Mr. David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

27 August 2012

Re: Cross-border Application of Certain Swaps Provisions of the Commodity Exchange Act
Notice of Proposed Exemptive Order

Dear Mr Stawick,

ICAP plc is the holding company for ICAP Group ("ICAP") which is the world's leading interdealer broker and OTC system operator. ICAP operates voice, hybrid and electronic trading systems in the wholesale markets in rates, credit, commodities, foreign exchange, emerging markets and equity derivatives. ICAP also provides post-trade processing, portfolio compression and reconciliation and risk management services. With offices in over 40 jurisdictions, ICAP is supervised by more than 50 regulatory authorities.

ICAP welcomes the opportunity to provide comments to the Commodity Futures Trading Commission (the "CFTC" or the "Commission") on both the Cross-border Application of Certain Swaps Provisions of the Commodity Exchange Act[1] and the Notice of Proposed Exemptive Order[2] under Title VII of the Dodd-Frank Wall Street and Consumer Protection Act (collectively for these purposes, the "Cross-Border Proposal"). Through multiple affiliated companies around the world, ICAP currently offers swaps brokerage services to clients located in virtually every noteworthy market center. Upon finalization of the swap execution facility ("SEF") rules ICAP intends to become a registered SEF across all asset classes and hopes to be a key provider of swap execution services to the marketplace.

It is from this perspective, as a provider of liquidity platforms for global swaps trading, that we urge the Commission to not underestimate the magnitude and complexity of the change and impact of its expansive application of Title VII requirements to activities and entities outside the United States. We see the Commission's approach driving the dynamics of swap execution in two potential ways, each of which should be given serious consideration as the Commission crafts the content and timelines for these rules.

Fractured Liquidity Pools

First, existing liquidity pools for swaps currently aggregate the trading interest of participants operating in a wide variety of jurisdictions, enhancing liquidity and permitting participants to trade all products during local market hours. We expect that in response to the Cross-Border Proposal at

[1] Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, RIN 3038-AD57, 77 Fed. Reg, 41213 (July 12, 2012).
[2] Exemptive Order Regarding Compliance with Certain Swap Regulations, RIN 3038-AD85, 77 Fed. Reg. 41110 (July 12, 2012).

least some market participants, and perhaps many, may structure their activities to avoid participating in liquidity pools with U.S. persons so as to avoid the reach of Title VII. This will result in fractured, localized, and smaller liquidity pools that would be expected to reduce liquidity and widen bid-offer spreads. While the Commission may view this as an acceptable or even desirable byproduct of its effort to insulate the U.S. from offshore swap risks, the disruption to current trading patterns and liquidity pools warrants an orderly transition period significantly lengthier than the Commission has provided.

In this regard, the potential availability of substituted compliance in certain situations is of only limited value. Many liquidity pools include U.S.-based U.S. persons ("Onshore U.S. persons"), such that substituted compliance for trade execution would not be available. Moreover, for non-U.S.-based entities that the Commission considers "U.S. persons" under the Cross-Border Proposal ("Offshore U.S. persons"), those entities currently participate in liquidity pools that at a minimum include other Offshore U.S. persons, such that they would effectively be barred from participating, at least in full, in such a liquidity pool. Thus, the delayed implementation of the Cross-Border Proposal to July 13 for Offshore U.S. Persons does not provide a genuine adjustment period, as the extent and nature of available liquidity for such parties will be altered and reduced immediately and significantly once SEF trading is required.

Conflicting Regulation

Second, there is the alternative possibility that most market participants who actively trade swaps will be willing to accept CFTC jurisdiction in order to freely transact with U.S. persons. In such a scenario, any platform would not only need to be SEF-compliant, but would also need to be compliant with the regulatory requirements of the jurisdictions where its non-U.S. customers are located. While such a scenario would create an attractive liquidity pool, we are concerned at the prospect that local requirements could be in conflict with CFTC requirements and actually preclude operation of a cross-jurisdictional multi-registered fully-compliant execution platform. We have identified in Appendix A certain areas of regulation where we can foresee potential conflict.

Confronted with these dynamics, both market participants and execution platform providers like ICAP find themselves facing the proverbial need to change the tires while the car is moving. Market participants will need to determine if they wish to organize their activities so as to accept Title VII jurisdiction without knowing (i) how the Commission will apply the substituted compliance standard; (ii) whether Offshore U.S. Persons will continue to participate in non-SEF liquidity pools; (iii) whether other similarly situated parties will opt to participate in liquidity pools with Onshore U.S. persons; and (iv) what G-20 regulation will ultimately provide.

As the operator of execution platforms, ICAP has actively prepared and positioned itself to launch both a SEF-compliant platform and platforms in other jurisdictions that comply with the relevant regulations in those locales. However, the Cross-Border Proposal presents ICAP not only with an opportunity, but indeed a commercial necessity to rethink the current envisioned execution platform framework to respond to the changing dynamics of how its customers may trade. In order to do this, though, ICAP will need to know: (i) whether non-U.S. persons will want to trade on a platform with U.S. persons; (ii) what jurisdictions its platform should be registered in as a result; and (iii) whether there will be conflicting regulations that preclude cross-jurisdictional registration. As the trading of swaps on regulated execution platforms is a key component of Title VII, we believe the Commission should share our interest in permitting sufficient time and rule clarity to design an optimal trading platform framework.

We recognize that the Act makes major changes to the structure and operation of the swaps markets, and that some level of complexity and uncertainty is inevitable. ICAP submits, however, that the potential for significant market disruption, ill-informed decision-making, and unnecessary

cost is quite real in this area. As the Commission finalises its cross-border guidance it is essential that the Commission engages with other regulators overseas. Swaps markets are global and therefore it is essential to ensure that cross-border application of Title VII is consistent with the reforms being introduced elsewhere, as for example through the European Market Infrastructure Regulation and revisions to the Markets in Financial Instruments Directive in the EU.

In this context, ICAP notes the responses that the European Commission, the United Kingdom's Financial Services Authority, the Bank of Japan and the Government of Japan's Financial Services Agency have submitted to the Commission, and agrees with their recommendation that it would be appropriate to defer application of the cross-border guidance until an internationally consistent approach has been agreed.

The Commission has previously stated that it is committed to an orderly transition to Title VII rules. ICAP would therefore encourage the Commission to defer application of its cross-border guidance until such time as the international regulatory community agrees on an approach that addresses cross-border regulation of OTC derivatives.

ICAP appreciates having the opportunity to comment on these proposals and would be happy to discuss further with the Commission if helpful.

Appendix A – Potential Cross-Jurisdictional Regulatory Conflicts

ICAP is concerned that, absent international regulatory coordination, the Commission's proposed cross-border application of Title VII could give rise to conflicting regulatory requirements in a number of areas including data protection and governance. We would note that this potential conflict extends not only to those firms outside the United States that seek to register as Swap Dealers and MSPs, but also to market operators that intend to seek registration as a SEF.

To illustrate some of the potential issues that might arise, ICAP has considered Part 37 of the Commission's proposed Code of Federal Regulations[3] which sets out the Core Principles with which SEFs are obliged to comply. The following examples highlight the potential divergence between regulatory regimes, and ICAP therefore urges the Commission to engage with overseas regulators to agree on a consistent framework and work towards mutual recognition of comparable regimes.

Data protection

Proposed Rule 37.7 requires that a SEF collect proprietary and personal data from its participants for regulatory purposes, and to share such information with other SEFs or Designated Contract Markets:

- Rule 37.203 also gives the SEF the authority to collect information and examine the books and records of participants.
- Rule 37.404 requires the SEF to have rules that require traders in its swaps to keep records of their trading, including records of their activity in the underlying commodity and derivatives markets, and to make such records available to the SEF and the Commission.
- Rule 37.205 requires a SEF to conduct member inspections in relation to information maintained by members for the purposes of audit trail requirements.

These requirements do not take into account data protection legislation, the law of confidentiality or banking confidentiality applicable in certain jurisdictions. For example, in Singapore and Korea data protection and banking confidentiality laws render the disclosure and / or transmission of confidential information a criminal offence. In the EU, there are questions as to how this would interact with existing obligations under Directive 95/46/EC on data protection (the Data Protection Directive). Particular concerns arise in France where a number of privacy and information laws, such as the Blocking Statute and Banking Secrecy Statue, could impact transmission of data to the Commission, a point that has been highlighted in comment letters from the French Authorities and Societe Generale.

Change of Control and Transfer of Business

Proposed Rule 37.3(d) sets out the conditions for transfers of registration of a SEF:

- The SEF must submit a request to the Commission for approval in anticipation of a corporate event (e.g. merger, corporate reorganization) which results in the transfer of all or substantially all of the SEF's assets to another legal entity.
- As a condition of approval, the SEF must submit a representation that it is in compliance with the SEF core principles and the Commission's regulations.
- The SEF must submit to the Commission various representations by the transferee regarding its duties and obligations.
- In the event of an equity interest transfer that results in a change in ownership, the Commission would determine whether the change in ownership will impact adversely the

[3] http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2010-32358a.pdf

operations of the SEF or the SEF's ability to comply with the core principles and the Commission's regulations.

It is not clear how these requirements would interact with change of control and business transfers regimes in other jurisdictions. In the UK, for example, the change of control and business transfers regime is currently provided for in Part VII (*Control of Business Transfers*) and Part XII (*Control Over Authorised Persons*) of the Financial Services and Markets Act 2000 ("FSMA"). Individuals or corporate bodies wishing to acquire or increase control in a UK authorised firm must seek prior approval from the Financial Services Authority ("FSA"). It is a criminal offence under section 191F of FSMA to acquire or increase control without notifying the FSA first. A person who fails to comply with the obligation to notify the FSA in such circumstances is guilty of a criminal offence and is liable on indictment to a fine exceeding the statutory maximum.

Governance

The Commission's proposed Rules require the Board of a SEF to operate autonomously within a Group structure. A SEF is required to operate under the direction of its Board and not a Group Board. A Group within which a SEF operates will be a member in a SEF (meaning third party shareholder and as distinct from "participant" – a third party with rights to trade on a SEF).

It is not clear whether, or to what extent, the Board of a SEF, which operates within wider Group companies, is subject to the direction of Group Boards and hence to the systems and controls, risk management and governance frameworks of the owning Groups. Whilst in practice a SEF will very likely be a subsidiary undertaking of a parent company, it is not envisaged that the SEF subsidiary is subject to the governance, independent control or risk management frameworks of a Group (subject to limited exceptions, e.g. the appointment of the SEF Chairman and a casting vote in a tied SEF Board) .

However the corporate governance principles as set down by the OECD[4], IOSCO and the Basel Committee require the Board of a Group to have enterprise-wide governance and risk management. In most jurisdictions therefore the expectation would be that such responsibility would also extend to a SEF that operates within a Group structure.

[4] *OECD Principles for Corporate Governance*, 2004 http://www.oecd.org/dataoecd/32/18/31557724.pdf