March 9, 2020

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

Re: Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, RIN 3038-AE84, 85 Fed. Reg. 952 (Jan. 8, 2020)

Dear Mr. Kirkpatrick:

The Institute of International Bankers ("**IIB**")[1] and the Securities Industry and Financial Markets Association ("**SIFMA**")[2] appreciate this opportunity to provide

1 IIB is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the United States. The IIB's mission is to help resolve the many special legislative, regulatory, tax, and compliance issues confronting internationally headquartered institutions that engage in banking, securities and other financial activities in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions. Further information is available at www.iib.org.

2 SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

the Commodity Futures Trading Commission (the "**Commission**" or "**CFTC**") with comments on the above-captioned proposal (the "**Proposal**") regarding the cross-border application of the registration thresholds and certain requirements applicable to swap dealers ("**SDs**") and major swap participants ("**MSPs**," and, together with SDs, "**Swap Entities**").

INTRODUCTION

For most of the seven-year period that the Commission has regulated the swap market under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**" or "**Dodd-Frank**"), the cross-border application of the Commission's swaps regulations has been governed by its July 2013 cross-border guidance (the "**2013 Guidance**").[3] The Commission now has enough experience to provide market participants with finality and clarity by codifying a cross-border framework that, consistent with Section 2(i) of the Commodity Exchange Act ("**CEA**"), does not regulate activities outside the United States unless they have a direct and significant connection with activities in, or effect on, U.S. commerce. We agree with Chairman Tarbert that this framework should: (1) protect the U.S. national interest by focusing on material risks from abroad that are most likely to affect the United States; (2) avoid duplicative and overlapping regulations with respect to both foreign and other U.S. regulators; and (3) reflect Securities and Exchange Commission ("**SEC**") harmonization where appropriate.[4]

The Proposal represents a positive step forward by the Commission and its staff to take into consideration evolving views informed by years of experience to improve the cross-border regulatory landscape. But, like any proposal, it can be improved. As described below, certain aspects of the Proposal—especially those that would expand the Commission's extraterritorial jurisdiction beyond the 2013 Guidance, such as the proposed treatment of significant foreign subsidiaries of certain large U.S. companies (called "significant risk subsidiaries" or "**SRSs**")—could better align with Chairman Tarbert's principles of focusing on material risks to the United States and avoiding unnecessarily overlapping and duplicative regulation. Other aspects of the Proposal, such as some of the proposed exceptions from Swap Entity registration thresholds, would benefit from further clarification and consistency with the 2013 Guidance.

In addition, the Commission should supplement the Proposal by addressing the cross-border application of its mandatory clearing, mandatory trade execution, real-time public reporting, and swap data reporting requirements. Without this step, even once the Commission finalizes the Proposal, these other requirements would

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[3] Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (Jul. 26, 2013).

[4] Proposal, 85 Fed. Reg. at 1,005-07.

continue to be governed by the 2013 Guidance, a November 2013 staff advisory (the "**ANE Staff Advisory**"), and related no-action relief regarding a non-U.S. SD that regularly uses personnel or agents located in the United States to arrange, negotiate, or execute a swap with a non-U.S. person ("**ANE Transactions**")[5]—relief that staff could potentially rescind without a vote by the Commission. In addition, to implement the Proposal before the Commission finalizes the rest of its revised cross-border framework, market participants would face significant compliance challenges that would require a long transition period due to the complexities of having to comply with different definitions and exceptions under both the Proposal and the 2013 Guidance at the same time for every swap transaction.

The Commission should address these issues first by immediately directing the staff to withdraw the ANE Staff Advisory—thus making clear that it does not reflect the Commission's policy with respect to ANE Transactions for any purposes—and by the Commission adopting corollary positions making clear that the location of personnel engaged in ANE activity does not bear on the regulatory treatment of swaps entered into by foreign branches of U.S. banks or U.S. branches of foreign banks. Then the Commission should propose and adopt new rules that address the cross-border application of mandatory clearing, mandatory trade execution, real-time public reporting, and swap data reporting requirements. It should also defer the compliance date for the Proposal to match the compliance date for those new rules and grandfather swaps entered into prior to such compliance date.

EXECUTIVE SUMMARY

As discussed in further detail in this letter, we recommend that the Commission modify and supplement the Proposal as follows:

- **Cross-Border Application of the SD Registration Threshold.** We support the ways the Proposal would apply the SD registration threshold to a U.S. person and a non-U.S. person whose performance under a swap is guaranteed by a U.S. person (a "**Guaranteed Entity**"), which would be consistent with the 2013 Guidance. However, the Commission should remove the SRS concept because it would extend the SD registration requirement beyond the Commission's authority under CEA Section 2(i). In addition, the Commission should conform the SD registration requirement for a non-U.S. person that is neither an SRS nor a Guaranteed Entity (an "**Other Non-U.S. Person**") to the 2013 Guidance and clarify the scope of the exception for anonymous cleared swaps.

- **Cross-Border Application of the MSP Registration Threshold.** We support the ways the Proposal would apply the MSP registration threshold to a U.S.

[5] CFTC Staff Advisory No. 13-69, Applicability of Transaction-Level Requirements to Activity in the United States (Nov. 14, 2013); CFTC Staff Letter 17-36, Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers (Nov. 30, 2017).

person, Guaranteed Entity, or Other Non-U.S. Person, which would effectively update the 2013 Guidance to account for the advent of uncleared swap margin rules. However, due to similar concerns regarding the Commission's authority under CEA Section 2(i) as noted above, the Commission should remove the SRS concept here as well. In addition, the Commission should conform the MSP attribution requirement for guarantors to the 2013 Guidance by recognizing an exception for entities subject to Basel compliant capital standards and oversight by a G20 prudential supervisor.

- **ANE Transactions.** We support the Commission's approach to ANE transactions which, as noted above, the Commission should extend to mandatory clearing, mandatory trade execution, and real-time public reporting requirements. We also support the Commission's related proposal to change the "swap conducted through a foreign branch" definition to eliminate the prong regarding personnel location, which we, likewise, recommend extending to apply in connection with these other requirements.

- **Categorization of Requirements.** We generally support the Proposal's categorization of Swap Entity requirements, but we respectfully request that the Commission expand and clarify such categorization in the following respects designed to align the cross-border application of the Commission's requirements with the policy objectives for those requirements:

    - **Group A Requirements.** The Commission should add Rule 1.31 and its capital and financial reporting rules to the list of Group A requirements.

    - **Group B Requirements.** The Commission should add its rules for clearing, margin for uncleared swaps, and, for non-U.S. Swap Entities with a non-U.S. ultimate parent entity, swap data reporting to the list of Group B requirements.

    - **Group C Requirements.** The Commission should re-categorize pre-execution daily trading records rules as Group C requirements (not Group B) and add its rules for mandatory trade execution, real-time public reporting, counterparty clearing documentation, and elective initial margin segregation to the list of Group C requirements.

- **Exceptions from Swap Entity Requirements.** The Commission should expand and clarify the Proposal's exceptions from Swap Entity requirements in certain respects:

    - **Exchange-Traded Exception.** The Commission should expand its proposed exchange-traded exception from most Group B and C requirements to apply to all anonymous cleared swaps, including those entered into by U.S. Swap Entities, in light of the risk mitigating effects of central clearing and the regulatory compliance and market integrity protections of trading anonymously on a regulated platform.

- **Foreign Swap Group C Exception.** In addition to the proposed foreign swap exception from Group C requirements, the Commission should refine how those requirements apply to all swaps entered into by Swap Entities with non-U.S. persons, including swaps entered into with non-U.S. persons by U.S. Swap Entities in the United States, to better balance counterparty protection interests against the market fragmentation that results when Swap Entities ask their non-U.S. counterparties to enter into documentation designed to satisfy U.S. legal requirements.

- **Non-U.S. Swap Entity Group B Exception.** The Commission should expand the proposed non-U.S. Swap Entity exception from Group B requirements by: (a) applying the exception to swaps with an SRS that is not a Swap Entity (*i.e.*, an SRS end user), so as to avoid burdening the foreign subsidiaries of U.S. multinational corporations; (b) conforming the treatment of Guaranteed Swap Entities and SRS Swap Entities to the 2013 Guidance, so as to minimize the competitive disadvantages faced by such Swap Entities when they are subject to U.S. rules extraterritorially; and (c) permitting a U.S. branch of an Other Non-U.S. Person Swap Entity to rely on the exception when it trades with a non-U.S. person that is not a Guaranteed Entity or another U.S. branch, which would appropriately recognize that such swaps do not present risks to the United States and align the scope of the exception to be consistent with analogous European Union ("**EU**") rules.

- **Foreign Branch Group B Exception.** The Commission should clarify that the exception from Group B requirements for swaps conducted through a foreign branch of a U.S. Swap Entity applies on a swap-by-swap, requirement-by-requirement basis, and that it is optional for a U.S. Swap Entity to rely on the exception for any given swap. Also, consistent with our requests above, this exception should be available when a foreign branch transacts with an SRS end user or U.S. branch of a foreign bank.

• **Substituted Compliance.** We support the Proposal's framework for substituted compliance for Group A requirements, but we respectfully request that the Commission expand the availability of substituted compliance for Group B and C requirements to be consistent with the SEC's substituted compliance framework by permitting substituted compliance for swaps with U.S. persons, swaps conducted through a U.S. branch, and Group C requirements (in general). We also seek certain clarifications regarding the supervision of Swap Entities relying on substituted compliance.

• **Key Definitions.** Subject to some minor clarifications, we generally support the Proposal's definitions for "U.S. person," "guarantee," "foreign branch," "swap conducted through a foreign branch," and "U.S. branch." As noted above, however, we do not support the SRS concept; in addition, if the Commission retains that concept, it should eliminate coverage of foreign subsidiaries of intermediate U.S. holding companies as SRSs, as these subsidiaries do not present significant risk to the United States. In addition, in support of international comity, the Commission should conform its definition for a "swap conducted through a U.S. branch" to be parallel to its definition for a "swap conducted through a foreign branch."

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DISCUSSION

I. Cross-Border Application of the SD Registration Threshold

The Proposal would apply different rules regarding the swaps a person must count toward its SD *de minimis* threshold calculation depending on whether the person is a U.S. person, a Guaranteed Entity, an SRS, or an Other Non-U.S. Person. With regards to U.S. persons and Guaranteed Entities, the Proposal would codify the requirement in the 2013 Guidance that such a person count all of its dealing swaps towards the *de minimis* threshold calculation. Accordingly, our comments below focus on the proposed treatment of SRSs and Other Non-U.S. Persons.

A. The Commission Should Remove the Concept of SRS Because It Would Extend the SD Registration Requirement Beyond the Commission's Jurisdictional Reach

The Proposal would require an SRS to count all of its dealing swaps towards the *de minimis* threshold calculation.[6] A non-U.S. person would be an SRS if: (1) the non-U.S. person is a "significant subsidiary"[7] of an "ultimate U.S. parent entity;"[8] (2) the ultimate U.S. parent entity has more than $50 billion in global consolidated assets, as determined in accordance with U.S. GAAP at the end of the most recently completed fiscal year; and (3) the non-U.S. person is not subject to either: (a) consolidated supervision and regulation by the Board of Governors of the Federal Reserve System (the "**Federal Reserve Board**"); or (b) capital standards and oversight by the non-U.S. person's home country regulator that are consistent with Basel III and margin requirements for uncleared swaps in a jurisdiction for which the Commission has

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[6] Proposed § 23.23(b)(1).

[7] A non-U.S. person would be considered a "significant subsidiary" if, together with its subsidiaries, it passes at least one of following three tests for significance relative to its ultimate U.S. parent entity: (a) the three-year rolling average of the subsidiary's equity capital is equal to or greater than five percent of the three-year rolling average of its ultimate U.S. parent entity's consolidated equity capital, as determined in accordance with U.S. GAAP at the end of the most recently completed fiscal year; (b) the three-year rolling average of the subsidiary's revenue is equal to or greater than ten percent of the three-year rolling average of its ultimate U.S. parent entity's consolidated revenue, as determined in accordance with U.S. GAAP at the end of the most recently completed fiscal year; or (c) the three-year rolling average of the subsidiary's assets is equal to or greater than ten percent of the three-year rolling average of its ultimate U.S. parent entity's consolidated assets, as determined in accordance with U.S. GAAP at the end of the most recently completed fiscal year. Proposed § 23.23(a)(13) (definition of "significant subsidiary").

[8] An "ultimate U.S. parent entity" would mean the U.S. parent entity that is not a subsidiary of any other U.S. parent entity, and a "parent entity" would mean any entity in a consolidated group that has one or more subsidiaries in which the entity has a controlling interest, as determined in accordance with U.S. GAAP. Proposed §23.23(a)(11) (definition of "parent entity") and (18) (definition of "ultimate U.S. parent entity").

issued a comparability determination with respect to uncleared swap margin requirement.[9]

1. The SRS Definition's Accounting Consolidation Test Does Not Satisfy CEA Section 2(i)

Although the SRS proposal is a significant improvement over Commission's October 2016 proposal (the "**2016 Proposal**")[10] to require any foreign consolidated subsidiary ("**FCS**")[11] to count all of its swaps toward the SD *de minimis* threshold, the SRS proposal remains flawed because it is based on the false premise that conducting swap dealing activity abroad through a separately incorporated subsidiary represents exploitation of a "substantial regulatory loophole" designed to "avoid the Dodd-Frank Act SD requirements." Since long before Congress enacted the Dodd-Frank Act, foreign subsidiaries of U.S. parent companies have engaged in a range of derivatives and non-derivatives financial services activities for local and international clients, with separate strategic, business, and legal reasons for their existence and organizational structure that have nothing to do with avoiding U.S. regulation. For example, in many jurisdictions, foreign subsidiaries have been established because certain activities may only be conducted by entities licensed or organized under local law.

Material legal and commercial consequences result from these decisions to conduct business through a foreign subsidiary instead of directly or through a branch. A U.S. parent company frequently faces limits on its ability to transfer revenues and capital from its foreign subsidiaries. Moreover, a U.S. parent company is not liable for a foreign subsidiary's obligations, absent extraordinary circumstances in which doctrines such as "piercing the corporate veil" or "substantive consolidation" are applied in a tort litigation or bankruptcy.[12]

Furthermore, applying SD registration requirements to a foreign subsidiary based solely on accounting consolidation with a U.S. parent company—without some contractual arrangement making a U.S. person directly liable for the foreign subsidiary's swaps—would contravene Section 2(i). Although the SRS proposal

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[9] Proposed § 23.23(a)(12) (definition of "significant risk subsidiary"). Our comments regarding the SRS definition are set forth in Part VII.C below.

[10] Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to [Swap Entities], 81 Fed. Reg. 71,946 (Oct. 18, 2016).

[11] The 2016 Proposal would have defined an FCS as a non-U.S. person in which an ultimate parent entity that is a U.S. person ("U.S. ultimate parent") has a controlling financial interest, in accordance with U.S. GAAP, such that the U.S. ultimate parent includes the non-U.S. person's operating results, financial position and statement of cash flows in the U.S. ultimate parent's consolidated financial statements, in accordance with U.S. GAAP.

[12] Courts are very unlikely to apply those doctrines to nonguaranteed subsidiaries that are separately regulated, well-capitalized, and have their own internal governance and records.

[13] Proposal, 85 Fed. Reg. at 964.

ameliorates some of the grave legal deficiencies exhibited by the 2016 Proposal's treatment of FCSs by incorporating a test for significance, Section 2(i) requires that extraterritorial swap activity have a U.S. connection or effect that is both "significant" and "direct." The SRS proposal fails to satisfy the direct-ness requirement.

Specifically, the Proposal argues that, by "virtue of consolidation," a "non-U.S. subsidiary's swap activity creates direct risk to the U.S. parent," justifying extraterritorial regulation under Section 2(i).[13] However, this argument runs at odds with judicial precedent that clearly requires more than a mere parent-subsidiary relationship to establish a "direct" link to the United States. The Commission bases its interpretation of Section 2(i)'s "direct and significant" test on the Seventh Circuit's interpretation of the "direct, substantial, and reasonably foreseeable" test for effects on U.S. commerce in the Foreign Trade Antitrust Improvements Act of 1982 (the "**FTAIA**").[14] The Seventh Circuit has addressed the treatment of U.S. companies' foreign subsidiaries for purposes of the FTAIA's test, finding that a mere parent-subsidiary relationship does not satisfy the test.

Specifically, in its 2015 decision in *Motorola Mobility LLC v. AU Optronics Corp.*, which involved a foreign antitrust conspiracy to raise the prices of certain cellphone components sold to the foreign subsidiaries of Motorola, the Seventh Circuit distinguished between components that those foreign subsidiaries incorporated into cellphones they sold to Motorola for resale in the United States, on the one hand, and components that the foreign subsidiaries incorporated into cellphones sold abroad, on the other hand.[15] The former category satisfied the FTAIA's "direct, substantial, and reasonably foreseeable" test, but the latter category did not.[16] Clearly, harm to Motorola's foreign subsidiaries through inflated costs was not enough to constitute a

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13 Proposal, 85 Fed. Reg. at 964.

14 *See* Proposal, 85 Fed. Reg. at 955. In this regard, the Commission opted not follow Supreme Court precedent interpreting the "direct effect" test found in the Foreign Sovereign Immunities Act of 1976, which the Court has interpreted to be satisfied only by conduct abroad that has "an immediate consequence" in the United States. *See Republic of Argentina v. Weltover*, 504 U.S. 605, 618 (1992). The Commission was wrong to do so. The case cited by the Commission as the basis for its decision, the Seventh Circuit *en banc* decision in *Minn-Chem, Inc. v. Agrium, Inc.*, was based on considerations that are relevant to the FTAIA—but *not* Section 2(i)—namely that (a) because the FTAIA includes the word "foreseeable" along with "direct," the word "direct" should be interpreted as part of an integrated phrase that includes "foreseeable" effects and (b) the FTAIA already addresses foreign conduct that has an immediate consequences in the United States through its separate provision for import commerce. *See Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012). But Section 2(i) does not include the word "foreseeable," nor does it include any other provisions addressing foreign conduct that has an immediate consequence within the United States. So the *Minn-Chem* Court's reasoning does not support the Commission's decision to discount the Supreme Court's interpretation of the word "direct" in *Weltover*.

15 *See Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 817 (7th Cir. 2015).

16 *See id.* at 818-819. The Court in *Motorola Mobility* went on to bar claims based on the former category on other grounds not relevant here.

sufficiently direct effect on U.S. commerce, even though those costs were surely reflected in Motorola's consolidated accounting—instead there needed to be a subsequent transfer of those inflated costs to U.S. affiliates (and, eventually, U.S. consumers). Similarly, here, a U.S. parent's consolidated accounting for swaps entered into by foreign subsidiaries abroad does not create a sufficiently "direct" U.S. connection or effect to satisfy Section 2(i); instead, there must be some additional arrangements, such as a guarantee or inter-affiliate swaps, to transfer the risks of those swaps into the United States. The 2013 Guidance got this right, but the Proposal does not.

2. <u>If the Commission Retains the SRS Concept, It Must Retain the SRS Definition's Test for Significance and Exclusions for Subsidiaries Subject to Local or Consolidated Regulation</u>

If, notwithstanding the concerns raised above, the Commission decides to adopt a version of the accounting consolidation test for SD registration, it is absolutely necessary that the Commission retain the SRS's definition's tests for significance to the United States and exclusions for prudentially regulated firms.[17] A test for significance is clearly necessary to satisfy Section 2(i)'s significance requirement. It would not be consistent with Section 2(i) for the Commission to treat the swap activity of all foreign subsidiaries as categorically exhibiting a "significant" U.S. connection or effect without considering either a group's significance to the United States or a subsidiary's significance to its U.S. parent entity.

We further emphasize that the Proposal's exclusions from the SRS definition for foreign subsidiaries subject to either consolidated supervision and

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[17] In this regard, we have grave concerns regarding Commissioner Berkovitz's proposed approach in his dissenting statement. Under that proposal, "true non-U.S. entities can trade with foreign affiliates of U.S. entities without counting those swaps toward U.S. swap dealer registration," provided that there are "substituted compliance determinations in place for key swap regulations (e.g. margin and risk management)," but "foreign entities that are wholly owned by U.S. parents would still be required to count swaps with other wholly-owned foreign affiliates of other U.S. parents" *See* Proposal 85 Fed. Reg. at 1015. This proposal would, for the most part, result in the same overbroad approach to extraterritorial regulation as the 2016 Proposal's approach to requiring every FCS—no matter its significance to the United States or the extent to which it is already regulated—to count all of its swap dealing transactions towards its SD *de minimis* threshold calculation and requiring every non-U.S. counterparty to an FCS to count all of their swaps with FCSs as well. Although Commissioner Berkovitz's proposal would permit a non-U.S. person that is not a subsidiary of, nor guaranteed by, a U.S. person (which is who we assume would qualify as a "true non-U.S. entity") to exclude swaps with an FCS if such non-U.S. person is located in a jurisdiction with comparable margin and risk management rules, non-U.S. persons in other foreign jurisdictions could not benefit from this exclusion. Considering that the only foreign jurisdictions that would currently qualify for the proposal's exclusion would be Australia, the EU, and Japan, U.S. multinational companies in other jurisdictions would face the daunting prospect of their foreign subsidiaries in several key jurisdictions (including more than half of the G20) losing access to local swap markets due to competitive disadvantages caused by the SD requirements that would attach to transactions entered into by these subsidiaries. And even in Australia, the EU, and Japan, the proposal would discourage foreign subsidiaries of U.S. banks from providing liquidity to the local subsidiaries of U.S. multinational companies, lest doing so would subject those banks' subsidiaries to SD registration.

regulation by the Federal Reserve Board or Basel-compliant capital standards and oversight and comparable margin requirements for uncleared swaps are important to the Section 2(i) analysis. Consolidated supervision and regulation by the Federal Reserve Board prevents foreign subsidiaries from presenting "direct" or "significant" risk to the United States by ensuring that the U.S. parent company maintains adequate capital against its foreign subsidiaries' exposures and that such subsidiaries engage solely in permissible activities. As a supervisory matter the Federal Reserve Board also would not permit a U.S. bank holding company to move swap activity abroad for purposes of evading Dodd-Frank Act SD requirements. The swap activities of foreign subsidiaries subject to Basel-compliant capital standards and comparable margin requirements, likewise, do not present direct or significant risk to the United States because such comparable foreign regulation mitigates the risk of those activities. Such foreign subsidiaries also are not engaged in an evasion of Dodd-Frank Act SD requirements given that they already face comparable local requirements. In addition, these exclusions help get at key factors—such as whether a subsidiary is regulated, whether the subsidiary operates in a different jurisdiction from its parent, whether the subsidiary benefits from documented credit support, and whether the parent has a policy (such as in its resolution plan) of supporting its subsidiaries—that materially affect whether a counterparty will rely on a foreign subsidiary receiving parental support. These types of factors were expressly noted by the Moody's Ratings paper that the Commission cited in the 2016 Proposal as a basis for regulating FCSs like U.S. persons.[18]

We address other, more technical aspects of the SRS definition in Part VII.C below.

B. <u>The Commission Should Conform the SD Registration Requirement for Other Non-U.S. Persons to the 2013 Guidance and Clarify the Exception for Anonymous Cleared Swaps</u>

As described below, we generally support the Proposal's application of the SD registration requirement to Other Non-U.S. Persons, which would largely codify the 2013 Guidance, but we think the Commission should clarify them and conform them further to the 2013 Guidance.

1. <u>Swaps Conducted Through a Foreign Branch</u>

We support the Commission's proposal that an Other Non-U.S. Person may continue to exclude swap dealing transactions conducted through a foreign branch of a registered SD;[19] we agree with the Commission that its regulatory interest in these swaps is not sufficient to warrant a competitive disadvantage for foreign branches of U.S. SDs, especially considering that Dodd-Frank Act transactional requirements, such as

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[18] *See* Moody's Investors Service, Proposed Bank Rating Methodology (Sept. 9, 2014) at p. 66-67, cited at 2016 Proposal, 81 Fed. Reg. at n. 39.

[19] Proposed Rule § 23.23(b)(2)(i).

margin requirements, mitigate the risk of these swaps to the U.S. SD. This exclusion also helps prevent market fragmentation by enabling Other Non-U.S. Persons to access liquidity provided by U.S. SDs through their foreign branches.

2. Swaps Conducted Through a U.S. Branch

We also support the Commission's decision, consistent with the 2013 Guidance, *not* to require a U.S. branch of non-U.S. banking organization to include all of its swap dealing transactions in its SD *de minimis* threshold calculation as if they were swaps entered into by a U.S. person or to require an Other Non-U.S. Person to include in its SD *de minimis* threshold calculation dealing swaps conducted through such a branch. As we lay out in greater detail in Part V.C.3 below, swaps between a U.S. branch and an Other Non-U.S. Person do not present risks to the United States that would justify applying the Commission's SD requirements.

3. Swaps with a Guaranteed Entity

The Proposal would require an Other Non-U.S. Person to count dealing swaps with a counterparty that is Guaranteed Entity toward its *de minimis* threshold calculation unless (a) the counterparty is registered as an SD or (b) the counterparty's swaps are guaranteed by a U.S. person that is a non-financial entity.[20] The Commission should further conform the Proposal to the 2013 Guidance by expanding these exceptions from counting dealing swaps with a Guaranteed Entity to cover a Guaranteed Entity that engages in *de minimis* swap dealing activity (or has crossed the *de minimis* threshold and intends to register as an SD by no later than two months after the end of the month in which it crossed the threshold) and is affiliated with a registered SD.[21] As the Commission noted in the 2013 Guidance, with respect to these transactions, "the Commission's regulatory concerns are addressed because the guaranteed affiliate engages in a level of swap dealing below the *de minimis* threshold and is part of an affiliated group with a swap dealer."[22] Absent an exception from counting these transactions, Other Non-U.S. Persons may refuse to deal with these Guaranteed Entities, thus causing market fragmentation without any meaningful reduction of risk to the United States.

4. Anonymous Cleared Swaps

Under the Proposal, an Other Non-U.S. Person could exclude that swap if (a) it entered into the swap on a designated contract market ("**DCM**"), registered or

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20 Proposed Rule § 23.23(b)(2)(iii).

21 *See* 2013 Guidance, 78 Fed. Reg. at 45,324. *See, also* CFTC Letter No. 13-64, No-Action Relief: Certain Swaps by Non-U.S. Persons that are Not Guaranteed or Conduit Affiliates of a U.S. Person Not to be Considered in Calculating Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception (Oct. 17, 2013).

22 2013 Guidance, 78 Fed. Reg. at 45,324.

exempt swap execution facility ("**SEF**"), or registered foreign board of trade ("**FBOT**"), (b) the swap was cleared through a registered or exempt derivatives clearing organization ("**DCO**"), and (c) the non-U.S. person did not know the identity of the swap counterparty prior to execution (such a swap, an "**Anonymous Cleared Swap**").[23] The Commission should expand this exception to cover swaps executed anonymously by an Other Non-U.S. Person on a non-U.S. trading venue and cleared by a non-U.S. clearing organization regardless of whether the trading venue and clearing organization are registered or exempt from registration with the Commission. Because these swaps are executed anonymously on a trading venue and centrally cleared, the Other Non-U.S. Person cannot determine whether the swaps would count towards the SD *de minimis* threshold. In addition, even if the Other Non-U.S. Person was registered as an SD, the swaps generally would not be subject to the Commission's external business conduct rules.[24] And because the swaps are centrally cleared by a non-U.S. clearing organization, which becomes the counterparty to the Other Non-U.S. Person, the swaps do not present risk to the United States that would justify application of the Commission's risk mitigation rules.

Furthermore, to the extent that the Other Non-U.S. Person's original counterparty was a U.S. person, the Commission's SEF and DCO registration requirements would independently require the trading venue and clearing organization to register with the Commission or obtain an exemption from registration. It is not necessary for the Commission to limit the SD registration exception for Anonymous Cleared Swaps in a manner that would indirectly expand the SEF and DCO registration requirements to non-U.S. trading venues and clearing organizations with Other Non-U.S. Person participants. We also believe that the Commission should not require non-U.S. trading venues or clearing organizations to register as SEFs or DCOs, respectively, merely because they permit participation by foreign branches of U.S. Swap Entities.[25]

C. **We Support the Proposal's Elimination of the Concept of Conduit Affiliates**

The Proposal would not include the concept of "conduit affiliate." We support elimination of the "conduit affiliate" concept in the Proposal, as the application of the conduit affiliate definition remains confusing for market participants, presenting significant compliance challenges while providing the Commission with limited additional regulatory oversight.

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23 Proposed § 23.23(d).

24 *See e.g.*, CFTC Regulations §§ 23.430(e), 23.431(c) and 23.450(h); *see also* CFTC Letter No. 13-70 (Nov. 15, 2013).

25 *See* SIFMA and Futures Industry Association, Promoting U.S. Access to Non-U.S. Swaps Markets: A Roadmap to Reverse Market Fragmentation (Dec. 14, 2017), *available at* https://www.sifma.org/wp-content/uploads/2017/12/Non-US-Trading-Platform-and-CCP-White-Paper-12-14-2017.pdf.

More generally, the Commission should not require a non-U.S. person, whether or not it is an SRS or other FCS, to include dealing swaps with a non-U.S. person in its SD *de minimis* threshold calculation merely because the risk of such swaps is transferred to an affiliated, registered U.S. SD.[26] There is no significant potential for risk to the United States or evasion of the Dodd-Frank Act in circumstances where a non-U.S. entity engaged in inter-affiliate transactions with a U.S. person is affiliated with a registered SD. In those circumstances, the Commission already can exercise appropriate regulatory oversight through direct regulation of the registered SD, which is subject to the relevant Dodd-Frank Act requirements, including the Commission's risk management requirements and either the Commission's or U.S. prudential regulators' margin and capital requirements. This consideration underlies the Commission's decision to exclude affiliates of a registered SD from the "conduit affiliate" definition in the 2013 Guidance,[27] as well as the similar approach taken by the SEC in its implementation of the Dodd-Frank Act.[28] We are not aware of any new data or changed circumstances that would merit a change in this policy by the Commission.[29]

II. <u>**Cross-Border Application of the MSP Registration Thresholds**</u>

Like with the SD registration threshold, the Proposal would apply different rules regarding the swaps a person must count toward its MSP registration thresholds depending on whether the person is a U.S. person, a Guaranteed Entity, an SRS, or an Other Non-U.S. Person. With regards to U.S. persons and Guaranteed Entities, the Proposal would codify the requirement in the 2013 Guidance that such a person count all of its swaps towards the MSP registration threshold. Accordingly, our comments below focus on the proposed treatment of SRSs and Other Non-U.S. Persons. We also address the requirement for guaranteed swaps to be attributed to the guarantor for MSP registration purposes.

A. <u>**The Commission Should Remove the Concept of SRS Because It Would Extend the MSP Registration Requirement Beyond the Commission's Jurisdictional Reach**</u>

The Proposal would require an SRS to count all of its swaps towards its MSP registration thresholds.[30] For the reasons set forth in Part I.A. above, the

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26 The Commission requested comment on this topic in the Proposal. *See* Proposal, 85 Fed. Reg. at 973 (request for comment (23)).

27 2013 Guidance, 78 Fed. Reg. at 45,319 and 45,359.

28 17 C.F.R. §§ 240.3a71-3(b)(1)(ii) and 240.3a71-3(a)(1).

29 If the Commission adopted an SD registration requirement for conduit affiliates, it should only do so in lieu of the SD registration requirement for SRSs, and it should define "conduit affiliate" like the SEC did.

30 Proposed § 23.23(c)(1).

Commission should not adopt this proposal. Absent a guarantee or other form of direct risk transfer to a U.S. person, a foreign subsidiary does not present sufficiently "direct" risk to the United States to justify extraterritorial application of the MSP registration requirement under Section 2(i). Permitting foreign subsidiaries to transact in swaps without registering as MSPs also would not create a substantial regulatory loophole, as there is no evidence of sufficiently substantial non-dealing swap activity occurring in foreign subsidiaries at present when SRSs are not subject to MSP registration (just as there are no U.S. persons currently registered as MSPs).

B. We Support the MSP Registration Requirement for Other Non-U.S. Persons under the Proposal

The Proposal would require an Other Non-U.S. Person to count the following swap positions toward its MSP registration thresholds: (1) swap positions where the counterparty is a U.S. person, other than swaps conducted through a foreign branch of a registered SD; and (2) swap positions with a counterparty that is a Guaranteed Entity, except when the counterparty is registered as an SD.[31] However, an Other Non-U.S. Person could exclude Anonymous Cleared Swaps from its MSP registration threshold calculations.

We generally support this proposal,[32] which is consistent with the 2013 Guidance except that it does not require that swaps with a foreign branch of a registered SD or a Guaranteed Affiliate that is registered as an SD to be subject to daily variation margin in order to be excluded from an Other Non-U.S. Person's MSP registration thresholds. It is no longer necessary for the Commission to apply this condition because Dodd-Frank's margin requirements independently impose variation margin requirements on SDs where appropriate. We further note that the need, under the 2013 Guidance, for non-U.S. persons to determine their own "financial entity" status in order to evaluate whether variation margin was required for them to exclude their swaps with foreign branches from MSP registration thresholds has resulted in undue complexity now that uncleared swap margin rules use the slightly different "financial counterparty" definition.

We also support the Commission's decision, consistent with the 2013 Guidance, *not* to require a U.S. branch of a non-U.S. banking organization to include all of its swap positions in its MSP threshold calculation as if they were swaps entered into by a U.S. person or to require an Other Non-U.S. Person to include in its MSP threshold calculation dealing swaps conducted through such a branch. As we lay out in greater detail in Part V.C.3 below, swaps between a U.S. branch and an Other Non-U.S. Person

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[31] Proposed § 23.23(c)(2).

[32] As described in Part I.B.4, however, we recommend that the Commission expand the exception for Anonymous Cleared Swaps to cover swaps executed anonymously by an Other Non-U.S. Person on a non-U.S. trading venue and cleared by a non-U.S. clearing organization regardless of whether the trading venue and clearing organization are registered or exempt from registration with the Commission.

do not present risks to the United States that would justify applying the Commission's MSP requirements.

C. **The Commission Should Conform the MSP Attribution Requirement for Guarantors to the 2013 Guidance**

In general, an entity's swap positions are attributed to a parent, other affiliate, or other guarantor for purposes of the MSP analysis to the extent that the counterparties to those positions have recourse to the parent, affiliate, or other guarantor, unless such entity is subject to capital regulation by the Commission or the SEC or is regulated as a bank in the United States.[33] The 2013 Guidance had clarified that this exception for entities subject to capital regulation also includes entities subject to non-U.S. capital standards that are comparable to, and as comprehensive as, the capital regulations and oversight by the Commission, SEC or a U.S. prudential regulator (*i.e.*, Basel compliant capital standards and oversight by a G20 prudential supervisor).[34]

The Proposal does not include this exception for entities subject to Basel-compliant capital standards and oversight by a G20 prudential regulator. However, as the Commission itself correctly recognizes, being "subject to capital standards and oversight by [an entity's] home country regulator[] that are consistent with Basel III" significantly limits "the potential risk that the entity might pose to the U.S. financial system."[35] Accordingly, the attribution requirement in the MSP threshold context should exclude entities subject to Basel compliant capital standards and oversight by a G20 prudential supervisor, as those entities should pose no higher risk than entities subject to capital regulation by the Commission, SEC, or a prudential regulator.

III. **We Support the Proposal's Approach to ANE Transactions**

We support the Commission's decision in the Proposal to only apply anti-fraud and anti-manipulation rules to ANE Transactions, so long as neither non-U.S. counterparty is an SRS or Guaranteed Entity.[36] We support this aspect of the Proposal because it is consistent with the Commission's regulatory interests. First, ANE Transactions do not present direct risk to the United States. Second, the anti-fraud and anti-manipulation rules that would remain applicable would mitigate potential concerns associated with any potential misconduct occurring in connection with ANE Transactions and any other conduct subject to the jurisdiction of the CEA. Third, today we would

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[33] Proposal, 85 Fed. Reg. at 976.

[34] 2013 Guidance, 78 Fed. Reg. at 45,326.

[35] Proposal, 85 Fed. Reg. at 966.

[36] We addressed the application of the Swap Entity registration thresholds to SRSs and Guaranteed Entities in Parts I and II above, and we address the application of other Swap Entity requirements to such entities in Part V below.

expect most ANE Transactions to be subject to foreign regulatory requirements similar to the Commission's own, unlike at the time of the adoption of the 2013 Guidance. Finally, applying the Commission's Swap Entity rules to ANE Transactions would likely result in disruptive and unnecessary market fragmentation as transactions ordinarily arranged, negotiated, or executed by U.S. personnel would shift to non-U.S. locations, resulting in decreased Commission oversight. We also note that the Proposal's approach to ANE Transactions is consistent with the Proposal's elimination of the employee location prong from the definition of "swaps conducted through a foreign branch" (as discussed in Part VII.D below), as both changes would focus on the Commission's regulatory interests and the actual economic risk of swap transactions to swap counterparties, rather than focusing on the physical location of personnel who happen to be involved in the swap transaction.

Although the Proposal's approach to ANE Transactions would deviate from that taken by the SEC, we believe this deviation is justified. We disagree with the SEC's decision to apply an ANE test to security-based swap dealer registration, business conduct, and reporting requirements for two reasons. First, costs associated with an ANE test, both with respect to implementing the test and managing ensuing conflicts with foreign laws, are likely to be significant, with minimal countervailing U.S. policy benefit.[37] Second, an ANE test would likely have significant negative consequences for U.S. jobs, as non-U.S. Swap Entities would need to move personnel offshore to accommodate increasing pressure from foreign counterparties to ensure that their trades are not subject to complex U.S. regulation. Additionally, some may argue that the relationship of the security-based swap market to the cash securities markets, and Congress's decision to define security-based swaps as "securities," present some justification for applying a test for use of U.S. jurisdictional means to conduct security-based swap business that is similar to the test that applies in connection with existing, pre-Dodd-Frank securities broker-dealer regulation. No similar justification applies in connection with swaps regulation by the Commission, as the swaps market generally trades independently of the U.S. futures market, and Congress did not define swaps to be a type of futures contract. It is, thus, entirely appropriate for the Commission to depart from the SEC's approach to ANE Transactions.

Currently, ANE Transactions are subject to the ANE Staff Advisory and related no-action relief. If adopted, the Proposal would supersede the ANE Staff Advisory, but only with respect to those requirements covered by the Proposal. However, certain other requirements—mandatory clearing, mandatory trade execution, and real-time public reporting—would remain subject to the ANE Staff Advisory and related no-action relief, pending further Commission action. To achieve a coherent, Commission-driven ANE transaction policy, we instead request that the Commission immediately direct the staff to withdraw the ANE Staff Advisory, and that the Commission withdraw the associated portions of the 2013 Guidance relating to the

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[37] *See* Letter from Sarah Miller, CEO, IIB, to Christopher Kirkpatrick, Secretary, the Commission, dated May 11, 2015 (performing a cost-benefit analysis for an ANE test).

treatment of foreign branches of U.S. banks[38] and U.S. branches of foreign banks,[39] making clear that the location of personnel engaged in ANE activity does not bear on the regulatory treatment of cross-border swaps for any purposes.[40]

IV. **Categorization of Swap Requirements**

A. **The Commission Should Categorize Rule 1.31 and its Capital and Financial Reporting Rules as Group A Requirements**

We support the Commission's proposed categorization of Group A requirements.[41] In particular, we support the Commission's decision to streamline categorization of the Commission's recordkeeping requirements under Commission Regulations § 23.201 (which the 2013 Guidance separated into two different sub-categories) and address the Commission's antitrust rules (which as were not addressed by the 2013 Guidance). Like the other "entity-level" requirements described in the 2013 Guidance, these requirements most naturally apply to a firm's operations as a whole, not to particular transactions.

In addition, the Commission should clarify that CFTC Regulations §§ 1.31 and 45.2 are Group A requirements. CFTC Regulations § 1.31 generally sets forth the substantive record retention requirements for Swap Entities, which CFTC Regulations § 23.203 incorporates by reference. Similarly, CFTC Regulation § 45.2(a) contains substantive recordkeeping requirements for Swap Dealers, among other registrants, as well as cross-references to recordkeeping requirements in Part 23. Accordingly, it would be consistent with categorizing CFTC Regulations § 23.203 as a Group A requirement to categorize CFTC Regulations §§ 1.31 and 45.2 in the same manner.

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38 2013 Guidance, 78 Fed. Reg. at 45,330. The Commission should also clarify that the location of personnel is not relevant for any staff no-action relief applicable to foreign branch activity. *See*, e.g., Staff No-Action Letter 15-64 (Nov. 20, 2015).

39 *Id.* at 45,350, footnote 513.

40 The Commission should also remove the reference to a swap "otherwise executed in the United States" from Commission Regulations § 45.8(f).

41 The Proposal would define the following rules as "**Group A requirements**" applicable to a Swap Entity on an entity-wide basis: chief compliance officer (CFTC Regulations § 3.3); required records (CFTC Regulations § 23.201); records retention and inspection (CFTC Regulations § 23.203); risk management program (CFTC Regulations § 23.600); monitoring of positon limits (CFTC Regulations § 23.601); diligent supervision (CFTC Regulations § 23.602); business continuity and disaster recovery (CFTC Regulations § 23.603); conflicts of interest policies and procedures (CFTC Regulations § 23.605); information availability for disclosure and inspection (CFTC Regulations § 23.606); antitrust considerations (CFTC Regulations § 23.607); and clearing member risk management (CFTC Regulations § 23.609). *See* Proposed § 23.23(a)(5).

Finally, in our other correspondence with the Commission, we have addressed the cross-border application of its capital and financial reporting requirements, which the Commission should categorize as Group A requirements.[42]

B. <u>**The Commission Should Categorize Rules for Clearing, Margin for Uncleared Swaps, and, for Non-U.S. Swap Entities with a Non-U.S. Ultimate Parent Entity, Swap Data Reporting as Group B Requirements**</u>

We support the Commission's proposed categorization of swap documentation rules (CFTC Regulations §§ 23.501-504) as Group B requirements.[43] These requirements are intended to mitigate risk to Swap Entities and their counterparties and so appropriately apply in circumstances where both the Swap Entity and its counterparty have a nexus to the United States. We also support treating daily trading records requirements as Group B requirements except, as noted in Part IV.C below, the Commission should re-categorize its pre-execution daily trading records requirements as Group C requirements.[44]

In addition, if the Commission adopts our recommendations in Part V below regarding exceptions from Group B and C requirements, the Commission should categorize the following requirements as Group B requirements:

1. <u>**Clearing-Related Requirements**</u>

The Proposal does not address the Commission's clearing-related requirements (CEA Section 2(h)(1), Part 50 of the Commission's regulations, and Commission Regulations §§ 23.505, 23.506, and 23.610). In the 2013 Guidance, the Commission classified these requirements as "Category A" transaction-level requirements because they are intended to mitigate risk to Swap Entities and their counterparties.[45] As a result, they currently apply to non-U.S. Swap Entities when they transact with U.S. persons, guaranteed affiliates, and conduit affiliates, and to foreign branches of U.S. banks when they transact with any type of counterparty (subject to an

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[42] *See* Letter from Briget Polichene, CEO, IIB, Scott O'Malia, CEO, ISDA, and Kenneth Bentsen, President and CEO, SIFMA, to Christopher Kirkpatrick, Secretary, the Commission, dated Mar. 3, 2020, *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62365.

[43] The Proposal would define the following rules as "**Group B requirements**" applicable to a Swap Entity on a transaction-level basis, with extraterritorial application to Guaranteed Entities and SRSs: daily trading records (CFTC Regulations § 23.202); swap confirmation (CFTC Regulations § 23.501); portfolio reconciliation (CFTC Regulations § 23.502); portfolio compression (CFTC Regulations § 23.503); and swap trading relationship documentation (CFTC Regulations § 23.504). *See* Proposed § 23.23(a)(6).

[44] We note that such categorization should not limit when these rules apply to trading on U.S. DCMs or SEFs.

[45] 2013 Guidance, 78 Fed. Reg. at 45,339.

exception for "emerging markets" branches). For similar reasons, the Commission should categorize these requirements as Group B requirements.

2. Uncleared Swap Margin Requirements

The Commission should categorize its uncleared swap margin requirements (CFTC Regulations §§ 23.150-161) as Group B requirements. This categorization would be consistent with categorization of other risk-based rules under the Proposal, as the Commission has noted that the margin rules are intended to "help ensure the safety and soundness of" the registered Swap Entity and to ensure that initial and variation margin are "appropriate for the risk associated with non-cleared swaps."[46]

Currently, the cross-border application of the uncleared swap margin requirements is governed by CFTC Regulation § 23.160. Relative to the Proposal's treatment of Group B requirements, CFTC Regulations § 23.160 applies U.S. uncleared margin rules more broadly to FCSs, including even when they trade with Other Non-U.S. Persons, and greatly restricts the ability of Guaranteed Entities to rely on substituted compliance. As discussed in Part II.A.1 above, application of an accounting consolidation test as part of the FCS definition is inconsistent with Section 2(i).[47] Further, the limited application of substituted compliance under § 23.160 is unnecessary to mitigate risk to the United States but instead results in overlapping rules that deter cross-border trading and increase risk.[48] Replacing § 23.160 with a classification of the margin requirements as Group B requirements would promote coherence within the Commission's regulatory regime, reduce complexity, and improve the efficiency of compliance by the market participants.

3. Swap Data Reporting Requirements

The Proposal does not address the Commission's swap data reporting requirements (Parts 45 and 46 of the Commission's regulations). Currently, the 2013 Guidance classifies those requirements as "Category 2" entity-level requirements, which apply to Swap Entities on an entity-wide basis, with non-U.S. Swap Entities potentially eligible for substituted compliance with respect to their swaps with non-U.S. persons.[49]

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[46] CEA § 4s(e)(3)(A).

[47] In our September 2015 comment letter to the Commission's proposed rules on the cross-border application of margin requirements ("2015 Margin Letter"), we explained in detail why it would contravene Section 2(i) to apply the Commission's margin rules to all uncleared swaps entered into by an FCS when the only U.S. nexus for such swaps would be the FCS's accounting consolidation with its U.S. parent. *See* Letter from Sarah Miller, CEO, IIB, and Kenneth Bentsen, President and CEO, SIFMA, to Christopher Kirkpatrick, Secretary, the Commission, dated Sept. 14, 2015, *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60479&SearchText=.

[48] *See* 2015 Margin Letter, at p. 4-9.

[49] 2013 Guidance, 78 Fed. Reg. at 45,349.

However, since 2013 the Commission staff has provided no-action relief from these requirements to non-U.S. Swap Entities that are not part of an affiliated group in which the ultimate parent entity is a U.S. Swap Entity bank, financial holding company, or bank holding company.[50]

Applying swap data reporting requirements to a non-U.S. Swap Entity's swaps with non-U.S. persons can cause the non-U.S. Swap Entity to violate local blocking, privacy or secrecy laws, as well as cause the non-U.S. Swap Entity to incur significant operational and compliance costs. Especially where a non-U.S. Swap Entity does not have a U.S. ultimate parent company, the swaps do not pose risk to the U.S. financial system that could justify extraterritorial application of Parts 45 and 46. Accordingly, the Commission should codify the existing staff no-action relief by making its swap data reporting requirements Group B requirements, at least for any Swap Entity that does not have a U.S. parent entity. Non-U.S. Swap Entities that have a U.S. parent entity should remain eligible for substituted compliance in connection with swap data reporting requirements.

C. <u>**The Commission Should Categorize Rules for Pre-Execution Daily Trading Records, Trade Execution, Real-Time Public Reporting, Counterparty Clearing Documentation, and Elective Initial Margin Segregation as Group C Requirements**</u>

We support the Proposal's categorization of the Commission's external business conduct standards as Group C requirements, which is consistent with the 2013 Guidance and the fact that these requirements focus on counterparty protection.[51]

In addition, if the Commission adopts our recommendations in Part V below regarding exceptions from Group B and C requirements, the Commission should classify the following requirements as Group C requirements:

1. <u>**Pre-Execution Daily Trading Records**</u>

A subset of the Commission's daily trading records requirements (CFTC Regulations § 23.202(a)(1) and 23.202(b)(1)-(3)) relate to pre-execution information, such as telephone or e-mail conversations with counterparties. This information generally has no nexus to the risk management of the Swap Entity or to the Commission's risk mitigation rules. Instead, it relates to a Swap Entity's sales practices.

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50 *See, e.g.*, CFTC Letter No. 17-64, Extension of Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain [Swap Entities] Established under the Laws of Australia, Canada, the European Union, Japan or Switzerland (Nov. 30, 2017).

51 Under the Proposal "**Group C requirements**" would be limited to the external business conduct standards (CFTC Regulations §§ 23.400-451), applicable to a Swap Entity on a transaction-level basis.

Accordingly, the Commission should re-categorize these requirements as Group C requirements, like the Commission's external business conduct standards.[52]

2. Trade Execution and Real-Time Public Reporting

The Proposal does not address the Commission's mandatory trade execution requirement (CEA Section 2(h)(8)) or its real-time public reporting requirements (Part 43 of the Commission's regulations). The 2013 Guidance categorized these requirements as "Category A" transaction-level requirements,[53] so that, like Group B requirements under the Proposal, they apply extraterritorially. It would be more appropriate, however, for the Commission to apply these requirements solely territorially, as Group C requirements.

The primary objectives of those requirements, similar to the Commission's external business conduct standards, are to change the information balance within the marketplace and, in so doing, give customers enhanced access to the best pricing. These objectives must be balanced against adverse effects on liquidity, particularly for large, bespoke, or illiquid swaps. Moreover, because they go to the heart of information availability in the marketplace, mandatory trade execution and public reporting requirements are core market structure regulations that affect not only the direct parties to the swap in question, but also every other participant in the market in which those parties trade. To raise a concrete example, if some participants in the European CDS market are required to disseminate their trading interest to at least three dealers and to have their transaction and pricing information disseminated publicly within 15 minutes of execution, then that affects the balance of information for the European CDS market as a whole.

As the Commission is aware from its own SEF and public reporting rulemakings, balancing the costs and benefits of liquidity and transparency entails difficult policy decisions integrally tied to the nature of the markets in question. Different regulators and legislators can and do strike different balances even while striving toward similar overall policy objectives, with resulting regulatory differences that, to-date, have prevented the Commission from making any comparability determinations for these requirements.[54]

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52 We note that such categorization should not limit when these rules apply to trading on U.S. DCMs or SEFs.

53 2013 Guidance, 78 Fed. Reg. at 45,339.

54 Although the Commission has exempted some foreign trading platforms from SEF registration, it has not made any comparability determinations for the mandatory trade execution requirement, meaning that the Commission's rules, not local market structure rules, determine which swaps the foreign branches of U.S. banks and guaranteed affiliates must execute on a DCM, FBOT, or registered or exempt SEF. As a result, these SEF registration exemptions have not fully addressed the issues posed by extraterritorial application of the mandatory trade execution requirement.

For these reasons, application of these pre- and post-trade requirements to swaps with non-U.S. counterparties tends to fragment markets. Non-U.S. counterparties who are not required, under local market structure rules, to execute swaps on regulated platforms have generally avoided transacting with foreign branches of U.S. banks or guaranteed affiliates, so that the Commission's mandatory trade execution requirement does not restrict the manner in which they execute their swaps. Even for swaps not subject to the mandatory trade execution requirement, non-U.S. counterparties frequently avoid transacting with foreign branches of U.S. banks or guaranteed affiliates in order to avoid having their swaps disseminated to the public more quickly than is required under local rules.

At the same time, the rationales for applying Dodd-Frank's pre- and post-trade transparency requirements extraterritorially are not very compelling. For instance, the 2013 Guidance asserts that the trade execution requirement is "[i]ntegrally linked to the clearing requirement."[55] In our view, this statement misconstrues the status of mandatory clearing as a prerequisite for mandatory trading—which exists because Congress believed that a swap must be liquid enough to support mandatory clearing before it could support mandatory trading—as an indication that the two requirements serve the same objective. Mandatory clearing is intended to reduce systemic risk by addressing the interconnectedness amongst financial institutions. Mandatory trading, in contrast, is intended to promote investor protection and best execution, as noted above.

In addition, the Commission notes that trade execution and real-time reporting requirements "provide important information" that "facilitates risk management."[56] While it is true that additional pricing information does assist in risk management, the sort of real-time pre- and post-trade pricing information mandated by Dodd-Frank's trade execution and real-time reporting requirements both goes much further than what is required for risk management purposes and, for some products, still does not provide enough. Specifically, for standardized products suitable for mandatory clearing, the central counterparty already typically obtains and makes available daily settlement pricing sufficient for margining and valuation purposes. For bespoke and illiquid products, on the other hand, the trade execution requirement does not apply in any event, and real-time public data reports often does not provide sufficient data about the terms of the swap to enable third parties to use those reports for their internal risk management purposes.

Thus, although the Commission has in the past referred to these rules as contributing to financial stability, this connection is far too attenuated to satisfy the significant and direct connection to or effect on the United States that is a prerequisite for the Commission to apply these rules extraterritorially.

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55 2013 Guidance, 78 Fed. Reg. at 45,367.

56 *Id.* at 45,356.

3. Counterparty Clearing Relationship and Elective Initial Margin Segregation

The Proposal does not address the Commission's counterparty clearing relationship requirements (CFTC Regulations § 23.608) or elective initial margin segregation requirements (CFTC Regulations §§ 23.701-704). These requirements are largely focused on customer protection rather than risk mitigation. Specifically, the counterparty clearing relationship requirements are designed to prevent Swap Entities from entering into certain relationships with a counterparty's futures commission merchant that might disadvantage that counterparty's ability to execute swaps on favorable terms or have access to straight-through-processing of cleared swaps. Elective initial margin segregation protects counterparties by allowing them to choose between facing credit risk to a Swap Entity when posting non-regulatory initial margin to that Swap Entity versus incurring the greater costs of segregating that initial margin. Accordingly, because these rules are generally focused on customer protection rather than risk mitigation, the Commission should categorize these requirements as Group C requirements.

V. Exceptions from Swap Entity Requirements

A. The Commission Should Expand the Exchange-Traded Exception

The Proposal would provide an exception from Group B requirements (other than the daily trading records requirements in §§ 23.202(a) through (a)(1)) and Group C requirements for Anonymous Cleared Swaps.[57] This exception would be available to each non-U.S. Swap Entity and each foreign branch of a U.S. Swap Entity, with respect to its "**foreign-based swaps**," which the Proposal would define to include (i) a swap by a non-U.S. Swap Entity, except for a swap conducted through a U.S. branch and (ii) a swap conducted through a foreign branch.[58]

For the reasons set forth in Part I.B.4 above, the Commission should expand this exception to apply to non-U.S. Swap Entities regardless of whether the trading venue and clearing organization are registered or exempt from registration with the Commission. It is not necessary for the Commission to limit this exception for Anonymous Cleared Swaps in a manner that would indirectly expand the SEF and DCO registration requirements to non-U.S. trading venues and clearing organizations with non-U.S. Swap Entity participants.

Additionally, the Commission should expand the exception for Anonymous Cleared Swaps to make it available to U.S. Swap Entities as well, except for daily trading records rules. With respect to the other Group B requirements, whether or not the Swap Entity is a U.S. person, the interposition of clearing organizations reduces

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[57] Proposed § 23.23(e)(1)(i).

[58] Proposed § 23.23(a)(4).

risk to the United States, thereby obviating the need for application of the risk mitigation rules. Those rules generally include exceptions that cover Anonymous Cleared Swaps,[59] but the scope of those exceptions vary in respects that are not clearly tied to any policy rationale but which complicate compliance measures. In addition, SEFs provide market participants with the regulatory compliance protections associated with centralized trading. Similarly, many Group C requirements do not apply to a Swap Entity in connection with swaps executed anonymously, regardless of the U.S. person status of the Swap Entity.[60]

B. The Commission Should Refine How Group C Requirements Apply to Swaps with Non-U.S. Persons

The Proposal would provide an exception from Group C requirements for a non-U.S. Swap Entity or the foreign branch of a U.S. Swap Entity with respect to its foreign-based swaps with a foreign counterparty.[61] The Proposal would define a "**foreign counterparty**" to mean: (i) a non-U.S. swap person, except with respect to a swap conducted through a U.S. branch of that non-U.S. person; or (ii) a foreign branch where it entered into a swap in a manner that satisfies the definition of a swap conducted through a foreign branch.[62]

We support the Commission's proposal not to apply the Group C requirements to swaps conducted through the foreign branch of a U.S. Swap Entity with a non-U.S. person or another foreign branch or swaps between a non-U.S. Swap Entity and a non-U.S. person or foreign branch. We agree that these swaps do not implicate the customer protection goals of Dodd-Frank embodied in the Group C requirements and that foreign regulators have a strong interest in overseeing sales practices for these swaps. Providing an exception from Group C requirements for these swaps would also be consistent with the 2013 Guidance.[63]

In addition, the Commission should refine how its external business conduct rules apply to U.S. Swap Entities and U.S. branches of non-U.S. Swap Entities when they transact with non-U.S. counterparties. In our experience since the rules took effect in 2013, the rules frequently fragment markets by causing non-U.S. counterparties to prefer to transact with non-U.S. Swap Entities not subject to the rules. In particular, rules that require non-U.S. counterparties to make extensive and intrusive

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59 *See* CFTC Regulations §§ 23.501(a)(4), 23.502(d), 23.503(c) and 23.504(a)(1)(ii). *See, also* CFTC Letter No. 13-70 (Nov. 15, 2013).

60 *See e.g.*, CFTC Regulations §§ 23.430(e), 23.431(c) and 23.450(h); *see also* CFTC Letter No. 13-70 (Nov. 15, 2013).

61 Proposed § 23.23(e)(1)(ii).

62 Proposed § 23.23(a)(3).

63 *See* 2013 Guidance, 78 Fed. Reg. at 45,360-61.

representations, such as suitability requirements, are burdensome on non-U.S. counterparties because they do not often have the U.S. legal expertise to review these representations. Also, non-U.S. counterparties frequently ask to opt out from rules that intrude on the execution process, most notably the pre-trade mid-market mark disclosure requirement. Non-U.S. financial counterparties also can be confused when they receive daily marks in addition to marks provided for variation margin purposes.

Moreover, because the business conduct requirements are designed to provide customer protection rather than to mitigate risk to the United States, the Commission has a limited regulatory interest in mandating full application of its customer protection requirements to all swap transactions between Swap Entities and their non-U.S. counterparties. In other contexts, such as its commodity pool operator and commodity trading advisor rules, the Commission has similarly recognized that non-U.S. persons do not generally implicate U.S. investor protection concerns.[64]

Recognizing these considerations, we propose that the Commission streamline which the business conduct requirements apply to swaps with non-U.S. persons, subject to the right for a non-U.S. person to opt in to additional requirements. Under the "opt-in" approach, unless a non-U.S. counterparty expressly opts in to the full range of external business conduct rules, the Commission should limit the external business conduct rules that apply to a U.S. Swap Entity (including its U.S. branches or when it otherwise trades in the United States) or U.S. branch of a non-U.S. Swap Entity when it trades with a non-U.S. counterparty to: (1) the prohibition on fraud, manipulation and other abusive practices (but not additional confidentiality requirements under § 23.410(c)); (2) verification of eligible contract participant ("**ECP**") status (although such verification should *not* require a written representation regarding a specific prong of the ECP definition, like it does for U.S. persons); (3) disclosure of material risks (but *not* scenario analysis under § 23.431(b)), material characteristics and economic terms, and material conflicts of interest and incentives (but *not* pre-trade mid-market marks under § 23.431(a)(3)(i)), *without* requiring the counterparty to agree in writing to the manner of disclosure as under §§ 23.402(e) and (f)); (4) fair and balanced communications; and (5) a one-time notification prior to entering into a new trading relationship with a non-U.S. counterparty that the non-U.S. counterparty may opt in to the additional customer protections provided by the remaining external business conduct rules along with a summary description of those rules. The Commission also should, like the SEC, clarify that non-U.S. persons are not Special Entities, considering that Congress was not seeking to protect foreign pension plans and endowments. This approach would result in improved flexibility in the Commission's regulatory regime, striking an appropriate balance between protecting market participants and eliminating inefficiencies that reduce market liquidity by fragmenting markets.

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[64] *See, e.g.*, CFTC Regulations § 4.7 (defining a Non-United States Person as a qualified eligible person to whom fewer investor protection obligations may apply).

C. **The Commission Should Expand the Non-U.S. Swap Entity Group B Exception**

The Proposal would provide an exception from Group B requirements for a Non-U.S. Swap Entity that is an Other Non-U.S. Person with respect to its foreign-based swaps with a foreign counterparty that also is an Other Non-U.S. Person.[65] We agree with the Commission that foreign regulators have a stronger supervisory interest in these swaps than the Commission in regards to the risk mitigation matters covered by the Group B requirements, notwithstanding that one or both parties to the swap may be a Swap Entity. However, we recommend that the Commission expand this exception in several respects.

1. **The Group B Exception Should Apply to Swaps with SRS End Users**

As explained in Part I.A.1 above, the Proposal's treatment of SRSs would inappropriately treat a wide range of *bona fide* activity conducted by foreign subsidiaries as exploitation of a "regulatory loophole" and fail to account for the risk-mitigating features of limited liability structures, in contravention of Section 2(i).

This overbroad application of Commission requirements to SRSs would be especially problematic in connection with the Group B requirements. These requirements indirectly regulate the end-user (*i.e.*, non-Swap Entity) counterparties of Swap Entities by requiring them to execute documentation, such as the March 2013 ISDA Dodd-Frank Protocol, and engage in portfolio reconciliation and compression exercises, when they trade with Swap Entities subject to the requirements. But many more end users will qualify as SRSs than Swap Entities because, unlike Swap Entities, end users generally will not qualify for the exclusions from the SRS definition for non-U.S. persons subject to consolidated supervision and regulation by the Federal Reserve Board or Basel-compliant capital standards and oversight and comparable margin requirements for uncleared swaps.

As a result, under the Proposal, significant foreign subsidiaries of large U.S. multinational companies would find themselves subject to Group B requirements when they trade with non-U.S. Swap Entities. This extraterritorial application of U.S. rules would pose particular problems for significant subsidiaries doing business in emerging market jurisdictions that have not yet adopted comparable rules to the Group B requirements because Swap Entities' operations in those jurisdictions might not be set up to apply the Group B requirements to trading with those subsidiaries. As a result those subsidiaries could lose access to key interest or currency hedging products and face increased hedging and risk management costs relative to their foreign competitors.

Subjecting SRS end users to Group B requirements would also impose undue costs on non-U.S. Swap Entities. Because the SRS test depends on a non-U.S.

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[65] Proposed § 23.23(e)(2).

counterparty's internal organizational structure and financial metrics, it generally would not be possible for a Swap Entity to determine whether its non-U.S. counterparty is an SRS without obtaining an affirmative representation. And because even a non-U.S. subsidiary of a company headquartered outside the United States—including even a private company—could be an SRS if it had an intermediate U.S. holding company, it would be difficult for a Swap Entity categorically to rule out any class of non-U.S. counterparties from being an SRS. As a result, the proposed application of Group B requirements to SRSs would force Swap Entities to obtain SRS representations from nearly their entire global client bases.

For these reasons, the Commission should either eliminate the SRS category or, at a minimum expand the Non-U.S. Swap Entity Group B exception to apply when a Non-U.S. Swap Entity trades with an SRS.

2. <u>Application of SD Requirements to Swaps with Guaranteed Swap Entities and SRS Swap Entities Should Conform to the 2013 Guidance</u>

Under the 2013 Guidance, a swap entered into by a Swap Entity that is a guaranteed affiliate is only subject to "Category A" transaction-level rules (the equivalent of Group B requirements) when it is with a U.S. person, another Swap Entity, or another guaranteed affiliate.[66] In contrast, the Proposal would apply the Group B requirements to all swaps entered into by a Swap Entity that is a Guaranteed Entity (a "**Guaranteed Swap Entity**"), regardless of whether its counterparty has a nexus to the United States on account of registering as a Swap Entity or having its obligations guaranteed by a U.S. person.

This proposed expansion of when the Group B requirements apply to a Guaranteed Swap Entity could raise serious commercial issues, especially in emerging markets that do not impose comparable requirements. As noted above, the Group B requirements indirectly regulate Swap Entities' end-user counterparties. Especially where a Guaranteed Swap Entity cannot rely on substituted compliance with local rules to satisfy Group B requirements, non-U.S. end users will likely avoid trading swaps with the Guaranteed Swap Entity so that they do not need to hire U.S. counsel to understand unfamiliar Dodd-Frank-driven documentation or set up the operational infrastructure to engage in portfolio reconciliation and compression. The resulting shift in business away from Guaranteed Swap Entities would not only directly affect the swaps subject to Group B requirements, it would also jeopardize the broader banking relationships and activity to which those swaps commonly relate.

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[66] *See* 2013 Guidance, 78 Fed. Reg. at 45,352-53. Where a non-U.S. Swap Entity's counterparty is a conduit affiliate, the 2013 Guidance also applies the conditions of the inter-affiliate clearing exemption, including the treatment of outward-facing swaps condition in Commission Regulations § 50.52(b)(4)(i), to the extent such exemption is elected, and Part 43 real-time reporting requirements. *See id.* at 45,359.

The 2013 Guidance avoided these issues by requiring a U.S. nexus on both sides of a swap in order for these requirements to apply. This approach has still been effective at mitigating risk to the United States because it applies the requirements to a Guaranteed Swap Entity's inter-dealer transactions (*i.e.*, swaps with other Swap Entities), which covers most trading activity by Guaranteed Swap Entities. We are not aware of any issues resulting from this approach. Accordingly, the Commission should conform to the 2013 Guidance by expanding the Non-U.S. Swap Entity Group B exception to apply when a Guaranteed Swap Entity trades with a non-U.S. person that is not a Swap Entity or a Guaranteed Entity.[67]

In addition, requiring a Swap Entity that is an SRS (an "**SRS Swap Entity**") to apply Group B requirements to all of its swaps, regardless of whether its counterparty has a nexus to the United States, would raise similar issues to the Proposal's treatment of Guaranteed Swap Entities. Accordingly, if the Commission retains the SRS category, it should apply the same changes we request above for Guaranteed Swap Entities to SRS Swap Entities.[68]

3. Group B Requirements Should Not Apply to Swaps Conducted Through a U.S. Branch With Non-U.S. Persons, Other Than Guaranteed Entities or Other U.S. Branches

The imposition of Group B requirements on a swap conducted through a U.S. branch with a non-U.S. person that is not a Guaranteed Entity or another U.S. branch, based solely on the fact that the U.S. branch is an office through which the non-U.S. person makes and receives payments and deliveries under the swap or the swap is reflected in the local accounts of the U.S. branch,[69] is inapposite to the risk mitigation objectives of the Group B requirements. For these swaps, the risks incurred by the foreign bank through its U.S. branch remain with the foreign bank outside the United States. Generally, regardless of the location of payments or accounts, from a risk perspective a foreign bank's swap counterparties look to the creditworthiness of the bank as a whole and its entity-level regulation and supervision by home country authorities. As a result, there is not a sufficient U.S. supervisory interest to merit applying Group B requirements to a swap conducted through a U.S. branch with a non-U.S. person that is not a Guaranteed Entity or another U.S. branch. Also, as discussed in Part VII.E below,

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[67] At a minimum, if the Commission does not so conform to the 2013 Guidance, the Commission should adopt an exception for *de minimis* trading by Guaranteed Swap Entities in jurisdictions not eligible for substituted compliance, similar to the Proposal's Foreign Branch Group B exception. There is no reason to apply U.S. rules more expansively to Guaranteed Swap Entities than foreign branches of U.S. Swap Entities.

[68] If the Commission created a Group B exception for SRS Swap Entities similar to the Foreign Branch Group B exception, then the 5% notional cap should apply at the level of the ultimate U.S. parent entity for a group of commonly controlled SRSs.

[69] *See* Proposed § 23.23(a)(17).

we are requesting that the Commission modify the definition of swap conducted through a U.S. branch to be consistent with the definition of swap conducted through a foreign branch, but even with those modifications, the relevant criteria would not change the fact that a U.S. branch's swaps with a foreign counterparty do not present risk to the United States.

Not only are there insufficient jurisdictional or policy bases for applying Group B requirements to swaps between the U.S. branch of a foreign bank and foreign counterparties, but the foreign bank's home country regulators typically impose similar risk mitigation requirements on those swaps, and there is little need for the Commission's rules or resources to be duplicative of foreign regulators. Specifically, like the Commission's approach to the foreign branches of U.S. Swap Entities, other jurisdictions frequently apply their derivatives regulations to locally organized entities on an entity-wide basis, which means that those regulations apply to U.S. branches of banks organized in those other jurisdictions. They also may not permit U.S. branches to substitute compliance with U.S. rules (or rely on equivalent relief), especially when such a branch transacts with a counterparty organized in its home country jurisdiction. For example, if the U.S. branch of an EU bank transacts with a Latin-American counterparty, many EU derivatives rules will apply; and if such branch transacts with an EU counterparty, such rules would apply without the ability to substitute compliance with U.S. rules (or rely on equivalent relief). We note that, in the parallel situation where an EU branch of a U.S. bank was transacting with a non-EU counterparty, those EU derivatives rules would not apply; instead, they only apply to EU branches of U.S. banks that transact with EU counterparties (including counterparties guaranteed by an EU entity) or other EU branches of non-EU entities, in each case subject to an exception if equivalent non-EU rules apply.[70] Accordingly, our approach to applying Group B requirements to U.S. branches of non-U.S. Swap Entities would be consistent with corollary EU regulations.

D. **The Commission Should Clarify and Modify the Foreign Branch Group B Exception**

The Proposal would provide an exception from the Group B requirements to a foreign branch of a U.S. Swap Entity with respect to its foreign-based swaps with a foreign counterparty that is an Other Non-U.S. Person, provided that: (i) the exception would not be available with respect to any Group B requirement for a swap that is

70 *See* Article 2(2) of COMMISSION DELEGATED REGULATION (EU) No 285/2014 of 13 February 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations (regulations addressing the cross-border application of the European Market Infrastructure Regulation); *see, also* Article 2(6) of COMMISSION DELEGATED REGULATION (EU) 2017/579 of 13 June 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 the direct, substantial and foreseeable effect of derivative contracts within the Union and the prevention of the evasion of rules and obligations (regulations addressing the cross-border application of the EU's Markets in Financial Instruments Regulation).

eligible for substituted compliance for such Group B requirement; and (ii) in any calendar quarter, the aggregate gross notion amount of swaps conducted by a Swap Entity in reliance on the exception could not exceed five percent of the aggregate gross notional amount of all it swaps.[71]

We generally support this exception, which we understand is meant to replace a similar exception in the 2013 Guidance for swaps between the foreign branch of a non-U.S. Swap Entity and a non-U.S. person that is not a guaranteed or conduit affiliate, where the swap takes place in a foreign jurisdiction other than Australia, Canada, the EU, Hong Kong, Japan, or Switzerland.[72] It is appropriate for the Commission to tailor exception further to apply depending on whether the specific swap in question is eligible for substituted compliance, not whether it is entered into outside of specific enumerated jurisdictions.

However, we request that the Commission confirm that: (a) a swap entered into by a foreign branch would remain eligible for the exception with respect to a Group B requirement not eligible for substituted compliance (*e.g.*, swap trading relationship documentation) even if the swap would be eligible for substituted compliance with respect to another Group B requirement (*e.g.*, portfolio reconciliation); (b) a swap entered into by a foreign branch that is not eligible for substituted compliance would remain eligible for the exception even if other swaps entered into by the same foreign branch are eligible for substituted compliance (*e.g.*, an EU branch of a U.S. Swap Entity could rely on the exception when it transacts with non-EU counterparties because EU derivatives rules would not apply to those swaps and thus those swaps would not be eligible for substituted compliance); and (c) the five percent notional cap would only cover transactions entered into "in reliance on" the exception, not all swaps eligible for the exception, such that a U.S. Swap Entity could elect to comply with the Group B requirements for otherwise eligible swaps instead of those swaps counting towards the notional cap. In effect, the Commission should confirm that the exception applies on a swap-by-swap, requirement-by-requirement basis, and it is optional for a U.S. Swap Entity to rely on it for any given swap.

In addition, for the reasons that laid out in Parts V.C.1 and V.C.3 above, the Commission should modify the Foreign Branch Group B exception to apply when a foreign branch transacts with an SRS end user or U.S. branch of a foreign bank.

Finally, with respect to the guidance in the Proposal that the use the Foreign Branch Group B exception be addressed by policies and procedures incorporated into the Swap Entities' risk management program ("**RMP**") under CFTC Regulation § 23.600,[73] we note that any credit or legal risks arising from swaps conducted in reliance

[71] Proposed § 23.23(e)(3).

[72] *See* 2013 Guidance, 78 Fed. Reg. at 45,351.

[73] *See* Proposal, 85 Fed. Reg. at 982.

on the exception should already be addressed through existing provisions of CFTC Regulations § 23.600 and so we assume the guidance was not meant to imply some additional RMP requirement in connection with reliance on the exception.

VI. **Substituted Compliance**

A. **We Support the Proposal's Substituted Compliance Framework for Group A Requirements**

The Proposal would permit a non-U.S. Swap Entity to satisfy any applicable Group A requirement by complying with the corresponding requirement of a foreign jurisdiction for which the Commission has issued a comparability determination.[74] We support this proposed allowance of substituted compliance for Group A requirements. In addition, because the Proposal would include the Commission's anti-trust rules in the Group A requirements, the Commission should make comparability determinations with respect to Commission Regulations § 23.607 in the jurisdictions for which it has made comparability determinations for other entity-level rules (*i.e.*, Australia, Canada, the EU, Hong Kong, Japan, and Switzerland) as those jurisdictions generally require their regulated firms to abide by applicable anti-trust laws.

B. **The Commission Should Expand the Availability of Substituted Compliance for Group B Requirements**

The Proposal would permit a non-U.S. Swap Entity or foreign branch of a U.S. Swap Entity to satisfy any applicable Group B requirement for a foreign-based swap with a foreign counterparty by complying with the corresponding requirement of a foreign jurisdiction for which the Commission has issued a comparability determination.[75] Although we support the availability of substituted compliance with respect to these swaps, we recommend that the Commission expand the availability of substituted compliance for Group B requirements in two respects.

1. **Swaps with U.S. Persons Should be Eligible For Substituted Compliance**

Like the 2013 Guidance, the Proposal would not permit substituted compliance for swaps with U.S. persons, other than swaps conducted through a foreign branch. Now, more than six years after the 2013 Guidance, this approach is unduly narrow. Many foreign jurisdictions have adopted comparable requirements, which apply when non-U.S. Swap Entities trade with U.S. persons. Failure to permit substituted compliance for such transactions leads to undue regulatory duplication, as well as regulatory conflicts that can cause market fragmentation. At the same time, the

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[74] Proposed § 23.23(f)(1).

[75] Proposed § 23.23(f)(2).

Commission's comparability determination process provides a safeguard to ensure that permitting substituted compliance does not lead to undue risk to the United States.

Similar considerations led the Commission to permit non-U.S. Swap Entities to substituted compliance with comparable foreign margin rules when entering into uncleared swaps with U.S. persons.[76] Also, the Commission already has effectively permitted this approach for most Group B requirements through staff no-action relief.[77] The SEC also permits substituted compliance for U.S.-facing transactions in connection with its trade acknowledgment and verification, recordkeeping, portfolio reconciliation, portfolio compression, and trading relationship documentation requirements.[78]

For these reasons, the Commission should permit substituted compliance for Group B requirements for all swaps entered into by a non-U.S. Swap Entity or foreign branch of a U.S. Swap Entity, including swaps with U.S. persons.

2. **Swaps Conducted Through a U.S. Branch Should Be Eligible For Substituted Compliance**

As explained in Parts V.C.3, the Commission's supervisory interest in swaps conducted through a U.S. branch with a non-U.S. counterparty that is not a Guaranteed Entity or another U.S. branch do not merit application of Group B requirements to such swaps. For swaps conducted through a U.S. branch with a Guaranteed Entity or another U.S. branch, the Commission should permit substituted compliance. As noted above, in many instance, the home country regulators for foreign banks apply their rules to those banks' U.S. branches. Accordingly, permitting U.S. branches to rely on substituted compliance would be necessary to avoid overlap, duplication, and possible conflicts with foreign rules.

C. **The Commission Should Make Substituted Compliance Available for Group C Requirements**

Similar to the 2013 Guidance, the Proposal would not permit substituted compliance for Group C requirements, although these requirements would not apply to foreign-based swaps. It is not clear why, however, substituted compliance should not be available when these requirements do apply, *i.e.*, for swaps with U.S. persons or U.S. branches of non-U.S. persons. The Commission's comparability determination process can ensure that U.S. persons receive appropriate counterparty protections when they trade

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76 *See* Margin Requirements for Uncleared Swaps for [Swap Entities]—Cross-Border Application of the Margin Requirements, 81 Fed. Reg. 34,818, 34,830 (May 31, 2016) (the "**Cross-Border Margin Rules**").

77 *See* CFTC Letter No. 13-45, No-Action Relief for Registered [Swap Entities] from Certain Requirements under Subpart I of Part 23 of Commission Regulations in Connection with Uncleared Swaps Subject to Risk Mitigation Techniques under EMIR (Jul. 11, 2013).

78 *See* 17 C.F.R. §§ 240.3a71-6(d)(3), (6), and (7).

with non-U.S. Swap Entities relying on substituted compliance for Group C requirements. The SEC likewise permits substituted compliance for U.S.-facing transactions in connection with its external business conduct standards,[79] and the SEC staff has published guidance addressing how to evaluate comparability of foreign counterparty protection requirements, which takes into account the special considerations raised in relation to requirements regarding eligible contract participant verification, special entities, and political contributions.[80] There is no reason why the Commission could not take a similar approach.

D. **<u>We Support the Proposal's Approach to Comparability Determinations</u>**

The Proposal would adopt a flexible outcomes-based approach to making comparability determinations, taking into consideration all relevant elements of a foreign jurisdiction's regulatory regime on a holistic basis, without requiring that regime to be identical to the relevant Commission requirements.[81] The Commission also could undertake a comparability determination on its own initiative.[82] We support these aspects of the Proposal, which would adopt a more flexible approach than the Commission has taken under the 2013 Guidance or the Cross-Border Margin Rules. This more flexible approach is justified by the significant progress that foreign regulators have made since 2013 and the extensive strides that the international regulatory community has made towards harmonization and convergence through such bodies as the International Organization of Securities Commissions.

E. **<u>The Commission Should Clarify its Approach to Supervision of Swap Entities Relying on Substituted Compliance</u>**

The Proposal does not address how the Commission or National Futures Association ("**NFA**") will supervise Swap Entities relying on substituted compliance. Although so far the Commission and NFA generally have not sought to examine for compliance with comparable foreign requirements or enforce those requirements, considerable uncertainty remains regarding whether they might do so in the future, given that violations of such requirements constitute violations of the corresponding Commission requirements.

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79 *See* 17 C.F.R. § 240.3a71-6(d)(1).

80 *See* Staff Guidance – Information Regarding Foreign Regulatory Requirements for Substituted Compliance Applications, ***available at*** https://www.sec.gov/files/staff-guidance-substituted-compliance-applications.pdf.

81 *See* Proposal, 85 Fed. Reg. at 986.

82 *Id.* at 987.

To address this uncertainty, the Commission should make clear that it and NFA will not independently examine for or otherwise assess whether a Swap Entity is complying with foreign requirements, but rather will look to the relevant foreign regulatory authority to conduct those examinations and make those assessments. Of course, if the Commission or NFA suspects a violation of a foreign requirement, it can and should consult with the relevant foreign regulatory authority, for example through a memorandum of understanding with that authority. And if a foreign regulatory authority finds that a Swap Entity has violated a foreign requirement and the Swap Entity was relying on substituted compliance with that requirement, the Commission and NFA could take appropriate enforcement or disciplinary action.

This approach is consistent with the fact that, under the Proposal, the Commission will take into account the ability of the relevant foreign regulatory authority to supervise and enforce compliance with the relevant foreign jurisdiction's standards.[83] Accordingly, the Commission should have confidence, when it has made a comparability determination, that the relevant foreign regulatory authority is up to the task of supervision and enforcement. Further, were the Commission and NFA instead independently to supervise and enforce compliance with foreign laws, doing so would undo the very benefits of regulatory efficiency and international comity that are the goals of substituted compliance. Finally, as a practical matter, the Commission and NFA lack the subject matter expertise to interpret and apply foreign laws (just as foreign regulators are in no position to interpret and apply U.S. law).

VII. **Key Definitions**

A. **The Commission Should Make Further Harmonizing Changes Relating to the "U.S. Person" Definition**

Subject to an exception for certain international financial institutions, the Proposal would define a "U.S. person" as any person that is: (i) a natural person resident in the United States; (ii) a legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States; (iii) an account (whether discretionary or non-discretionary) of a U.S. person; or (iv) an estate of a decedent who was a resident of the United States at the time of death.[84]

We generally support this proposed definition, which would be consistent with the definition used by the SEC for the cross-border application of its security-based swap rules.[85] The SEC rules will begin to apply in 2021, and it will help avoid undue

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83 Proposed § 23.23(g)(4)(iii).

84 Proposed § 23.23(a)(22).

85 *See* 17 C.F.R. § 240.3a71-3(a)(4).

regulatory complexity if firms can rely on the same "U.S. person" definition for purposes of both their swaps and security-based swaps businesses.

The proposed definition would also be more straightforward to apply than the parallel definition from the 2013 Guidance because it would eliminate prongs that depend on an entity's internal ownership structure. In particular, it would eliminate the prong for a collective investment vehicle that is organized and has its principal place of business outside the United States but is majority-owned by U.S. persons. There are significant practical impediments to the identification and tracking of U.S. beneficial ownership in foreign collective investment vehicles, including by the vehicle itself (and its management).[86]

The proposed definition would also eliminate the prong for entities for which U.S. person owner(s) bear unlimited responsibility. In this respect the Proposal would also depart the Cross-Border Margin Rule. This change is warranted because, as the Commission notes,[87] this corporate structure is not commonly in use in the marketplace. To the extent that a firm uses this structure, we believe that the Commission can sufficiently address the resulting risks to the United States by treating the firm as having a guarantee from a U.S. person, like the SEC does.[88]

We additionally support the Proposal's adoption of the SEC's "principal place of business" test for collective investment vehicles, as this approach better captures business reality by focusing more on investment strategy than location of promoters who do not have an ongoing responsibility for the vehicle.

The proposed definition would contain an exception for certain international financial institutions. The Commission has routinely recognized the special status afforded these institutions under the traditions of the international system by effectively treating them as non-U.S. persons for most purposes.[89] It is appropriate for

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86 Particularly in the case of investment vehicles formed before the adoption of the 2013 Guidance, subscription documents did not capture the requisite information or include a framework to track it. And, as a result, in the case of new collective investment vehicles, many non-U.S. asset managers have taken more blunt steps to restrict investments by U.S. persons. The resulting limits on investment options for U.S. persons impose costs when the competing benefits could be better addressed in other, less costly ways. In particular, concerns regarding U.S. ownership of foreign collective investment vehicles that engage in swaps activity are instead more appropriately addressed by applying the Commission's existing comprehensive investor protection requirements to investment by U.S. persons in collective investment vehicles, which does have a direct nexus to the United States.

87 Proposal, 85 Fed. Reg. at 961.

88 *See id.* at n. 97 and accompanying text.

89 *See* 2013 Guidance at n. 531, 595, 598, and 605 (generally treating these institutions as non-U.S. persons for purposes of transaction-level swaps requirements); *see, also* CFTC Staff Letter No. 18-13, No-Action Position: Relief for Certain Non-U.S. persons from Including Swaps with International Financial Institutions in Determining [Swap Entity] Status (May 16, 2018).

the Commission to codify this treatment through this exception. We believe that the proposed catch-all for "similar international organizations" appropriately address the international comity considerations that underlie this exception.

The proposed definition would further provide an exclusive definition by eliminating the catch-all prefatory phrase "includes, but is not limited to," as defined in the 2013 Guidance. Market participants have lacked any practical way to delineate the scope of that catch-all phrase, and so its sole effect has been to create legal uncertainty regarding the possibility of the Commission second-guessing a person's U.S. person status. The Commission is right to eliminate this legal uncertainty by eliminating the phrase.

We encourage the Commission to take three additional steps in relation to the U.S. person definition under the Proposal:

- First, the Commission should, consistent with the SEC, clarify that under the "account" prong of the "U.S." person definition, an account's U.S. person status should depend on whether any U.S.-person owner of the account actually incurs obligations under the swap in question.[90]

- Second, the Commission should make conforming changes to the "U.S. person" definition under the Cross-Border Margin Rule to avoid the confusion that will arise from using different definitions of the same term in a single, comprehensive regulatory regime. However, efforts to make such conforming changes should not delay the Commission's finalization of the Proposal.

- Finally, although the Proposal would expressly permit reliance on U.S. person representations made with respect to the Cross-Border Margin Rule until December 31, 2025, the Commission should expand this relief by: (1) permitting such reliance on a permanent basis; and (2) extending such reliance to include representations made with respect to the 2013 Guidance. This clarification is justified because these representations under the Cross-Border Margin Rule and 2013 Guidance as a practical matter should only be more broad than the "U.S. person" definition in the Proposal.

B. <u>**We Support the Proposal's "Guarantee" Definition**</u>

As with the U.S. person definition, the Proposal would conform its "guarantee" definition to parallel SEC rules,[91] which are also consistent with the Commission's Cross-Border Margin Rule.[92] Specifically, under the Proposal the term

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[90] *See* 79 Fed. Reg. 47277, 47312 (Aug. 12, 2014).

[91] *See* 17 C.F.R. § 240.3a71-3(b)(iii)(B).

[92] *See* 17 C.F.R. § 23.160(a)(2).

"guarantee" would mean an arrangement pursuant to which a party to a swap with a non-U.S. person has a legally enforceable right of recourse against a U.S. person for such non-U.S. person's obligations under that swap.[93]

We support this proposed definition. Like the proposed "U.S. person" definition, the proposed "guarantee" definition would promote legal certainty by establishing a clearer test for when a non-U.S. person is considered to have financial support from a U.S. person, eliminating coverage of certain risk-shifting arrangements (such as keepwells and liquidity puts) that do not provide a non-U.S. person's counterparty with recourse against a U.S. guarantor. Because these arrangements are not visible to third parties, their inclusion in the 2013 Guidance's "guarantee" definition has made it virtually impossible for a non-U.S. Swap Entity to determine whether its non-U.S. counterparty has a guarantee, without obtaining an affirmative representation. Especially for non-U.S. Swap Entities that conduct extensive business with commercial organizations abroad, it is extremely burdensome to ask all their non-U.S. counterparties—many of which do not speak English or have U.S. counsel—to make representations regarding the vague and open-ended "guarantee" definition from the 2013 Guidance.

In this connection, we note that a key rationale for why the 2013 Guidance applied certain transaction-level rules to guaranteed affiliates of a U.S. person was because a "guarantee of a swap is a term of that swap that affects the price or pricing attributes of that swap" and "typically when a swap counterparty uses a guarantee as credit support for its swaps obligations, the guarantor's resources are added to the analysis of the swap because the market will not trade with that counterparty at the same price, on the same terms, or at all without the guarantee."[94] Although these statements generally apply to guarantees as defined by the Proposal, they do not apply to risk-shifting arrangements that do not provide a non-U.S. person's counterparties with recourse to a guarantor. Counterparties generally cannot and do not rely on these arrangements because they have no legal rights under them and may not even be aware of them.[95] As a result, the Proposal's "guarantee" definition is more consistent with Section 2(i); only arrangements that involve legally enforceable recourse by a non-U.S. counterparty against a U.S. person result in the sort of direct privity between a non-U.S. counterparty and a U.S. guarantor that should be a necessary (although not sufficient) condition for applying transaction-level rules extraterritorially under Section 2(i).

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93 Proposed § 23.23(a)(8).

94 2013 Guidance, 78 Fed. Reg. at 45,356 (internal quotations omitted).

95 For example, U.S. bank capital rules require that, in order to recognize a guarantee for credit risk mitigation purposes, the guarantee must give the beneficiary a direct claim against the protection provider. *See* 12 C.F.R. § 217.2 (definition of "eligible guarantee").

Finally, because the proposed "guarantee" definition is narrower than the definition in the 2013 Guidance and, for uncleared swaps, identical to the definition in the Cross-Broder Margin Rule, the Commission should permanently permit reliance on representations made regarding these parallel definitions.

C. **The Commission Should Eliminate Coverage of Foreign Subsidiaries of Intermediate U.S. Holding Companies as SRSs**

For the reasons set forth in Part I.A. and Part V.C.1 above, the Commission should not adopt the SRS concept from the Proposal. However, if the Commission is determined to adopt a version of the SRS concept, it should limit the definition of "ultimate U.S. parent entity" to subsidiaries of groups whose top-tier ultimate parent company is a U.S. person. The Proposal currently defines an "ultimate U.S. parent entity" as the U.S. parent entity that is not a subsidiary of any other U.S. parent entity. This definition would encompass intermediate U.S. parent entities that form part of a consolidated corporate family with an ultimate parent entity located outside the United States. Because the SRS concept follows the risk incurred by subsidiaries in a corporate family up the corporate chain, it should naturally look to the ultimate foreign parent entity as the entity in which the risk would reside. Excluding from the SRS definition subsidiaries of groups whose top-tier ultimate parent company is a non-U.S. person would be consistent with the Commission's risk-focused approach to cross-border regulation.

If the Commission does not adopt the above modification, then it should expand the Proposal's exclusion for subsidiaries of U.S. bank holding companies to include (1) subsidiaries of a U.S. intermediate holding company of a foreign banking organization and (2) subsidiaries of a U.S. intermediate holding company of a non-U.S. ultimate parent entity subject to consolidated supervision and regulation in a G20 jurisdiction. The Commission correctly recognizes in the Proposal that subsidiaries that are part of a U.S. bank holding company are already subject to consolidated supervision and regulation by the Federal Reserve Board, and accordingly duplicate regulations by the Commission would be unnecessary.[96] Intermediate holding companies of foreign banking organizations are also subject to prudential supervision, including Basel capital requirements, stress testing, liquidity, and risk management requirements.[97] Subsidiaries whose ultimate non-U.S. parent entities are subject to consolidated supervision and regulation in a G20 jurisdiction are also typically subject to similar requirements. In each case these requirements limit the risks to the U.S. intermediate holding company and help ensure that the non-U.S. subsidiary is not established to evade U.S. SD requirements. Accordingly, subsidiaries subject to such consolidated supervision and regulation should

96 Proposal, 85 Fed. Reg. at 966.

97 *See* 12 C.F.R. Part 252, Regulation YY.

accordingly be excluded from the SRS definition like subsidiaries of U.S. bank holding companies.

D. **<u>We Support the Proposal's "Foreign Branch" and "Swap Conducted Through a Foreign Branch" Definitions</u>**

The Proposal would define a "foreign branch" to mean any office of a U.S. bank that: (1) is located outside the United States; (2) operates for valid business reasons; (3) maintains accounts independently of the home office and of the accounts of other foreign branches, with the profit or loss accrued at each branch determined as a separate item for each foreign branch; and (4) is engaged in the business of banking and is subject to substantive regulation in banking or financing in the jurisdiction where it is located.[98] A "swap conducted through a foreign branch" would mean a swap entered into by a foreign branch where: (1) the foreign branch or another foreign branch is the office through which the U.S. person makes and receives payments and deliveries under the swap pursuant to a master netting or similar trading agreement, and the documentation of the swap specifies that the office for the U.S. person is such foreign branch; (2) the swap is entered into by such foreign branch in its normal course of business; and (3) the swap is reflected in the local accounts of the foreign branch.[99]

We support these proposed definitions, which in substance would be consistent with the parallel definitions in the 2013 Guidance except for omitting the requirement that swaps conducted through a foreign branch be negotiated and agreed by employees located in the foreign branch or another foreign branch. That requirement is not necessary to apply because the location of a U.S. bank's employees in connection with a particular swap does not determine whether that swap presents risks to the United States. At the same time, foreign branches of a U.S. bank are generally subject to foreign rules when transacting with non-U.S. counterparties regardless of whether the bank's U.S. personnel are involved. In these cases, applying additional U.S. rules to swaps with non-U.S. counterparties based on the involvement of U.S. personnel causes market distortions by discouraging non-U.S. counterparties from interacting with U.S. personnel. Indeed, since 2013 many U.S. banks have had to rearrange their front office coverage of non-U.S. counterparties in order to address this concern. The Proposal would help to reverse this damaging trend.

E. **<u>The Commission Should Conform the "Swap Conducted Through a U.S. Branch" Definition to its "Swap Conducted Through a Foreign Branch" Definition</u>**

The Proposal would define a "U.S. branch" to mean a branch or agency of a non-U.S. banking organization where such branch or agency: (1) is located inside the

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[98] Proposed § 23.23(a)(2).

[99] Proposed § 23.23(a)(16).

United States; (2) maintains accounts independently of the home office and of the accounts of other foreign branches, with the profit or loss accrued at each branch determined as a separate item for each foreign branch; and (3) engages in the business of banking and is subject to substantive banking regulation in the state or district where located.[100] A "swap conducted through a U.S. branch" would mean a swap entered into by a U.S. branch where: (1) the U.S. branch is the office through which the non-U.S. person makes and receives payments and deliveries under the swap pursuant to a master netting or similar trading agreement, and the documentation of the swap specifies that the office for the U.S. person is such U.S. branch (in other words, the U.S. branch is where the swap is booked); or (2) the swap is reflected in the local accounts of the U.S. branch.[101]

The Commission should conform this definition of a "swap conducted through a U.S. branch" to its definition for a "swap conducted through a foreign branch." In particular, the former definition is broader than the latter definition because it (a) applies disjunctively (a foreign bank's swap that satisfies *either* prong of the definition is treated as a swap conducted through a U.S. branch) as opposed to conjunctively (a U.S. bank's swap must satisfy *all* prongs of the definition to be treated as a swap conducted through a foreign branch) and (b) omits a prong for the swap being entered into by the U.S. branch in its normal course of business.

The Proposal offers no justification for this asymmetric approach. The only justification that we can surmise is that the Commission intends to maximize the application of its rules by making the exceptions available to foreign branches narrow while at the same time making the trigger for applying rules to U.S. branches broad. It is completely inconsistent with the goals of focusing on material risks to the United States and avoiding duplicative regulation to seek through definitional triggers to maximize when U.S. rules might apply to swaps involving foreign parties. Instead the Commission should take a balanced and symmetric approach to recognizing when home versus host country regulators have an interest in applying their rules. If the Commission believes that satisfaction of all prongs of the "swap conducted through a foreign branch" definition is needed for there to be sufficient host country interest not to apply U.S. home country rules to a foreign branch when it trades with a foreign counterparty, then principles of comity should require a U.S. branch's swap to satisfy all the same prongs for there to be sufficient U.S. host country interest to apply U.S. host country rules to a non-U.S. Swap Entity when it trades with a foreign counterparty.

VIII. **<u>The Commission Should Take Further Actions to Facilitate an Orderly Transition to the New Cross-Border Framework</u>**

If adopted, the Proposal would bring significant changes to portions of the Commission's cross-border framework which currently consists of, among other things,

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100 Proposed § 23.23(a)(20).

101 Proposed § 23.23(a)(16).

the 2013 Guidance, staff letters, as well as no-action relief. As a result, the Commission should consider making certain clarifications and conforming changes to ensure an orderly transition process.

First, the Commission should clarify that any no-action relief or guidance that applies to the requirements not addressed in the Proposal will remain effective, and that any no-action letter or guidance not specifically revoked by the Proposal remains in effect. This clarification would provide necessary assurance to firms relying on such guidance and no-action letters, prevent confusion among market participants, and prevent disputes regarding the effectiveness of such relief or guidance. Relatedly, if the Commission plans to amend or revoke any applicable letters, guidance or other relief not specifically addressed in the Proposal, the Commission should only do so following adequate notice and opportunity for comment.

Second, the Commission should grandfather transactions entered into prior to the compliance date of any final cross-border rules adopted by the Commission. Permitting grandfathering of such transactions would avoid unnecessary disruptions to any existing swap transactions or trading relationships that may newly become subject to the Commission's requirements.

Third, as we have noted throughout this letter, the Commission should continue the codification exercise reflected by the Proposal further by codifying the cross-border application of the swap-related requirements not covered by the Proposal. In this letter we have addressed the Commission's clearing-related requirements, mandatory trading requirements, real-time public reporting requirements, and swap data reporting requirements.[102] We also have noted the need to make a conforming change to the "U.S. person" definition in the Cross-Border Margin Rule. Finally, in our other correspondence with the Commission, we have addressed the cross-border application of its capital and financial reporting requirements.[103]

We recognize that the Commission would make many of these further changes through additional rulemakings. The Commission should not delay its finalization of the Proposal in order to conduct those additional rulemakings. It should, however, delay the compliance date for the changes set forth in the Proposal until it completes these additional rulemakings. Until that time, market participants could continue to follow the 2013 Guidance. This approach would prevent the undue complexity associated with applying multiple cross-border frameworks at the same time and allow market participants to transition to the new framework more smoothly.

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[102] Although we have addressed our recommendations regarding these requirements towards Swap Entities, the same categorization of the requirements and availability of exceptions and substituted compliance should also apply to non-registrants.

[103] *See* Letter from Briget Polichene, CEO, IIB, Scott O'Malia, CEO, ISDA, and Kenneth Bentsen, President and CEO, SIFMA, to Christopher Kirkpatrick, Secretary, the Commission, dated Mar. 3, 2020, *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62365.

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We would be pleased to provide further information or assistance at the request of the Commission or its staff. Please do not hesitate to contact the undersigned if you should have any questions with regard to the foregoing.

Respectfully submitted,

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