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The Honorable Gary Gensler
Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Dear Chairman Gensler:

As the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, the U.S. Chamber of Commerce ("U.S. Chamber") is concerned about reports regarding the swap-dealing provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Specifically, the Chamber is concerned with the Commodity Futures Trading Commission's ("The Commission") position regarding the circumstances in which those provisions will apply extraterritorially. This is an issue of significant concern not merely to U.S. financial institutions, but to a broad array of American businesses that are end-users of swaps and would be adversely affected if the provisions were applied more expansively than Congress intended.

Setting an appropriate scope for Dodd-Frank's extraterritorial application is crucial for achieving effective cross-border swaps regulation. Michel Barnier, EU Commissioner for Internal Market and Services, has taken the position that where the rules of a foreign country are "comparable and consistent with the objectives of U.S. law, it is reasonable to expect U.S. authorities to rely on those rules and recognize activities regulated under them as compliant"[1] with U.S. regulations. We agree. From the perspective of U.S. companies and end-users, an overly-broad extraterritorial application of new derivatives regulations could create competitive disadvantages for U.S. firms. Foreign branches of U.S. firms could have to comply with U.S. regulations in foreign markets, whereas foreign firms in foreign markets would have

[1] Michel Barnier "The U.S. Must Not Override EU Regulators", *Financial Times* (June 21, 2012).

to comply with host country regulations. More costly regulations would drive up expenses for U.S. firms and could reduce the number of counterparties available to U.S. end-users.

In addition, extraterritorial application of derivatives regulation could also invite other jurisdictions to attempt to extend their regulatory reach into the U.S. creating transatlantic and even global duplication that ultimately harms the competitiveness of American businesses, and runs counter to other policy initiatives designed to jumpstart the economy and job creation, such as the Obama Administration's goal to double exports.

As you know, it has been widely reported that the Commission intends to address the provisions' extraterritorial application in a release that it will characterize as "interpretative guidance," rather than in a release that the Commission denominates a substantive or "legislative" rule and promulgates according to the procedures required for such rules. Among other things, it has been suggested that the Commission is considering proceeding in this manner to avoid the requirements of Section 15(a) of the Commodity Exchange Act, which directs the Commission to "evaluate" the "costs and benefits" of its actions in light, among other things, of their effects on efficiency, competitiveness, and price discovery.[2]

These reports are of concern to the Chamber, and we urge the Commission instead to conduct a full rulemaking, taking and considering public comments on the proposal in accordance with the Administrative Procedure Act and giving full consideration to the economic consequences of its action. This approach would be consistent with the law and the principles of sound government.

With regard to sound government, there is no reason that the public's views and information on this subject should receive any less attention than public comments in other rulemakings: the extraterritorial application of the swap-dealing provision is a matter of great consequence, and the public interest should be carefully

[2] *See* Letter from the Honorable Scott Garrett and Randy Neugebauer to the Honorable Gary Gensler (June 20, 2012).

considered. As you know, President Obama has asked agencies to proceed through notice and comment, even in circumstances where not strictly required by law.[3]

With respect to the Commission's legal responsibilities, the Chamber anticipates that the Commission's "guidance" will function as a legislative rule, requiring notice and comment as a matter of law. The Supreme Court's decisions last week in *Christopher v. SmithKline Beecham* and *Federal Communications Commission v. Fox* are but the latest reminders of the importance the courts attach to agency procedures and proper public notice.

Economic effects are at the center of the Commission's approach toward extraterritoriality and are the very reason the Commission will be acting on this issue. It follows that the Commission cannot give proper consideration to the issue and the public's comments without paying particular attention to the economic consequences—the costs and benefits—of its proposed approach toward extraterritoriality.

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Thank you for considering the views set forth in this letter. The Chamber looks forward to continuing to work with the Commission to ensure the proper implementation of Dodd-Frank.

Sincerely,

David Hirschmann

[3] *See* Executive Order 13563, "Improving Regulation and Regulatory Review," Section 2(b), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011).