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August 27, 2012

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

RIN number 3038–AD57

Re: Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, Interpretative Guidance

Dear Secretary,

On behalf of more than 300,000 Public Citizen members and supporters, we write to comment on the proposed interpretative guidance for the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act.

Four years after the financial crash demonstrated how the swaps market transmitted risk between financial institutions and across geographic borders, fundamental safeguards and tools to equip prudential regulators to oversee this market remain unimplemented. With this interpretative guidance, the Commission correctly attempts to establish an important and overdue framework.

The Dodd-Frank Wall Street Reform Act provides in Section 722(d) that swap activities undertaken by U.S. institutions overseas that have ''a direct and significant connection with activities in, or effect on, commerce of the United States'' may be supervised by U.S. regulators.

There can be no clearer expression of "a direct and significant connection" to the "commerce of the United States" than the unprecedented bailout of American and even foreign derivatives dealers following the financial crash of 2008.

The financial crisis of 2008 demonstrated sizeable risk in the global swap business. Failure of American International Group (AIG) dramatized how a well- regarded, large U.S. financial institution could be infected by activities in a relatively small overseas division. AIG's London division was organized as a branch of a French bank that was a subsidiary of a Connecticut-headquartered subsidiary of the New York-based parent company. When the London office found itself asymmetrically exposed to inflated

mortgage securities, guarantees from the parent led U.S. authorities in the Bush administration to authorize the largest bailout in history.

The Lehman Brothers bankruptcy presents another important example of how a firm with thousands of affiliates and subsidiaries, ostensibly established to silo risk, could nevertheless operate as a unified risk-taker for the purposes of management. At the time of bankruptcy, Lehman had 130,000 derivative contracts open, most of which were executed from its European affiliates. But the liabilities of those derivatives returned to the American parent; the bankruptcy court found that Lehman's seemingly diverse, overseas operations were ''highly integrated" with the parent. [1] In fact, the bankruptcy court had difficulty identifying the specific assets and liabilities of each subsidiary.

Citicorp, Lehman and other firms disguised many of their liabilities off balance sheet (and out of view of investors) and through incorporations in the Cayman Islands.[2]

Present examples of danger from overseas activity abound. Swap transactions executed in the London office of JP Morgan led to an as yet undetermined loss. Initially dismissed as a "tempest in a teapot" by JP Morgan CEO Jamie Dimon in the spring, 2012, then estimated at $2 billion and recognized as an "egregious" mistake two months later, and subsequently estimated at $6 billion in a July report, the complex transaction led shareholders to devalue the company by 20 percent. Observers including members of Congress such as Sen. Robert Menendez, (D-N.J.) have commented that lack of understanding by a bank regarded as one of the best managed in the industry of its own trading makes clear the need for careful U.S. oversight.[3]

The Commission's proposed interpretative guidance will reduce uncertainty for market participants. As Commissioner Sommers noted, "We needed to address the growing uncertainty brewing among swap market participants who were trying to decipher the extraterritorial reach of the Dodd-Frank Act. " [4] Concurred Commissioner O'Malia, "The timely release of these proposals is critical for firms to have some sense of what U.S. standards will apply to their cross-border transaction, and how those standards will comport with international standards."

Indeed, the entire Commission voted to release guidelines.

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[1] Lehman Brothers International (Europe) in Administration, Joint Administrators' Progress Report for the Period 15 September 2008 to 14 March 2009 (2009), http://www.pwc.co.uk/assets/pdf/lbie-progress-report-140409.pdf

[2] Lehman Brothers Holding Incorporated, United States Securities and Exchange Commission Form 10-K for 2005, (November 30, 2005) http://sec.gov/Archives/edgar/data/806085/000104746906001870/a2167455z10-k.htm

[3] Press Release, Menendez Turns Up Heat On Federal Regulator Over JP Morgan Trading Losses, (June 6, 2012) http://www.menendez.senate.gov/newsroom/press/release/?id=99142c81-91c2-47e9-b492-317ce081f3cc

[4] Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act; Proposed Rule, 17 CFR Part I, 2012
http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf

This guidance is of particular importance because the swaps market is international in scope and transactions between swaps market participants frequently take place across national borders. In fact, most swaps activity takes place extraterritorially. Europe leads activity accounting for 44 percent of the global outstanding volume. Asian derivative markets account for a third. Korea hosts the largest single derivatives exchange and India boasts the fastest growing exchange. [5] Many Wall Street banks routinely transact the majority of their swaps business through foreign subsidiaries.[6]

Moreover, this largely foreign-based over-the-counter swaps activity is immense, measuring some $700 trillion in annual notional value. If the housing bubble amounted to roughly $700 billion in mortgage debt beyond the true value of American homes, then the inability of market participants to honor obligations on even $1 trillion in outward exposure portends an equivalent crisis. In its most recent report, the Comptroller of the Currency reports that U.S. bank gross negative fair values totaled $4.5 trillion in the first quarter of 2012. Swings in these figures invite careful scrutiny. For example, netted current credit exposure declined by 12 percent in one quarter, and the level of gross positive fair value derivatives fell by 17 percent. [7] The OCC report also notes that banking industry trading in credit derivatives recorded a worst-quarter loss of $11 billion. As this was concentrated in four banks, which account for more than 95 percent of all derivatives trading, such acute losses threaten to bring down a large bank.

Finally, the Commission should consider the utility of the global swaps markets. Industry will undoubtedly comment on how additional reporting and prudential requirements may add burdens to this market. Consequently, the Commission will consider what harms may be suffered. Many products the Commission now supervises did not exist two decades ago, yet American business found access to credit, calling into question the utility of these new products. A New York University study by Thomas Philippon found that so-called innovations in credit markets actually increased the cost of capital to business. America developed railroads and the complex pharmaceutical industry with less expensive credit than current real economy industry confronts today. [8] Generally, the utility of swaps can be analyzed by examining the actual pecuniary benefit to bona fide end users, firms that produce for the real economy. Through this lens, swaps drain substantial income from real economy businesses. A Standard & Poors report found that financial firms enjoy a 35 percent operating margin.[9] Since swaps

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[5] Chris Brummer, "Curbing the Extraterritoriality of Dodd-Frank's Derivatives Regulation: An Examination of the Swap Jurisdiction Certainty Act," Testimony to Subcommittee on Capital Markets and Government Sponsored Enterprises, House Committee on Financial Services, (February 8, 2012)
http://financialservices.house.gov/uploadedfiles/hhrg-112-ba-wstate-cbrummer-20120208.pdf

[6] See Brush, Silla, "Goldman Sachs Among Banks Lobbying To Exempt Half of Swaps From Dodd Frank", Bloomberg News, January 30, 2012.

[7] Comptroller of the Currency Administrator of National Banks, OCC's Quarterly Report on Bank Trading and Derivatives Activities First Quarter 2012, (2012) http://www.occ.gov/topics/capital-markets/financial-markets/trading/derivatives/dq112.pdf

[8] Thomas Philippon, "Has the U.S. Finance Industry Become Less Efficient? On the Theory and Measurement of Financial Intermediation," (May, 2012) http://pages.stern.nyu.edu/~tphilipp/papers/Finance_Efficiency.pdf

[9] From S&P report: "As we did when making our prior estimate, we simplified our analysis by assuming that the overall industry derives 35% of all trading revenues from derivatives products and that the business generates a 35% operating margin. Based on historical derivative transactions, we continue to assume that 97% of derivatives

are bets, it is difficult to conceive that real economy firms gain when banks make $1.35 for every $1 ventured with them.

Some products, such as the credit default swap, played a clearly detrimental role leading to the financial crisis, creating the appearance of risk mitigation, when, in fact, these products served to amplify risk.[10] Other products have served to manipulate underlying commodity prices, such as for fuel or food.[11] "We are not talking about an abstract concept here," observed President of the Dominican Republic Leonel Fernández Reyna. "We are talking about something that is having a devastating, dramatic and brutal impact on the lives of people."[12] Added Unilever CEO Paul Polman, "The speculative part has to be taken out of it. That's part of discussing new models of working. You need forward markets and guaranteed pricing, some elements need to exist. But you have seen incredible amounts of money going into commodities from other securities in recent years and it's not always adding value."[13]

Swaps between financial entities should be considered with skepticism, as part of a zero sum game of gambling. Federal Reserve Gov. Sarah Bloom Raskin recently characterized proprietary trading in such vehicles as swaps "as an activity of low or no real economic value."[14] To the extent that U.S. firms contest that the Commission's rules may hamper the profitability of their swaps activity, the Commission should view this in light its mission,[15] namely to regulate a market, as opposed to maximize the profit of financial intermediaries.

## OVERVIEW

The Commission takes important, welcome steps to oversee swaps activity with a foreign nexus.

The Dodd Frank Act requires all swap dealers (SD) and major swap participants (MSPs ) to register with the Commodities Futures Trading Commission (CFTC ) and/or Securities Exchange Commission

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can remain in (or move to) bank subsidiaries and that a large portion of these transactions will move to a clearinghouse. We also assume that greater pricing transparency and margin requirements for the business that moves to clearinghouses will cut margins for that business in half, to about 16%-17%. However, we don't assume that the regulation will cause a significant change in derivatives volumes."

[10] Financial Crisis Inquiry Commission, Financial Crisis Inquiry Report (2011), http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf

[11] Institute for Agriculture and Trade Policy, "Excessive Speculation in Agriculture Commodities: Selected Writings 2008-2011," (April, 2011), http://www.iadb.org/intal/intalcdi/PE/2011/08247.pdf

[12] Press Release, Food and Agriculture Organization of the United Nations, "Experts Eye Commodities Speculation, Food Price Swings," (July 6, 2012) http://www.fao.org/news/story/en/item/150900/icode/

[13] Damian Reece, "Davos 2012: Unilever Chief Polman Warns of Higher Food Prices and Urges Curbs on Commodities Speculation," The Telegraph, (Jan 25, 2012) http://www.telegraph.co.uk/finance/financetopics/davos/9037996/Davos-2012-Unilever-chief-Polman-warns-of-higher-food-prices-and-urges-curbs-on-commodity-speculation.html

[14] Sarah Bloom Raskin, "How Well is Our Financial System Serving U.S.? Working Together to Find the High Road," (Graduate School of Banking at Boulder, Colorado, June 23, 2012) http://www.federalreserve.gov/newsevents/speech/raskin20120723a.htm

[15] U.S. Commodity Futures Trading Commission, http://www.cftc.gov/about/missionresponsibilities/index.htm

(SEC ) and to disclose any material risks associated with swaps as well as any material incentives or conflicts of interest. [16] Under the guidance, SDs and MSPs must meet capital and margin requirements and conform to business conduct rules that include prohibitions against fraud and market manipulation.

Under Section 722(d), Dodd-Frank authorizes U.S. regulators to apply regulations to foreign banks and to trades conducted outside of the United States that directly involve U.S. parties or could substantially impact the U.S. economy. Dodd-Frank regulations apply to any non-U.S. financial institutions that enters into a swaps transaction with a U.S. counterparty, even if the transaction occurs outside of the United States. Additionally, Section 722(d) authorizes the CFTC to regulate any activity that has a "direct and significant connection with activities in, or affect on commerce of the United States."

In *Morrison v. National Australia Bank*, a case involving the extra territorial reach of U.S. securities legislation, the Supreme Court found that in the absence of explicit Congressional intent to the contrary, U.S. statutes are presumed to apply primarily to domestic actors.[17] In Dodd-Frank, Congress clearly expressed its intent to address, where necessary, regulatory challenges extraterritorially.

Public Citizen associates with the comments proffered by Michael Greenberger and George Waddington of the University of Maryland regarding the legal foundation for the Commission's authority on cross border swaps oversight.

The interpretative guidance correctly applies the full suite of U.S. prudential regulation to overseas branches and agencies of U.S. firms. Registered swap dealers or major swap participants would be subject to all "entity-level" requirements (such as capital, internal business conduct, chief compliance officer and reporting to swap data repositories) and "transaction-level" requirements (such as margin, clearing and external business conduct). [18]

We support this as an important, urgent reform. In operation, the CFTC can improve the safety of swaps trading. U.S. Firms will be less able to escape prudential rules and oversight by staging swaps activity outside U.S. geographic borders. Had this guidance prevailed ahead of the financial crisis, swap activity overseas guaranteed by the U.S. parent would have been detected early and contained to a level that

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[16] The CFTC has primary regulatory authority for swaps. For single issue swaps, such as a CDS for a single bond, the SEC has authority. From: http://www.sec.gov/news/press/2012/2012-67.htm
[17] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).
[18] Transaction level requirements include: clearing and swap processing; margining and segregation for uncleared swaps; trade execution; swap trading relationship documentation; portfolio reconciliation and compression; real-time public reporting; trade confirmation; daily trading records; and external business conduct standards. The guidance generally does not extend substituted compliance to transaction level requirements, since it views the purpose of most of these requirements—risk mitigation and transparency—as part of its critical oversight responsibility. Entity level requirements include capital; assignment of a chief compliance officer; risk management; swap data recordkeeping; swap data reporting and physical commodity swaps reporting The Entity-Level Requirements apply to registered swap dealers and MSPs across all their swaps without distinctions as to the counterparty or the location of the swap.

could have prevented the failure of the parent. For example, the AIGFP credit default swaps enjoyed a guarantee from the parent.[19] That guarantee enabled (if not emboldened) counterparties such as Goldman Sachs to engage in enormous transactions with AIGFP, under the calculation that the parent would make good on the subsidiary's obligations. The parent guarantee figured into Goldman's daily oversight of its contracts and the firm collected collateral payments when the parent lost its AAA rating.[20] Similarly, Lehman Brothers found itself unable to isolate the losses of its swaps subsidiaries, and these failures meant failure of the parent.

Disciplined market participants would rationally seek explicit guarantees, or deal directly with a U.S. entity through a branch or agency. In the Spring, 2012, counterparties of Merrill Lynch, for example, sought to shift these contracts to the federally insured parent, namely Bank of America to seek extra comfort.

While we applaud the Commission's guidance on key issues, we do take issue with the proposal to reduce direction CFTC oversight depending on the presence or absence of parent guarantees, and the legal structure of the foreign swaps entity. We strongly oppose reduced oversight for foreign subsidiaries guaranteed by a U.S. parent. In practice, the absence of guarantee becomes meaningless when the parent company defends a swap contract to protect its reputation. Similarly, a parent will also support a subsidiary that cannot meet a swaps obligation. We are unaware of a parent that allowed a swap subsidiary to fail where the parent remained intact. Concomitantly, as we believe the CFTC should view all overseas swap entities controlled by U.S. parents as "U.S. persons" and therefore should be overseen direction by the Commission, we object to the U.S.e of substituted compliance. Our views and reasoning are more specifically detailed in response to the Commission's 32 enumerated questions.

## RESPONSES to SELECT COMMISSION QUESTIONS

*Q1. Please provide specific comments regarding the Commission's proposed interpretation of the term ''U.S. person.''*

*Q1a. In the Commission's view, the concerns regarding risks associated with the affiliate group structure are heightened where a U.S. person guarantees (or provides similar support) to a foreign affiliate or subsidiary. In such situations, the risk of the swaps executed abroad are effectively transferred to or incurred by the U.S. person. Or stated differently, the risk of the affiliate's swap transactions have a direct and significant connection to, or effect on, the U.S. person that is the guarantor. Under these*

[19] According to the 2006 AIG 10k: "AIG has issued unconditional guarantees with respect to the prompt payment, when due, of all present and future payment obligations and liabilities of AIGFP arising from transactions entered into by AIGFP." : http://media.corporate-ir.net/media_files/irol/76/76115/pdf/10K_pdf.pdf

[20] William D. Cohan, *How Goldman Killed A.I.G.*, New York Times, (February 16, 2011) http://opinionator.blogs.nytimes.com/2011/02/16/how-goldman-killed-a-i-g-and-other-stories/

*circumstances, notwithstanding that the U.S. person may be subject to a robust regulatory regime, its financial stability may be put at risk by activities outside the firm. Accordingly, the Commission is considering, and seeks comments on, whether the term ''U.S. person'' should be interpreted to include a foreign affiliate or subsidiary guaranteed by a U.S. person.*

We support the Commission's recognition that swaps activity in overseas branches and agencies of U.S. firms directly impact the integrity of the American parent.

Theoretically, rational investors will insist on guarantees and engagements with branches and agencies of U.S. firms, as opposed to subsidiaries without guarantees. Practically, however, counterparties could view a guaranteed subsidiary as essentially equivalent in risk to direct, guaranteed engagement with the parent. Therefore, we enthusiastically welcome a Commission decision to interpret as a U.S. person a foreign affiliate or subsidiary guaranteed by a U.S. person. AIG guaranteed its subsidiary AIGFP, as noted, which led to the massive bailout. That guarantee exacerbated the risk AIG undertook, as counterparties understood that the American parent, and implicitly, the American taxpayer, would underwrite any losses.[21] Such a guarantee permitted these counterparties to reduce diligence they might otherwise apply in circumstances without such a solid backstop. Guarantees become an invitation for excessive risk.

Similar dynamics apply from the swap dealer's vantage. As a matter of routine, financial institutions maintain risk managers that survey consolidated risk because profits and losses of subsidiaries stream up to the parent. Many banks consolidate their derivatives transactions across branches, subsidiaries and affiliates. Such consolidation may take place on a daily basis. The Lehman Brothers bankruptcy report examined this activity.[22][23][24][25] Financial firms divide their operations by type of business, such as natural gas, interest rates, or agriculture commodities, not by the legal structure through which the business-related swaps are channeled. Activity in one business such as natural gas may take place through different, multiple legal subsidiaries, but the parent coordinates the business.

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[21] Federal Register, Volume 77 Issue 134 (Thursday, July 12, 2012)[Federal Register Volume 77, Number 134 (Thursday, July 12, 2012)] http://www.cftc.gov/LawRegulation/FederalRegister/ProposedRules/2012-16496

[22] Letter from Robert H. Herz, Chairman Financial Accounting Standards Board, to Barney Frank and Spencer Bachus, (April 19, 2010) http://www.fasb.org/cs/BlobServer?blobkey=id&blobwhere=1175820569499&blobheader=application%2Fpdf&bobcol=urldata&blobtable=MungoBlobs

[23] The point of operation through subsidiaries involves the isolation of liability, tax advantage, or regulatory advantage. Citigroup emphasized guarantees in products, limiting details of limits on those guarantees to footnotes. Citibank, N.A., London Branch, Man MGS Access Series 2 Ltd, http://www.globalinvestments.net/news/MMGSAS2.pdf

[24] John McDermott, *The Mystery of U.S. banks' European Exposure,* Financial Times, (October 5, 2012) http://ftalphaville.ft.com/blog/2011/10/05/692936/the-mystery-of-us-banks-european-exposure/

[25] Bear Stearns OTC derivatives payments during a three day period in 2008 revealed U.S.e of numerous affiliates and subsidiaries. JPMorgan Chase & Co. "Response to the Financial Crisis Inquiry Commission's Letter" (February 18, 2010) http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2008-09-10_Bear_Stearns_OTC_Derivitives_Payments.pdf

While the Commission appropriately looks to the guarantees from the parent, those subsidiaries whose swaps are not guaranteed by the parent may pose similar systemic risk for the United States. A parent will inevitably bailout a faltering subsidiary. In practice, such failures may be silent and frequent, where the subsidiary finds itself short in its ability to make payments, and seeks funding from the parent. [26] We are unaware of examples where a parent permitted a swap dealer subsidiary to fail while the parent remained healthy. In fact, such a dynamic defies common sense.

In 2007, Bear Stearns rescued two of its sinking hedge fund affiliates, which had significant investments in subprime mortgages. As Chairman Gensler observed, "Bear Stearns did so to preserve its reputation, as well as its ability to continue funding itself. The result was the same: Bear Stearns took on the risk of its failing affiliates. This was just the beginning of the end, as within months, the Federal Reserve provided extraordinary support to the failing Bear Stearns. "[27]

Before the 2008 crash, regulators permitted banks to place liabilities off balance sheet under the theory that the parent would not be responsible for liabilities. This proved illusory as off balance sheet activity proved fatal, such as at Citigroup. Clients engaged with these off balance sheet entities understood the implicit guarantee. The parent assumed responsibility during the crisis. (Due to this, regulators have now limited off balance sheet accounting.)

Highlighting the exposure of U.S. taxpayers to foreign subsidiaries ofU.S. firms, much of the U.S. taxpayer bailout money went to foreign parents.[28] Japan's Norinchukin Bank borrowed $22 billion of emergency funds from the Federal Reserve during the 2008 financial crisis;[29] the Royal Bank of Scotland ("RBS") borrowed approximately $85 billion;[30] Deutsche Bank borrowed $66 billion.[31] The Commission

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[26] Hypothetically, the Commission might require that the absence of guarantees be explicit, meaning language in the derivative contract that declares the counterparty will have no claim on the parent in the event of failure. But such hypotheticals do not seem conceivable. Americans for Financial Reform offers that the CFTC creates a rebuttable presumption that affiliates and subsidiaries are guaranteed, requiring that the absence of a guarantee be demonstrated. Such documentation would be shared with all customers.

[27] Gary Gensler, U.S. Commodity Futures Trading Commission, "Keynote Address on the Cross-Border Application of Dodd-Frank Swaps Market Reforms before the 2012 FINRA Annual Conference" (May 21, 2012)http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-113

[28] Michael Mandel, *German and French Banks Got $36 Billion from AIG Bailout,* Bloomberg Businessweek, (March 15, 2012)
http://www.businessweek.com/the_thread/economicsunbound/archives/2009/03/german_and_fren.html

[29] Yalman Onaran, *Bank Lobby Widened Volcker Rule, Inciting Foreign Outrage*, BLOOMBERG (Feb. 23, 2012, 2:56 PM), http://www.bloomberg.com/news/2012-02-23/banks-lobbied-to-widen-volcker-rule-before-inciting-foreigners-against-law.html.

[30] *The Fed's Secret Liquidity Lifelines: Royal Bank of Scotland Group Plc Details*, BLOOMBERG, http://www.bloomberg.com/data-visualization/federal-reserve-emergency-lending/#/Royal_Bank_of_Scotland_Group_PLC/?total=true&mcp=true&mc=true&taf=false&cpff=false&pdcf=false&tslf=false&stomo=false&amlf=false&dw=false/.

[31] The review of Federal Reserve help comes from Prof. Greenberger's submission to the CFTC regarding the exemptive order.

can hardly rely on the technical legal separation of a U.S. subsidiary from its U.S. parent if the American taxpayer wasn't even insulated from liability for firms with non-US parents.

In a March, 2011 study, the IMF found that the legal silo of a subsidiary could be and has been easily breached by a parent seeking to protect reputation. Under either branch or subsidiary structure, "reputational risks and confidence effects may limit the ability to limit contagion, with problems in one part of the group quickly threatening the viability of the rest."[32]

Under the UK Insolvency Act, claimants upon a subsidiary may seek restitution from the parent if it can be shown that the parent actively participates in the management of the subsidiary. [33][34]

An industry that seeks to avoid the Commission's full suite of prudential regulations may instead attempt to channel activity through subsidiaries and affiliates that the proposed guidance exempts from this full suite. News reports suggest banks already prepare evasion plans. U.S. banks are working with their foreign allies to determine how to restructure their operations to allow foreign banks to swap with U.S. banks through non-U.S. persons (i.e., persons who do not have to comply with Dodd-Frank).[35] As a manager at an Asian bank recently observed: "If I have a choice, I just don't want to deal with a 'U.S. person'." Asian banks hope to continue to trade with large U.S. banks through entities that are controlled by these banks, but are designated non-U.S. persons for the purposes of Dodd-Frank.[36] Industry support for legislation in Congress (such as HR 3283) to prevent such oversight and industry comment opposing the extraterritorial reach ofU.S. regulation attests to industry objection to these rules. The Commission should anticipate, then, that significant swaps activity may be re-routed through vehicles that escape direct CFTC oversight if they are not included in the final guidance.

Swap activity that escapes more stringent oversight will, by nature, be more risky.

In sum, reducing oversight of foreign swap subsidiaries ofU.S. parents will invite increased risk-taking that will inevitably be borne by theU.S. parents and, in turn, theU.S. taxpayer.

*Q1c. As an alternative to the proposed interpretation of the term ''U.S. person,'' should the Commission interpret the term to include a concept of control under which a non-U.S. person who is controlled by or under common control with a U.S. person would also be considered a U.S. person? If so, how should the Commission define the term ''controlled by or under common control?''*

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[32] IMF, Subsidiaries or Branches? Does One Size Fit All?, (March 7, 2011) http://www.imf.org/external/pubs/ft/sdn/2011/sdn1104.pdf

[33] http://www.legislation.gov.uk/ukpga/1986/45/contents

[34] (i) Were the profits of the subsidiary those of the parent company? (ii) Were the persons conducting the business of the subsidiary appointed by the parent company? (iii) Was the parent company the "*head and brains*" of the venture? (iv) Did the parent company govern the venture? (v) Were the profits made by the subsidiary company made by the skill and direction of the parent company? (vi) Was the parent company in effective and constant control of the subsidiary?http://www.radcliffechambers.com/articleDocs/374.pdf

[35] http://www.reuters.com/article/2012/08/19/us-asia-regualtion-derivatives-idUSBRE87I0A720120819

[36] http://www.reuters.com/article/2012/08/19/us-asia-regualtion-derivatives-idUSBRE87I0A720120819

The Commission's concern about risk "effectively transferred" to theU.S. parent should be reflected in Commission policy; affiliates and subsidiaries should be accorded the same oversight as branches and agencies. We support a definition of "US person" as an entity controlled by a U.S. parent, whether it is incorporated domestically or abroad, is a subsidiary, affiliate, branch or agency.

*Q2. Do commenters agree that in determining whether it is a swap dealer, a non-U.S. person without a guarantee from a U.S. person should consider whether it is engaged in swap dealing as part of ''a regular business'' only with respect to U.S. persons (as opposed to non-U.S. persons)? Why or why not? In such an analysis, would it generally be feasible for the non-U.S. person to distinguish swap dealing activities with U.S. persons from swap dealing activities with non-U.S. persons and are there any practical difficulties in this approach?*

Because we believe that the absence of a U.S. guarantee does not insulate the U.S. parent from risk exposure, swaps activity with both U.S. and non-US persons should be included. The total exposure of swaps activity that may be transmitted to the U.S. parent can only be understood if it is defined in such a manner. Inclusion of all activity obviates the need to distinguish between U.S. and non-US persons.

*Q3. Please provide comments regarding all aspects of the Commission's proposed interpretation, including particular alternative interpretations the Commission should consider in assessing whether a non-U.S. person should be required to register as a swap dealer or MSP.*

*Q3a. Do commenters agree that the Commission should determine whether a non-U.S. person, without a guarantee from a U.S. affiliate, is a swap dealer based solely upon the aggregate notional amount of swap dealing activities with U.S. persons as counterparties? Why or why not?*

The notional amount should be figured on the swap dealing activities in total regardless of the counterparty or existence of explicit guarantee. Failure of a swap dealer from risk of non-US counterparties without an explicit guarantee will be as certain as those from guaranteed branches with U.S. counterparties, and this risk will transmit to the parent and impact the U.S. economy.

Chairman Gensler explained, "When Lehman Brothers collapsed in 2008, it had a complex web of affiliates. This included Lehman Brothers International (Europe) (LBIE), an unlimited liability company in London. At that time, it had more than 300 outstanding creditor and debtor balances with its affiliates amounting to more than $21 billion in total. What happened to LBIE is directly relevant to the current discussions about cross-border application of swaps reforms, as LBIE had more than 130,000 swaps contracts outstanding when it failed. Many of its counterparties were guaranteed by the parent, Lehman Brothers Holdings, back in the United States. Not only did LBIE's customers pay the price. Over $28 billion in client assets and money were caught up in the bankruptcy of the UK entity. This uncertainty led, further, to a run on many other financial institutions when customers feared for their positions and collateral housed in overseas affiliates of other U.S. financial institutions."[37]

[37] Gary Gensler, Keynote Address on the Cross-Border Application of Dodd-Frank Swaps Market Reforms Before the Final 2012 FINRA Annual Conference, U.S. Commodity Futures Trading Commission, (May 21, 2012) http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-113

*Q3b. Do commenters agree that the Commission should determine whether a non-U.S. person is a swap dealer based on the aggregate notional amount of swap dealing activities when the swap dealing obligations of such non-U.S. person are guaranteed by a U.S. person? Why or why not?*

Existence of an explicit U.S. guarantee should certainly mandate aggregation of swaps with non-US counterparties. Please see our discussion in response to Q1.

*Q3c. Do commenters agree that in determining whether a non-U.S. person is a swap dealer, the notional amount of swap dealing activities conducted by it and all of its non-U.S. affiliates under common control should be aggregated together? Why or why not? Should the Commission further interpret the phrase ''under common control'' and, if so, how should the Commission define ''common control'' for aggregation purposes? Should the notional amount of swap dealing activities conducted by its U.S. affiliates also be included?*

The widest possible interpretation should prevail, as risk accrues to a parent, and is not arrested by geographic borders. In tranquil periods, a parent will preserve any subsidiary; in turbulent periods, history demonstrates taxpayers may be asked to prevent systemic reverberations from collapsing subsidiaries to protect a U.S. person.

Aggregation will also prevent evasion. For example, an evading firm might attempt to set up countless subsidiaries engaged in $7.9 billion notional value activity, whose aggregate could be an order of magnitude greater.

*Q3d. Are any other aspects of a swap—such as, for example, the place of execution or clearing—relevant to the determination of whether a non-U.S. person is a swap dealer?*

Should the Commission retain its distinction regarding affiliates and subsidiaries, which we do not support, these structures should be overseen by the Commission directly where execution or clearing takes place on a U.S. domiciled execution or clearing facility.

*Q3e. Do commenters agree that the Commission should determine whether a non-U.S. person is an MSP based solely on its swap positions with U.S. persons as counterparties? If not, why?*

No. Designation as a MSP should be determined based on total swap positions, as risk is cumulative.

*Q3f. Do commenters agree that, in determining whether a non-U.S. person is an MSP, its swap positions guaranteed by a U.S. person should be attributed to such U.S. person and not the non-U.S. person? If not, why? How should the Commission's determination change when some but not all of the non-U.S. person's swap obligations are guaranteed by a U.S. person?*

Designation as an MSP should incorporate all swaps. At a minimum, only those non-US-facing swaps with an explicit non-guarantee might be excluded.

*Q3g. Are any other aspects of a swap—such as the place of execution or clearing—relevant to the determination of whether a non-U.S. person is an MSP?*

*No.*

*Q4. As noted above, the Commission does not propose that a non-U.S. person should include, in determining whether the swap dealer de minimis threshold is met, the notional value of swap dealing transactions with foreign branches of U.S. swap dealers. Noting the risk based, as opposed to activities-based, nature of the MSP registration category and related calculations, the Commission seeks comment on whether a non-U.S. person should include, in determining whether it is required to register as an MSP, its swap positions with foreign branches of U.S. swap dealers.*

As risk is borne ultimately by parent firms, the notional swap value of overseas branches of U.S. firms should be aggregated with the notional swap value of affiliates of U.S. firms. Distinguishing between legal entities engaging in swaps could simply prompt U.S. firms to doctor these frameworks or redirect swap activity to subsidiaries to avoid oversight.

*Q5. Under the aggregation description above, a non-U.S. person, in determining whether the de minimis threshold is met, must include the notional value of dealing swaps by its non-U.S. affiliates under common control. The Commission requests comments on whether, to the extent that any such non-U.S. affiliate is registered with the Commission as a swap dealer, the notional value of dealing swaps entered into by such registered swap dealer should not be aggregated with the notional value of dealing swaps entered into by the other non-U.S. affiliates under common control.*

All swaps regardless of geography should be aggregated. The inability of a firm to meet swaps obligations could be a catalyst where even a a small exposure in a foreign affiliate could precipitate firm-wide failure.

*Q8. Do commenters agree that the Commission should exclude the swap dealing transactions of a non-U.S. person from the determination of whether such non-U.S. person qualifies as a swap dealer, where the counterparty to such dealing swaps are non-U.S. persons (guaranteed or not)? Should the Commission exclude swap obligations in excess of a capped guaranty provided by a U.S. person (i.e.,a guaranty that limits the U.S. person's liability to a capped or maximum amount)? How should the Commission account for the reduced risks assumed by a U.S. person guaranteeing certain or all swaps of a particular non-U.S. person under that non-U.S. person's master agreements with non-U.S. counterparties, where the U.S. person's liability under the guarantee is limited?*

As we discount the concept of non-explicit guarantees as insulating a parent, we also assert that graduated guarantees will not safeguard the transmission of risk to the U.S. parent. Graduating the firm's obligations based on level of guarantee invites gaming. Firms could simply engage in swaps activity through exempt foreign affiliates to the extent that graduated guarantees permit.

*Q10. Please provide comments regarding all aspects of the Commission's proposed grouping of requirements into Entity-Level and Transaction-Level Requirements and application of the same to U.S. and non-U.S. persons as discussed above.*

We support the full application of transaction level requirements, including margin and capital. We support both the individual items and the grouping for transaction and entity-level supervision.

*Q11a. Should the Commission group the Entity-Level Requirements and Transaction-Level Requirements differently for swap dealers and MSPs? If so, how and why?*

Swap dealers and MSPs should be accorded identical treatment as both interconnect with each other and throughout the economy. By the Commission's definition, an MSP is a firm "whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets." [38]

*Q12. Please provide specific comments regarding the proposed application of the Transaction-Level Requirements to swaps with counterparties that are U.S. persons. Should the Commission permit substituted compliance for swaps between a non-U.S. swap dealer or non-U.S. MSP with a U.S. person?*

We oppose substituted compliance. Substituted compliance should be minimized, if permitted at all. (See our broader discussion under Question 15a.) It should not be permitted when the swap involves a U.S. counterparty. The failure of the U.S. subsidiary, for reasons unrelated to a U.S. counterparty, would nonetheless redound to the U.S. counterparty.

We support the proposal from AFR that acceptance of substituted compliance be transparent. The public should be allowed to comment with the Commission on requests for substituted compliance. To this end, the key documentation supporting a determination of comparability should be made publicly available on the internet when an application is made by industry.

*Q13. Please provide specific comments regarding the proposed application of the Transaction-Level Requirements to swaps with counterparties that are non-U.S. persons*.

Transaction level requirements should be required for counterparties that are non-US persons. Returning to the example of Goldman Sachs' dealings with AIGFP in London that required a bailout: margin could have prevented the extraordinary build-up of AIG's positions. Well enforced transaction level requirements should serve to prevent similar occurrences at other companies.

*Q14. Market participants may not be able to determine, in certain cases, whether their counterparties are U.S. persons, non-U.S. persons with a guarantee from U.S. persons, or non-U.S. persons without guarantees. How should the Commission address this issue?*

That guarantees may not be clear highlights the perilous division the Commission has attempted to draw in applying direct U.S. oversight. Rather than attempt to determine the type of counterparty, the

[38] Commodity Futures Trading Commission, 17 CFR Part 1 Rules and Regulations, (May 23, 2012) http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-10562a.pdf

Commission's default position should involve the application of its full suite of prudential oversight. Should the Commission retain its basic distinctions between branches and subsidiaries and guarantees and non-guarantees, the Commission should at least retain direct oversight where guarantees cannot be determined.

*Q15. Please provide comments regarding the Commission's proposed interpretation with respect to non-U.S. swap counterparties whose swap obligations are guaranteed by U.S. persons. Should the interpretation for swaps between non-U.S. swap dealers or non-U.S. MSPs and non-U.S. counterparties whose swap obligations are guaranteed by U.S. persons be different than with respect to swaps between non-U.S. swap dealers or non-U.S. MSPs and U.S. persons (e.g., should fewer Transaction-Level Requirements apply)? If so, how (e.g., which Transaction-Level Requirements should apply)? Should the Commission not permit substituted compliance with respect to the Entity-Level and Transaction-Level Requirements in connection with transactions with non-U.S. persons?*

These distinctions hinge on the assumption that the failure of an affiliate without a U.S. guarantee holds insignificant risk and can be accorded vicarious oversight through substituted compliance; we disagree with that assumption.

*Q15a. Should the Commission permit substituted compliance for some requirements but not others? If so, which ones? Should the applicable requirements be different for non-U.S. swap dealers as compared to non-U.S. MSPs?*

The Commission offers a regime of substituted compliance by the foreign government of foreign subsidiaries of U.S. entities engaged in swaps activity where there is no guarantee from the parent. Foreign affiliates and subsidiaries of U.S. firms that are registered as swap dealers or MSPs must comply with all Entity-Level Requirements, but the Commission permits these entities to satisfy these obligations by complying with their domestic regulatory requirements instead of the CFTC's if their domestic requirements are comparable to those of the CFTC and, in the case of reporting obligations, the CFTC has direct access to the relevant data.

While not problematic on its face, experience with substituted compliance reveals notable problems. The CFTC ceded oversight of the Atlanta-based InterContinental Exchange to the UK Financial Services Authority. That authority failed to intervene when alleged market manipulation led to a precipitous increase in energy prices in 2008. Former CFTC official Michael Greenberger criticized the "total laxity of the FSA regulatory process."[39][40][41][42]

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[39] Alton Parrish, *The Enron Loophole: An Orgy of Speculation and the High Price of Oil*, Yahoo Voices, (June 24, 2008) http://voices.yahoo.com/the-enron-loophole-orgy-speculation-the-1597859.html

[40] The Senate Permanent Investigations staff and others have identified the Intercontinental Exchange (ICE) of Atlanta, Georgia as an "unregulated facility" upon which considerable exempt energy futures trading is done. For purposes of facilitating exempt natural gas futures, ICE is deemed a U.S. "exempt commercial market" under the Enron Loophole. For purposes of its facilitating U.S. WTI crude oil futures, the CFTC, by informal staff action, deems ICE to be a U.K. entity not subject to direct CFTC regulation even though ICE maintains U.S. headquarters and trading infrastructure, facilitating, among other things, about 30% of trades in U.S. WTI futures. That staff informal action may be terminated instantly by the CFTC under existing law. *Id.*

"The lack of regulation of trading" by UK authorities over the Atlanta-based ICE led, testified Dr. Mark Cooper of the Consumer Federation of America before the CFTC "has influenced the price of natural gas in a volatile and upward direction."[43]

Despite the fact that FTSE 100 companies were and are required to report all their subsidiaries to British authorities, a study revealed that almost half of the companies in the FTSE had refused to disclose this mandated information. Forty-six companies did not list all their subsidiaries, and three, while they listed their subsidiaries, would not disclose in which countries they were incorporated. [44]

Where multiple regulators carry oversight responsibility, each one may view their responsibilities as marginal. AIG's French, UK and American nexus meant that "The French banking regulator . . . recognized [the U.S. Office of Thrift Supervision] as comparable—in part because of its own weak regulation of swaps—and in doing so allowed the United States to act as the primary regulator for AIG's worldwide operations," observed Chris Brummer of Georgetown Law School. "Poor oversight by an understaffed OTS demonstrated, however, how delocalized risk associated with credit default swaps could eventually become."[45]

It is safer to apply U.S. based CFTC oversight wherever possible for consistent regulation.

While there have been some positive experiences with international supervision, it U.S.ually required foreign jurisdictions to adopt stronger rules to conform with American standards. A Canadian-US accord for securities transactions required Canadian regulators to institute changes associated with both issuance rules and supervisory activities as a condition for participating in the program. "The SEC eked out additional concessions from Canadian regulators over time," observed Georgetown's Brummer. [46]

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[41] The CFTC found that the unregulated Atlanta ICE exchange offered essentially the same trading opportunities as the regulated New York Mercantile Exchange (NYMEX), attracting the same traders.
Commodity Futures and Trading Commission, Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets, (October, 2007)
http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf

[42] Sean Cota, President Cota & Cota, Inc., Testimony before Commodity Futures and Trading Commission, Commodity Futures and Trading Commission, (July 28, 2009)
http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing072809_cota.pdf

[43] Commodity Futures and Trading Commission, Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets, (October, 2007)
http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf

[44] Leah Hyslop, Almost half of FTSE 100 companies 'not declaring subsidiaries,' The Telegraph (February 9, 2011)
http://www.telegraph.co.uk/finance/personalfinance/offshorefinance/8310625/Almost-half-of-FTSE-100-companies-not-declaring-subsidiaries.html

[45] Chris Brummer, "Curbing the Extraterritoriality of Dodd-Frank's Derivatives Regulation: An Examination of the Swap Jurisdiction Certainty Act," Testimony to Subcommittee on Capital Markets and Government Sponsored Enterprises, House Committee on Financial Services, (February 8, 2012)
http://financialservices.house.gov/uploadedfiles/hhrg-112-ba-wstate-cbrummer-20120208.pdf

[46] Chris Brummer, "Curbing the Extraterritoriality of Dodd-Frank's Derivatives Regulation: An Examination of the Swap Jurisdiction Certainty Act," Testimony to Subcommittee on Capital Markets and Government Sponsored

However, we generally oppose substituted compliance. U.S. firms, however legally configured or wherever geographcally located, should oblige U.S. law.

*Q16. For Entity-Level Requirements, should the Commission not permit substituted compliance for U.S. persons?*

Should the Commission retain substituted compliance, it should at least retain direct supervision regarding entity-level requirements. Entity-level requirements constitute the risk management firmament, whereas failure of individual transactions represent a lesser firm-wide hazard.

*Q17. The Commission is aware that some non-U.S. swap dealers or MSPs may be prohibited from reporting swap transaction data to an SDR as a result of their home country's privacy laws, especially with respect to such swap dealer's or MSP's swaps with non-U.S. persons. How should the Commission address the application of the SDR Reporting requirement with respect to these swaps? Should the Commission address the application of such requirements differently with respect to non-U.S. swap dealers and non-U.S. MSPs?*

Such swap dealers should not be permitted to engage with such counterparties. U.S. anti-money laundering laws do not countenance foreign privacy laws, for obvious reasons. Permission for U.S. firms swap dealers to hide behind foreign privacy law will simply mask risk. The Commission should make no concession for non-US swap dealers or MSPs.

*Q18. The Commission seeks comments concerning the proposed disapplication of the external business conduct standards to swaps involving non-U.S. persons. Would it be consistent with the expectations of non-U.S. persons to not apply these requirements to swaps with their local swap dealer, irrespective of whether such dealer is a foreign- or U.S.-based person? Should such requirements apply only to swaps involving the foreign branches or affiliates of a U.S.-based swap dealer?*

Limiting external business conduct standards invites arrangements with counterparties that may be inappropriate, which could lead to counterparty failure. Congress and the agencies mandate external business conduct standards to prevent swaps dealers from duping customers. Congress may have less concern when U.S. firms dupe non-US customers, but this dual standard hardly constitutes reputable foreign policy. Moreover, there can be real ramifications for American taxpayers. Inappropriate extensions of credit can lead to counterparty failure, exposing the U.S. affiliate.

*Q19. Should the Commission interpret section 2(i) so as to not apply the Transaction-Level requirements to the foreign branches of U.S.-swap dealers operating in the emerging markets? If so, is it appropriate to condition eligibility for such an exception in the manner discussed above? Should the Commission permit a higher or lower percentage of swaps to be executed through foreign branches of U.S. registrants in emerging market jurisdictions without comparable regulation? If so, why and what percentage would be appropriate?*

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Enterprises, House Committee on Financial Services, (February 8, 2012)
http://financialservices.house.gov/uploadedfiles/hhrg-112-ba-wstate-cbrummer-20120208.pdf

Activity in emerging markets should be accorded no regulatory exemption of rules that applies to activity conducted in other foreign markets. The CFTC should not serve as vehicle for foreign economic development.

*Q20. With respect to the exception for foreign branches of a U.S. swap dealer operating in the emerging markets with respect to swaps with a non-U.S. person guaranteed by a U.S. person, should the Commission change the baseline from the aggregate notional value of a firm's swap activities to $8 billion (or certain fixed numerical threshold) so as to not disadvantage small swap dealers?*

The Commission proposes that the aggregate notional value of the swaps of all foreign branches and agencies in emerging countries not exceed five percent of the aggregate notional value of all of the swaps of the U.S. swap dealer, in order to qualify for reduced compliance. The Commission would require the U.S. person to maintain records with supporting information to verify its eligibility for the exception. This means that a relatively small U.S. firm would be unable to engage significantly in an emerging market without adhering to greater compliance than would a larger firm, for which the 5 percent figure represents greater activity.

We oppose reduced compliance, whether the activity takes place in developed or emerging markets, or where this activity represents a small percent of the firm's total. Rather than reducing compliance requirements for small firms, compliance for all transactions for both SDs and MSPs should be uniform and identical to that which applies to U.S. based transactions.

*Q21. The Commission requests comment on its proposed approach of applying the Transaction-Level Requirements to a conduit's swaps as if counterparty were a non-U.S. person that is guaranteed by a U.S. person (i.e., Transaction-Level Requirements will apply, with substituted compliance permitted).*

The Commission defines a conduit as a non-US entity that is majority-owned, directly or indirectly, by a U.S. person; regularly enters into swaps with one or more U.S. affiliates or subsidiaries of the U.S. person; and is consolidated by the U.S. person into the U.S. person's financial statements. A transaction between a non-US swap dealer or MSP and a conduit is treated as if it were a swap with a non-US person that was guaranteed by a U.S. person. The CFTC will permit substituted compliance for these transactions

The Commission should apply the highest standards especially where there is a U.S. guarantee, and not permit substituted compliance. Existence of a conduit attests to the transmission of risk to the parent.

*Q22. The Commission requests comment on its proposed definition of ''conduit.'' Are the three prongs of that definition appropriate? If not, how should they be modified? Should the second prong include language that limits application of the conduit test to ''regular'' inter-affiliate transactions moving economic risk, in whole or in part, to the United States. Should the definition of conduit distinguish between different types of counterparties or registration status of such counterparties?*

As the Commission notes, a U.S. person "directly exposed to risks from and incurred by the conduit" must be recognized. The possibility that "a U.S. swap dealer or MSP could execute a swap with its

foreign affiliate or subsidiary, which could then execute a swap with a non-U.S. third-party in a jurisdiction that is unregulated or lack comparable transactional requirements" constitutes a clear opportunity to escape prudential regulation. Consequently, the second prong of the conduit test is appropriate. We support the Commission's second prong, which looks at whether a counterparty regularly engages with the affiliate or subsidiary. We urge that "regularly" be defined as engaging in more than two transactions per year.

*Q24. The Commission proposed anti-evasion provisions in proposed rule 1.6 of the product definitions joint rulemaking with the SEC. To what extent would inter affiliate conduit transactions be undertaken for purposes of evasion as described in proposed rule 1.6?*

Short of noting the LIBOR investigation, MF Global and Peregrine collapses, Standard Chartered and HSBC money laundering cases, as well as the JP Morgan trading mistakes, we are unable to quantify the "extent" to which firms will attempt to evade compliance.

*Q25. The Commission requests comments on whether substituted compliance should be permitted for swaps entered between a foreign branch of a U.S. person with another foreign branch of a U.S. person.*

Substituted compliance should not be permitted, and certainly limited. The Commission recognizes the need for full supervision of U.S. persons, which should extend to swaps between U.S. persons regardless of the geography of a computer terminal.

*Q26. Please provide comments regarding the Commission's substituted compliance proposal, including the appropriate standard and degree of comparability and comprehensiveness that should be applied to make such determination.*

We oppose substituted compliance. Should the commission adopted this regime, we do support metrics by which it will acknowledge legitimate regimes. The Commission declares that it "anticipates that it would review comparability" covering "(i) Capital requirements; (ii) chief compliance officer (iii) clearing and swap processing; (iv) daily trading records; (v) margin (and segregation) requirements for uncleared swap transactions; (vi) physical commodity swaps reporting; (vii) portfolio reconciliation and compression; (viii) real-time public reporting; (ix) SDR Reporting; (x) risk management; (xi) swap data recordkeeping; (xii) swap trading relationship documentation; (xiii) trade confirmation (xiv) trade execution."

Where numerical values can be identified, such as with capital and margin, we ask that values be identical. In a market where firms profit on fractions of basis points, any variation from identical margin or capital rules will simply encourage a firm to operate its trades out of the advantageous geographic platform.

*Q27. What are some of the factors or elements of a supervisory program that the Commission should consider in making a comparability finding?*

We welcome the Commission's declaration that it will consider substituted compliance based on "results" tests. In addition to the metrics proposed, the history of enforcement in a particular foreign jurisdiction should be examined. Where enforcement actions in one jurisdiction fall below a certain threshold that would indicate vigorous prosecution, the Commission should consider revoking substituted compliance. It does not seem plausible that one jurisdiction could find numerous violations by a set of firms operating under its purview, when another jurisdiction overseeing those same firms find none, yet both oversee these firms with equal vigilance.

*Q27a. Should the Commission take a different approach with respect to swap dealers as compared to MSPs?*

No. MSPs have become indistinguishable from swap dealers as each category of large swap participant poses systemic risk.

*Q29. Many foreign jurisdictions are in the process of implementing major changes to their oversight of the swaps market. Assuming that a foreign jurisdiction has adopted swaps legislation but has yet to finalize implementing regulations, should the Commission develop an interim process that takes into account the development of ''comparable'' legislation and proposed regulations?*

Only operating regulations should be recognized, as opposed to proposed regulations, or regulations not yet in effect. Delay can be a proxy for eventual repeal or nullification. As new rules come into effect, the Commission should recognize the stronger provision.

*Q30. How should the Commission ensure that prior comparability determinations remain appropriate over time?*

Should the Commission adopt substituted compliance, which we do not support, the Commission should review comparability every two years. Where events or market conditions inform the suitability of substituted compliance, the Commission should adjust.

*Q31. Please provide comments regarding all aspects of the Commission's interpretation of CEA section 2(i) with respect to the proposed application of the Transaction-Level Requirements. The Commission is particularly interested in commenters' views on the impact on U.S. persons as a result of the proposed application of the Dodd-Frank Act's trading requirements.*

End-user counterparties will benefit from enhanced regulation of swap dealers and will gravitate to the markets with highest integrity.

*Q32. What, if any, competitive or economic effects on U.S. commerce, including U.S. persons, should the Commission consider when interpreting CEA section 2(i)? What, if any, competitive or economic effects on non-U.S. persons should the Commission consider when interpreting CEA section 2(i)*

The Commission should place bona fide end U.S.er results as the primary means by which to judge success of its regime. A well operating market should become more efficient, which means that profitability of the financial intermediary should decline. A rise in profit among financial swap dealers will signal market inefficiency. However, the Commission should not view financial success of financial firms as its goal.

In conclusion, we support the Commission's thoughtful efforts to provide useful safeguards for this important international market. For questions, please contact Bartlett Naylor at bnaylor@citizen.org, 202.580.5626

Sincerely,

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