12 November 2019

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Exemption from Derivatives Clearing Organization Registration (RIN 3038-AE65)

Dear Mr. Kirkpatrick,

I. Introduction

CCP12 appreciates the opportunity to provide the Commodity Futures Trading Commission ("**Commission**" or "**CFTC**") with comments on its supplemental notice of proposed rulemaking ("**SNPR**") regarding Exemptions From Derivatives Clearing Organization Registration.[1] CCP12 supports the CFTC's efforts to codify the existing regulatory framework for exempting clearinghouses from the derivatives clearing organization ("**DCO**") registration requirements, which would greatly enhance transparency regarding the exempt DCO process.

CCP12 strongly supports the Commission's proposal under the SNPR to permit exempt DCOs to clear swaps for U.S. customers, as it embraces an approach of regulatory deference. Approaches of regulatory deference rightfully allow local policy-makers to adopt legal and regulatory requirements that are appropriate for the markets they oversee, while facilitating cross-border cooperation and avoiding market fragmentation.

As discussed in greater detail below, permitting exempt DCOs that do not pose a substantial risk to the U.S. financial system to provide clearing services to U.S. customers through clearing members that are not registered futures commission merchants ("**FCMs**") will expand the clearinghouse options available to U.S. swaps customers while affording customers the protections of rules and regulations that are consistent with the Principles for Financial Market Infrastructure ("**PFMIs**").[2]

[1] Exemption from Derivatives Clearing Organization Registration, 84 Fed. Reg. 35456 (Jul. 23, 2019).
[2] Committee on Payment and Settlement Systems (later renamed the Committee on Payments and Market Infrastructures) and Technical Committee of the International Organization of Securities Commissions, Principles for Financial Market Infrastructures (Apr. 2012).

II. The SNPR expands the ability of U.S. swaps customers to access non-U.S. swaps markets

As the CFTC is aware, the swaps market is global in nature, with cross-border trading constituting a significant portion of market activity. As such, U.S. customers should be permitted to have access to clearinghouses outside of the U.S. to clear their swaps exposures. Given the impending adoption of mandatory clearing requirements in non-U.S. jurisdictions, the next implementation phase of initial margin requirements for uncleared swaps, and the obvious benefits of multilateral netting for centrally cleared transactions, there will be a significant demand for clearing, including at non-U.S. clearinghouses. CCP12 is therefore supportive of the CFTC approach. At the same time, the proposed rules should not create significant imbalances in the global swaps clearing regulatory architecture. Therefore, the CFTC should consider conducting a principles-based (as opposed to line-by-line) assessment of the level of deference and access to clearing markets in the said jurisdiction. Deference in said jurisdiction should be based on adherence with the principle of international comity which drove the establishment of the PFMI standards. This would create a balanced approach to accommodate deference meeting commitments to reduce market fragmentation, promote global financial stability, and reduce frictions caused by the cross-border application of regulations.

Central clearing is attractive to swaps market participants due to the reduced capital requirements for clearinghouse exposures under the Basel III capital framework, as evidenced in recent research[3] by the Financial Stability Board. Thus, the current prohibition on exempt DCOs from clearing swaps for U.S. customers could become increasingly problematic. This situation is further exacerbated for U.S. customers that trade swaps that are denominated in foreign currencies and subject to the CFTC's clearing mandate.[4]

CCP12 believes that it would be highly beneficial for U.S. customers to be able to access the widest possible range of non-U.S. swaps markets without constraint, as this would provide U.S. customers with the ability to diversify their risks of counterparty exposures and access the most efficient pools of liquidity. This could also encourage the voluntary clearing of swaps that are not currently included in the CFTC's clearing mandate, thus supporting the G20 commitment to incentivize the central clearing of swaps.

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[3] *See* Financial Stability Board, Incentives to centrally clear over-the-counter (OTC) derivatives, A post-implementation evaluation of the effects of the G20 financial regulatory reforms (Nov. 2018), Part An Executive Summary, *available at* https://www.fsb.org/wp-content/uploads/R191118-1-1.pdf.

[4] The CFTC's clearing mandate includes IRS products denominated in Australian Dollar, Canadian Dollar, Euro, Hong Kong Dollar, Mexican Peso, Norwegian Krone, Polish Zloty, Singapore Dollar, Swedish Krona, Swiss Franc, Sterling, U.S. Dollar, and Yen. For details, please see the following website link: https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/clearingrequirementcharts9-16.pdf.

In order to provide U.S. customers with access to a wider range of DCOs, the SNPR did not require U.S. customers to access an exempt DCO via an FCM. CCP12 understands that currently no FCM is a clearing member of current exempt DCOs, as there are various potential legal and regulatory constraints and conflicts, in addition to the cost associated with FCM registration for non-U.S. clearing members of exempt DCOs. And where an FCM already has non-U.S. affiliated clearing members at an exempt DCO, the cost of onboarding an additional FCM-affiliate as a clearing member, solely to provide swaps clearing services to U.S. customers in an exempt DCO, may be prohibitively expensive.[5] Additionally, to support client portability for U.S. customers in the event of a clearing member default at a non-U.S. clearinghouse under the CFTC's current regulatory framework, multiple FCM clearing members would be needed, which would be challenging for a non-U.S. clearinghouse, especially for those non-U.S. clearinghouses seeking exemption from DCOs registration as the size of their swaps clearing businesses are not so large. Unless multiple FCM clearing members are available in the event of the default of an FCM clearing member, without the CFTC's guidance or some regulatory relief for non-FCM clearing members, this non-U.S. clearinghouse would be forced to liquidate the collateral and positions of the defaulting FCM clearing member's U.S. customers, which may increase systemic risk in a time of market stress. Consequently, CCP12 strongly supports the SNPR's proposal to permit exempt DCOs to clear swaps for U.S. customers without the intermediation of an FCM.

In addition to supporting the SNPR, CCP12 supports the addition of a part 30-type regime for swaps (see response to the Commission's Question 2 below).

III. Protections for U.S. Customers Under the SNPR

As the CFTC is aware, significant progress has been made in addressing systemic risk issues through the broad adoption by regulators globally of internationally recognized standards, such as the PFMIs. It is important that supervisory authorities, both in the U.S. and in other jurisdictions, recognize the broad comparability of jurisdictions' implementation of these standards and employ approaches to regulation that avoid unnecessary cost and duplication, while providing appropriate protections to customers and the wider financial system. The SNPR correctly recognizes this, while ensuring that U.S. swaps customers are well-protected without imposing unnecessary costs or duplicative requirements on exempt DCOs and their clearing members. Exporting the CFTC's regulatory models to non-U.S. clearinghouses is unnecessary where non-U.S. jurisdictions have developed substantially comparable regimes for customer protection and the non-U.S. clearinghouse does not pose a substantial risk to the U.S. financial system.

The SNPR would also only permit exempt DCOs to clear swaps on behalf of U.S. customers that are eligible contract participations ("**ECPs**"). ECPs are sophisticated market participants that are familiar with the swaps markets and can appropriately assess the risks of being subject to non-U.S. laws and regulations. Additionally, under the SNPR, any U.S. customer that wishes to clear swaps through an exempt DCO would be provided with clear disclosures that the protections of the U.S. Bankruptcy Code do not apply to the U.S. customer's funds and would compare the protections available to the U.S. customer under U.S. law with those available to the customer under the exempt DCO's home country regulatory regime.

[5] *See* Statement of Commissioner Dawn D. Stump, Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 Fed. Reg. 34819, 34836 (Jul. 19, 2019).

Specifically, in addition to the disclosures discussed above, the SNPR provides protections for U.S. swaps customers, including that:

- The non-U.S. jurisdiction of an exempt DCO must have rules and regulations that are consistent with the PFMIs;
- The exempt DCO must not pose a substantial risk to the U.S. financial system;
- A memorandum of understanding ("**MOU**") between an exempt DCO's home country regulator(s) and the CFTC must be in effect;
- The exempt DCO must provide the CFTC with an annual certification of its observance with the PFMIs; and
- The home country regulator must certify that an exempt DCO is in good regulatory standing.

It would be natural for market participants to seek to execute a given transaction in the venue with the highest liquidity and the best available prices, and of course, where appropriate customer protections under the clearing arrangements for that transaction are offered. In some cases, that could be the home country of the currency relevant to the swaps transaction.

CCP12 strongly advocates for strong protections for all collateral posted to a CCP for all cleared positions that meet minimum standards established by the PFMIs and recognized through the capital regulations that apply to banks when capitalizing cleared exposures.

While the SNPR would remove certain collateral protections that apply when clearing through a US FCM, as defined within the CEA (e.g., LSOC, Part 190 bankruptcy protections), it is noted that comparable regulatory and legal frameworks have been set out in other jurisdictions that provide protections for collateral posted to a CCP. Such protections should adhere to standards established by the PFMI which are typically supported by industry assessment and/or legal opinions.

In fact, an exempt DCO would be required under the SNPR to provide protections to its customers through the use of a PFMI-adherent customer segregation framework, with disclosures of the related framework provided by its non-FCM clearing member to any U.S. customer, so that each U.S. customer would be well informed of any risks, before deciding whether to access an exempt DCO through a non-FCM clearing member or indirectly through an FCM who is documented with their non-U.S. affiliated clearing member.

IV. CCP12 comments on the section "V. Request for Comments" in the supplemental notice of proposed rulemaking

1. **Due to uncertainty regarding the applicability of the Bankruptcy Code in the event of an insolvency of an FCM clearing for customers directly at, or through a foreign member of, the exempt DCO, the proposed regulations would permit U.S. customer positions to be cleared at an exempt DCO but only through a foreign intermediary that is not registered as an FCM.**
    a. **Can the Bankruptcy Code be read to permit swaps customer funds to be deposited at an exempt DCO by an FCM directly, or through a foreign member of the exempt DCO, and still receive the same protections as swaps customer funds deposited at a registered DCO? Why or why not?**

CCP12 Response
CCP12 has no specific comment on this question.

    b. **Does the Bankruptcy Code or other relevant laws distinguish swaps customer funds of U.S. persons from non-U.S. persons that are deposited at an exempt DCO by an FCM for purposes of distribution of such funds to the U.S. and non-U.S. persons in the event of the FCM's insolvency? If so, please explain which laws are relevant and how such laws address the distribution of customer funds of U.S. and non- U.S. persons.**

CCP12 Response
CCP12 has no specific comment on this question.

    c. **Should the Commission permit FCMs to clear swaps for U.S. customers that are eligible contract participants at exempt DCOs despite uncertainty of bankruptcy protection in such arrangements? Why or why not?**

CCP12 Response
CCP12 has no specific comment on this question.

    d. **Can any concerns regarding uncertainty with respect to U.S. customers whose transactions are cleared by an FCM directly or indirectly at an exempt DCO be sufficiently addressed by—**
        i. **Requiring, similar to the requirement in proposed § 39.6(b)(2), that an exempt DCO have rules that require an FCM seeking to clear swaps for a U.S. customer to provide written notice to, and obtain acknowledgement from, the U.S. customer prior to clearing that the exempt DCO is exempt from registration with the Commission, and that the protections of the Bankruptcy Code may not apply to the U.S. customer's funds? Why or why not?**

CCP12 Response
CCP12 has no specific comment on this question.

ii. **Limiting clearing of swap positions by U.S. customers at exempt DCOs through FCMs to only a specified subset(s) of eligible contract participants? Why or why not?**

CCP12 Response
CCP12 has no specific comment on this question.

e. **Can any concerns regarding potential uncertainty with respect to other U.S. customers (i.e., customers who limit their activities to transactions cleared at registered DCOs) of an FCM that clears transactions for customers at an exempt DCO be sufficiently addressed through disclosure or other means? Why or why not? In this regard, please address the potential of (1) a bankruptcy court in an FCM bankruptcy proceeding delaying the transfer of all swaps customer positions to another FCM to address potential legal challenges to the bankruptcy status of customer positions cleared at an exempt DCO, resulting in the need to close out customer positions, or (2) a shortfall in swaps customer funds affecting all swaps customers of the FCM due to the bankruptcy of an affiliated foreign clearing member of the FCM through which the FCM clears customer transactions at the exempt DCO?**

CCP12 Response
CCP12 has no specific comment on this question.

f. **Does the proposal strike the right balance between customer protection and providing greater access to swaps clearing? Are there additional measures the Commission should take to enhance customer protection?**

CCP12 Response
CCP12 believes that the proposals under the SNPR to allow U.S. customers to clear at exempt DCOs through foreign intermediaries that are not registered as FCMs strike the right balance between customer protection and providing greater access to swaps clearing as stated in Sections II and III.

2. **Commenters also suggested a regime for swaps similar to that of futures, in which a distinct set of Commission regulations—part 30—governs "foreign futures" traded outside of the United States. The Commission notes that the foreign futures regime is expressly contemplated by the CEA. Section 4(b)(2) of the CEA, for example, authorizes the Commission to adopt rules and regulations requiring the "safeguarding of customers' funds" by any person located inside the United States who engages in the offer or sale of a futures contract made on or subject to the rules of a board of trade, exchange, or market located outside the United States. The CEA does not include similar provisions for swaps, however. Similarly, the Bankruptcy Code establishes separate protections for foreign futures, traded on or subject to the rules of, a board of trade outside the United States, through a "foreign futures commission merchant," but has no similar provisions for swaps. Although these statutory distinctions do not necessarily preclude the Commission from constructing a "part 30- type" regime for swaps, the Commission is not proposing to do so at this time. However, the Commission is requesting additional comment on constructing a "part 30-type" regime for swaps.**

CCP12 Response

The swaps markets are global in nature and cross-border trading forms a significant portion of market activity. To provide the greatest amount of flexibility and choice to U.S. customers seeking to access exempt DCOs for swaps clearing, CCP12 supports the construction of a CFTC Part 30-type regime for swaps in addition to proceeding with the current SNPR. For background, U.S. customers can currently access foreign futures markets via CFTC Part 30 Regulations.

A CFTC Part 30-type regime could achieve cost savings by eliminating the need for U.S. customers to potentially enter into duplicative or new relationships with alternative non-U.S. affiliated clearing members, further expanding choices for U.S. customers. This regime would provide access for U.S. customers to foreign futures markets and swaps markets at exempt DCOs under an aligned framework and structure. Creating a CFTC Part 30-type regime for swaps would enable U.S. customers to continue to document directly with an FCM who in turn documented with their non-U.S. affiliated clearing member at an exempt DCO for swaps clearing. As this regime aligns with the access model used by U.S. customers to access foreign futures markets under the CFTC Part 30 Regulations, cost-saving mechanisms such as cross-product margin offsets available at some exempt DCOs could also then be made available to U.S. customers.

CCP12 requests that the Commission prioritises progress of the current SNPR, but concurrently, or following the implementation of the SNPR, introduces a CFTC Part 30-type regime for swaps clearing at exempt DCOs for U.S. customers.

3. **As proposed, § 39.6(d) would require that if a clearing member clears through an exempt DCO a swap that has been reported to a registered swap data repository (SDR) pursuant to part 45 of the Commission's regulations, the exempt DCO must report to an SDR data regarding the two swaps resulting from the novation of the original swap that had been submitted to the exempt DCO for clearing. In addition, an exempt DCO would be required to report the termination of the original swap accepted for clearing by the exempt DCO to the SDR to which the original swap was reported. Further, in order to avoid duplicative reporting for such transactions, an exempt DCO would be required to have rules that prohibit the part 45 reporting of the two new swaps by the counterparties to the original swap. The Commission notes that the intention would be to apply this requirement to U.S. customer trades at an exempt DCO; however, the Commission requests comment as to whether this would pose challenges. Furthermore, should the Commission consider removing this requirement altogether?**

CCP12 Response

CCP12 acknowledges that transparency in the swaps markets, which is supported by swap data repository ("**SDR**") reporting, provides a number of benefits.

However, we would like to note that the current SDR reporting requirements applied to exempt DCOs pose significant operational challenges, such as requiring the operational set-up with a U.S. SDR using a different reporting format than is required by the home country regime, in addition to the burden of the reporting fees charged by U.S. SDRs based on the number of reported transactions.

4. **Is the proposed test for "substantial risk to the U.S. financial system" the best measure of such risk? If not, please explain why, and if there is a better measure/metric that the Commission should use when implementing the exempt DCO regime, please provide a rationale and supporting data, if available.**

CCP12 Response

Under the SNPR, an exempt DCO would only be able to clear swaps of U.S. customers if a non-U.S. clearinghouse does not pose a "substantial risk to the U.S. financial system." Under the SNPR, a non-U.S. clearinghouse organized outside of the U.S. poses a "substantial risk to the U.S. financial system" if: (1) the non-U.S. clearinghouse holds 20% or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs; and (2) 20% or more of the required initial margin for swaps at the non-U.S. clearinghouse is attributable to U.S. clearing members; provided, however, where one or both of these thresholds are close to 20%, the CFTC may exercise discretion in determining whether the non-U.S. clearinghouse poses a substantial risk to the U.S. financial system.[6]

[6] Exemption from Derivatives Clearing Organization Registration, 84 Fed. Reg. 35456, 35472 (Jul. 23, 2019).

Due to the large global presence of non-U.S. entities affiliated with U.S. banking groups in swaps markets, CCP12 believes that the second threshold (i.e., 20% or more of the required initial margin for swaps at the non-U.S. clearinghouse is attributable to U.S. clearing members) could easily be breached by exempt DCOs. This is mainly due to the inclusion of non-U.S. subsidiaries whose parent companies are organized in the U.S. that are clearing members of the non-U.S. clearinghouse in the definition of "U.S. clearing member" for which the ultimate risks to the U.S. financial system would be negligible. Further, pursuant to Section 2(i) of the Commodity Exchange Act ("**CEA**"), the DCO registration requirement under Section 5b(a) extends to any clearinghouse whose clearing activities outside of the U.S. have a direct and significant connection with activities in, or effect on, commerce of the U.S.; except for clearinghouses exempt from DCO registration in cases where the Commission has determined that the clearinghouse is subject to "comparable, comprehensive supervision and regulation" by its home country regulator. The Commission's current DCO registration and exemption regime is triggered based on the definition of U.S. person as defined in the CFTC's guidance where essentially DCO registration or exemption is required to clear swaps for a U.S. person. This approach, like other jurisdictions' regimes, defines the trigger for a foreign clearinghouse's registration to be rightfully based on its clearing for local market participants. We believe the Commission's current approach is the right approach for measuring "direct and significant" connection with the U.S. under Section 2(i) of the CEA and is also the appropriate approach in measuring substantial risk to the U.S. financial system. In other words, to be aligned with the current regime, under the SNPR a non-U.S. clearinghouse's non-U.S. clearing member that are subsidiaries of U.S. parent organizations should not impact the Commission's determination if the clearinghouse poses a substantial risk to the U.S. financial system. Consequently, CCP12 requests the Commission revise the definition of "U.S. clearing member" to mean a clearing member that is organized in the U.S. or a U.S. FCM, and not to include any non-U.S. clearing members simply because their parents are organized in the U.S. In line with this, CCP12 believes that other jurisdictions should also adopt a similar approach to determining the appropriate supervisory oversight framework for foreign clearinghouses providing clearing services locally.

Where a non-U.S. clearinghouse is deemed to be a "substantial risk to the U.S. financial system" under the SNPR, because the clearinghouse is close to one of the two defined thresholds, the non-U.S. clearinghouse must fully register as a DCO with the CFTC and would not be able to rely on the exemption from DCO registration contemplated by the SNPR or the alternative compliance framework for the DCO registration, which has been proposed separately. Due to potentially conflicting laws and regulations between the U.S. and the exempt DCO's home country, an exempt DCO may not be able to register as a DCO, and may then have to cease providing swaps clearing services to any U.S. persons, including clearing members and their affiliated entities, for which the exempt DCO currently services under the existing CFTC exemption order. This could potentially result in termination of existing cleared swaps positions of these U.S. persons. In order to avoid significant uncertainty and potential systemic risks presenting themselves in local swaps markets, CCP12 strongly requests that the CFTC clarify the criteria for the assessment of "substantial risk to the U.S. financial system" as defined in proposed § 39.2, such that the test should permit the CFTC to exercise its discretion only if both of the two thresholds are close to 20% on the exempt DCO. This would more accurately capture the potential risks to the U.S. financial system. CCP12 would recommend that the observation period be long enough to verify whether the breach is a structural trend or a temporary phenomenon, and that the CFTC grant sufficient notice periods for the DCO to duly adjust.

5. **What is the frequency with which the Commission should reassess an exempt DCO's "risk to the U.S. financial system" for purposes of the test, and across what time period?**

CCP12 Response

CCP12 believes that the status of each exempt DCO should be reassessed at least every two years or following a material change to its clearing services. This should be sufficient, as it would allow a regular review of each exempt DCO. CCP12 would suggest that the reassessment of each threshold test looks at the averages over the previous 12 months to ensure that the test results are not overly influenced by any specific event, such as quarter-end or year-end.

6. **With respect to the written notice of protections available to U.S. persons required by proposed § 39.6(b)(2), the Commission invites comment as to the elements that should be required in any such disclosure, and how detailed such a disclosure should be in describing the relevant bankruptcy regimes.**

CCP12 Response

In line with the SNPR, CCP12 believes that any disclosure should: (1) explicitly state that any customer funds deposited with an exempt DCO and its clearing members would not be treated in accordance with U.S. law, including the U.S. Bankruptcy Code; and (2) compare in a summarized manner the protections available to U.S. customers under U.S. law with those available under the exempt DCO's home country regulatory regime and its rulebook. Beyond that, the elements of the disclosure should be left to the discretion of each exempt DCO and its clearing members, and U.S. customers are expected to review the exempt DCO's rulebook to assess the applicable customer protection framework and make their own judgement.

CCP12 believes that U.S. swaps customers of such exempt DCOs, who are ECPs, would be keen to understand the protection mechanisms for their funds held by an exempt DCO and its clearing member and given a clearinghouse's objective to provide its clearing services in a risk prudent manner to the marketplace, such disclosures made available to U.S. customers should be sufficiently detailed by our suggested approach. Such disclosures should enable U.S. customers to obtain sufficient information to determine that relevant laws and regulations applicable in the exempt DCO's home country and the exempt DCO's rulebook provide comparable levels of customer protections to those provided by the U.S. Bankruptcy Code.

7. **The Commission requests that non-U.S. clearing organizations provide estimates of the percentage of initial margin deposited with the clearing organization that is attributable to clearing members that have a U.S. parent company.**

CCP12 Response

This question is not applicable to CCP12.

8. **The Commission requests that U.S. swaps market participants provide examples of swaps that they would like to clear at non-U.S. clearing organizations. Relatedly, to the extent that U.S. swaps market participants currently are engaging in these swaps on an uncleared basis, the Commission requests information about whether counterparties to these swaps are predominantly financial entities or commercial end-users.**

CCP12 Response

This question is not applicable to CCP12.

9. **The Commission requests information concerning legal, operational, or other impediments, if any, to (1) FCMs becoming members of exempt DCOs, and (2) exempt DCOs, and non-U.S. clearing organizations that may choose to become exempt DCOs, complying with cleared swaps customer funds protection and segregation rules set forth in parts 1, 22, 39, and 190 of the Commission's regulations.**

CCP12 Response

Currently, a financial group that includes an FCM entity generally maintains a clearing membership at an exempt DCO via a local security and derivative broker subsidiary, or via the local branch of a banking entity, in the country where the exempt DCO is located. Therefore, it would be economically efficient for a financial group to utilise these local entities for holding the clearing membership at an exempt DCO. Onboarding of an additional U.S. FCM entity as a clearing member at an exempt DCO would impose additional costs on the financial group, in terms of membership fees, additional default fund contributions, cash calls in the case of a default of another clearing member, and reduced netting benefits, in addition to the operational and onboarding costs. These additional costs may not be justifiable in relation to the relative business opportunity for an FCM clearing member to provide clearing services to U.S. customers at an exempt DCO.

Notwithstanding the fact that an exempt DCO's non-FCM clearing members are appropriately regulated, supervised, and licensed in their home countries to provide swaps clearing services for customers, they may be unable to register as an FCM, due to potential legal and regulatory conflicts. For example, the swaps customer's collateral held by a non-U.S. FCM is subject to segregation requirements consistent with the U.S. Bankruptcy Code, as required by the CEA and the CFTC Part 22 Regulations, even in the case of the default of a non-U.S. FCM where the home country's bankruptcy law would need to be applied. It could be impracticable for exempt DCOs to establish a separate customer protection and segregation system solely for U.S. customers to comply with the requirements contained in CFTC Parts 1, 22, 39, and 190 Regulations.

Additionally, under the SNPR, an exempt DCO's customer protection system must fully conform with the relevant principles of the PFMIs through the exempt DCO's home country regulation and supervision, which would be sufficient protection for its customers, regardless of where the customers are domiciled. CCP12 believes this is the right approach, and would also like to highlight that, in relation to the authorization of a foreign clearinghouse for swaps customer clearing for a local legal entity, it is not aware of any regulatory framework, other than the CFTC's framework, where the extraterritorial application of its jurisdiction's bankruptcy code is effectively imposed to foreign clearinghouses, for the protection of customers domiciled in its own jurisdiction but clearing at a foreign clearinghouse[7].

More generally, CCP12 has serious concerns where any jurisdiction, including the CFTC, deviates from an approach of regulatory deference for the cross-border oversight of foreign clearinghouses. Requiring regulations or guidance designed for a jurisdiction's local markets, including relating to the treatment of customer positions and funds, apply to foreign clearinghouses is inappropriate where the clearinghouse's home country regulator employs comparable regulatory requirements.

10. The Commission requests estimates from swap dealers, FCMs, and their affiliates of the percentages of their swap business, measured in terms of initial margin, that they estimate is cleared at particular non-U.S. DCOs, either registered or exempt.

CCP12 Response

This question is not applicable to CCP12.

[7] As a condition of exemption, each of existing non-U.S. DCOs has been required to consent to jurisdiction in the United States.

11. In the 2018 Proposal, the Commission proposed to define "good regulatory standing" to mean that either there has been no finding by the home country regulator of material non-observance of the PFMIs or other relevant home country legal requirements, or there has been such a finding by the home country regulator, but it has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the exempt DCO. Although the Commission proposed to limit this to instances of "material" non-observance of the PFMIs or other relevant home country legal requirements, the Commission requests comment as to whether it should instead require all instances of non-observance.

CCP12 Response

The SNPR requires an annual representation from the exempt DCO's home country regulator, that the exempt DCO is in good regulatory standing. The SNPR defines "good regulatory standing" to mean that in the case of an exempt DCO, either there has been no finding by the home country regulator of material non-observance of the PFMIs or other relevant home country legal requirements, or if there has been a finding by the home country regulator of material non-observance of the PFMIs or other relevant home country legal requirements such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the DCO.[8] CCP12 believes this is the appropriate definition of good regulatory standing as individual regulators have appropriately taken differing approaches to how they apply the PFMIs in their jurisdictions in the context of the markets they regulate and supervise and CCP12 does not recommend extending the definition to all instances of non-observance of the PFMIs.

12. Commenters suggested the Commission should clarify that a non-U.S. clearing organization clearing swaps does not trigger registration as a DCO solely because it permits participation (direct or indirect) by foreign branches of U.S. bank swap dealers (foreign branches). The commenters argued that because such participation takes place outside the United States, it does not involve use of U.S. jurisdictional means by the non-U.S. clearing organization. The commenters noted that the Commission has recognized in other contexts that applying the Dodd-Frank Act's registration requirements to parties transacting with foreign branches would result in competitive disparities that are not necessary to mitigate risk to the United States. The commenters also noted that subjecting non-U.S. clearing organizations clearing swaps to registration as DCOs when they permit participation by foreign branches discourages those non-U.S. clearing organizations from permitting such participation, and that, to access those non-U.S. clearing organizations, U.S. banks must incur the costs, including the additional regulatory burden, of "subsidiarizing" their local clearing operations. To date, the Commission has not addressed directly the scope of the DCO registration requirement for non-U.S. clearing organizations clearing swaps in the specific context of foreign branches, and the Commission declines to do so at this time. However, the Commission requests additional comment on whether the Commission should address the scope of the registration requirement under section 2(i) with respect to foreign branches, as suggested by the commenters.

CCP12 Response

CCP12 has no specific comment on this question.

[8] As a condition of exemption, each of existing non-U.S. DCOs has been required to consent to jurisdiction in the United States.

13. The Commission currently does not require non-U.S. customers clearing foreign futures or swaps at registered non-U.S. DCOs to clear through FCMs. In addition, the Commission is proposing in this release to permit U.S. customers to clear swaps through non-FCMs at exempt DCOs. In light of this, should the Commission consider permitting non-U.S. customers to clear futures and swaps through non-FCMs at U.S. registered DCOs? In other words, should the Commission give non-U.S. customers the option of choosing to clear futures and swaps through local intermediaries that are clearing members of U.S. registered DCOs, instead of requiring them to clear, directly or indirectly, through FCMs at U.S. registered DCOs?

CCP12 Response

For the reasons outlined below, CCP12 believes the Commission should permit non-U.S. customers to clear futures and swaps through non-FCM clearing members at a U.S.-registered DCO. This permission would be consistent with the broader objective of the SNPR to employ an approach of regulatory deference where a home country has a regulatory framework comparable to the CFTC's own framework. We believe such an approach should be adopted across derivatives markets, including for intermediaries acting as clearing members, and not limited to clearinghouses. Embracing an approach of regulatory deference for comparable regulatory frameworks across derivatives markets promotes access to central clearing to support financial stability, while endeavouring to avoid market fragmentation.

Allowing non-U.S. customers to access to futures and swaps cleared at a U.S. DCO through a non-FCM clearing member would provide them access subject to the risk management standards of a clearinghouse under the CFTC's regulatory framework, while appropriately recognizing the customer protection framework established by their home country jurisdiction. In line with the SNPR, this access model would be consistent with an approach of regulatory deference by appropriately deferring to the expertise of the home country regulator in designing a framework for its local customers and allow non-U.S. customers to access a U.S. DCO's clearing services under a framework which they are familiar.

Additionally, allowing non-U.S. customers to access futures and swaps cleared at a U.S. DCO through a non-FCM clearing member appropriately recognizes the global nature of derivatives markets today, something that is already recognized for the clearing of foreign futures for U.S. customers and would be recognized for swaps under the SNPR. The current FCM-only access model for non-U.S. customers of U.S. DCOs reflects a time when cleared derivatives were traded and cleared in regional rather than global markets. Today's regulation should recognize the diverse set of market participants accessing derivatives markets.

Further, allowing U.S. DCOs to offer clearing to non-U.S. customers through a non-FCM clearing member could increase the number of clearing members at a DCO. Similar to the benefits noted related to the proposals under the SNPR, this would provide benefits to both U.S. and non-U.S. market participants of a U.S. DCO by fostering deeper pools of liquidity in the markets cleared by the DCO. It could also further diversify the counterparty exposures of a U.S. DCO. Notwithstanding this, under the current FCM-only access model for customers of U.S. DCOs, access for non-U.S. customers is commonly facilitated by a foreign broker that is a customer of an FCM clearing member, which can be inefficient from a capital perspective, so allowing a foreign broker to act as a direct clearing member for non-U.S. customers without registration as an FCM may address this inefficiency.

Notwithstanding any of the above, allowing non-FCM clearing members to provide clearing for non-U.S. customers at a U.S. DCO is consistent with the current access U.S. customers have to foreign futures cleared at a non-U.S. clearinghouse and proposals under the SNPR for U.S. customers' access to swaps clearing at an exempt DCO. Further, it would be consistent with the approaches taken by several jurisdictions, which allow clearinghouses to admit foreign clearing members that are not registered with the given clearinghouse's home country regulator to clear customer exposures.

14. **Until now, it has been the Commission's policy to allow U.S. customers' swap positions to be cleared only through registered FCMs at registered DCOs. However, the Commission understands that an FCM may be reluctant to participate as a direct member of a registered non-U.S. DCO if the FCM's affiliate is also a member of the DCO, due to duplicative requirements that would be borne by the two affiliates. The Commission requests comment as to alternatives to address concerns with this approach. For example, where consistent with the rules of a registered DCO, an FCM could potentially participate as a "special" member whose obligations to the DCO could be guaranteed by its non-FCM affiliate acting as a "traditional" member of the DCO. All customer funds would flow directly from the FCM to the registered DCO, i.e., they would not pass through the non-FCM affiliate. Similarly, in the event of the default of a customer of the FCM, the FCM would, nonetheless, be responsible in the first instance for making prompt payment in full of all obligations under contracts cleared through the FCM at the registered DCO. The guarantor affiliate's responsibility to perform on the guarantee would only be activated in the event that the FCM fails promptly to perform in full with respect to the positions it clears. In guaranteeing the FCM's obligations, the non-FCM affiliate would need a (subordinated) security interest in the collateral held at the registered DCO to enable it to protect its own interests if it is called upon to perform under that guarantee. Such a security interest with respect to customer collateral generally, and, in the case of cleared swaps collateral specifically, would necessarily be subject to the limitation that the guarantor could access no more of the collateral than the registered DCO could use under section 4d of the CEA and the Commissions regulations thereunder (including, with respect to cleared swaps customer collateral, Part 22). The Commission requests comment as to whether this approach is viable, and the extent to which there would need to be protections in place for the FCM, the non-FCM affiliate, FCM customers, and the registered DCO, and, if so, what protections would be appropriate. In particular, the Commission further requests comment as to whether there would need to be modifications to § 22.2(d)(2), which provides that an FCM may not impose or permit the imposition of a lien on cleared swaps customer collateral, to accommodate this approach, and, if so, what modifications would be most appropriate (including providing appropriate protection for customer funds).**

CCP12 Response

CCP12 has no specific comment on this question.

15. Considering the increased demand for swap clearing and the declining number of FCMs, are there other operational structures that the Commission should consider to better ensure availability of swap clearing services at both registered and exempt DCOs without jeopardizing U.S. customer protections? If so, please describe in detail.

CCP12 Response

CCP12 believes that the CFTC should consider exempting the registration requirements for a Swap Dealer, in relation to the de minimis calculation for bilateral swaps that are cleared by a registered or an exempt DCO, irrespective of whether these are traded on SEFs. CCP12 believes this is a reasonable exemption because the bilateral credit risk against a counterparty not registered as a Swap Dealer is eliminated as a result of central clearing. In addition, trading facilities for swaps has started operation globally, to support the swap trading mandate implemented in each jurisdiction. These developments should be recognized in any regulatory framework having an extraterritorial effect, as failure to do so could result in market fragmentation.

The current structure of the requirements can unfortunately bifurcate global liquidity pools for the swaps markets. CCP12 understands that there are cases where non-U.S. swap counterparties implemented, through internal rules or procedures, a prohibition on any swaps trading with U.S. persons, to avoid being captured by U.S. regulations, particularly the Swap Dealer registration requirement. Under CCP12's proposed approach, we believe that the competition of swaps clearing brokers will be promoted, the concentration of risks in a limited number of swaps clearing brokers will be mitigated, and most importantly, U.S. customers would be able to enjoy a wider choice of clearing brokers to access an exempt DCO, including non-U.S. entities not registered as Swap Dealers.

V. Conclusion

CCP12 strongly recommends that the CFTC finalize its current proposals under the SNPR.

VI. About CCP12

CCP12 is a global association of 37 members who operate more than 60 individual CCPs globally across Europe/Middle East/Africa (EMEA), the Americas, and the Asia-Pacific (APAC) regions. CCP12 aims to promote effective, practical and appropriate risk management and operational standards for CCPs to ensure the safety and efficiency of the financial markets it represents. CCP12 leads and assesses global regulatory and industry initiatives that concern CCPs to form consensus views of its members and seeks to actively engage with regulatory agencies and industry constituents through consultation responses, forum discussions and position papers.

VII. CCP12 Members