers of Registered Investment Companies.

For the reasons listed in our letter to the US Department of the Treasury earlier this year in response to Executive Order No. 13772 (the "FSR Treasury Letter"),[41] and as set forth below, we recommend that

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37 Swaps Incorporation Rules, 77 Fed. Reg. at 66291.

38 17 C.F.R. §§ 1.3(aa)(2), (kkkk) (emphasis added).

39 17 C.F.R. § 1.3(aa)(6).

40 These arguments have previously been made by the Futures Industry Association ("FIA"), in a 2013 letter to the Commission. Futures Industry Association, Associated Person Registration (Feb. 15, 2013), *available at* https://secure.fia.org/downloads/FIA-AP-IB-interpretation_02-15-13.pdf.

41 Financial Services Roundtable, Recommendations for Aligning Financial Regulation with Core Principles, at p. 77 (May 3, 2017), *available at* http://www.fsroundtable.org/wp-content/uploads/2017/06/FSR-Letter-to-Treasury-on-Core-Principles-May-3.pdf ("FSR Treasury Letter"); *see* Exec. Order No. 13772, Core Principles for Regulating the United States Financial System, 82 Fed. Reg. 9965 (Feb. 8, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-02-08/pdf/2017-02762.pdf ("Executive Order No. 13772").

the Commission reduce the regulatory burdens on commodity pool operators ("CPOs") by restoring the CPO registration exemption for investment managers of registered investment companies.

Between 2003 and 2012, Rule 4.5 provided an exclusion from regulation as a CPO for investment managers which were already subject to comprehensive regulation by the SEC as investment advisers ("IAs") in respect of registered investment companies ("40 Act Funds").[42] Prior to 2003, this CPO exclusion was available to IAs with respect to 40 Act Funds ("40 Act Fund CPOs") so long as (i) the aggregate margin or premium associated with commodity futures and options transactions, other than *bona fide* hedges, constituted five percent (5%) or less of the 40 Act Fund's liquidation value (the "5% Margin Threshold") and (ii) the notional value of the 40 Act Fund's commodity futures and options positions (other than those comprising *bona fide* hedges) did not exceed 100 percent (100%) of the 40 Act Fund's liquidation value (the "100% Notional Threshold"). The Commission restored this limitation in 2012, extending the pre-2003 calculations under Rule 4.5(c) to include (in addition to the pool's futures and options positions), (x) with respect to the 5% Margin Threshold, margin or premium in respect of the pool's swap transactions and, (y) with respect to the 100% Notional Threshold, the notional value of the pool's swap transactions.[43] As a result of the rule change in 2012, many of the previously excluded 40 Act Fund CPOs were required to register with the Commission as CPOs, which subjected these IAs to duplicative regulation by both the SEC and the Commission. Following the 2012 amendments to Rule 4.5, all 40 Act Funds must now analyze, and monitor on an ongoing basis, whether they meet the tests enumerated in Rule 4.5(c)(2)(iii) for the CPO exclusion, a process which is made more burdensome by virtue of the fact that many of the terms used in Rule 4.5(c)(2)(iii) are ambiguous and subjective.[44]

We believe that subjecting 40 Act Fund CPOs, which are otherwise subject to regulation by the SEC as IAs and which would otherwise qualify for the CPO exclusion enumerated in Rule 4.5, to CPO (and potentially CTA)[45] regulation under Part 4 imposes regulatory requirements on 40 Act Funds and their managers that are unnecessary, duplicative and overly burdensome. Because this duplicative regulation imposes significant costs on 40 Act Funds and their managers without providing any clear benefit to market participants, we would urge the Commission to remove the 5% Margin and 100% Notional Thresholds for 40 Act Fund CPOs to be able to avail themselves of the exclusion from CPO regulation under Rule 4.5. These IAs are already subject to oversight by the SEC and must comply with robust regulatory requirements (*e.g.,* requirements regarding the form and content of disclosure documentation, as well as recordkeeping and reporting requirements) which, in many cases, are similar to the Commission's own regulatory

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[42] *See* Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors; Past Performance Issues, 68 Fed. Reg. 47221 (Aug. 8, 2003), *available at* https://www.gpo.gov/fdsys/pkg/FR-2003-08-08/pdf/03-20094.pdf ("2003 Rule 4.5 Amendments").

[43] *See* 17 C.F.R. § 4.5(c)(2)(iii); Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations; Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. 11252 (Feb. 24, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-02-24/pdf/2012-3390.pdf (as corrected by Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 17328 (March 26, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-03-26/pdf/C1-2012-3390.pdf).

[44] We would also note that Rule 4.6 provides an exclusion from regulation as a CTA for any person that qualifies from the CPO exclusion in Rule 4.5. Between 2003 and 2012, 40 Act Fund CPOs could avail themselves of the exclusion from regulation as a CTA so long as their commodity interest trading advisory activities were solely incidental to their operation of those 40 Act Funds for which Rule 4.5 provided relief. As a result of the rule change in 2012, many previously excluded 40 Act Fund CPOs were likewise required to register with the Commission as CTAs. *See* 17 C.F.R. § 4.6(a)(2).

[45] *See supra,* n. 43.

requirements for CPOs.[46] Notwithstanding these similarities and the Commission's efforts to "harmonize" exemptions for some of its regulatory requirements applicable to CPOs,[47] many significant areas of the Commission's Part 4 regulatory regime impose duplicative standards on IAs that fail to qualify for the current exclusion under Rule 4.5(c)(2)(iii), including (without limitation) the following:

- **Recordkeeping.** SEC-registered IAs that are now required to register with the Commission as CPOs are subject to all of the Part 4 recordkeeping requirements.[48] Notwithstanding that these SEC registrants already comply with the SEC's comprehensive recordkeeping requirements, they must also consult and comply with an entirely separate set of recordkeeping rules. While the purposes of these requirements overlap, there are some inherent differences between the two regimes, which requires duplicative efforts by 40 Act Funds.

- **Regulatory Reporting.** 40 Act Fund CPOs must also comply with the Commission's and the National Futures Association's ("NFA's") complex regulatory reporting regime, including quarterly or annual filing, as applicable, for Form CPO-PQR and quarterly filing of NFA Form PQR. These forms, while designed to serve the same regulatory oversight goal sought by the SEC in its own reporting forms, require different formats and reporting styles, resulting in labor-intensive dual reporting by 40 Act Funds.[49]

- **NFA Rules.** In addition to the NFA's rules and forms for registered CPOs, SEC-registered IAs must comply with an additional comprehensive set of NFA rules and filing requirements, which add yet another regulatory overlay, in this case with variations historically designed for an entirely different set of markets and market participants.

Additionally, the Commission's 2012 amendments to Rule 4.5 to significantly narrow the CPO exclusion for 40 Act Funds reflected an abrupt reversal of the Commission's decision in 2003 to expand the exemption. The Commission's reasoning in 2003, which effectively removed 40 Act Funds from the scope of its Part 4 regulatory regime for CPOs, was articulated as follows:

> [The expanded exclusion] is intended to allow greater flexibility and innovation, and to take into account market developments and the current investment environment, by modernizing the requirements for determining who should be excluded from the CPO definition, and who should remain within the CPO and CTA definitions but be exempt from registration. Thus, this relief is intended to encourage and facilitate participation in the commodity interest markets by

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46 The significant protections imposed under the Investment Company Act include, among others, strict asset coverage requirements, leverage restrictions, governance requirements and internal conflict mitigation mechanisms. *See, e.g.,* 15 U.S.C. §§ 80a-17, 80a-18.

47 Such "harmonization" efforts include permitting 40 Act Funds to rely on substituted compliance with SEC regulations for most of the Commission's disclosure and shareholder reporting requirements.

48 *See* 17 C.F.R. § 4.23.

49 The burdens of duplicative reporting are now being compounded as 40 Act Funds and their IAs prepare for compliance with the SEC's new modernized reporting requirements, which will substantially expand the amount and frequency of data required to be reported. *See* Investment Company Reporting Modernization, 81 Fed. Reg. 81870 (Nov. 18, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-11-18/pdf/2016-25349.pdf; Form ADV and Investment Advisers Act Rules, 81 Fed. Reg. 60418 (Sept. 1, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-09-01/pdf/2016-20832.pdf.

> additional collective investment vehicles and their advisers, with the added benefit to all market participants of increased liquidity.[50]

In the Commission's 2012 determination to once again narrow the Rule 4.5 CPO exclusion for 40 Act Funds – and, indeed, to further restrict it by including swaps in the calculation without increasing the 5% Margin or 100% Notional Thresholds to account for the broader product scope – the Commission did not explain how the original goals cited above (*i.e.,* allowing greater flexibility and innovation, and providing all market participants the benefit of increased liquidity) would continue to be served despite its amendment of Rule 4.5. We believe that the 2012 amendments have, in fact, greatly impeded the Commission's previously articulated policy goals, and that returning to the pre-2012 language (*i.e.,* the expanded CPO exclusion under Rule 4.5) would once again foster the flexibility, innovation and market liquidity that the Commission has historically viewed as a primary policy goal.

III. REPORTING; RECORDKEEPING[51]

A. Swap Data Recordkeeping Requirements.

1. *Provide Relief from the Voice Recording Requirement in Respect of Swaps.*

Rule 23.202 sets forth daily trading record requirements applicable to registered swap dealers and MSPs (collectively, "Registered Swap Entities") in respect of swaps and related cash and forward transactions, which records include trade information related to pre-execution, execution and post-execution swap data and any related cash or forward transactions. Specifically, Rules 23.202(a)(1) and (b)(1) require each Registered Swap Entity to make and keep pre-execution trade information, including records of all oral and written communications provided or received concerning quotes, solicitations, bids, instructions, trading and prices, that lead to the execution of a swap (or lead to the conclusion of a related cash or forward transaction), whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media.[52] DSIO has twice previously granted time-limited no-action relief in respect of Registered Swap Entities' compliance with Rule 23.202, though such relief expired in 2013.[53] In particular, our members have found that compliance with the voice recording requirement under Rule 23.202 has proven to be especially burdensome as an administrative matter, as our members report that firms' information technology ("IT") departments have struggled to

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[50] 2003 Rule 4.5 Amendments, 68 Fed. Reg. at 47223 (citing Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors, 68 Fed. Reg. 12622 (March 17, 2003), *available at* https://www.gpo.gov/fdsys/pkg/FR-2003-03-17/pdf/03-6180.pdf).

[51] **The Commission has requested suggestions on how its existing rules, regulations or practices pertaining to reporting requirements, including swap data and recordkeeping, could be applied in a simpler, less burdensome and less costly manner.**

[52] *See* 17 C.F.R. § 23.202; Swap Dealer and Major Swap Participant Recordkeeping, Reporting and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20128 (April 3, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-04-03/pdf/2012-5317.pdf ("CCO Rules").

[53] *See* CFTC Letter No. 13-06, Request for No-Action Relief for Swap Dealers and Major Swap Participants from Compliance with Certain Internal Business Conduct Requirements Found in Subpart F to Part 23 of the CFTC's Regulations (March 30, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-06.pdf; CFTC Letter No. 12-29, Request for No-Action Relief for Swap Dealers and Major Swap Participants from Compliance with Certain Internal Business Conduct Requirements Found in Subpart F to Part 23 of the CFTC's Regulations (Oct. 26, 2012), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/12-29.pdf.

implement the necessary technology and retention policies. We urge the Commission to issue no-action relief for Registered Swap Entities from the voice recording requirements under Rule 23.202, to the effect that (i) if voice communications are recorded, they must be retained per the retention requirements of Rule 23.202, but that (ii) there is no affirmative obligation to make voice recordings. Such interpretation would be consistent with the statutory mandate under Section 4s(g)(1) of the CEA, which does not necessarily include an affirmative obligation to make voice recordings and instead only requires that Registered Swap Entities "**maintain** . . . recorded communications[.]"[54] The provision of such relief would be consistent with the analogous rules on voice communications proposed by the SEC with respect to security-based swap ("SBS") transactions, which do not include an affirmative obligation to make voice recordings.[55]

Should the Commission maintain an affirmative obligation to record in Part 23, we urge the Commission to consider shortening the retention period to six months, which would be consistent with the analogous rule promulgated by the Financial Conduct Authority in the UK.[56]

2. *Tailor the "Searchability" Requirements Under the Commission's Swap Data Recordkeeping Requirements to Account for Technological Feasibility.*

The requirement under Rules 23.201(a)(1) and 23.202(a)-(b) that swap dealers maintain swap transaction records and daily trading records, respectively, in a manner identifiable and searchable by transaction has proven not to be technologically feasible.[57] In particular, the timestamp requirements and the requirement that voice recordings be searchable in Rule 23.202, as well as the permitted trade reconstruction timeframe under Rule 23.203, have imposed considerable burdens on our members. In finalizing its regulations regarding reporting, recordkeeping and daily trading records requirements for swap dealers, the Commission specifically acknowledged commenters' concerns that:

> [T]ying records of . . . correspondence (*e.g.,* voice records, email, and instant messages) . . . and other records required by proposed § 23.201(a)(1) to each

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54 7 U.S.C. § 6s(g)(1).

55 *See* Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers, 79 Fed. Reg. 25194, 25213 (May 2, 2014), *available at* https://www.gpo.gov/fdsys/pkg/FR-2014-05-02/pdf/2014-09108.pdf ("However, the [SEC] has not previously interpreted the term *communications* to include telephonic communications. Therefore, to implement section 15F(g)(1) of the Exchange Act, the [SEC] is proposing to amend the preservation requirement in paragraph (b)(4) of Rule 17a-4 to include 'recordings of telephone calls required to be maintained pursuant to section 15F(g)(1) of the Exchange Act.' Under this proposed requirement, a broker-dealer SBSD or a broker-dealer MSBSP would be required to preserve for three years **telephone calls that it chooses to record** to the extent the calls are required to be maintained pursuant to section 15F(g)(1) of the Exchange Act.") (emphasis added) (citations omitted) ("SEC Recordkeeping Proposal"); *see also* SEC Recordkeeping Proposal, 79 Fed. Reg. at 25266 ("The [SEC] proposes to amend paragraph (b)(4) of Rule 17a-4 to require broker-dealer SBSDs and broker-dealer MSBSPs to retain telephone calls that have already been recorded and are related to the broker-dealer SBSD's and broker-dealer MSBSP's security-based swap business. Paragraph (b)(4) of Rule 17a-4, as proposed to be amended, **only requires the retention of telephonic recordings the broker-dealer SBSD or broker-dealer MSBSP voluntarily chooses to record**[.]") (emphasis added) (citations omitted).

56 *See* Financial Conduct Authority, RECORDING OF TELEPHONE CONVERSATIONS AND ELECTRONIC COMMUNICATIONS (June 8, 2016), *available at* https://www.fca.org.uk/firms/recording-telephone-conversations-electronic-communications (last visited Sept. 25, 2017).

57 *See* 17 C.F.R. §§ 23.201(a)(1), 23.202(a)-(b); CCO Rules, 77 Fed. Reg. at 20130; *see also* 7 U.S.C. § 4s(g)(3); National Economic Research Associates, Inc., Cost-Benefit Analysis of the CFTC's Proposed Swap Dealer Definition Prepared for the Working Group of Commercial Energy Firms, p. 29 (Dec. 20, 2011), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=50037.

> individual transaction in a manner that is identifiable and searchable by transaction would create an enormous technical burden, likely requiring the review, sorting, and assignment of such data to each transaction manually by individual employees.[58]

While the Commission removed the proposed requirement that each transaction be maintained as a separate electronic file and specifically noted that raw data in searchable databases need not be "tagged with transaction and counterparty identifiers so long as the swap dealer can readily access and identify records pertaining to a transaction or counterparty by running a search on the raw data[,]"[59] our members have noted that the concerns acknowledged by the Commission in its adopting release remain because of the 72-hour requirement included in Rule 23.203. As illustrated below, while producing basic trade data with respect to a handful of transactions would be feasible within 72 hours, compliance with such timeframe could be impracticable if a request under Rule 23.203 covered a significant number of transactions or asked for pre-execution trade information.

For example, if the Commission were to request information regarding a dozen transactions, it would be fairly easy for a swap dealer to provide the execution, confirmation and other basic trade information within the 72-hour window provided under Rule 23.203. On the other hand, however, if the Commission were to request that a swap dealer produce **pre-execution** trade information for a dozen transactions, it would require swap dealer personnel looking through thousands of emails, instant messages and voice records to ascertain which should be included in (or excluded from) the batch of information produced. Our members have indicated that even the best voice and email records systems have difficulties filtering data, and a complete trade reconstruction (including pre-trade records) of a single transaction could take hours to reassemble. Pre-execution trade information requires additional data filtering and interpretation from a resource perspective, and can understandably extend over a longer timeline. Strong client relationships often require frequent communication between swap dealer personnel and existing or potential counterparties. These communications, combined with the possibility of multiple marketers at a swap dealer providing indicative pricing for a potential transaction over several weeks, result in a vast pool of related communications through which swap dealer personnel must sift in order to comply with the 72-hour requirement under Rule 23.203.

We would further note that Section 4s(g)(3) of the CEA (*i.e.,* the Commission's legislative mandate to require swap dealer's maintenance of daily trading records) does not require – as a statutory matter – that swap dealers maintain records in a manner which is searchable by individual transaction, and instead only requires the maintenance of "daily trading records for each counterparty in a manner and form that is identifiable with each swap transaction."[60] On account of the points discussed above, we urge the Commission to work with the industry to develop an approach to its swap data recordkeeping rules that advances its mandate under Title VII of the Dodd-Frank Act, while at the same time acknowledging certain technological limitations. As illustrated by the example set forth above, an appropriate solution would take into account both (i) the number of transactions requested and (ii) the types of information requested in respect of each such transaction. We would note that the Commission has recently adopted a "principles-based approach" in finalizing amendments to its recordkeeping regulations under Rule 1.31,[61] and urge the Commission to similarly revisit its recordkeeping obligations for Registered Swap Entities under Part 23. We believe that a principles-based approach to the timing of records production, over the 72-hour

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58 CCO Rules, 77 Fed. Reg. at 20130; *see* 17 C.F.R. § 23.201(a)(1).

59 CCO Rules, 77 Fed. Reg. at 20130.

60 7 U.S.C. § 4s(g)(3).

61 *See* Recordkeeping, 82 Fed. Reg. 24479, 24482 (May 30, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-05-30/pdf/2017-11014.pdf.

requirement, would provide an evergreen, workable solution to the limitations faced by current technological capabilities; rather than implementing a hard deadline for the production of records, the swap dealer should be considered to be in compliance with its obligations under Rule 23.203 so long as, given the scope of the production request, it is working diligently to produce the requested records.

B. Clarify that Risk Exposure Reports Need Only Provide Information Concerning Material Changes in Risk Exposure.

Rule 23.600(c)(2) requires (i) that the risk management unit of each Registered Swap Entity provide risk exposure reports to senior management and to its governing body on a quarterly basis, as well as immediately upon detection of any material change in the risk exposure of the Registered Swap Entity ("Risk Exposure Reports"), and (ii) that each Registered Swap Entity furnish copies of such Risk Exposure Reports to the Commission within five (5) business days of providing such reports to the registrant's senior management. Under Rule 23.600(c)(2), these Risk Exposure Reports must set forth the following:

- The market, credit, liquidity, foreign currency, legal, operational, settlement and any other applicable risk exposures of the Registered Swap Entity;
- Any recommended or completed changes to the Risk Management Program (as defined in Rule 23.600(b)(1));[62]
- The recommended time frame for implementing recommended changes; and
- The status of any incomplete implementation of previously recommended changes to the Risk Management Program.[63]

We recommend that the Commission clarify that Risk Exposure Reports under Rule 23.600(c)(2) be limited to providing information concerning material changes in risk exposure. Specifically, we would request that the Commission clarify that quarterly Risk Exposure Reports need not cover every identified risk if there was no material change in the risk identified on the Risk Exposure Report for the previous quarter.

In adopting Rule 23.600 in 2012, the Commission expressly declined to provide a standard, prescriptive form for the Risk Exposure Report, and instead left the form of the report to the discretion of the registrant; the Commission further stated that the purpose of the requirement in Rule 23.600(c) was to provide important information to the Commission "related to the key risks associated with the registrants' swaps activities" and to "provide management with the information necessary to monitor and make adjustments to risk levels in a timely manner."[64] We believe that the stated intent of the Commission in finalizing Rule 23.600 supports the premise that the Risk Exposure Reports should contain only information regarding material changes in the registrant's risk exposure, thus reducing the burden on swap dealers to engage in a rote exercise of regurgitating previously reported information from other internal monitoring functions which does not contribute to the goal of reducing economic risk faced by the registrant or the swaps market as a whole.

C. Part 20 Large Trader Reporting Requirements.

1. *Eliminate Duplicative Portions of Part 20 Large Trader Reporting Requirements.*

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[62] *See* 17 C.F.R. § 23.600(b)(1)

[63] 17 C.F.R. § 23.600(c)(2).

[64] CCO Rules, 77 Fed. Reg. at 20138.

In 2011, the Commission finalized reporting regulations with respect to physical commodity swap and swaptions, which rules specifically require routine position reports from clearing organizations, clearing members and swap dealers and also apply to reportable swap trader positions (the "Part 20 Rules").[65] The Part 20 Rules were explicitly adopted by the Commission as a means "to establish position limits, as appropriate, on an expedited basis" because it "may be considerable time before SDRs are able to reliably convert transaction data into positional data."[66] However, the Commission specifically acknowledged that the Part 20 Rules may be unnecessary in the future, incorporating a sunset provision in Rule 20.9 which, upon the requisite finding by the Commission that swap data repositories ("SDRs") are effectively processing positional data as necessary to accommodate the Commission's surveillance of the paired swap and swaption markets, would render all or part of the Part 20 Rules "ineffective and unenforceable[.]"[67]

Because SDRs have now been operational for several years, the transaction and positional data gathered by the SDRs will presumably provide the necessary data for the finalization of the expanded set of position limits for physical commodity swaps. As a result, we believe that the Part 20 Rules are no longer necessary for the Commission's satisfaction of its regulatory mandate under the Dodd-Frank Act. Swap dealers and clearing members now expend significant time and resources identifying physical commodity swaps and swaptions which are subject to the Part 20 Rules, as well as converting such covered transactions into futures equivalent positions and validating positional data prior to submitting such data to the Commission in accordance with the Part 20 Rules. These efforts are in addition to the efforts large traders make in complying with the numerous other reporting requirements applicable to their trading activity under the Commission's regulations. Furthermore, we understand that the Commission invests significant time and other resources receiving and processing the large trader reports under Part 20. In order to better conserve scarce resources, we urge the Commission to make efforts to identify other manners in which it can utilize swaps transaction data it already receives from SDRs, to carry out its regulatory mandate under Title VII of the Dodd-Frank Act. We accordingly request that the Commission consider eliminating the large trader reporting requirements under Part 20.

2. *If the Part 20 Large Trader Reporting Requirements Are Retained, the Commission Should Nonetheless Consider Not Requiring Swap Dealers to Report Under Part 20 if No US Person or Guaranteed or Conduit Affiliate Is a Counterparty to the Transaction.*

Currently, swap dealers are subject to the large trader reporting requirements under Part 20, regardless of whether either counterparty to the trade is a US or a non-US person.[68] The reports required under Part 20 create an administrative workload which prove to be unduly burdensome when neither counterparty to the swap is a US person. We would accordingly urge the Commission to issue no-action relief for non-US person swap dealers from compliance with the Part 20 Rules in respect of trades for which their counterparty is a non-US person.

D. Swap Transaction Data Reporting Fields.

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[65] Large Trader Reporting for Physical Commodity Swaps, 76 Fed. Reg. 43851 (July 22, 2011), *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-07-22/pdf/2011-18054.pdf ("Part 20 Rules").

[66] Part 20 Rules, 76 Fed. Reg. at 43852.

[67] 17 C.F.R. § 20.9; *see* Part 20 Rules, 76 Fed. Reg. at 43857.

[68] *See* 17 C.F.R. § 20.1 ("*Reporting entity* means: (1) [a] clearing member; or (2) [a] swap dealer in one or more paired swaps or swaptions as that term is defined in section 1a of the Act and any Commission definitional regulations adopted thereunder."); *see also* Part 20 Rules, 76 Fed. Reg. at 43856, n. 17.

For the reasons listed in our previous comment letters in respect of the Commission's adoption[69] and subsequent review[70] of its swap data recordkeeping and reporting rules and most recently in respect of its amendment of its cleared swap data recordkeeping and reporting requirements,[71] in the FSR Treasury Letter[72] and as set forth below, we urge the Commission to consider taking action to streamline the Part 45 reporting process. In addition, we generally support the suggestion set forth by the International Swaps and Derivatives Association, Inc. ("ISDA") and SIFMA in their joint comment letter in response to the comprehensive review by the Commission's Division of Market Oversight ("DMO") of the swaps reporting rules (the "ISDA-SIFMA Reporting Comment Letter"), to harmonize the Commission's swaps reporting requirements with those promulgated by the SEC and global regulators.[73]

We are generally supportive of the suggestions made in the ISDA-SIFMA Reporting Comment Letter urging the Commission to clarify the appropriate manner in which a number of unique swap transactions and situations must be reported, including addressing the following: (i) the impact of a change in the reporting counterparty's registration status; (ii) packages, bespoke and complex trades; (iii) novation flows (including novation fees); (iv) block trades and allocations; (v) mixed swaps; (vi) cross-border transactions; (vii) the transfer of portfolios (*i.e.,* "portfolio take-downs"); (viii) prime brokerage transactions; (ix) defining SDR message types (*e.g.,* amend, new, modify) and clarify execution time reporting for continuation data life cycle events and corporate events; (x) trade corrections for Part 43 public

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[69] Financial Services Roundtable, Comments on Title VII Implementation Challenges, Comment No. 50491 (May 12, 2011), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=50491; *see* Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574 (proposed Dec. 8, 2010), *available at* https://www.gpo.gov/fdsys/pkg/FR-2010-12-08/pdf/2010-30476.pdf; *see also* Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-01-13/pdf/2011-33199.pdf ("Recordkeeping and Reporting Rules").

[70] Financial Services Roundtable, Comments on Review of Swap Data Recordkeeping and Reporting Requirements, Comment No. 59870 (May 27, 2014), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59870; *see* Review of Swap Data Recordkeeping and Reporting Requirements, 79 Fed. Reg. 16689 (March 26, 2014), *available at* https://www.gpo.gov/fdsys/pkg/FR-2014-03-26/pdf/2014-06426.pdf.

[71] Financial Services Roundtable, Comments on Proposed Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, Comment No. 60526 (Oct. 30, 2015), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60526; *see* Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, 80 Fed. Reg. 52544 (proposed Aug. 31, 2015), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-08-31/pdf/2015-21030.pdf; *see also* Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, 81 Fed. Reg. 41736 (June 27, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-06-27/pdf/2016-14414.pdf.

[72] *See* FSR Treasury Letter at pp. 74-75.

[73] International Swaps and Derivatives Association, Inc. and Securities Industry and Financial Markets Association, Comment Letter on Request for Comments from the Division of Market Oversight of the U.S. Commodity Futures Trading Commission Regarding Staff's Comprehensive Review of the Commission's Swaps Reporting Rules and Staff's Roadmap to Achieve High Quality Swaps Data, Comment No. 61288, at p. 5 (Aug. 21, 2017), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61288 ("ISDA-SIFMA Reporting Comment Letter"); *see* CFTC Letter 17-33, Division of Market Oversight Announces Review of Swap Reporting Rules in Parts 43, 45, and 49 of Commission Regulations (July 10, 2017), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-33.pdf.

dissemination and back reporting; (xi) reporting based on different clearing models; and (xii) amending Part 45 in order to sunset the Part 20 large trader reporting rules.[74]

1. *Simplify the Swaps Reporting Process by Reducing the Number of Fields Required to Be Included in Real Time and Regulatory Trade Reports.*

We believe that the current swap data reporting requirements are overly complex and operationally burdensome. The Commission's rules require various types of reporting for each transaction (*i.e.,* real-time, primary economic terms, confirmation, snapshot and valuation), providing the Commission with voluminous amounts of data beyond what is necessary for it to meaningfully review the state of the swaps market. For example, as a report for a plain vanilla interest rate swap only requires a small number of data fields to be completed (since many of the fields required under Part 45 are not relevant), we would encourage the Commission to create a streamlined process for reporting such swaps, with a reduced number of data fields. We believe this approach would reduce the burden on and costs incurred by many smaller banks that are required to report under the Commission's regulations.

We recommend that the Commission continue to take public input on ways to improve its swap data reporting rules, and we would further urge the Commission to take steps to ensure that reporting parties are only required to report each swap transaction once (and only once). We would note that we are generally supportive of the suggestions made in the ISDA-SIFMA Reporting Comment Letter, including the requests to eliminate (i) catch-all data fields that cannot be aggregated for regulatory analysis purposes (*e.g.,* "Any Other Terms" fields), (ii) reporting obligations for *void ab initio* swaps and (iii) other data fields that are not necessary for the Commission to achieve its regulatory oversight function.[75]

2. *Clarify Which Swap Transaction Data Reporting Fields Should Be Based on Original Execution, as Opposed to Which Should be Based on Subsequent Events.*

Under the Commission's current regulations, a reporting counterparty for an amortizing swap that uses a life cycle method for continuation data reporting must submit a report each time the notional value changes; the language of such rules could be misconstrued to require the submission of such a report, even though such changes were agreed to at the time of execution.[76] We encourage the Commission to amend its Part 45 regulations to clarify that these changes are to be reported as part of the initial primary economic terms report, such that reporting counterparties using the life cycle method for continuation data reporting are only required to report changes to the initial amortization schedule as life cycle events. However, we note that reporting counterparties using the snapshot reporting method should continue to be allowed to report amortizations of a swap's notional amount as part of the state data (when such amortizations occur), and should not be required to report the amortizations as part of the primary economic terms data for the swap.

E. There Should Be a Delay Before Public Dissemination of Swaps Data.

For the reasons listed in the FSR Treasury Letter,[77] and as set forth below, we recommend that the Commission amend its regulations to provide for a delay prior to the public dissemination of swaps data.

Section 727 of the Dodd-Frank Act amended the CEA by inserting a new Section 2(a)(13), which requires public availability of swap transaction data, authorizing the Commission to make swap transactions

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[74] *See* ISDA-SIFMA Reporting Comment Letter at p. 7.

[75] *See* ISDA-SIFMA Reporting Comment Letter at pp. 7-8.

[76] *See* 17 C.F.R. §§ 45.3, 45.4; 17 C.F.R. pt. 45, app. 1; *see also* Recordkeeping and Reporting Rules.

[77] *See* FSR Treasury Letter at p. 75.

and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.[78] While Section 2(a)(13) of the CEA specifies that data relating to a swap transaction (including price and volume) be publicly disseminated as soon as technologically practicable after the time at which the swap transaction has been executed, the statute also requires that (i) the Commission specify criteria for determining what constitutes a "large notional swap transaction" (referred to herein as follows: with respect to on-facility swaps, "block trades" and, with respect to off-facility swaps, "large notional off-facility swaps") for purposes of applying time delays for public dissemination of such block trades and large notional off-facility swaps and (ii) **the publicly reported information not identify the transaction participants, market position or business transactions of any person**. In finalizing its Part 43 rules pursuant to Section 2(a)(13) of the CEA, the Commission specifically provided that time delays for public dissemination differ based on, *inter alia*, the type of execution, underlying asset and market participant.[79] The Commission later finalized rules relating to the categorization of swaps for such purposes, as well as the determination of appropriate minimum block size relating for block trades and large notional off-facility swaps.[80]

Under the Commission's Part 43 real-time reporting requirements, key information about swaps must be publicly disseminated via SDRs. Currently, swap data is released through SDRs in real-time, with a 15-minute delay for block trades executed on or pursuant to the rules of a SEF or designated contract market ("DCM"), or off-facility swaps subject to the mandatory clearing requirement.[81] While the information generated by these reports is useful to the Commission in monitoring the swaps markets, and while efforts are made to render this data anonymous to protect counterparties' identities, the large amounts of data being publicly disseminated is harming end-users' ability to execute trades in the most cost-efficient manner, while potentially revealing proprietary information, including trading strategies. While we appreciate the Commission's consideration of protecting counterparties' identities in developing its Part 43 real-time reporting rules, the reality is that, in practice, the large amount of data disclosed contains enough clues for other market participants to ascertain the end-user counterparties' identities, particularly in the areas of the market where there are a limited number of participants.

With respect to block trades, fifteen minutes is too short a window within which to execute large hedging programs, which typically take several days or even weeks to execute, and current block trade reporting delays do not give end-users sufficient flexibility for creating efficient trade execution strategies without the risk of potentially revealing counterparty identities. Anecdotal evidence suggests that data mining is pervasive – market participants have reported repeated instances in which markets have moved away from them shortly after beginning to execute large transactions as part of a hedging strategy.

With respect to other swaps (*i.e.,* swaps not falling within the "block trade" or "large notional off-facility swaps" categories discussed above), as with block trades, our members' swap counterparties have expressed concern with the lack of confidentiality provided under a real-time reporting regime. These

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[78] *See* 7 U.S.C. § 2(a)(13).

[79] 17 C.F.R. § 43.5; 17 C.F.R. pt. 43, app. B; *see* Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-01-09/pdf/2011-33173.pdf.

[80] 17 C.F.R. § 43.6; 17 C.F.R. pt. 43, apps. D-F; *see* Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 78 Fed. Reg. 32866 (May 31, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-05-31/pdf/2013-12133.pdf.

[81] 17 C.F.R. §§ 43.5(d)-(e). Rule 43.5(f) provides a 30-minute delay for large notional off-facility swaps in the interest rate, credit, FX or equity asset classes not subject to the mandatory clearing requirement with at least one Registered Swap Entity counterparty, while Rule 43.5(g) provides a two-hour delay for large notional off-facility swaps in the other commodity asset class not subject to the mandatory clearing requirement with at least one Registered Swap Entity counterparty. 17 C.F.R. §§ 43.5(f)-(g).

concerns on behalf of swap counterparties gives rise to a larger concern with the potential negative impact the real-time public reporting regime is having on risk management and trading strategies generally, as well as a very real concern regarding the competitiveness of Commission-regulated swap dealers as opposed to other banks which are subject to the (more forgiving) reporting regimes of the Commission's foreign regulatory counterparts. We would note in particular that MiFID II provides for a delay in public dissemination of transaction data, not only in respect of block trades and large notional off-facility transactions, but also in respect of other transactions, including those "in a financial instrument or a class of financial instruments for which there is not a liquid market[.]"[82] FSR urges the Commission to extend the timeframe for public dissemination of swaps transaction data under Part 43 in the interest of achieving a more globally consistent derivatives reporting framework, as well as maintaining a robust and sound market.

We therefore believe that the Commission should amend its regulations to provide for a significant delay, based on the underlying product and asset class, prior to the public reporting of swaps under Part 43. Providing such a delay for the public dissemination of swaps data would be consistent with the Dodd-Frank Act's guiding principle that reporting requirements must be implemented with proper regard to liquidity concerns and anonymity, and would not compromise the underlying policy objectives of transparency for regulators and end-users. Such a delay would also promote the core principles for regulating the US financial system articulated in Executive Order No. 13772, citing the importance of vibrant and fair markets (the "Core Principles"),[83] and would be a step towards global harmonization of derivative transactions.

F. Related Cross-Border Issues.

1. *Make Permanent Existing No-Action Relief Providing for the Masking of Certain Identifying Information in Part 45 Reports.*

On June 28, 2013, DMO issued a no-action letter (i) permitting swap data reporting counterparties to mask legal entity identifiers ("LEIs"), other enumerated identifiers and other identifying terms and (ii) permitting large trader reporting entities to mask identifying information in certain enumerated jurisdictions as a result of foreign privacy laws barring the reporting of such information under Parts 20, 45 and/or 46 ("CFTC Letter No. 13-41").[84] DSIO has since extended the relief originally provided in CFTC Letter No. 13-41, subject to certain conditions, until: (x) September 1, 2017 for "French Reportable Swaps" and "Swiss Reportable Swaps" (each as defined in CFTC Letter No. 17-16); and (y) for all other swaps, the applicable "Reasonable Belief Expiration Date" (*i.e.,* such time as the reporting counterparty no longer holds the requisite reasonable belief regarding the privacy law consequences of reporting) for such swap or group of

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[82] Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 Supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on Markets in Financial Instruments with Regard to Regulatory Technical Standards on Transparency Requirements for Trading Venues and Investment Firms in Respect of Bonds, Structured Finance Products, Emission Allowances and Derivatives, 2017 O.J. (L 87), Art. 8 (July 14, 2016), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0583&from=EN.

[83] *See* Executive Order No. 13772.

[84] CFTC Letter No. 13-41, Time-Limited No-Action Relief Permitting Part 45 and Part 46 Reporting Counterparties to Mask Legal Entity Identifiers, Other Enumerated Identifiers and Other Identifying Terms and Permitting Part 20 Reporting Entities to Mask Identifying Information, with Respect to Certain Enumerated Jurisdictions (June 28, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-41.pdf; *see* CFTC Letter No. 12-46, Time-Limited No-Action Relief for Part 20 Reporting Entities Regarding Identifying Information and Time-Limited No-Action Relief for Part 45 and Part 46 Reporting Counterparties Regarding Legal Entity Identifiers, Other Enumerated Identifiers or Other Identifying Terms (Dec. 7, 2012), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/12-46.pdf.

swaps.[85] These most recent no-action letters permit reporting parties that had previously met the conditions of CFTC Letter No. 13-41 (or who meet those conditions in the future) to fulfill their reporting obligations under Parts 20, 45 and/or 46 while acknowledging privacy, secrecy and blocking laws in certain non-US jurisdictions. While we appreciate the Commission's efforts in this arena, we would note in particular two areas of concern with respect to the existing no-action relief provided under CFTC Letter No. 13-41 and subsequent extensions of relief thereunder: first, the no-action relief is based on counterparty identity (rather than the jurisdiction in which the trade was actually executed) and, second, the relief does not provide for the masking of swap dealer identifying information. In the interest of international comity and the recognition of privacy laws of other sovereign nations, we would urge the Commission to cooperate with its global counterparts to encourage harmonization and elimination of barriers to global derivatives trade reporting.

2. *Make Permanent Existing No-Action Relief from Part 45 and 46 Requirements for Swap Dealers in Certain Jurisdictions.*

DMO has issued, and thrice extended, time-limited no-action relief from the swap data reporting rules under Parts 45 and 46 for foreign swap dealers established under the laws of Australia, Canada, the EU, Japan or Switzerland, which are not part of an affiliate group in which the ultimate parent entity is a US swap dealer, MSP, bank, financial holding company or bank holding company.[86] Because the Commission has not yet issued comparability determinations as to whether the regulatory requirements of any foreign jurisdiction are comparable to and as comprehensive as the applicable requirements under the CEA and Commission regulations with respect to the Part 45 and Part 46 reporting rules, we recommend that the Commission extend its existing no-action relief with respect to the aforementioned jurisdictions until such substituted compliance determination with respect to such jurisdiction is effective.

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[85] CFTC Letter No. 17-16 (Amended), Further Extension of Conditional Masking No-Action Relief Provided in CFTC Letters 16-03 and 16-33 (March 10, 2017), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-16.pdf ("CFTC Letter No. 17-16"); CFTC Letter No. 16-03, Further Extension of the Time-Limited, Conditional No-Action Relief Provided in CFTC Letter 13-41; Additional Relief (Jan. 15, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-03.pdf; CFTC Letter No. 15-01, Extension of Time-Limited No-Action Relief Provided in CFTC Letter No. 13-41 (Jan. 8, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-01.pdf; CFTC Letter No. 14-89, Extension of Time-Limited No-Action Relief Provided in CFTC Letter No. 13-41 (June 27, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-89.pdf.

[86] CFTC Letter No. 16-79, Extension of Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan or Switzerland (Nov. 21, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-79.pdf; CFTC Letter No. 15-61, Extension of Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan or Switzerland (Nov. 9, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-61.pdf; CFTC Letter No. 14-141, Extension of Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan and Switzerland (Nov. 24, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-141.pdf; CFTC Letter No. 13-75, Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan or Switzerland (Dec. 20, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-75.pdf.

G. CCO Reporting Obligations.

1. *Expand the Definition of "Senior Officer" with Respect to Internal CCO Reporting Obligations.*

For the reasons set forth below, we recommend that the Commission amend Part 3 to provide for an expanded definition of "senior officer" for purposes of the Commission's chief compliance officer ("CCO") requirements.

Under Sections 4s(k)(2) and (3) of the CEA, CCOs of registered swap dealers must, among other duties, prepare and sign an annual compliance report ("CCO Annual Report"); Section 4d(d) of the CEA requires CCOs of futures commission merchants ("FCMs") to "perform such duties and responsibilities" as are established by Commission regulation or by the rules of a registered futures association.[87] In 2012, the Commission promulgated Rules 3.3(d)-(f) pursuant to its mandate under Sections 4d(d) and 4s(k) of the CEA.[88] Among other requirements, Rule 3.3 requires a CCO to be actively engaged in compliance activities with the appropriate authority, resources and access to the board of directors or senior officer to administer the registered firm's compliance activities. On July 25, 2016, in an effort to clarify Rule 3.3's required elements and address additional supervisory relationships that a CCO may have with senior management, in addition to those with the registered firm's board of directors or senior officer, DSIO issued a Staff advisory regarding CCO reporting line requirements for swap dealers and FCMs ("CFTC Staff Advisory No. 16-62").[89] While DSIO laid out certain examples in CFTC Staff Advisory No. 16-62 of reporting lines to senior officers which could be permissible based on the relevant facts and circumstances, there was no specific Commission guidance on who would qualify as a "senior officer" for purposes of a CCO's compliance with Rule 3.3, until the Commission published proposed amendments to Part 3 in respect of CCO regulatory compliance obligations (the "Proposed CCO Amendments"),[90] which would define "senior officer" in Rule 3.1 as "the chief executive officer or other equivalent officer of a registrant."

In finalizing the Proposed CCO Amendments, we urge the Commission to consider a less restrictive definition of "senior officer." As proposed, the definition would require a CCO to report to the chief executive officer ("CEO") of a giant, multinational, multi-product bank, of which the swap dealer or FCM is a small part. We instead suggest that the term "senior officer" be defined in Rule 3.1 to include the head of the division that houses the swap dealing activity (*e.g.,* head of corporate and investment banking or head of wholesale banking), so long as the CCO is reporting at least one level up from the business trading unit. We also urge the Commission to adopt a clarification in the finalized amendments to Part 3 that the "senior officer" could include a senior risk executive (*e.g.,* chief risk officer or wholesale risk executive) if the swap dealer or FCM, as applicable, has determined – in accordance with the best practices of prudentially regulated banks – that compliance personnel should not report to a business person (*e.g.,* the CEO), and should instead report through an independent risk function. This would maintain the independence of the compliance function from the business function, while still providing the CCO with the stature and authority that the senior officer reporting requirement is meant to provide.

2. *Clarify and Refine the Annual Report Requirement for CCOs.*

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[87] 7 U.S.C. §§ 6d(d), 6(s)(k)(1)-(3).

[88] 17 C.F.R. §§ 3.3(d)-(f); *see* CCO Rules, 77 Fed. Reg. 20128.

[89] CFTC Staff Advisory No. 16-62, Chief Compliance Officer Reporting Lines (July 25, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-62.pdf.

[90] Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants, 82 Fed. Reg. 21330 (proposed May 8, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-05-08/pdf/2017-09229.pdf ("Proposed CCO Amendments").

While we commend the Commission's efforts in its Proposed CCO Amendments to eliminate the requirement that CCO Annual Reports map the registered firm's compliance against each applicable statutory and regulatory requirement,[91] we would recommend that the Commission further refine the CCO Annual Report requirements when finalizing its amendments to Rule 3.3. In general, we support the suggestions set forth by FIA and SIFMA in their joint comment letter in response to the Proposed CCO Amendments (the "FIA-SIFMA CCO Amendments Comment Letter"), certain points of which we have reiterated below.[92]

a. **Clarify that Volcker Rule Compliance Is Outside the Scope of CCO Reporting Obligations Under Rule 3.3.** In a footnote to the preamble of its release adopting Part 75 of its regulations, which implement Section 619 of the Dodd-Frank Act (*i.e.,* the "Volcker Rule"), the Commission took the position that the compliance requirements of Subpart D of Part 75 are to be addressed as part of the CCO obligations (*e.g.,* the CCO Annual Report) applicable to a swap dealer under Rule 3.3,[93] a position which was later extended by DSIO in a Staff advisory to include CCO obligations applicable to FCMs (the "Volcker Rule Interpretation").[94] However, neither the Commission nor its Staff have provided any additional explanation as to what was actually required under their Volcker Rule Interpretation, and the Commission has not afforded the public an opportunity to comment on its Volcker Rule Interpretation. Because the Volcker Rule Interpretation was limited to the Commission's interpretation of Rule 3.3 and not of the Volcker Rule itself or even Part 75, the Request for Information provides the Commission with an opportunity to revisit the Volcker Rule Interpretation without having to amend the Volcker Rule or Part 45. We agree with the assertions in the FIA-SIFMA CCO Amendments Comment Letter that (i) revisiting the Volcker Rule Interpretation would actually reinforce the compliance program envisioned under the Volcker Rule, (ii) the application of the CCO Annual Report requirement in Rule 3.3(e)(2) to the Volcker Rule would be superfluous and duplicative of the requirements under Part 75 and (iii) the Volcker Rule Interpretation is inconsistent with the statutory mandate under the Dodd-Frank Act and related Commission regulations in Part 3 promulgated pursuant thereto.[95] We accordingly urge the Commission to clarify that Rule 3.3(e)(2) would not extend to a firm's compliance with the Volcker Rule, considering that (i) such a requirement was not included under the Dodd-Frank Act and (ii) the Volcker Rule itself provides for an enterprise-wide compliance program, as well as a separate CEO certification.

b. **Limit the CCO Annual Report to Material Information.** In addition, we suggest that the Commission consider including a materiality qualifier on the CCO's required certification of the CCO Annual Report under Rule 3.3(f)(3), such that the certifier is solely responsible for ensuring that the information contained in the CCO Annual Report is accurate and complete "in all material respects," an amendment which would be consistent with the Commission's stated objective of aligning Rule 3.3 with parallel rules adopted by the SEC for security-based swap dealers ("SBSDs")

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[91] *See* Proposed CCO Amendments, 82 Fed. Reg. at 21334.

[92] Comment Letter on Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants, Comment No. 61256 (July 7, 2017), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61256 ("FIA-SIFMA CCO Amendments Comment Letter").

[93] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5808 (Jan. 31, 2014), *available at* https://www.gpo.gov/fdsys/pkg/FR-2014-01-31/pdf/2013-31476.pdf; *see* 17 C.F.R. pt. 75.

[94] CFTC Staff Advisory, Volcker Rule Compliance (Jan. 19, 2016), *available at* https://www.bridgingtheweek.com/ckfinder/userfiles/files/DSIO%20CCO%20Volcker%20Advisory.pdf.

[95] *See* FIA-SIFMA CCO Amendments Comment Letter at pp. 15-17.

(the "SEC CCO Rule").[96] We agree with the assertions made in the FIA-SIFMA CCO Amendments Comment Letter, including (among other statements) that such a materiality qualifier would address the industry-wide concern that the certifier should not have to accept liability for immaterial misstatements or omissions in the CCO Annual Report, given that – in any reasonably sizable organization – neither the certifier nor the senior-level personnel who might provide sub-certifications could possibly be personally knowledgeable about every detail in the report.[97]

c. **Broaden the Scope of the Permitted Internal CCO Annual Reporting Lines.** Furthermore, we recommend that the Commission remove the requirement in Rule 3.3(f) that a CCO provide the CCO Annual Report to the registered firm's board of directors and audit committee (or equivalent body), due to the fact that, for many banks – absent a material escalation issue in respect of a CCO Annual Report – the board and audit committee are too far removed from the swap dealing or futures business to provide meaningful guidance. We agree with the FIA-SIFMA CCO Amendments Comment Letter suggestion to amend Rule 3.3(f)(1) to permit delivery of the CCO Annual Report to a firm's governing body (as defined in Rules 1.11 (for FCMs) or 23.600 (for Registered Swap Entities)) as a solution for alleviating this concern and further aligning Rule 3.3 with Rules 1.11 and 23.600.[98] We also generally agree with the support provided in the FIA-SIFMA CCO Amendments Comment Letter with respect to the Commission's proposed amendment of Rule 3.3(f)(1),[99] and urge the Commission to consider the arguments set forth herein and therein when finalizing its amendments to Rule 3.3.

IV. CLEARING[100]

FSR believes that the Commission's rules on mandatory clearing can be reconsidered to provide greater flexibility to market participants and to eliminate certain unintended consequences of the clearing requirements.

A. Swaps Resulting from Bilateral Compression of Legacy Swaps Should Not Be Subject to Mandatory Clearing.

In its first rulemaking implementing the Clearing Requirement Determination,[101] the Commission clarified that the mandatory clearing requirement applies to all "new swaps," including swaps that result from changes in ownership as a result of assignment or novation.[102] FSR further understands that the Commission would view a material amendment to swaps entered into prior to adoption of the clearing mandate ("Legacy Swaps") as a "new swap" for purposes of the clearing mandate. However, this approach has limited the ability of market participants to engage in bilateral compression exercises to reduce credit and outstanding notional exposures. FSR requests, therefore, that the Commission issue guidance clarifying that swaps resulting from bilateral compression exercises in respect of legacy swaps not be considered "new

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96 *See* 17 C.F.R. § 240.15Fk-1(c)(2)(ii)(D).

97 *See* FIA-SIFMA CCO Amendments Comment Letter at p. 9.

98 *See* FIA-SIFMA CCO Amendments Comment Letter at p. 10.

99 *See* FIA-SIFMA CCO Amendments Comment Letter at pp. 9-11.

100 The Commission has requested suggestions on how its existing rules, regulations or practices pertaining to clearing services with respect to futures contracts, options on futures contracts or swaps could be applied in a simpler, less burdensome and less costly manner.

101 *See* Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act, 77 Fed. Reg. 74284 (Dec. 13, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-12-13/pdf/FR-2012-12-13.pdf ("2012 Clearing Determination").

102 *See* 2012 Clearing Determination, 77 Fed. Reg. at 74316.

swaps" subject to the clearing mandate. FSR believes that such guidance would be consistent with relief that the Commission has already provided with respect to multilateral clearing exercises[103] and partial novations and partial termination of legacy swaps.[104] As in the case of multilateral compression exercises and partial novations and terminations, bilateral compression exercises mitigate counterparty, credit, and operational risk by reducing the number of swaps outstanding and the aggregate notional amount of swaps as between two counterparties. Providing market participants with additional flexibility to engage in further compression exercises without the additional expense of clearing would thus further the Dodd-Frank Act's stated goal of reducing systemic risk and a main purpose of mandatory clearing, *i.e.*, reducing counterparty credit risk.

B. Legacy Swaps That Are Merely Recouponed Should Not Be Subject to Mandatory Clearing.

As noted above, the Commission has indicated that it would view a novation or material amendment to a Legacy Swap as a "new swap" for purposes of the mandatory clearing requirement. As with bilateral portfolio compression exercises, however, this approach has limited market participants' ability to recoupon Legacy Swaps in order to reduce counterparty credit risk and overall exposures. In some cases, outstanding Legacy Swaps are continuing under extremely off-market rates because a recouponing of such Legacy Swaps could result in the transactions being required to be cleared, which would add additional cost and additional administrative burden. Accordingly, FSR requests that the Commission consider relief that would allow market participants to recoupon Legacy Swaps, which, again, would allow market participants to both (i) reduce exposures, counterparty credit risk, and capital charges and (ii) maintain existing transactions that reflect current-market rates.

C. Finalize Rulemaking on the Inter-Affiliate Clearing Exemption.

Under the inter-affiliate exemption from the clearing requirement,[105] one of the conditions requires the clearing of all swaps between affiliated counterparties claiming the exemption and unaffiliated counterparties (the "Outward Facing Swaps Condition"). In order to provide for an orderly transition period with respect to the Outward Facing Swaps Condition and timing issues associated with the implementation of mandatory clearing regimes in non-US jurisdictions, the Commission provided two temporary, alternative compliance frameworks for compliance with the Outward Facing Swaps Condition, which allow entities relying on the exemption to post and collect VM rather than clearing all outward facing swaps.[106] In addition, pursuant to a no-action letter published last year, the Staff has extended the deadlines for the alternative compliance framework until December 31, 2017 ("CFTC Letter No. 16-81").[107] While FSR

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[103] *See* CFTC Letter No. 13-01, No-Action Relief from Required Clearing for Swaps Resulting from Multilateral Portfolio Compression Exercises (March 18, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-01.pdf.

[104] *See* CFTC Letter No. 13-02, No-Action Relief from Required Clearing for Partial Novation and Partial Termination of Swaps (March 20, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-02.pdf.

[105] Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 Fed. Reg. 21750 (April 11, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-04-11/pdf/2013-07970.pdf ("Inter-Affiliate Clearing Exemption").

[106] Inter-Affiliate Clearing Exemption, 78 Fed. Reg. at 21763-21766. Rule 50.52(b)(4)(ii) provides an alternative compliance framework for entities located in the EU, Japan and Singapore, and Rule 50.52(b)(4)(iii) provides an alternative compliance framework for entities located in all other non-US jurisdictions. 17 C.F.R. §§ 50.52(b)(4)(ii)-(iii).

[107] CFTC Letter No. 16-81, Time-Limited No-Action Relief from Certain Provisions of the Treatment of Outward-Facing Swaps Condition in the Inter-Affiliate Exemption (Nov. 28, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-81.pdf.

appreciates the temporary no-action relief that the Staff has provided with respect to the Outward Facing Swaps Condition under CFTC Letter No. 16-81, we urge the Commission to exempt inter-affiliate transactions from the scope of its swaps regulations (as further discussed below in Paragraph VI.A.3 (*Consider a General Exemption of Inter-Affiliate Transactions from the Commission's Rulemakings Under Title VII of the Dodd-Frank Act*)). In the absence of a wholesale exemption, FSR requests that the Commission at least consider making the two alternative compliance frameworks permanent. As noted by the Commission, a key purpose of the Outward Facing Swaps Condition is to address the potential impact on systemic risk posed by uncleared, inter-affiliate swaps involving non-US affiliates. FSR believes that concern is adequately addressed by allowing affiliated counterparties claiming the exemption to rely on the two, existing alternative compliance frameworks and that the existing no-action relief under CFTC Letter No. 16-81 should be permanently codified.

D. Provide a Streamlined Substituted Compliance Regime for Non-US Central Counterparties.

The CEA does not impose any geographic limitations with respect to the registration requirements for DCOs. Further, the CEA does not mandate that clearing, of futures contracts or swaps traded in the United States, actually occur in the United States. Rather, futures contracts and swaps, which are traded in the United States, are permitted to be cleared outside of the United States if the foreign central counterparty ("CCP") is registered with the Commission as a DCO. In only limited circumstances, the Commission has provided exemptions from registration for foreign-based CCPs that clear proprietary swaps positions for their US members and affiliates. Specifically, those exemptions have been limited in number and issued pursuant to Section 5b(h) of the CEA, which permits the Commission to exempt a clearing organization from DCO registration for the clearing of swaps to the extent that the Commission determines that such clearing organization is subject to comparable, comprehensive supervision by appropriate government authorities in the clearing organization's home country. While FSR appreciates the Commission's efforts on this topic to date, in particular the EU comparability determination and dually-registered DCOs and CCPs,[108] we believe that process highlighted the need for a more streamlined approach in mutually recognizing foreign CCPs and that long, drawn-out comparability assessment and negotiation may result in uncertainty among market participants. Regulatory changes in the derivatives markets have significantly affected global market participants. In order to reduce the risk of even further market fragmentation, and to promote central clearing as a means to reduce counterparty risk, FSR requests that the Commission consider broader, more streamlined relief for mutual recognition of CCPs across jurisdictions.

E. Additional Entities or Transactions Should Be Exempt from Mandatory Clearing.

FSR believes that the mandatory clearing mandate, as it currently applies, is overly restrictive and has caused a number of entities to cease executing swaps that are required to be cleared because the cost of clearing outweighs the benefits of entering into such transactions. For example, under the current clearing framework, any entity that is a "financial entity" that enters into a single swap that is subject to mandatory clearing is required to clear such transaction and, as a result, engage in a significant operational and economic undertaking in terms of identifying and engaging an FCM, which includes negotiating and executing additional clearing documentation, and incurring additional FCM fees. FSR understands that for certain entities that qualify as "financial entities," even though they are not actively engaged in the swaps market and would merely enter into a limited number of swaps for hedging and risk management purposes, the mandatory clearing requirement has made it operationally and cost prohibitive to do so. FSR believes that it was not the intent of the mandatory clearing requirement and the Dodd-Frank Act generally to capture all of the entities and transactions that are currently captured in the Commission's mandatory clearing

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[108] Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 Fed. Reg. 15260 (March 22, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-03-22/pdf/2016-06261.pdf.

mandate. For example, FSR does not believe that any entity that qualifies as a "financial entity" that enters into a single vanilla interest rate swap to hedge interest rate exposure on floating rate borrowings should be required to clear such transactions. Accordingly, FSR requests that the Commission consider narrowing the scope of the mandatory clearing requirement or limiting the types of transactions that are required to be cleared.

V. EXECUTING[109]

FSR believes that the Commission's SEF rules can be improved in a number of respects. FSR appreciates many of the Commission's current efforts in this respect and would encourage the Commission to continue refining the SEF rules in a manner that promotes transparency and central execution of swaps in a sensible manner.

A. Expand the Methods of Execution for Required Transactions.

FSR believes that the Commission should revise its final rulemaking with respect to core principles and other requirements for SEFs (the "SEF Rules"),[110] to provide greater flexibility on methods of execution for swaps required to be traded on a SEF ("Required Transactions") beyond a central limit order book ("CLOB") and request-for-quote system ("RFQ System") to three participants. As Chairman Giancarlo has noted, "there is no firm statutory support for segmenting swaps into two categories or for limiting one of those categories to two methods of execution" and "the only thing that CEA section 2(h)(8) expressly requires . . . is that swaps subject to the trade execution requirement must be executed on a SEF or DCM."[111] FSR agrees with Chairman Giancarlo that "Congress clearly drafted [the] broad and flexible definition [of a SEF] to allow execution methods beyond an Order Book or RFQ System for all swaps, not just some swaps." FSR believes that by expanding the available methods of execution for SEFs, as Congress intended, SEFs will be in a better position to attract liquidity to their platforms and to respond to changes in technology over time. FSR also believes that the additional flexibility would further the Dodd-Frank Act's goal of promoting transparency by requiring the central execution of swaps.

B. The Commission Should Control the MAT Determination Process.

Under the Commission's final rules on the process for a DCM or SEF to make a swap available to trade (*i.e.,* "made available to trade" or "MAT"), a SEF or DCM may determine that a swap is MAT and submit that determination to the Commission, either for approval or self-certification. While FSR appreciates that SEFs and DCMs must follow the rule filing procedures of the Commission's regulations and must consider certain factors in their MAT submissions (including, among other things, trading volume, number and types of market participants, and the usual number of resting firm or indicative bids and offers), the process, in large part, is driven by the SEFs and DCMs themselves. FSR recommends that the Commission revise the MAT determination to provide the Commission with a more prominent role in reviewing and rejecting MAT determinations. FSR believes that the Commission should be required to make a determination that the swaps that are proposed to be designated as MAT satisfy certain objective

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[109] **The Commission has requested suggestions on how its existing rules, regulations or practices relating to marketplace transaction of futures and swaps could be applied in a simpler, less burdensome and less costly manner.**

[110] Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476 (June 4, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-06-04/pdf/2013-12242.pdf (as corrected by Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 47154 (Aug. 5, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-08-05/pdf/2013-18773.pdf).

[111] *See* Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank White Paper (Jan. 29, 2015)*, available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf.

criteria demonstrating that the swap does, in fact, have sufficient liquidity to support trading on a DCM or SEF. FSR believes that requiring the Commission to make this determination would improve the MAT process in a number of respects, including by limiting those MAT submissions by SEFs and DCMs that are not supported by objective criteria and ensuring that only the most liquid swaps are required to be traded on a SEF or DCM.

C. Codify Certain No-Action Letters.

In addition to the foregoing matters, FSR believes that certain adjustments to the SEF rules, which have been made via no-action relief and address certain practical and operational implementation issues, should be permanently codified in the Commissions rulemakings. These include:

- **Operational and Clerical Errors.** In September 2013, the Staff published guidance on the straight through processing of swaps (the "STP Guidance").[112] The STP Guidance provided, among other things, that: (a) FCMs must screen orders for execution on a SEF pursuant to either Rule 1.73(a)(2)(i) or (ii), regardless of the method of execution;[113] (b) pursuant to Rule 37.702(b), each SEF must make it possible for clearing FCMs to screen each order as required by Rule 1.73;[114] (c) SEFs must have rules stating that trades that are rejected from clearing are *void ab initio*; and (d) SEFs, FCMs, swap dealers and MSPs may not require breakage agreements as a condition for trading swaps intended for clearing on a SEF. After the publication of such guidance, the Staff was alerted that some swap trades are rejected by a DCO because of operational or clerical errors that are readily correctable. For example, some clearing submissions fail to match on a material economic term due to an operational error; the trades are then rejected from clearing and deemed *void ab initio*. In response, the Staff has issued a series of no-action letters addressing these matters.[115] FSR believes that despite SEF's efforts, market participants continue to encounter circumstances in which a trade is rejected from clearing due to a readily correctible clerical or operational error or an error is discovered after a trade has been cleared. Further, FSR does not believe that market participants will be able to entirely eliminate operational and clerical errors. As such, FSR encourages the Commission to adopt a permanent process that would allow market participants to modify previously executed and cleared swaps with operational or clerical errors.

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[112] *See* Staff Guidance on Swaps Straight-Through Processing (Sep. 26, 2013), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/stpguidance.pdf ("STP Guidance").

[113] *See* 17 C.F.R. §§ 1.73(a)(2)(i)-(ii).

[114] *See* 17 C.F.R. §§ 1.73, 37.702(b).

[115] *See* CFTC Letter No. 16-58, No-Action Relief for Swap Execution Facilities and Designated Contract Markets in Connection with Swaps with Operational or Clerical Errors Executed on a Swap Execution Facility or Designated Contract Market (June 10, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-58.pdf.

- **Package Transactions.** The Staff's existing no-action relief with respect to swaps executed as part of package transactions[116] ("CFTC Letter No. 16-76") is set to expire on November 15, 2017.[117] As noted in CFTC Letter No. 16-76, DMO has continued to facilitate trading of certain transactions in a manner that balances the utility of package transactions against the policy goals of the trade execution requirement. FSR appreciates the work of the Staff in this regard and would request that the Commission adopt a permanent regulatory framework for package transactions that allows market participants to execute all components of the package transaction away from a SEF. FSR believes that requiring that the swap component of a package transaction to be traded on a SEF increases transaction risk and creates uncertainty with respect to the package transaction as a whole. In addition, as a result of the Commission's *void ab initio* rules, requiring the swap component of a package transaction to be traded on a SEF increases the risk that market participants may have to unwind the entire transaction, because the swap component of the package transaction failed to clear. Our members indicate that, in most cases, package transactions are bespoke transactions that are customized and developed for specific customer purposes. As such, the swap component of such transaction would not benefit from, or add to, the transparency that SEF trading is intended to promote. Accordingly, FSR requests that the Commission make the existing no-action relief in CFTC Letter No. 16-76 (and its predecessors) with respect to package transactions permanent.

- **Mandatory Trading and Inter-Affiliate Transactions.** In the preamble setting forth the process for a SEF (or DCM) to make a swap available to trade, the Commission stated that inter-affiliate swaps that are exempt from clearing in accordance with the inter-affiliate clearing exemption in

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116 The term "package transaction" refers to a transaction involving more than one instrument (i) that is executed between two counterparties, (ii) that is priced or quoted as one economic transaction with simultaneous execution of all components, (iii) that has at least one component that is a swap that is MAT (and is therefore subject to the trade execution requirement under Section 2(h)(8) of the CEA) and (iv) for which the execution of each component is contingent upon the execution of all other components. *See* CFTC Letter No. 14-12, No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 for Swaps Executed as Part of a Package Transaction, at p. 4 (Feb. 10, 2014), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/letter/14-12.pdf ("CFTC Letter No. 14-12").

117 *See* CFTC Letter No. 16-76, Extension of No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 and No-Action Relief for Swap Execution Facilities from Commission Regulation § 37.3(a)(2) for Swaps Executed as Part of Certain Package Transactions (Nov. 1, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-76.pdf; *see also* CFTC Letter No. 15-55, Extension of No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 and No-Action Relief for Swap Execution Facilities from Commission Regulation § 37.3(a)(2) for Swaps Executed as Part of Certain Package Transactions (Oct. 14, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-55.pdf; CFTC Letter No. 14-137, Extension of No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 and No-Action Relief for Swap Execution Facilities from Commission Regulation § 37.3(a)(2) for Swaps Executed as Part of Certain Package Transactions (Nov. 10, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-137.pdf; CFTC Letter No. 14-62, No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 for Swaps Executed as Part of Certain Package Transactions and No-Action Relief for Swap Execution Facilities from Compliance with Certain Requirements of Commission Regulations § 37.9(a)(2), § 37.203(a) and § 38.152 for Package Transactions (May 1, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-62.pdf; CFTC Letter No. 14-12.

Rule 50.52 are not subject to the mandatory trading requirement.[118] However, swaps involving affiliate counterparties that do not satisfy Rule 50.52(b) or another exception or exemption from the clearing mandate are subject to the trade execution requirement. In response to comments from market participants, the Staff has granted time-limited no-action relief from mandatory trading requirements for inter-affiliate trades (regardless of whether the inter-affiliate clearing exemption is available) to provide the Commission time to consider and establish a permanent exemption for inter-affiliate swaps from the trade execution requirement under Section 2(h)(8) of the CEA.[119] FSR agrees that, as noted by the Staff in the existing no-action letters, requiring inter-affiliate transactions to be executed on a SEF or DCM would not promote the pre-trade price transparency and price discovery goals associated with the trade execution requirement, because affiliate counterparties are not primarily concerned with obtaining fully competitive pricing. Further, because of the SEF order book and "request for quote" requirements, it is not certain that that the affiliates would be matched with one another as intended, which may prevent certain inter-affiliate risk transfers from occurring. FSR requests that the Commission move forward with permanent relief from the mandatory trading requirement for swaps between affiliated entities.

D. Issue Guidance Regarding Away SEF Block Trades.

As part of the STP Guidance, the Staff clarified that trades executed on or subject to the rules of SEF must be screened in accordance with Rule 1.73, regardless of the method of execution.[120] Separately, Rule 43.2 defines a "block trade" as a publicly reportable swap transaction involving a swap that is listed on a registered SEF or DCM and "occurs away" from the registered SEF's or DCM's trading system or platform and is executed pursuant to the registered SEF's or DCM's rules and procedures.[121] FSR agrees with Chairman Giancarlo's assessment that, taken together, the "[Commission's] approach is . . . creating technological challenges for SEFs and [FCMs] in facilitating pre-execution credit checks of block trades that occur way from the SEF's platform."[122] Specifically, because block trades are effectively required to be privately negotiated and executed "off-SEF," the SEF and FCM do not have the same ability to perform pre-execution screening in the same manner as "on-SEF" transactions. As described in CFTC Letter No. 14-118,[123] an FCM may have no involvement in a block transaction occurring away from a SEF's trading system or platform or an FCM cannot screen SEF trades without the SEF itself facilitating the screens. FSR appreciates the no-action relief that the Staff has provided on this topic to date. However, FSR requests that the Commission adopt a more permanent solution that continues to allow market participants to conduct

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[118] Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606, n. 1 (June 4, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-06-04/pdf/2013-12250.pdf; *see* 17 C.F.R. § 50.52.

[119] CFTC Letter No. 16-80, Extension of Time-Limited No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52 (Nov. 28, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-80.pdf ("CFTC Letter No. 16-80"); *see* 7 U.S.C. § 2(h).

[120] *See* STP Guidance; *see also* 17 C.F.R. § 1.73.

[121] 17 C.F.R. § 43.2.

[122] *See* Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank White Paper (Jan. 29, 2015), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf.

[123] CFTC Letter No. 14-118, No-Action Relief for Swap Execution Facilities from Certain "Block Trade" Requirements in Commission Regulation 43.2 (Sept. 19, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-118.pdf.

block trades "off-SEF" and provides that FCMs are in compliance with their pre-trade screening requirements under Rule 1.73 by screening such block trades for compliance with the FCM's risk-based limits when the trade has been reported to the SEF.

E. The Commission's Rules Should Promote Greater Harmonization Across SEFs.

The SEF Rules establish guidance and acceptable practices with respect to core principles that SEFs are required to comply with initially and on a continuing basis as part of the conditions of registration as a SEF. FSR acknowledges that the policy behind the CEA, and the Commission's longstanding practice with respect to DCMs, has been to afford registrants with a degree of flexibility in complying with acceptable practices rather than imposing prescriptive regulatory requirements. FSR appreciates that the Commission, as part of its SEF rulemaking, carefully considered which SEF core principles would benefit from regulations and which core principles would benefit from guidance or acceptable practices, where flexibility is more appropriate. However, now that the SEF Rule has been in place for some time, and with more than 20 SEFs in operation, FSR believes it would be appropriate for the Commission to consider where the SEF Rules can be revised as regulations to provide legal certainty to the marketplace on certain topics. As an example, because each SEF acts as a self-regulatory organization (*i.e.,* an "SRO"), each imposes their own unique requirements with respect to things such as regulatory notifications. For market participants that are members of multiple SEFs, and seek to access liquidity across platforms, monitoring and complying with the varying requirements has become operationally burdensome and inefficient. Accordingly, FSR would request that the Commission review the SEF Rules to identify those areas where greater harmonization across SEFs and SEF rulebooks may be possible.

F. Improve the Rules on Straight Through Processing.

On September 26, 2013, the Staff issued guidance providing that contracts submitted for clearing should be accepted or rejected for clearing as quickly as technologically practicable ("AQATP"),[124] which the Staff has subsequently stated means that a cleared contract must be routed and received by the relevant DCO no more than 10 minutes after execution.[125] FSR understands that orders can be filled and routed to clearing in a number of ways, including through the use of voice brokers, which means that human intervention is part of more than one part of processing a swap for clearing and can result in delay due to the manual nature of the process. Conversely, the manual post-execution affirmation process is useful to identify errors before a trade is submitted for clearing because some methods of execution currently have higher error rates and requiring that trades be submitted within narrow time limits could result in erroneous trades being rejected, or worse, accepted by a DCO. Additionally, counterparties may have to bear significant margin costs until an error is corrected because of a swap being cleared at the wrong DCO, having the wrong counterparty or having the wrong economic terms. While FSR appreciates the Staff's effort on this topic and extending the AQATP timeline to 10 minutes, FSR believes that additional improvements can be made. For example, FSR believes that the Commission should consider a framework that only penalizes those persons that caused the failure, such as the SEF or voice broker, rather than the participants that are merely seeking to hedge their exposure.

G. Collaborate with Global Regulators to Harmonize Trading Rules.

FSR believes that the Commission should collaborate with EU regulators, and regulators in other jurisdictions, to harmonize rules on mandatory trading requirements to the greatest extent possible, in order to reduce the risk of market fragmentation and regulatory arbitrage and to enhance liquidity among US and

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[124] *See* STP Guidance.

[125] *See* CFTC Letter No. 15-67, Straight Through Processing and Affirmation of SEF Cleared Swaps (Dec. 21, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-67.pdf.

global derivatives markets. More specifically, FSR believes that the Commission should cooperate with global regulators in developing trading rules to facilitate mutual recognition of trading platforms and mandatory trading requirements across jurisdictions. Indeed, FSR believes this would be consistent with the Commission's legacy practice of recognizing foreign boards of trade ("FBOTs") that allow direct access to US persons and the current rules allowing FBOTs that are subject to comprehensive regulation and supervision in their home country, to market to participants in the United States. Further, Section 5h(g) of the CEA, acknowledging the importance of international cooperation and harmonization, specifically provides that the Commission may exempt a facility from SEF registration if the Commission finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis the appropriate governmental authorities in the home country of the facility.[126] Accordingly, FSR requests the Commission continue to work collaboratively with global regulators on creating a regulatory framework that will efficiently facilitate mutual recognition of similarly regulated trading venues.

VI. MISCELLANEOUS[127]

A. Scope of Title VII Regulatory Requirements.

1. *Revise the "Swap" Definition to Formally Exclude Stable Value Contracts.*

Section 719(d)(1) of the Dodd-Frank Act required the SEC and the Commission to complete a study to determine whether stable value contracts ("SVCs") should fall within the definition a "swap" under the Dodd-Frank Act and, if so, whether SVCs should be exempted from that definition based on the public interest (the "Stable Value Study").[128] While the Commission and the SEC have requested comment on whether SVCs should fall under the definition of a "swap" (with the comment period closing on November 1, 2012), they have yet to make such a determination. For the reasons listed in our previous comment letter dated September 26, 2011, in respect of the Stable Value Study,[129] in the FSR Treasury Letter[130] and as set forth below, we urge the Commission to consider revising its definition of "swap" to formally exclude SVCs.

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[126] 7 U.S.C. § 7b-3(g).

[127] **The Commission has requested suggestions on how its existing rules, regulations or practices not falling within the registration, reporting, clearing or executing categories could be applied in a simpler, less burdensome and less costly manner.**

[128] The Dodd-Frank Act defined SVCs as any contract, agreement or transaction that provides a crediting interest rate and guaranty or financial assurance of liquidity at contract or book value prior to maturity offered by a bank, insurance company or other State or federally regulated financial institution for the benefit of any individual or commingled fund available as an investment in an employee benefit plan (as defined in 29 U.S.C. § 1002(3), including plans described in 29 U.S.C. § 1002(32)) subject to participant direction, an eligible deferred compensation plan (as defined in 26 U.S.C. § 457(b)) that is maintained by an eligible employer described in 26 U.S.C. § 457(e)(1)(A), an arrangement described in 26 U.S.C. § 403(b) or a qualified tuition program (as defined in 26 U.S.C. § 529). 15 U.S.C. § 8307(d)(2).

[129] Stable Value Investment Association, American Bankers Association and Financial Services Roundtable, Submission on Study of Stable Value Contracts, Comment No. 48226 (Sept. 26, 2011), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=48226 ("SVIA-ABA-FSR Stable Value Study Letter"); *see* Acceptance of Public Submissions Regarding the Study of Stable Value Contracts, 76 Fed. Reg. 53162 (Aug. 25, 2011), *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-08-25/pdf/2011-21645.pdf; *see also* Acceptance of Public Submissions Regarding the Study of Stable Value Contracts, 77 Fed. Reg. 60113 (Oct. 2, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-10-02/pdf/2012-24179.pdf.

[130] *See* FSR Treasury Letter at p. 77.

- SVCs are not swaps. Congress recognized that SVCs are a unique risk management instrument that merits separate consideration and potentially separate treatment from "swaps" and other derivative instruments when it directed the Commission (alongside the SEC) to conduct the Stable Value Study.[131]

- Stable value products are wholly unrelated to the transactions that Congress sought to regulate through the Dodd-Frank Act. Significantly, SVCs and stable value funds do not pose systemic risk concerns. On the contrary, stable value products are highly-specialized, conservative investment products used by plan participants to reduce their exposure to market volatility within defined contribution plans. Regulating SVCs as swaps could eliminate this important investment option.[132]

- The existing regulatory structure applicable to providers of SVCs and the defined contribution savings plans that offer stable value funds is effective and consistent with the goals Congress set out in the Dodd-Frank Act – namely, to provide transparency, safeguards against systemic risks to the US financial system and appropriate oversight of the financial markets. [133]

Nevertheless, should the Commission find that SVCs fall within the definition of "swap," we believe the Commission should utilize the exemptive authority specifically provided in Section 719(d)(1)(B) of the Dodd-Frank Act to exempt SVCs from the definition. An exemption is not only appropriate and in the public interest, but also necessary to ensure that defined contribution plan participants will continue to have access to high-quality, conservative investment options. Without SVCs, retirees and other defined contribution plan participants would have no alternative but to switch to investments that either carry greater risk or offer lower returns. Congress did not intend to cause such uncertainty or jeopardize plan participants' and retirees' retirement investments or income.

2. *Clarify that FX Window Forwards Are Not Swaps.*

We believe that foreign exchange ("FX") window forwards should be regulated under the CEA as FX forwards, which have been exempted from the "swap" definition in 2012 by the Secretary of the Treasury (the "Treasury Determination").[134] The uncertainty of the status of FX window forwards has caused some firms to treat them as "swaps" (rather than "FX forwards"), which imposes significant costs on access to this product for Main Street businesses involved in cross-border commerce. Our members have reported confusion and frustration from business customers who use FX window forwards to hedge their business risks when access to these products is restricted due to regulatory uncertainty. Commercial hedgers typically view FX window forwards as a simple FX forward with some additional flexibility to allow them to manage their business risks.

In an FX window forward, counterparties enter into an agreement to make a physical exchange of two currencies at an agreed price on one or more dates during an agreed "window" of time. Physical delivery of currency is required to occur on the last day of the window period, just like in a vanilla FX forward; however, the purchaser may elect to exchange currency on an earlier date so long as such date is within the window period. All other terms of the exchange, including price, are established at the time the

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131 *See* SVIA-ABA-FSR Stable Value Study Letter at pp. 4-6.

132 *See* SVIA-ABA-FSR Stable Value Study Letter at pp. 15-22.

133 *See* SVIA-ABA-FSR Stable Value Study Letter at pp. 22-30.

134 Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69694 (Nov. 20, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-11-20/pdf/2012-28319.pdf ("Treasury Determination"). Because the Treasury exemption applies to all FX forwards, then – by definition – FX window forwards would be exempt so long as they are classified as being FX forwards.

contract is entered into by the parties. FX window forwards are products commonly used by commercial enterprises to hedge currency risk and facilitate future payments on foreign currencies when such enterprises do not know the precise date on which they will need the currency (*e.g.,* when they will have to pay for a shipment that may arrive within a specified period, or when they will receive foreign currency as payment for an overseas delivery), and are thus an important part of the FX forward market for commercial end-users and have precisely the same function as do standard FX forward contracts.

FX window forwards are particularly important for small- to mid-sized commercial end-users who, unlike large, multinational corporations, lack a global treasury management infrastructure. Instead, smaller companies require a financial product that allows them to perfectly align the payment dates on the underlying commercial contract, with FX settlement dates. Regulating FX window forwards as swaps, rather than as FX forwards, would disproportionately and negatively affect these smaller businesses to the extent such regulation reduces the availability of or increases the cost of transacting in FX window forwards.

a. **FX Window Forwards Are Extremely Similar to Exempt FX Forwards, and Do Not Present Issues Requiring Disparate Regulatory Treatment.** The CEA defines an FX forward as follows:

> The term "foreign exchange forward" means a transaction that solely involves the exchange of 2 different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange.[135]

An FX window forward solely involves (i) the exchange of two different currencies, (ii) on a specific future date or dates, (iii) at a fixed rate agreed upon on the inception of the contract covering the exchange. The sole distinction between an FX window forward and a non-window FX forward, is that an FX window forward allows the end-user to specify, after the trade date, a date or series of dates earlier than the last date of the settlement window, but within the window, as the "specific future date" on which the settlement will occur. If the end-user does not make such an election, then the settlement date is the last date of the settlement window. Thus, an FX window forward is not an option to exchange currency; it is a forward commitment with a specific date by which the currency exchange must occur. Both the mandatory final settlement date for the contract and the fixed rate are agreed upon on the inception of the contract; however, the exchange of currencies may occur earlier than the mandatory final settlement date so long as it occurs within the contractual window.

In addition, the reasons supporting the exclusion of FX forwards and FX swaps from the definition of "swap" in the Treasury Determination apply equally to FX window forwards. In particular, Treasury concluded that the primary risk for FX forwards and FX swaps is settlement risk, rather than counterparty risk, and a central clearing requirement for FX forwards and FX swaps would disrupt existing settlement systems and thus increase, rather than decrease, the risk of these instruments.[136] Treasury also noted the high degree of existing oversight of FX transactions by banking supervisors and the significant transparency that already exists in this market.[137] These considerations are no less relevant for FX window forwards than for any other FX forwards.

Moreover, under Section 2(e) of the CEA, entities that are not ECPs are prohibited from entering into over-the-counter ("OTC") swaps. It is not clear to what extent this prohibition applies to transactions with non-ECPs that are able to make and take delivery in connection with their lines

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135 7 U.S.C. § 1a(24).

136 *See* Treasury Determination, 77 Fed. Reg. at 69697-69698.

137 *See* Treasury Determination, 77 Fed. Reg. at 69698-69699.

of business. Although some of our members believe that FX window forwards may still be transacted by banks with non-ECPs under these circumstances, based on an analysis that jurisdiction over such transactions has been transferred fully to the applicable Prudential Regulators[138] under Section 2(c) of the CEA and such regulators do not distinguish FX window forwards from other FX forwards, other members are concerned that these transactions cannot be entered into with non-ECPs because of the Section 2(e) prohibition. These transactions may still be able to be entered into under retail forex rules, but those rules create additional costs and burdens for non-ECP small businesses. Many banks that have provided FX window forwards to such customers do not operate retail forex businesses and will be unable to provide this product to their customers if it must be provided in compliance with—rather than pursuant to an exclusion from—the retail forex rules. Thus, if FX window forwards are treated differently than FX forwards that are exempt under the Treasury Determination, they would become less available to and more expensive for many commercial end-users, with increased settlement risk for the banks providing these transactions to their customers.

b. **Congress Has Excluded FX Transactions Entered into by Businesses That Make or Take Delivery in Connection with Their Lines of Business from Restrictive Regulation, and FX Window Forwards Should Be Treated the Same.** Section 2(c) of the CEA provides an exception to the retail forex rules for a contract that "creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business." Because exempt FX forwards are not swaps, they are also not required to be transacted only with ECPs and can thus be used by small businesses under the line-of-business exclusion in Section 2(c). Under Title VII, exempt FX forwards are subject to reporting requirements and, if entered into by a registered swap dealer, also subject to business conduct rules and trade documentation. Thus, although subject to less onerous regulation than swaps, exempt FX forwards are still subject to significant regulatory oversight. FX window forwards should be allowed to be transacted on the same terms under the Section 2(c) line-of-business exclusion.

FX window forwards are products used largely by businesses engaged in cross-border commerce to manage their risks related to payments to be received in foreign currency (*i.e.,* export currency risk) and their risk related to their obligations to make such payments (*i.e.,* import currency risk). Indeed, Export.gov, a US government website managed by the International Trade Administration, US Department of Commerce, to "provide trusted market intelligence, practical advice and business tools to help US companies expand in global markets[,]"[139] explicitly recommends the use of FX window forwards (emphasis added):

> The most direct method of hedging FX risk is a forward contract, which enables the exporter to sell a set amount of foreign currency at a pre-agreed exchange rate with a delivery date from three days to one year into the future. For example, U.S. goods are sold to a German company for €1 million on 60-day terms and the forward rate for "60-day euro" is 0.80 euro to the dollar. The U.S. exporter can eliminate FX exposure by contracting to deliver €1 million to its bank in 60 days in exchange for payment of $1.25 million. Such a forward contract will ensure that the U.S. exporter can convert the €1 million into $1.25 million, regardless of what may happen to the dollar-euro exchange rates over the next 60 days. However, if

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[138] Section 1a(39) of the CEA defines the term "Prudential Regulators" to refer to the FRB, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency. 7 U.S.C. § 1a(39).

[139] Int'l Trade Admin., U.S. Dep't of Commerce, EXPORT.GOV: HELPING U.S. COMPANIES EXPORT, https://www.export.gov/welcome (last visited Sept. 25, 2017).

> the German buyer fails to pay on time, the U.S. exporter will still be obligated to deliver €1 million in 60 days. **Accordingly, when using forward contracts to hedge FX risk, U.S. exporters are advised to pick forward delivery dates conservatively or to ask the trader for a "window forward" which allows for delivery between two dates versus a specific settlement date.** If the foreign currency is collected sooner, the exporter can hold on to it until the delivery date or can "swap" the old FX contract for a new one with a new delivery date at a minimal cost. Note that there are no fees or charges for forward contracts since the FX trader makes a "spread" by buying at one price and selling to someone else at a higher price.[140]

In an FX window forward, the length of the window typically is set to allow customers to manage risks either with respect to a particular payment or shipment for which the date of receipt is not yet known, or for all such payments and shipments in a set period of time. FX window forwards typically do not have a duration of more than 18 months, and the window is generally a much shorter period within that term.

FX window forwards are a commercial product entered into to hedge the currency risks of a particular business, and fit well within the language and intent of the Section 2(c) line-of-business exclusion. If they are regulated as swaps, however, a large number of small business users of this product to hedge their import and export risk may no longer have access to this product at a commercially acceptable cost.

c. **FX Window Forwards Share Characteristics with Physically Delivered Forward Contracts on Non-Financial Commodities Involving Volumetric Optionality.** FX window forwards should be afforded similar treatment as forward contracts for non-financial commodities with volumetric optionality that continue to benefit from the forward contract exclusion. In finalizing its further definition of "swap" and other product-specific terms under the Dodd-Frank Act (the "Final Products Rules"), the Commission took the position that, subject to satisfaction of a seven-part test, non-financial forward contracts with embedded optionality in respect of the delivery date for a contract that is intended to be physically delivered does not alter the status of the contract as an exempt forward contract under the forward contract exclusion for non-financial commodities. In other words, optionality on the delivery date is not dispositive in creating a swap, so long as physical delivery is intended to occur at the inception of the contract (save for book-out exclusions).[141]

Further, in 2015, the Commission finalized further interpretive guidance (the "Volumetric Optionality Interpretation"), which (i) clarified that, in determining whether a forward contract with embedded volumetric optionality would qualify for the forward contract exclusion, the Commission would take a similar approach as it had traditionally taken in the context of the forward

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[140] Int'l Trade Admin., U.S. Dep't of Commerce, *Foreign Exchange Risk*, TRADE FINANCE GUIDE: A QUICK REFERENCE FOR U.S. EXPORTERS (April 27, 2016), *available at* https://www.export.gov/article?id=Trade-Finance-Guide-Chapter-14-Foreign-Exchange-FX-Risk-Management (last visited Sept. 25, 2017).

[141] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48208, 48240 (Aug. 13, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-08-13/pdf/2012-18003.pdf ("Products Release") ("[T]he CFTC clarifies that embedded optionality as to delivery points and delivery dates will not cause a transaction that otherwise qualifies as a forward contract to be considered a swap. The CFTC emphasizes, however, that delivery must occur at some delivery point and on some date, or the lack of delivery must be due to the transaction being booked out or otherwise be consistent with the CFTC's interpretation regarding the forward exclusions from the swap and future delivery definitions.").

contract exclusion in the futures context (*i.e.,* whether the intention of the counterparties is to make and take delivery of a commodity, rather than to speculate on favorable market conditions)[142] and (ii) further clarified and amended the seven-part test previously set forth in the Final Products Rules, which provides that an agreement, contract or transaction falls within the forward exclusion from the "swap" and "future delivery" definitions, notwithstanding that it contains embedded volumetric optionality, if:

i. The embedded optionality does not undermine the overall nature of the agreement, contract or transaction as a forward contract;

ii. The predominant feature of the agreement, contract or transaction is actual delivery;

iii. The embedded optionality cannot be severed and marketed separately from the overall agreement, contract or transaction in which it is embedded;

iv. The seller of a non-financial commodity underlying the agreement, contract or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract or transaction, to deliver the underlying non-financial commodity if the embedded volumetric optionality is exercised;

v. The buyer of a non-financial commodity underlying the agreement, contract or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract or transaction, to take delivery of the underlying non-financial commodity if the embedded volumetric optionality is exercised;

vi. Both parties are commercial parties; and

vii. The embedded volumetric optionality **is primarily intended, at the time that the parties enter into the agreement, contract or transaction, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of**, the non-financial commodity.[143]

By analogy, FX window forwards are very much in line with this approach and would meet each prong of the seven-part test (save for the fact that this is a financial instrument). In particular, prong (vii) of the seven-part test is quite analogous to the FX hedging needs of market participants which enter into FX window forwards. The settlement window in an FX window forward is provided primarily to address the uncertain settlement date of the underlying payment, against the currency exposure of which the FX window forward is meant to hedge. As with the non-financial commodity forward contracts at issue in the Commission's Volumetric Optionality Interpretation, the optionality embedded in FX window forwards is driven by the existence of the underlying need for the hedge in an uncertain environment that is outside the control of the market participant which is purchasing the hedge. Under non-financial forward contracts with volumetric optionality, the

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[142] *See, e.g.,* Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39188 (Sept. 25, 1990); Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options, 50 Fed. Reg. 39656 (Sept. 30, 1985).

[143] *See* Forward Contracts with Embedded Volumetric Optionality, 80 Fed. Reg. 28239 (May 18, 2015), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-05-18/pdf/2015-11946.pdf (emphasis added) ("Volumetric Optionality Interpretation"). By way of example, the Commission noted that the scheduling of plant maintenance or plans to expand the business would not cause the seventh element to fail, despite the fact that such decisions are within the parties' control. *See* Volumetric Optionality Interpretation, 80 Fed. Reg. at 28242.

underlying supply and demand for the contract can drive a change in delivery date and deliverable supply. Similarly, for FX window forwards, the underlying need for the FX hedge is driven by the settlement of the underlying payment, which creates the foreign currency exposure, rather than the price or exchange rate which applies to the contract. The settlement of the underlying payment may come at a variable time and not necessarily on the expressed delivery date. The counterparty cannot control the settlement of the underlying payment and, as a result, the need for optionality on delivery date, becomes a necessity to properly hedge the underlying currency risks it is trying to solve for by entering into the FX trade.

Furthermore, clients can effectively obtain the same flexibility inherent in FX window forwards by executing a vanilla FX forward and then seeking early termination and settlement from the swap dealer, which is entirely permissible. Clients do, however, prefer the legal certainty of having that early settlement option embedded in the contract, rather than having to seek the swap dealer's consent to an early settlement.

d. **The Retail Forex Rules Are Not Designed for Small Businesses That Are Using FX Products to Hedge Commercial Risk.** A small business that uses an FX window forward to hedge commercial risk would typically do so as part of its overall relationship with its bank. Thus, the small business would not have to post cash or cash equivalents as margin but might be able to enter into the transaction on an unsecured basis or as secured under its existing credit agreement with its counterparty bank. Under the retail forex rules adopted by the Commission[144] or the Prudential Regulators,[145] however, these customers would have to post liquid margin and be subject to daily margin calls based on changes to the mark-to-market value of the forward agreement. These margin requirements, which may be appropriate for retail investors engaging in speculative trades, would impose significant costs and liquidity burdens on business users of this product that were not considered when the retail foreign exchange rules were adopted. As discussed above, Congress has already excluded from the retail forex rules a contract that "creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business." We believe that FX window forwards should be permitted to trade subject to the same exception.

Accordingly, for the reasons set forth above, we recommend that the Commission clarify that FX window forwards shall be treated as FX forwards (rather than as swaps) for purposes of its regulations promulgated pursuant to Title VII the Dodd-Frank Act.

3. *Consider a General Exemption of Inter-Affiliate Transactions from the Commission's Rulemakings Under Title VII of the Dodd-Frank Act.*

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[144] Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 Fed. Reg. 55410 (Sept. 10, 2010), *available at* https://www.gpo.gov/fdsys/pkg/FR-2010-09-10/pdf/2010-21729.pdf.

[145] Board of Governors of the Federal Reserve System, Retail Foreign Exchange Transactions (Regulation NN), 78 Fed. Reg. 21019 (April 9, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-04-09/pdf/2013-08163.pdf; Office of the Comptroller of the Currency, Retail Foreign Exchange Transactions, 76 Fed. Reg. 41375 (July 14, 2011), *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17514.pdf.

For the reasons listed in our joint letter to the US House of Representatives in response to the inter-affiliate transactions amendment to H.R. 238,[146] and as set forth below, we recommend that the Commission consider exempting inter-affiliate transactions from all rulemakings under Title VII of the Dodd-Frank Act.

Businesses from all segments of the economy rely on derivatives to protect their core business activities from the risks they face in their day-to-day operations, and many businesses also use internal risk-management transactions that – unlike market-facing derivative transactions between third parties – are entered into among affiliates of the same corporate group. The Commission itself highlighted the risk-management benefits of inter-affiliate transactions in finalizing its inter-affiliate exemption from mandatory clearing under Rule 50.52:[147]

> Executing swaps through one affiliate may enable corporate entities to concentrate their swap and hedging expertise and activity within a single affiliate, which reduces personnel costs. It also allows the corporation to net various positions before facing the market, thus reducing the number of market facing swaps, and the attendant fees.
>
> Moreover, these affiliate structures may not only reduce costs, but certain types of risk for the corporation as well.[148]

The Commission had also previously recognized, when it was finalizing its definition of "swap dealer" in Rule 1.3(ggg), that transactions between majority-owned affiliates do not implicate the policy concerns that swap dealer regulation was meant to mitigate:[149]

> These rules are consistent with the . . . recognition of the need to consider the economic reality of any swaps or [SBS] that a person enters into with affiliates. Market participants may enter into such inter-affiliate swaps or [SBS] for a variety of purposes, such as to allocate risk within a corporate group or to transfer risks within a corporate group to a central hedging or treasury entity.
>
> Under the final rules, the dealer analysis will not apply to swaps and [SBS] between majority-owned affiliates. When the economic interests of those affiliates are aligned adequately—as would be found in the case of majority ownership—such swaps and [SBS] serve to allocate or transfer risks within an affiliated group, rather than to move those risks out of the group to an unaffiliated third party. For this reason, . . . **we do not believe that such swaps and [SBS] involve the**

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[146] American Bankers Association, Financial Services Forum, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Securities Industry and Financial Markets Association, Letter to US House of Representatives in Support of H.R. 238, Commodity End-User Relief Act (Jan. 12, 2017), *available at* https://www.sifma.org/wp-content/uploads/2017/05/SIFMA-Submits-Joint-Trade-Letter-to-US-House-of-Representatives-in-support-of-the-Lucas-Amendment-to-H.R.-238.pdf; *see also* Commodity End-User Relief Act, H.R. 238, 115th Cong. (1st Sess. 2017), *available at* https://www.congress.gov/115/bills/hr238/BILLS-115hr238rfs.pdf.

[147] *See* 17 C.F.R. § 50.52; Inter-Affiliate Clearing Exemption.

[148] Inter-Affiliate Clearing Exemption, 78 Fed. Reg. at 21771.

[149] *See* 17 C.F.R. § 1.3(ggg)(g)(i) ("In determining whether a person is a swap dealer, that person's swaps with majority-owned affiliates shall not be considered.").

interaction with unaffiliated persons to which dealer regulation is intended to apply.[150]

While the Commission has made efforts to account for a different regulatory treatment of inter-affiliate swaps through various rule exemptions and Staff no-action letters,[151] there remains a lack of consistency across the Commission's regulatory requirements under Title VII of the Dodd-Frank Act. We therefore urge the Commission to either clarify or amend its rules to provide, as necessary, that inter-affiliate transactions are not subject to the Commission's swaps regulation.

4. *Ensure the Relevant End-User Exceptions Are Consistent Across the Commission's Various Rulemakings.*

Over recent years, market participants have familiarized themselves with the commercial end-user exception from mandatory clearing for non-financial entities under Rule 50.50 (the "End-User Exception"),[152] and have become accustomed to giving and receiving notifications of their reliance on the End-User Exception with respect to swaps subject to the Commission's clearing mandate. More recently, Registered Swap Entities have endeavored to obtain a separate representation from their swap counterparties regarding their qualification for an exemption from application of either the Commission's margin requirements for uncleared swap transactions (the "CFTC Margin Rules")[153] or the PR Margin Rules[154] (together with the CFTC Margin Rules, collectively referred to herein as the "US Margin Rules"), as applicable, which is available to (i) commercial end-users, including treasury affiliates (that qualify for

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150 Definitions Release, 77 Fed. Reg. at 30624-30625 (emphasis added) (citations omitted).

151 *See, e.g.,* 17 C.F.R. § 23.159; CFTC Letter No. 16-84, No-Action Relief from Regulation 50.52(b)(4)(ii) for Swaps with Eligible Affiliate Counterparties Located in Australia or Mexico (Dec. 15, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-84.pdf; CFTC Letter No. 16-80; CFTC Letter No. 15-62, Extension of Time-Limited No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52 (Nov. 17, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-62.pdf; CFTC Letter No. 14-136, Extension of Time-Limited No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52 (Nov. 7, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-136.pdf; CFTC Letter No. 14-26, Time-Limited No-Action Relief from the Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities Not Electing Commission Regulation § 50.52 (March 6, 2014), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/letter/14-26.pdf; Inter-Affiliate Clearing Exemption; CFTC Letter No. 13-09, No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements Under Parts 45, 46, and Regulation 50.50(b) of the Commission's Regulations (April 5, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-09.pdf.

152 17 C.F.R. § 50.50. The End-User Exception under Section 2(h)(2) of the CEA is available to non-financial entities that are using the swap to hedge or mitigate commercial risk and notify the Commission how it generally meets it financial obligations.

153 *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 636 (Jan. 6, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-01-06/pdf/2015-32320.pdf.

154 As used herein, "PR Margin Rules" refers to the Prudential Regulators' margin requirements for uncleared swap and uncleared SBS transactions. *See* Margin and Capital Requirements for Covered Swap Entities, 81 Fed. Reg. 50605 (Aug. 2, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-08-02/pdf/2016-18193.pdf; Margin and Capital Requirements for Covered Swap Entities, 80 Fed. Reg. 74840 (Nov. 30, 2015), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-11-30/pdf/2015-28671.pdf.

the End-User Exception) acting as agent, (ii) financial institutions (*i.e.,* small banks, savings associations, Farm Credit System institutions, credit unions) with total assets of US$10 billion or less, (iii) certain financial cooperatives hedging the risks associated with originating loans for their members and (iv) certain captive finance companies ("Exempted End-Users"). The US Margin Rules apply to Registered Swap Entities and "financial end users" (as defined in the US Margin Rules, a "Financial End-User"),[155] the definition of which does not align perfectly with the definition of "financial entity" in Section 2(h)(2)(C) with respect to the End-User Exception ("Financial Entity")[156] – the result is that a swap counterparty, whose uncleared swap transactions are outside the scope of the US Margin Rules because such counterparty is not a Financial End-User, may nonetheless not qualify for the End-User Exception because it falls within the Financial Entity definition. Because of this variance, Registered Swap Entities often obtain separate "end-user" representations from each of their swap counterparties, which compounds the administrative costs associated with completing the regulatory onboarding process.

In order to align the scope of the required representations, we urge the Commission to issue no-action relief providing that a swap counterparty which is not a Financial End-User for purposes of the US Margin Rules, would not be considered to be a Financial Entity for purposes of electing the End-User Exception to mandatory clearing. We believe that such relief would standardize the two sets of exceptions in a way that would permit Registered Swap Entities to obtain a single representation from each swap counterparty which would suffice for purposes of both sets of rules.

Furthermore, we recommend that the Commission work alongside the Prudential Regulators to clarify that parties, whose swaps qualify for the exemption under the US Margin Rules by virtue of one of the parties being an Exempted End-User, (i) need only have reported their election of the End-User Exception in respect of uncleared swaps which would otherwise be subject to mandatory clearing (*e.g.,* certain interest rate swaps and index CDS) and (ii) are not required to have submitted any reports in respect of the End-User Exception for uncleared swaps which are no subject to mandatory clearing, in light of the fact that the parties will not have reported their election of the End-User Exception with respect to such swaps.[157]

5. *Streamline Regulation of Mixed Swaps.*

For the reasons listed in the FSR Treasury Letter,[158] and as set forth below, we recommend that the Commission work with the SEC to either reduce or eliminate the number of products treated as "mixed swaps."

Currently, a broad range of swaps may be treated as "mixed swaps" over which the Commission and the SEC have joint jurisdiction. The resulting uncertainty as to the potential increased regulatory burden associated with these swaps has had a chilling effect on trading. Furthermore, the process for determining

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155 17 C.F.R. § 23.151.

156 7 U.S.C. § 2(h)(2)(C).

157 The US Margin Rules provide that, in order for an uncleared swap to qualify for an exemption from the US Margin Rules by virtue of one of the counterparties being an Exempted End-User, the Exempted End-User must, *inter ali*a, qualify for the End-User Exception under Section 2(h)(7)(A) of the CEA, prong (iii) of which requires that the counterparty electing the End-User Exception notify the Commission how it generally meets its financial obligations associated with entering into uncleared swaps. *See* 17 C.F.R. § 23.150(b)(1); PR Margin Rules, § __.1(d)(i); 7 U.S.C. § 2(h)(7)(A)(iii). Rule 50.50(b) provides that, when a counterparty elects the End-User Exception under Section 2(h)(7)(A) of the CEA, the reporting counterparty shall provide (or cause to be provided), to an SDR (among other information), notice of the End-User Exception election. 17 C.F.R. § 50.50(b).

158 *See* FSR Treasury Letter at p. 72.

the regulatory treatment of certain mixed swaps under Rule 1.9(c) – whereby a counterparty is required to write into the Commission and the SEC to request that they issue a joint order as to the regulatory treatment of the mixed swap – provides for either (i) a delay in the negotiation and execution of the mixed swap at question or (ii) a requirement that counterparties expend duplicative compliance efforts and resources to ensure their compliance with both the Commission's and the SEC's respective derivatives regulatory regime.[159]

In the absence of any up-front legal certainty or further guidance, we believe that the Commission should work alongside the SEC to either (i) eliminate the category of mixed swaps altogether (and treat each type of swap (or SBS, as applicable) as subject to either Commission or SEC jurisdiction, but not both) or, (ii) at the very least, significantly narrow the definition of "mixed swap" to include only those products that are the most difficult to categorize. The treatment of these products as either swaps or SBS (and the corresponding jurisdictional implications) should be based on which regulatory category better suits the predominant economic terms of the product, with considerable deference to the parties' choice of classification, as notified to the Commission and the SEC.

B. Margin and Capital Rules; Other Collateral Requirements.

1. *The Commission Should Consider Amending Certain Aspects of Its Uncleared Swap Margin Rules.*

For the reasons listed in our previous comment letter dated December 2, 2014[160] in respect of the CFTC Margin Rules, in the FSR Treasury Letter[161] and as set forth below, we recommend that the Commission consider key amendments to the CFTC Margin Rules to align with the analogous regulatory regimes promulgated by other G-20 regulators[162] and reduce unnecessary costs for counterparties to swaps which do not raise specific concerns regarding systemic risk in the derivatives markets.

a. Exempt Inter-Affiliate Swaps from the Commission's IM Requirements for Uncleared Swaps.

Under the CEA, Commission regulations and Staff no-action letters, a number of categories of swaps market participants are not required to clear swaps even if that category of swaps is generally subject to the Commission's mandatory clearing requirements (*e.g.,* certain small banks, non-financial entities and eligible treasury affiliates). The CEA and Commission regulations likewise provide similar exemptions from the CFTC Margin Rules for many of the same categories of swap counterparties. However, while the Commission has granted an exemption from mandatory clearing for certain inter-affiliate swaps, the Commission and the Prudential Regulators have not exempted uncleared inter-affiliate swaps from the CFTC Margin Rules and the PR Margin Rules, respectively. Where a "Covered Swap Entity" (as defined in the US Margin Rules) enters into an uncleared swap with a Financial End-User affiliate, such swap would be subject to margin requirements under the US Margin Rules (notwithstanding that certain special rules

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159 *See* 17 C.F.R. § 1.9(c).

160 Financial Services Roundtable, Comment on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, Comment No. 60040 (Dec. 2, 2014), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60040; *see* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 Fed. Reg. 59898 (proposed Oct. 3, 2014), *available at* https://www.gpo.gov/fdsys/pkg/FR-2014-10-03/pdf/2014-22962.pdf.

161 *See* FSR Treasury Letter at pp. 72, 75, 78.

162 *See* Group of Twenty, Leaders' Statement, The Pittsburgh Summit (Sept. 24-25, 2009), *available at* https://www.g20.org/Content/DE/StatischeSeiten/Breg/G7G20/Anlagen/G20-erklaerung-pittsburgh-2009-en.pdf?__blob=publicationFile&v=1.

would apply to such swap). As discussed above in Paragraph VI.A.3 (*Consider a General Exemption of Inter-Affiliate Transactions from the Commission's Rulemakings Under Title VII of the Dodd-Frank Act*), FSR supports an exemption of all inter-affiliate transactions from the scope of the Commission's swaps regulations. In the absence of a wholesale exemption, we would urge the Commission at least to coordinate with the Prudential Regulators to amend the US Margin Rules to provide an exemption from the IM posting and collection requirements for inter-affiliate swaps, in the interest of achieving parity between the swaps clearing mandate, on one hand, and the uncleared swap margin rules, on the other.

b. Revise the Commission's Uncleared Swap Margin Rules to Align with Non-US Regulatory Regimes.

The US Margin Rules are more onerous in certain respects than the corresponding margin requirements promulgated by regulators in the EU and other G-20 jurisdictions. For the reasons listed in the FSR Cross-Border Margin Rules Letter,[163] the FSR Treasury Letter[164] and as set forth below, we recommend that the Commission revise its uncleared swap margin rules in an effort to harmonize with the analogous regimes of foreign regulatory authorities.

i. **Harmonize the Commission's Rules for Settlement Timing with Those of Non-US Regulatory Regimes in Respect of the Posting of Uncleared Swap Margin.** The US Margin Rules require that margin be posted and collected on a T+1 basis in all cases, while other jurisdictions' analogous margin rules (including the EU margin requirements for non-centrally cleared OTC derivatives (the "EU Margin Rules")) permit margin to be exchanged on a less frequent basis in certain circumstances (*i.e.,* T+2 or greater). Accordingly, we support amendments to the US Margin Rules to align transfer timing requirements with those required in the EU and elsewhere (including, *e.g.,* Australia, Switzerland).

ii. **Clarify the Scope of Products Permitted in the Initial Margin Calculation Under the Commission's Uncleared Swap Margin Rules.**

- **Codify Existing No-Action Relief Regarding Inclusion of SBS in IM Product Set.** The PR Margin Rules permit counterparties to calculate IM on an aggregate net basis with respect to all uncleared swaps and uncleared SBS governed by an eligible master netting agreement (as defined in the US Margin Rules, an "EMNA"),[165] though the CFTC Margin Rules do not expressly permit SBS to be included in the margin calculations thereunder.[166] On August 23, 2016, DSIO addressed the discrepancy between the CFTC Margin Rules and the PR Margin Rules with respect to the inclusion of SBS in a netting set for IM calculation purposes by issuing no-action relief for non-prudentially regulated swap dealers that collect and post IM under the CFTC Margin Rules on a portfolio basis for swaps and SBS ("CFTC Letter No. 16-71").[167] We appreciate and commend the Commission's efforts to align the CFTC Margin Rules with the PR Margin Rules in this regard, and respectfully request that the Commission codify the relief issued by DSIO in CFTC Letter No. 16-71.

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163 See FSR Cross-Border Margin Rules Letter.

164 *See* FSR Treasury Letter at pp. 85-86.

165 *See* PR Margin Rules, § __.5(a).

166 *See* 17 C.F.R. § 23.153(d).

167 CFTC Letter No. 16-71, Request to Include Security-Based Swaps in Product Set for Initial Margin for Uncleared Swaps (Aug. 23, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-71.pdf.

- **Expressly Align Permitted IM Product Scope with EU Margin Rules.** The Dodd-Frank Act expressly excluded certain purchases and sales of securities from the swap and SBS definitions, including (i) purchases and sales of securities on a fixed or contingent basis, (ii) sales of securities for deferred shipment or delivery that are intended to be physically settled[168] and (iii) security options.[169] The Commission and the SEC later clarified in the Final Products Rules that security forwards, in which the sale of the security occurs at the time the forward contract is entered into, with the performance of the contract deferred or delayed and which is intended to be physically settled, would be within the security forward exclusion and therefore outside of the swap and SBS definitions.[170] Furthermore, security options are not treated as swaps or SBS, and instead remain subject to existing securities laws and related SEC regulations.[171]

  The EU Margin Rules require that security options and physically-settled security forwards be included in the IM calculations (subject to a delayed compliance date for security options). However, because security options and physically-settled security forwards are not captured by the swap or SBS definitions, they are by definition outside the scope of the US Margin Rules, and are not expressly included in the product scope for purposes of calculating IM under the US Margin Rules. Neither the Commission nor the Prudential Regulators have specifically addressed the difference between the US and EU margin regimes with respect to the inclusion of security options and physically-settled security forwards in a portfolio netting set for purposes of collecting and posting IM under the US Margin Rules. This distinction between the US and EU regulatory regimes introduces significant operational complexities and risks. In addition to eliminating the administrative burden and cost expended by swap dealers in making two separate IM calculations with respect to each transaction governed by an EMNA, the alignment of the US and EU regulatory regimes with respect to calculating IM under an EMNA is appropriate from a risk management perspective – SBS, securities options and physically-settled security forwards are similar from an economic risk perspective, so including them in the risk offsets permitted for purposes of calculating risk exposure makes sense as a practical matter.

  We respectfully request that the Commission coordinate with the Prudential Regulators to clarify that the US Margin Rules would permit – but not require – swap dealers (and, with respect to the PR Margin Rules, SBSDs) to include security options and physically-settled security forwards in their IM calculations. We believe that this simple reform would help reduce the operational burdens on swap dealers that are subject to multiple uncleared swap margin regimes, thus allowing for more consistent calculations under both US and non-US regulations.

iii. **Amend the Uncleared Swap Margin Rules to Provide a *De Minimis* Exception for Non-Netting Jurisdictions to Align with Non-US Regulatory Regimes for Non-Centrally Cleared OTC Derivatives.** For purposes of determining the amount of margin that must be collected by a swap dealer, the US Margin Rules prohibit the swap dealer from netting its swaps with counterparties

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[168] *See* 7 U.S.C. § 1a(47)(B)(ii), (v), (vi); *see also* Products Release, 77 Fed. Reg. at 48244.

[169] *See, e.g.,* Products Release, 77 Fed. Reg. at 48343.

[170] *See* Products Release, 77 Fed. Reg. at 48244-48245, n. 408 (citing Securities Offering Reform, 70 Fed. Reg. 44722 (Aug. 3, 2005), *available at* https://www.gpo.gov/fdsys/pkg/FR-2005-08-03/pdf/05-14560.pdf).

[171] *See, e.g.,* Products Release, 77 Fed. Reg. at 48343.

located in jurisdictions for which such swap dealer is unable to conclude that the netting arrangement is an "eligible master netting agreement" as defined in the US Margin Rules (a "non-netting jurisdiction"). In determining the amount of margin to be posted (but not collected) by a swap dealer, the US Margin Rules permit the swap dealer to net a portfolio of swaps with such counterparties in non-netting jurisdictions, subject to certain conditions. For swaps with counterparties in non-netting jurisdictions, the US Margin Rules require (i) that margin be collected on a gross basis for swaps with such counterparties and (ii) that swap dealers have policies and procedures in place, and maintain books and records, in each case for purposes of complying (and documenting such compliance) with the conditions imposed on posting (on a net basis) and collecting (on a gross basis) margin with a swap dealer's counterparties in non-netting jurisdictions.[172] These requirements under the US Margin Rules that a swap dealer collect gross margin from counterparties in non-netting jurisdictions are more onerous than the corresponding rules promulgated by regulatory authorities in other G-20 jurisdictions (*e.g.,* the EU Margin Rules), which generally provide a *de minimis* exception in respect of swaps with counterparties located in non-netting jurisdictions.[173] We accordingly urge the Commission to support an amendment to the US Margin Rules providing a similar *de minimis* exception for purposes of determining the amount of margin to be collected by a swap dealer facing counterparties located in non-netting jurisdictions.

c. Provide Relief from IM Obligations Under US Margin Rules for Risk Participation Agreements.

We urge the Commission to consider working alongside the Prudential Regulators to provide relief from application of the IM posting and collection requirements under the US Margin Rules for parties entering into risk participation agreements ("RPAs") in the context of syndicated loan facilities.[174] From conversations with our members, we know that there have been (and there inevitably will be more) cases where the Fronting Bank (which has entered into the finance-linked interest rate swap with the borrower counterparty) is unable to enter into RPAs with the other syndicate lenders due to there not being IM documentation (and the requisite third-party custodial arrangements) in place between the Fronting Bank and such syndicate lenders (*i.e.,* the would-be Participation Banks). Oftentimes in these situations, the cost

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[172] 17 C.F.R. § 23.160(d); *see* PR Margin Rules, § __.5(a)(4).

[173] *See, e.g.,* Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 Supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC Derivatives, Central Counterparties and Trade Repositories with Regard to Regulatory Technical Standards for Risk-Mitigation Techniques for OTC Derivative Contracts Not Cleared by a Central Counterparty, 2016 O.J. (L 340), Art. 31 (Oct. 4, 2016), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2251&from=EN.

[174] RPAs may be used where a customer prefers to enter into a single interest rate swap facing one bank, rather than multiple banks. The bank that the customer faces acts as a fronting bank (the "Fronting Bank") and transfers participations of its loan with a borrower, along with the associated interest rate swap, to a group of other banks ("Participant Banks"). The participations in the loan are documented in loan participation agreements, while the corresponding participations in the related interest rate swap are documented in RPAs. Alternatively, if a bank customer (*i.e.,* the borrower) needs to hedge its interest rate exposure in connection with a loan (*i.e.,* a finance-linked interest rate swap), but the lender bank does not generally offer interest rate swaps for whatever reason (*e.g.,* it is a smaller community bank), the lender bank may arrange for another bank to act as the hedge bank facing the borrower counterparty on the finance-linked interest rate swap, with the lender bank then taking back the credit risk of its own customer through an RPA. A Participant Bank receives an initial fee, and then has no further involvement with the swap unless the borrower counterparty defaults. Under an RPA, if the borrower counterparty to the underlying interest rate swap defaults, the Participant Bank is responsible for its share of losses to the Fronting Bank. These arrangements are common when there are numerous banks participating in a loan; typically, a Participant Bank's risk participation under the RPA is *pro rata* to its participation in the loan.

associated with setting up a third-party custodian account is too high when considered against a relatively small trading relationship between the Fronting Bank and the would-be Participant Bank (which may be limited to the sole RPA being contemplated). While this is less of a concern for the larger dealers, who are more likely to have inter-dealer IM documentation and third-party custodial arrangements in place amongst themselves, the cost issue described in this example is faced most readily when the Participant Banks in question are smaller banks which may have inter-dealer IM arrangements in place with some, but not all, of the larger dealers which would take on the role of Fronting Bank in these RPA arrangements. In situations like these, where a larger lender bank would otherwise prefer go the RPA route with respect to the finance-linked swap if it already had IM arrangements in place with the smaller lenders in the syndicate, the larger dealer (*i.e.,* the would-be Fronting Bank) may have to carry 100 percent of the borrower counterparty default risk on the swap instead of passing *pro rata* portions onto the other members of the lending syndicate (as it would be able to do under an RPA structure).

RPAs allow members of a bank group to provide credit risk protection to a single bank that enters into a finance-linked interest rate swap, and are tied to a specific loan obligation that is actually held by the Fronting Bank and each Participant Banks. The underlying swap between the Fronting Bank and the borrower counterparty would presumably be exempt from the US Margin Rules by virtue of the borrower counterparty's qualifying for and electing the End-User Exception to mandatory clearing. We urge the Commission to consider the unique nature of RPAs and accordingly work alongside the Prudential Regulators to issue relief for RPAs from the IM requirements under the US Margin Rules.

d. Further Refine and Consider Targeted Relief from the IM Requirements Under the US Margin Rules.

For the reasons listed in the FSR Treasury Letter,[175] and as set forth below, we recommend that the Commission coordinate with the Prudential Regulators to further refine and consider targeted relief from the IM requirements under the US Margin Rules.

The US Margin Rules require daily two-way posting of IM and VM, as well as segregation of IM at a third-party custodian. While we believe the VM requirements are an important improvement in safety and soundness of the market, and a prudent risk management tool, the marginal risk management benefits of the current IM requirements are outweighed by their inordinate costs, which are draining market liquidity. At a minimum, swap dealers should be allowed discretion as to whether to collect IM from Financial End-users based on objective third-party credit ratings, their own internal credit assessments or a combination of both. Allowing IM decisions to be made by the markets is consistent with the Core Principles.

In addition, we believe that the Commission should work alongside the Prudential Regulators to amend or otherwise provide relief under the US Margin Rules, to ensure that IM calculation methods are appropriately refined to address the risk associated with the trading activity and credit quality of the trader. Industry estimates of the IM amount that will be required in future years suggest the minimum requirement will be greater than necessary, considering the nature and risk of the trades implicated, in particular as compared to current DCO requirements. The Commission and the Prudential Regulators should not require swap dealers to use calculation methods that result in the imposition of punitive IM requirements and reduced liquidity in the markets.

In general, we support the global alignment of IM requirements, and urge the Commission to make efforts to minimize the imposition of undue burdens arising from complex distinctions among various regulators' treatment of various categories of trades and counterparties. For example, FSR urges the

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[175] *See* FSR Treasury Letter at p. 75.

Commission to consider increasing the IM threshold in an effort to achieve cross-border harmonization of IM calculation for uncleared swaps.

2. *Revise the Commission's Customer Segregation Rules for Initial Margin.*

Section 724(c) of the Dodd-Frank Act amended the CEA to add Section 4s(l), which requires swap dealers to notify their uncleared swap counterparties of such counterparties' right to have any IM segregated in a separate account. While we appreciate the customer protection aspect driving the Commission's adoption of the IM segregation rules in Part 23,[176] the reality is that compliance with these regulations has proven to be unduly burdensome for swap dealers when weighed against the protections afforded to swap counterparties thereunder. Our members have advised that counterparties (i) rarely, if ever, elect to segregate IM and (ii) have found little use in receiving the notices. As such, we would recommend the Commission make efforts to address the IM segregation rules in Part 23 as set forth below.

a. **Eliminate the Annual Notice Requirement.** Section 4s(l)(1)(A) of the CEA states that a swap dealer must notify its counterparty of the right to require segregation of funds or other property supplied to margin, guarantee or secure the counterparties obligations "at the beginning of a swap transaction."[177] While the Commission noted in its adopting release for the IM segregation rules that requiring such notification on a transaction-by-transaction basis would be repetitive, "redundant, costly and needlessly burdensome[,]" the Commission cited "the importance of the segregation decision" as its basis for requiring such notification under Rule 23.701(e) on an annual basis.[178] We would urge the Commission to revisit the annual notice requirement under Rule 23.701(e) in an effort to further reduce the undue burden imposed on swap dealers under the Commission's IM segregation rules.

b. **Provide Relief from Application of the Quarterly Reporting Requirement.** Should the Commission deem counterparty notices essential to satisfaction of its statutory mandate under the Dodd-Frank Act, we would urge the Commission to nonetheless support an amendment to Section 4s(l)(4) of the CEA to eliminate the quarterly reporting requirement in respect of IM segregation and retain only the annual notice requirement under Rule 23.704 or, alternatively, issue no-action relief with respect to the quarterly reporting requirement in Rule 23.704. As the Commission itself noted in the adopting release for Rule 23.704, quarterly reporting imposes various administrative burdens on swap dealers which outweigh the customer protection benefits achieved by the imposition of the quarterly reporting requirement.[179]

In addition, we note that the scope of the quarterly notice is vague and – should the Commission retain its quarterly notice requirement under Rule 23.704 – we respectfully request that the Commission issue interpretive guidance with respect to the scope of the quarterly notice requirement, as described below. Rule 23.704 requires a certification that the "back office procedures" of the swap dealer are "in compliance with the agreement" of the parties. It is not clear what specific contractual provisions are being referenced. Our members believe this may be referring to either (i) a potential restriction on rehypothecation contained in Paragraph 13 of the standard New York law-governed Credit Support Annex (Bilateral Form), as published by ISDA

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176 *See* Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy, 78 Fed. Reg. 66621 (Nov. 6, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-11-06/pdf/2013-26479.pdf ("Uncleared Swap Customer Collateral Protection Rules"); 17 C.F.R. §§ 23.700-23.704.

177 7 U.S.C. § 6s(l)(1)(A).

178 *See* Uncleared Swap Customer Collateral Protection Rules, 78 Fed. Reg. at 66625; 17 C.F.R. § 23.701(e).

179 *See* Uncleared Swap Customer Collateral Protection Rules, 78 Fed. Reg. at 66629; 17 C.F.R. § 23.704.

in 1994, and/or (ii) perhaps compliance with a call to return unsegregated IM upon termination of the related swap. If these are the "agreement[s] of the counterparties" to which Rule 23.704 refers, we respectfully request that the Commission provide certainty to market participants by issuing an interpretation to that effect.

c. **Issue No-Action Relief Regarding Negative Consent to Waiver of IM Segregation.** While the market has adjusted to the general process of sending IM segregation notices and obtaining IM segregation elections from OTC swap counterparties,[180] our members indicate that their swap counterparties rarely elect to segregate collateral posted as IM and often drag their feet on returning their acknowledgment of receipt of such notice (or IM segregation election, as applicable). We appreciate and commend DSIO's efforts in publishing the Staff's interpretation in CFTC Letter No. 14-132, blessing a counterparty's negative consent in the context of IM segregation elections ("CFTC Letter No. 14-132").[181] In order to further decrease the operational and administrative burden imposed on swap dealers under the IM segregation rules, we urge the Commission to codify its interpretation in CFTC Letter No. 14-132 with respect to swap dealers' ability to rely on negative consent, provided that its IM segregation notice includes a prominent and unambiguous statement that failure to respond will be deemed to be an election by the counterparty not to require segregation of collateral posted as IM, unless and until the counterparty notifies the swap dealer to the contrary.

3. *The Commission Should Refrain From Finalizing Its Capital Rules Until the SEC Finalizes Its Analogous Rules.*

Last year, the Commission proposed to adopt new regulations and to amend existing regulations to implement Sections 4s(e)-(f) of the CEA with respect to capital requirements for non-prudentially regulated swap dealers and related financial reporting and recordkeeping requirements (the "Proposed SD Capital Requirements"),[182] in which it specifically noted that it considered the SEC's proposal regarding capital rules for non-prudentially regulated SBSDs (the "Proposed SBSD Capital Requirements") in developing its Proposed SD Capital Requirements.[183] We urge the Commission to refrain from finalizing the Proposed SD Capital Requirements until the SEC has finalized its Proposed SBSD Capital Requirements, in an effort to ensure as much harmonization between the Commission and the SEC as possible in respect of carrying out the respective statutory mandates under Title VII of the Dodd-Frank Act.

4. *The Commission Should Eliminate Duplicative Reporting Requirements in Its Proposed Capital Rules.*

Under the Proposed SD Capital Requirements, swap dealers subject to prudential regulation will be required to submit certain financial information to the Commission. The Commission has stated that the

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180 *See* 17 C.F.R. § 23.701; 7 U.S.C. §§ 6s(l)(1)(A), 6s(l)(4).

181 CFTC Letter No. 14-132, Staff Interpretation Regarding the Notification of Right to Segregation of Initial Margin in Uncleared Swap Transactions and Quarterly Reporting under Commodity Futures Trading Commission Regulations 23.701 and 23.704 (Oct. 31, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-132.pdf.

182 Capital Requirements for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 91252 (proposed Dec. 16, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-12-16/pdf/2016-29368.pdf ("Proposed SD Capital Requirements").

183 *See* Proposed SD Capital Requirements, 81 Fed. Reg. at 91254; *see also* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants, 77 Fed. Reg. 70214 (proposed Nov. 23, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-11-23/pdf/2012-26164.pdf.

financial information will be used to provide it and the NFA with swap trade data, which may be monitored as a part of their respective financial and market surveillance monitoring programs.[184] To the extent that prudentially regulated firms have already submitted such information to their respective Prudential Regulators, FSR does not believe that they should be required to comply with duplicative reporting requirements under the Commission's rules, as compliance will likely present significant time and resource constraints for swap dealers.

Furthermore, we believe that the Commission and NFA can conduct robust surveillance and monitoring programs by utilizing information that prudentially regulated firms already provide to the Prudential Regulators, the NFA and other Commission registrants. As the Commission noted in its Proposed SD Capital Requirements, the financial information that swap dealers will be required to provide to the Commission is already reflected in call reports, which are submitted to and reviewed by the Prudential Regulators for compliance with their respective capital requirements.[185] In addition to these reports, trade data reflecting positions and other financial data which the Commission and NFA can use for monitoring purposes is already provided by, or will be provided by, each swap dealer to the NFA,[186] as well as to Commission-regulated DCOs and SDRs. To the extent that the Commission believes it needs such information from prudentially regulated firms, FSR suggests that it be shared among government agencies (*e.g.,* the Commission, Prudential Regulators), SROs (*e.g.,* the NFA) and other Commission Registrants (*e.g.,* DCMs, SDRs) to the extent such agencies have jurisdiction over the particular swap dealer.

C. Cross-Border Application of Commission Regulations.

The Commission should ensure fair market access of US persons in foreign jurisdictions by amending its regulations and cross-border guidance to (i) align the Commission's rules with non-US regulatory regimes, (ii) forgo adoption of the Commission's 2016 proposed cross-border rules and the extension of its regulations to swaps arranged, negotiated or executed by US personnel, (iii) amend the Commission's cross-border guidance to require that substituted compliance determinations be made ahead of the effectiveness of the relevant US regulations and to allow for global coordination of implementation timelines and (iv) harmonize the US regime for IM with non-US regulatory regimes to ensure that US swap dealers are not at a competitive disadvantage.

1. *Provide Permanent Relief for Transactions Between Non-US Swap Dealers and Non-US Persons that Are "Arranged, Negotiated or Executed" by Personnel Located in the United States.*

[184] *See* Proposed SD Capital Requirements, 81 Fed. Reg. at 91279.

[185] We would note in particular that these call reports are publicly available on the Federal Financial Institutions Examination Council's ("FFIEC's") website. *See* Federal Financial Institutions Examination Council, https://cdr.ffiec.gov/public/ (last visited Sept. 25, 2017).

[186] *See* NFA Notice I-17-10, Monthly Risk Data Reporting Requirements for Swap Dealers (May 30, 2017), *available at* https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4817.

For the reasons listed in our previous comment letter (dated March 10, 2014)[187] and in the FSR Treasury Letter[188] in respect of the application of the Commission's regulations to swaps between non-US swap dealers and non-US counterparties that are "arranged, negotiated or executed" by personnel located in the United States ("ANE Transactions"), and as set forth below, we urge the Commission to consider providing permanent relief for ANE Transactions.

The 2013 advisory issued by DSIO states that a non-US swap dealer "regularly using personnel or agents located in the United States to arrange, negotiate or execute a swap" with a non-US person would generally be required to comply with the Commission's transaction-level requirements (including the EBC Rules), even with respect to its swaps with non-US persons (the "2013 ANE Advisory").[189] The 2016 Cross-Border Proposal, if finalized, would generally codify the 2013 ANE Advisory for ANE Transactions, with some clarifications (*e.g.,* focusing on the activities of personnel assigned to or regularly working in a US location). Importantly, however, the 2016 Cross-Border Proposal would not limit the scope of these ANE Transactions to those that are "regularly" arranged, negotiated or executed using US personnel, thereby forcing swap dealers to establish operational structures to identify each swap for which US personnel were involved in performing market-facing activities. Such a trade-by-trade analysis would be unnecessarily burdensome for swap dealers, and we accordingly recommend that the Commission not finalize the 2016 Cross-Border Proposal as originally proposed. Furthermore, we do not believe that ANE Transactions rise to the level of having a "direct and significant" connection with activities in, or effect on, US commerce, as required under Section 2(i) of the CEA.[190] While we appreciate the Staff's issuance and subsequent renewal of no-action relief from compliance with the 2013 ANE Advisory for certain cross-border transactions,[191] we would recommend that the Commission issue guidance to remove all ANE Transactions from the ambit of the Commission's transaction-level requirements for swaps entered into by swap dealers.

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[187] Securities Industry and Financial Markets Association, Futures Industry Association and Financial Services Roundtable, Comments on the Application of Commission Regulations to Swaps Between Non-US Swap Dealers and Non-US Counterparties Involving Personnel or Agents of the Non-US Swap Dealers Located in the United States, Comment No. 59793 (March 10, 2014), *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59793; *see* Request for Comment on Application of Commission Regulations to Swaps Between Non-US Swap Dealers and Non-US Counterparties Involving Personnel or Agents of the Non-US Swap Dealers Located in the United States, 79 Fed. Reg. 1347 (Jan. 8, 2014), *available at* https://www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2014-00080.pdf; *see also* CFTC Staff Advisory No. 13-69, Applicability of Transaction-Level Requirements to Activity in the United States (Nov. 14, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-69.pdf ("2013 ANE Advisory").

[188] *See* FSR Treasury Letter at p. 84.

[189] *See* 2013 ANE Advisory.

[190] *See* 7 U.S.C. § 2(i).

[191] *See* CFTC Letter No. 17-36, Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers (July 25, 2017), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-36.pdf; CFTC Letter No. 16-64, Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers (Aug. 4, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-64.pdf; CFTC Letter No. 15-48, Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers (Aug. 13, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-48.pdf; CFTC Letter No. 14-140, Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers (Nov. 14, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-140.pdf; CFTC Letter No. 14-74, Extension of No-Action Relief: Transaction-Level Requirements for

The 2013 Cross-Border Guidance provides relief from the transaction-level requirements for certain swaps entered into by foreign branches of US banks; however, to qualify as a "foreign branch" of a US bank for purposes of the 2013 Cross-Border Guidance (among other requirements):

> The employees negotiating and agreeing to the terms of the swap (or, if the swap is executed electronically, managing the execution of the swap), other than employees with functions that are solely clerical or ministerial, are located in such foreign branch or in another foreign branch of the U.S. bank[.]

Furthermore, the 2013 Cross-Border Guidance provides that:

> [I]f material terms of the swap are negotiated or agreed to by employees of the U.S. bank located in the United States, the Commission believes that generally the swap should be considered to be with the U.S. principal bank, rather than its foreign branch, for purposes of this Guidance.[192]

The 2013 ANE Advisory specifically captured swaps "between a non-U.S. [swap dealer] and a non-U.S. person booked in a non-U.S. branch of the non-U.S. [swap dealer] if the non-U.S. [swap dealer] is using personnel or agents located in the U.S. to arrange, negotiate, or execute such swap."[193] Along a similar vein as discussed above, we respectfully request that the Commission remove the limitation on qualification as a "foreign branch" of a US bank under the 2013 Cross-Border Guidance for swaps of which the material terms are negotiated or agreed to by employees of the US bank located in the United States. Specifically, we urge the Commission to issue guidance relieving, from transaction-level requirements, the swaps of (i) a non-US branch of a US swap dealer facing a non-US branch of a US bank, (ii) a non-US branch of a US swap dealer facing a non-US person and (iii) a non-US swap dealer facing a non-US branch of a US bank, in each case regardless of whether the terms of that particular swap were negotiated by an employee that happened to be physically located in the United States.[194]

Non-U.S. Swap Dealers (June 4, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-74.pdf; CFTC Letter No. 14-01, Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers (Jan. 3, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-01.pdf; CFTC Letter No. 13-71, No-Action Relief: Certain Transaction-Level Requirements for Non-U.S. Swap Dealers (Nov. 26, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-71.pdf.

[192] 2013 Cross-Border Guidance, 78 Fed. Reg. at 45330.

[193] 2013 ANE Advisory at p. 2.

[194] We would note that the Commission proposed to limit the applicability of transaction-level requirements under the EBC Rules to foreign branches in respect of their ANE Transactions, to solely require such foreign branch's compliance with Rules 23.410 (regarding fraud, manipulation and other abusive practices) and 23.433 (regarding fair dealing). The Commission noted in the 2016 Cross-Border Proposal that:

> This position reflects the Commission's belief that, in general, imposing its customer protection standards on transactions between a foreign branch of a U.S. [swap dealer] or a non-U.S. [swap dealer], on the one hand, and a counterparty that is a non-U.S. person or the foreign branch of a U.S. [swap dealer] on the other, would generally not be necessary to advance the goals of the Dodd-Frank customer protection regime. . . . By limiting the application of the [EBC Rules] to ANE [T]ransactions to the antifraud and fair dealing requirements, the proposed rule is tailored to ensure a basic level of counterparty protections while, consistent with the principles of international comity, recognizing the supervisory interests of the relevant foreign jurisdictions in applying their own sales practices requirements to transactions involving counterparties that are non-U.S. persons

2. ***Amend the Commission's Cross-Border Interpretive Guidance and the Cross-Border Application of Its Regulations to Align with the Analogous Requirements Under Parties' Local, Non-US Regulatory Regimes.***

For the reasons listed in the FSR Treasury Letter,[195] and as set forth below, we recommend that the Commission amend its cross-border interpretive guidance and the cross-border application of its regulations to align with the analogous requirements under parties' local, non-US regulatory regimes.

The Commission's 2013 Cross-Border Guidance and the Cross-Border Margin Rules provide only the narrowest of exemptions to non-US swap dealers, and permit substituted compliance with a foreign swap dealer's local regulatory regime only in very limited instances. We believe that this jurisdictional overreach would only be exacerbated by the 2016 Cross-Border Proposal.

Among other reforms, we believe the "US person" definition in the 2013 Cross-Border Guidance and the Cross-Border Margin Rules should be amended to remove the "principal place of business" test, which defines investment funds as US persons where the IA's senior personnel are located in the United States, even when the fund is organized outside of the United States. This overly-expansive US person definition incentivizes funds to favor non-US IAs and, in some cases, to terminate existing trading relationships in the United States, harming the US job market and U.S.-based financial professionals.

We urge the Commission to amend its rules and guidance to align its cross-border requirements with those of local jurisdictions, which amendments should eliminate the "principal place of business" test, in favor of a purely jurisdiction-based analysis.

3. ***Amend the Commission's Rules and Interpretive Guidance to Provide for (i) Pre-Effectiveness Substituted Compliance Determination and (ii) Coordinated Global Implementation Timelines.***

The 2013 Cross-Border Guidance and the Cross-Border Margin Rules provide for substituted compliance in limited instances where the Commission has determined that a non-US regulatory requirement is comparable to the corresponding US requirement. When the Commission issues such a comparability determination, a swap dealer that is subject to both the Commission's regime and a comparable non-US regulatory regime may choose to comply with the applicable non-US regulations in lieu of the Commission's analogous requirements. However, the Commission has been cautious in approving comparability determinations, granting them only in limited instances, and even then only after the relevant US regulations have become effective. Furthermore, while the Commission has repeatedly insisted that the comparability test is an "outcomes-based approach" and does not require that foreign jurisdiction's requirements be identical to the Commission's analogous regulations, in practice the Commission's comparability determinations have been granted on a requirement-by-requirement basis, and only where the requirements are nearly identical to the Commission's corresponding rules.[196]

> or foreign branches of a U.S. [swap dealer]. This approach recognizes the supervisory interests of the local jurisdiction with respect to swaps conducted within that jurisdiction and that **broadly imposing U.S. external business conduct standards with respect to such transactions would not be necessary to advance the goals of the Dodd-Frank customer protection regime**.

2016 Cross-Border Proposal, 81 Fed. Reg. at 71961-71962 (emphasis added); *see* 17 C.F.R. §§ 23.410, 23.433.

195 *See* FSR Treasury Letter at p. 83.

196 *See, e.g.,* Comparability Determination for Japan: Certain Entity-Level Requirements, 78 Fed. Reg. 78910 (Dec. 27, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30976.pdf.

We urge the Commission to amend its regulations and to issue new guidance clarifying that substituted compliance determinations may be issued prior to the effective date of the relevant Commission rules, and would further urge the Commission to prioritize global coordination of implementation timelines. We believe that comparability determinations should be a strictly outcomes-based test, based on either a category-by-category comparison or a holistic comparison of the Commission's regulatory regime to the analogous foreign regime as a whole, with less of a line-by-line focus on the possibility of regulatory arbitrage.

4. *Coordinate with the SEC and Other US Regulators to Provide for a Consistent US Person Definition Across Relevant US Regulatory Regimes.*

As noted above, we appreciate and commend the Commission's recent efforts in publishing the 2016 Cross-Border Proposal, in which the Commission has proposed to adopt the same "US person" definition for purposes of the cross-border application of its EBC Rules and the swap dealer *de minimis* registration threshold, as that which it adopted under the Cross-Border Margin Rules.[197] We are generally supportive of this aspect of the 2016 Cross-Border Proposal, specifically with respect to the elimination of both (i) the US majority ownership prong for collective investment vehicles and (ii) the prefatory phrase "includes, but is not limited to" in the US person definition under the 2013 Cross-Border Guidance.[198] While we are supportive of the Commission's finalizing the "US person" definition substantively as proposed in the 2016 Cross-Border Proposal, we urge the Commission to work with the SEC and the Prudential Regulators generally to encourage coordination and harmonization of the various regulators' respective "US person" definitions in a way that minimizes the regulatory compliance burden on firms registered as swap dealers and SBSDs pursuant to the agencies' derivatives rulemakings under Title VII of the Dodd-Frank Act.

5. *Recognize Compliance with Centralized Risk Management Requirements of Other US and Non-US Regulators.*

As discussed above, Rule 23.600 requires that swap dealers "establish, document, maintain, and enforce a system of risk management policies and procedures designed to monitor and manage the risks associated with [their] swaps activities",[199] and – among other enumerated requirements – further provides that each swap dealer must "establish and maintain a risk management unit with sufficient authority; qualified personnel; and financial, operational, and other resources to carry out the risk management program established pursuant to" Rule 23.600.[200] Many swap dealers are subject to similar risk management requirements promulgated by the SEC, Prudential Regulators or foreign regulatory authorities, which may not align perfectly with the centralized risk management requirements prescribed by the Commission in Rule 23.600. FSR respectfully requests that the Commission recognize a swap dealer's compliance with entity-level risk management requirements under regulations promulgated the SEC or a Prudential Regulator which are applicable to such swap dealer. We would further urge the Commission to recognize a swap dealer's compliance with consolidated risk management requirements prescribed by the Federal

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[197] *See* 2016 Cross-Border Proposal, 81 Fed. Reg. at 71948-71950; *see also* 17 C.F.R. § 23.160(a)(10); Cross-Border Margin Rules, 81 Fed. Reg. at 34821-34824.

[198] *See* 2013 Cross-Border Guidance, 78 Fed. Reg. at 45308-45317.

[199] 17 C.F.R. § 23.600(b)(1).

[200] 17 C.F.R. § 23.600(b)(5).

Reserve or an applicable foreign regulator, so long as such foreign regulator's consolidated capital framework is consistent with Basel III.[201]

D. Other Business Conduct Requirements.

1. *Clarify the Commission's Dispute Reporting Rules in Respect of Portfolio Reconciliation.*

In 2012, the Commission finalized requirements for swap dealers in respect of trade confirmation, portfolio reconciliation and compression and swap trading relationship documentation (the "Portfolio Reconciliation Rules"), including the requirement in Rule 23.502(c) that swap dealers provide notice to the relevant regulatory body (*i.e.,* the Commission, SEC or applicable Prudential Regulator) of any swap valuation dispute in excess of US$20 million (or its equivalent in any other currency).[202] The Commission later issued an order, effective March 1, 2016, which authorized the NFA to receive, review, maintain and serve as the official custodian of records for notices provided by swap dealers of swap valuation disputes in excess of US$20 million under Rule 23.502(c),[203] after which the NFA published certain notices to its members and an interpretive statement regarding the NFA's satisfaction of its mandate under the Commission's order.[204] The NFA's interpretive notice regarding NFA Compliance Rule 2-49, which is currently scheduled to go into effect on January 2, 2018, includes the requirement that swap dealers file a notice with the NFA of swap valuation disputes in respect of disputed amounts in excess of US$20 million, which requirement would apply to disputes involving the exchange of collateral, regardless of whether the margin requirements apply with respect to the underlying swaps. The requirement to file a notice of swap valuation dispute would also apply to swap transactions where the swap dealer does not exchange collateral, but where a portfolio valuation dispute exists in excess of US$20 million. While the NFA's interpretive notice does not constitute an interpretation with respect to Rule 23.502(c) that is additional to the Commission's own guidance or statements regarding its interpretation of Rule 23.502(c) in finalizing the Portfolio Reconciliation Rules,[205] the NFA's publication of its interpretive notice has caused confusion in the industry as to the interplay between the interpretive notice and Rule 23.502(c). In order to address this

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201 *See* Basel Committee on Banking Supervision, Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems (June 2011), *available at* http://www.bis.org/publ/bcbs189.pdf ("Basel III").

202 *See* Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 55904 (Sept. 11, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-09-11/pdf/2012-21414.pdf ("Portfolio Reconciliation Rules"); 17 C.F.R. § 23.502(c).

203 Performance of Certain Functions by the National Futures Association Related to Notices of Swap Valuation Disputes Filed by Swap Dealers and Major Swap Participants, 81 Fed. Reg. 3390 (Jan. 21, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-01-21/pdf/2016-01051.pdf ("Swap Valuation Dispute Order").

204 *See* NFA Interpretive Notice 9072, NFA Compliance Rule 2-49: Swap Valuation Dispute Filing Requirements (effective Jan. 2, 2018), *available at* https://www.nfa.futures.org/rulebook/rules.aspx?Section=9&RuleID=9072; NFA Notice I-17-13, Effective Date of Interpretive Notice to NFA Compliance Rule 2-49: Swap Valuation Dispute Filing Requirements (July 20, 2017), *available at* https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4827; NFA Notice I-16-07, CFTC Authorizes NFA to Receive Notices of Swap Valuation Disputes in Excess of $20 Million Filed by Swap Dealers and Major Swap Participants (Feb. 2, 2016), *available at* https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4689.

205 *See* Swap Valuation Dispute Order, 81 Fed. Reg. at 3391 ("This Order does not, however, authorize NFA to render 'no-action' positions, exemptions or interpretations with respect to applicable disclosure, reporting, recordkeeping and registration requirements.").

confusion, we urge the Commission to work with the NFA to provide some form of clarification with respect to the application of Rule 23.502(c) and the NFA's interpretive notice to avoid duplicative reporting.

2. *Permit Waiver of Pre-Trade Mark Disclosure Requirements for All Eligible Contract Participant Counterparties.*

On February 17, 2012, the Commission finalized Rule 23.431 under Section 4s(h)(3)(B) of the CEA, requiring that swap dealers disclose a pre-trade mid-market mark (the "PTM") and citing the purpose of its PTM requirement as being that:

> [T]he spread between the quote and mid-market mark is relevant to disclosures regarding material incentives and provides the counterparty with pricing information that facilitates negotiations and balances historical information asymmetry regarding swap pricing.[206]

Rule 23.431(c) provides an exception from the PTM requirement for swap dealers with respect to transactions that are initiated on a DCM or SEF, and for which the swap dealer does not know the identity of its counterparty prior to execution.[207] DSIO has provided further relief from the PTM requirement in respect of certain physically-settled FX swaps and forwards and vanilla FX options for which the counterparty has waived disclosure of the PTM in writing prior to the parties' execution of the transaction.[208] In issuing its no-action relief, DSIO cited its understanding that real-time tradeable bid and offer prices for each of the categories of FX transactions for which the relief was granted, are available to counterparties electronically in the market.[209]

We believe relief from the requirement to provide PTM disclosure is also warranted when the swap dealer is facing ECPs in a swap transaction. In amending the CEA to make it unlawful for a non-ECP to enter into a swap other than on or subject to the rules of a DCM, Section 723(a)(2) of the Dodd-Frank Act was a recognition by Congress that ECPs are sophisticated parties capable of making their own investment decisions based on such information they may deem appropriate.[210] While we request relief from the PTM disclosure requirement, we urge the Commission to take a different approach to the waiver of PTM disclosure from that taken in CFTC Letter No. 13-12, which required counterparties to affirmatively waive the right to receive PTM disclosure of a contemplated FX transaction. Rather, we urge the Commission to take a more streamlined approach and grant broad relief from the requirement for swap dealers to provide a PTM in respect of any swap transaction, and instead require counterparties to affirmatively opt-in to receive a PTM, whereby failure to do so would be deemed negative consent to not receive such PTM disclosure. The counterparty protection concerns which accompanied the Commission's rulemaking in respect of the PTM requirement are not triggered in respect of swap counterparties qualifying as ECPs. If a counterparty determines that it does not have sufficient information to make an informed trading decision,

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206 Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734, 9766 (Feb. 17, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-02-17/pdf/2012-1244.pdf ("EBC Rules"); *see* 17 C.F.R. § 23.431; 7 U.S.C. § 6s(h)(3)(B).

207 17 C.F.R. § 23.431(c).

208 CFTC Letter No. 13-12, Relief for Swap Dealers and Major Swap Participants Regarding the Obligation to Provide Certain Disclosures for Certain Transactions Under Regulation 23.431 (May 1, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-12.pdf ("CFTC Letter No. 13-12"); *see* CFTC Letter No. 12-42, Request for Relief Regarding Obligation to Provide Pre-Trade Mid-Market Mark for Certain Foreign Exchange Transactions (Dec. 6, 2012), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/12-42.pdf.

209 *See* CFTC Letter No. 13-12 at p. 4.

210 *See* 7 U.S.C. § 2(e).

then it would ask for PTM disclosure, provided that sufficient disclosure has been provided by the swap dealer to such counterparty of its right to request a PTM, which would be in a similar vein to the request for scenario analysis under Rule 23.431(b).[211] Allowing swap counterparties to choose whether to request PTM disclosure will reduce trading delays, while still affording counterparties who wish to obtain the information with the avenue to request it. Affirmatively obtaining a waiver has proven to be difficult under the best of circumstances, as we have previously noted in this submission.[212] There is no guarantee that the counterparty will return the documents prior to trading and, as a result, a reduction in the trading delays incurred by the requirement for swap dealers to provide PTMs would not be sufficiently resolved through an affirmative waiver. As such, FSR urges the Commission to consider providing relief from the PTM disclosure requirement, provided that the swap dealer has provided its counterparty with notice of its right to request PTM disclosure at any time.[213]

Further, we note that the SEC does not impose PTM requirements for SBSDs in its own EBC standards.[214] As such, providing relief would achieve the policy goal of harmonizing business conduct requirements imposed on swap dealers who will eventually be subject to SEC regulation as SBSDs.

3. *Allow for Intra-Group Satisfaction of Centralized Risk Management Requirements.*

As discussed above, Rule 23.600 requires that swap dealers "establish, document, maintain, and enforce a system of risk management policies and procedures designed to monitor and manage the risks associated with [their] swaps activities",[215] and – among other enumerated requirements – further provides that each swap dealer must "establish and maintain a risk management unit with sufficient authority; qualified personnel; and financial, operational, and other resources to carry out the risk management program established pursuant to" Rule 23.600.[216] In finalizing Rule 23.600, the Commission expressly provided that ", to the extent [a swap dealer] is part of a holding company with an integrated risk management program, the [swap dealer] may address affiliate risks and comply with § 23.600(c)(1)(ii) through its participation in a consolidated entity risk management program[,]" and further provided that a swap dealer "should be aware of all risks posed by affiliates" and that Rule 23.600 requires a swap dealer's risk management program to be integrated into overall risk management considerations at the consolidated entity level.[217] In light of the Commission's express recognition of the consolidated nature of an affiliated group's overall risk management program, we would request that the Commission issue some form of clarification providing that, where a consolidated group includes more than one swap dealer entity, its

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211 *See* 17 C.F.R. § 23.431(b).

212 Please see discussion in Paragraph VI.B.2 (*Revise the Commission's Customer Segregation Rules for Initial Margin*), above, regarding negative consent in the context of IM segregation.

213 We would also contend that the institutional suitability safe harbor for non-special entity counterparties should exclude a swap from the PTM requirements when a swap dealer is facing an ECP counterparty, precisely because ECPs are considered to be sophisticated enough to trade swaps over-the-counter under the Dodd-Frank Act. *See* 17 C.F.R. § 23.434(b); EBC Rules, 77 Fed. Reg. at 9771-9774.

214 *See* 17 C.F.R. § 15Fh-3(b); Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 81 Fed. Reg. 29960, 29985 (May 13, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-05-13/pdf/2016-10918.pdf ("A . . . commenter also supported the proposed rule, noting that it is consistent with the CFTC's parallel requirement, except for the CFTC's requirement to disclose a pre-trade mid-market mark, which the commenter argued is of limited benefit and delays execution of transactions.").

215 17 C.F.R. § 23.600(b)(1).

216 17 C.F.R. § 23.600(b)(5).

217 CCO Rules, 77 Fed. Reg. at 20136; *see* 17 C.F.R. § 23.600(c)(1)(ii).

regulations allow for intra-group satisfaction of the centralized risk management requirements under Rule 23.600.

4. *Codify Existing Relief Regarding Prime Brokerage Transactions.*

In CFTC Letters No. 13-11[218] and 13-39,[219] the Staff granted time limited relief for swap dealers in connection with certain prime brokerage arrangements. Specifically, the Staff recognized that it would be difficult or impracticable for prime brokers as well as executing dealers to fully comply with the Commission's EBC Rules with respect to each transaction, because the prime broker and the executing dealer may have access to the counterparty and information at different points in time. On one hand, the prime broker may have the detailed credit and portfolio information regarding a counterparty. On the other hand, the executing dealer may not even know the identity of the underlying counterparty. Accordingly, in recognition of the numerous benefits of prime brokerage arrangements (including increased market liquidity, management of counterparty risk, lower costs, and decreased operational risk) and to facilitate compliance with the EBC Rules in the context of prime brokerage arrangements, the Staff allowed compliance with certain aspects of the EBC Rules to be allocated among swap dealers (or other registered intermediaries). FSR believes that the relief provided in the two no-action letters identified above provides a workable framework for prime brokerage arrangements and would suggest that the Commission adopt further rulemaking to codify such relief.

E. Establish a Cybersecurity Advisory Committee and Work with Market Participants and Other Regulators to Coordinate the Commission's Regulatory Requirements on Cybersecurity.

In light of the evolving nature, increasing frequency and sophistication of cybersecurity attacks on market participants, as well as the potential for harm to investors, firms and the swaps market, cybersecurity practices are understandably a key regulatory focus for the Commission and other US and non-US regulatory authorities. Consistent with this increasing focus on cybersecurity, FSR urges the Commission to form an advisory committee to address the topic. We would envision the key function of the advisory committee being to advise on the Commission's proposed cybersecurity-related rulemakings; such committee could also help identify and resolve instances of regulatory overlap arising from the disparate supervisory approaches being taken by US and non-US regulators with respect to cybersecurity; we have urged other US authorities to take a similar approach to cybersecurity regulation.[220] In particular, we suggest that the advisory committee would advise, and the Commission receive comments, on the adoption of a uniform financial services sector cybersecurity "profile" to guide and structure market participants' cybersecurity obligations,[221] which would also achieve the goal of reducing duplicative regulatory efforts.

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[218] CFTC Letter No. 13-11, Time Limited Relief for Swap Dealers in Connection with Prime Brokerage Arrangements (April 30, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-11.pdf.

[219] CFTC Letter No. 13-39, Time Limited Relief for Swap Dealers in Connection with Foreign Exchange Intermediated Prime Brokerage Arrangements (June 27, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-39.pdf.

[220] *See, e.g.,* Financial Services Roundtable, Comment on Potential Enhancements to Certain FINRA Engagement Programs, at pp. 2-3 (June 19, 2017), *available at* https://www.finra.org/sites/default/files/notice_comment_file_ref/SN-32117_FSR_comment.pdf; FSR Treasury Letter at pp. 11-14.

[221] FSR believes the Commission should harmonize and center its cybersecurity compliance approach around a sector-specific cybersecurity "profile" that (i) is consistent in its organization, taxonomy and the diagnostic requirements, (ii) applies a risk-based approach to determine the appropriate level of proscriptive measures

Finally, we urge the Commission to table any pending cybersecurity rulemaking proposals in order to allow time for coordination among regulatory authorities of a harmonized approach to cybersecurity.

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FSR appreciates the opportunity to provide suggestions in response to the Request for Information. As the Commission progresses in its on-going effort to refine its swaps rulemakings and related interpretive guidance pursuant to Title VII of the Dodd-Frank Act, we would welcome the opportunity to assist in the process. Please feel free to contact me at Richard.Foster@FSRoundtable.org or (202) 589-2424 or to reach out to my colleague Robert Hatch at Robert.Hatch@FSRoundtable.org or (202) 589-2429.

Sincerely yours,

Rich Foster

Senior Vice President & Senior Counsel for
Regulatory and Legal Affairs

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that each firm should establish and maintain, while (iii) retaining the flexibility for each regulatory authority to superimpose its unique statutory authority and areas of focus and oversight.