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The Goldman Sachs Group, Inc.

Goldman Sachs

VIA ELECTRONIC MAIL

August 27, 2012

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

RE: RIN: 3038-AD57, Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act and RIN: 3038-AD85, Exemptive Order Regarding Compliance with Certain Swap Regulations

Dear Mr. Stawick:

The Goldman Sachs Group, Inc. ("Goldman Sachs")[1] appreciates the opportunity to provide comments on the proposed interpretive guidance and policy statement (the "Proposed Guidance"),[2] and the notice of proposed exemptive order and request for comment (the "Proposed Exemption"),[3] issued by the Commodity Futures Trading Commission (the "CFTC")

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[1] Goldman Sachs is a global investment banking and securities firm that engages in investment banking, securities, investment management and other financial services primarily with institutional clients. It is a financial holding company regulated by the Federal Reserve Board, and its wholly owned subsidiaries, Goldman, Sachs & Co. and Goldman Sachs Execution & Clearing, L.P., are both registered with the Securities and Exchange Commission as broker-dealers and with the CFTC as futures commission merchants.

[2] *See* Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214, July 12, 2012.

[3] *See* Exemptive Order Regarding Compliance With Certain Swap Regulations, 77 Fed. Reg. 41110, July 12, 2012.

on the cross-border application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Goldman Sachs commends the CFTC for recognizing the need to provide market participants with clarity on the reach of Title VII in an increasingly global derivatives market.

However, we are concerned that the application of the principles outlined in both the Proposed Guidance and the Proposed Exemption will create inconsistencies in the implementation of Title VII requirements by market participants, competitive disparities between U.S. and non-U.S. dealers, and even between U.S. dealers based on their different organizational structures, and potentially overlapping and inconsistent regulatory requirements for global financial institutions like Goldman Sachs. We note that the statutory language of Dodd-Frank limits the extraterritorial application of the regulatory requirements of Dodd-Frank to activities that have a "direct and significant" connection with activities taking place in the United States, that have a "direct and significant" effect on the commerce of the United States or that contravene the CFTC's anti-evasion rules. The CFTC failed to establish a standard for the types of non-U.S. activities that would have a direct and significant connection with U.S. activities or effect on U.S. commerce, in either the Proposed Guidance or the Proposed Exemption. Therefore, we believe the CFTC should reconsider the approach articulated in the Proposed Guidance and the Proposed Exemption; we believe that this approach exceeds the scope of the CFTC's jurisdiction under the statute and would result in the application of Dodd-Frank to market participants and transactions even when there clearly is no direct *and* significant connection to or effect on the United States.

We also urge the CFTC to coordinate with the Securities and Exchange Commission (the "SEC"), the U.S. prudential regulators and foreign regulators to harmonize the various regulatory frameworks implementing the G-20 commitments, in order to accord with generally accepted notions of international comity. As with all formal rule-makings subject to the Administrative Procedures Act (the "APA"), we further believe that the Proposed Guidance should be subject to a cost-benefit analysis to appropriately assess the costs that will be imposed on market participants by the imposition of Title VII requirements on their non-U.S. activities against the benefits of imposing potentially duplicative and inconsistent regulation on activities already subject to the supervision of foreign regulators.

Many market participants have submitted comment letters to the CFTC on the Proposed Guidance and the Proposed Exemption. While we will not repeat all of the issues raised in these letters, we generally support the comments made in these letters and urge the CFTC to carefully consider the issues addressed in them. In particular, we generally support the comments made by the Securities Industry and Financial Markets Association ("SIFMA") in its letters submitted on August 13, 2012 and August 27, 2012 and the Global Financial Markets Association in its letter submitted on August 13, 2012, and we urge the CFTC to consider the thoughtful recommendations made by both associations. In addition, we would like to highlight a few areas of particular importance and concern to us.

I. Definition of U.S. Person

Additional Clarity Is Needed on the Scope of the Definition

As a general matter, we note that the definition of U.S. person is confusing, inconsistent, and vague. The final version of the definition must be revised to ensure that it is workable for all market participants, as the definition of U.S. person is critical to the application of the Dodd-Frank regulatory regime to U.S. and non-U.S. entities. As currently drafted, we believe the definition is likely to result in an entity being treated as both a U.S. person under the Proposed Guidance and Proposed Exemption as well as a non-U.S. person by a foreign regulator in a non-U.S. jurisdiction. We also believe that the definition of U.S. person should be clear and concise, such that two different market participants would analyze and apply the definition to its own entities and/or counterparties in a consistent manner.[4] We further believe that the CFTC should clarify that the definition of U.S. person applies only to CFTC regulations promulgated under Title VII, and that it is not applied to other CFTC regulations.

Given that the definition serves as a linchpin of Title VII, we encourage the CFTC to utilize the workable approach advocated by SIFMA in their letters with respect to the definition of U.S. person. Prior to the effective date of the final definition, market participants should be permitted to use an interim definition that relies principally on how their existing internal systems classify the domicile of counterparties based on information that is already tracked and available to them in the absence of representations from counterparties. This will provide regulatory certainty to market participants, as the compliance date of certain Dodd-Frank regulatory requirements approaches, such as the real-time reporting rules. We recognize that the interim definition may lead to different status determinations by market participants prior to the compliance date for the final definition; however, this approach would enable market participants to identify the core U.S. person counterparties using information captured in existing systems and facilitate the implementation of Title VII requirements within the short time frame that is being provided. We also agree with SIFMA that market participants will need at least 90 days after the publication of a final definition to implement any required changes to come into compliance with Dodd-Frank. Therefore, the CFTC should stipulate that the compliance date for the transaction-level and entity-level Dodd-Frank requirements is the later of 90 days after the

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4 In this regard, we note that there are other standard and widely accepted definitions of a U.S. person under other regulatory regimes, such as SEC Regulation S, which is used to establish the extraterritorial application of certain the U.S. securities laws. 17 C.F.R. § 230.902(k). We also support the recommendation from both the European Commission and the Financial Services Authority to the CFTC, as discussed in the SIFMA letter. We encourage the CFTC to utilize these other definitions as a basis for its definition, which would promote consistency across regulatory regimes and allow market participants to rely on well-known and consistently applied precedents and treatment.

publication of the final definition of U.S. person or the compliance date for any of the applicable Dodd-Frank regulatory requirements.[5]

II. Registration and Aggregation Issues

The Treatment of U.S.-Guaranteed Non-U.S. Entities is Overly Burdensome

Section 722 of Dodd-Frank reflects Congressional intent that Dodd-Frank and the CFTC's corresponding jurisdiction should not extend to non-U.S. persons or non-U.S. markets, unless their activities have a direct and significant connection with or effect on U.S. commerce or if such extension of jurisdiction is needed to prevent evasion of the requirements of Title VII. This approach is consistent with the CFTC's historical treatment of non-U.S. entities. Specifically, the CFTC has in the past regarded a non-U.S. entity, including a subsidiary or affiliate of a U.S. entity, as a non-U.S. person, and has treated transactions entered into by such an entity outside the United States, with non-U.S. counterparties or on non-U.S. markets, as non-U.S. transactions not subject to the CFTC's jurisdiction.[6] Dodd-Frank reflects this approach and nothing in the statute indicates that any change to or expansion of the CFTC's jurisdiction was intended.

However, contrary to this longstanding position, the Proposed Guidance states that non-U.S. persons are required to aggregate swap dealing positions with all of the swap dealing activity of their non-U.S. affiliates, for purposes of applying the swap dealer *de minimis* threshold calculation for purposes of the registration requirements. We believe that the aggregation requirement effectively disregards the legal independence of non-U.S. entities, the history and practice under the Commodity Exchange Act and the effectiveness of local regulatory regimes. Moreover, it does so in the absence of any analysis by the CFTC, regarding how the change would address the perceived problem that has been articulated. Non-U.S. subsidiaries are separately incorporated under the laws of the jurisdictions in which they are based, have their principal places of business outside the United States and are subject to

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[5] In addition, we support SIFMA's proposed final definition of U.S. person and position that counterparties should be permitted to self-report their status to swap counterparties through either representations or their Legal Entity Identifiers. A market participant should not be required to make a difficult decision as to whether or not its counterparty is a U.S. person for the purpose of Dodd-Frank and should be permitted to rely on representations provided by its counterparty as to the counterparty's status as a U.S. person.

[6] *See* Request for IB Registration No-Action Position, CFTC Staff Ltr. No. 00-44 (CCH) 28,095 (Mar. 31, 2000) (non-U.S. branch of U.S. bank not required to register as IB because it was only transacting business with non-U.S. customers). *See also* Authorizing Subsidiary of FCM to Enter Into Certain Contracts with a Federal Power Marketing Agency, CFTC Order (CCH) ¶ 24,297 (Aug. 2, 1988) (subsidiary of a registered foreign futures commission merchant permitted to enter into options contracts without becoming subject to CFTC rules to the same degree as its parent).

regulation and oversight in the jurisdictions in which they are located. Furthermore, it would be contrary to the interests of international comity for a non-U.S. entity engaged in swap activities solely with non-U.S. customers to be subject to a U.S.-based regulatory regime.

Similarly, we believe it would be inconsistent with Dodd-Frank and the CFTC's historical treatment of non-U.S. entities to require non-U.S. persons to register as swap dealers simply because such entities have U.S. parents that provide guarantees with respect to their obligations, absent any evidence of a direct and significant connection with or effect on U.S. commerce or evidence that the activities demonstrate an attempt to evade the requirements of Dodd-Frank.[7] The CFTC should revise the Proposed Guidance to eliminate the requirement that a non-U.S. entity must register as a swap dealer solely because it is guaranteed by a U.S. entity or because it is affiliated with a non-U.S. person that is guaranteed by a U.S. entity, and has exceeded the *de minimis* threshold.

While we appreciate the concerns over the potential evasion of the swap dealer registration rules and the Dodd-Frank regulatory requirements, we believe the CFTC should use its anti-evasion authority to carefully target actual evasive activity if it determines that specific U.S. entities are using non-U.S. affiliates to evade these requirements, instead of imposing an overly broad jurisdictional reach on all market participants.

Registration of Non-U.S. Persons Based on Inter-dealer Activities

In the Proposed Guidance, the CFTC specifically excludes from a non-U.S. person's *de minimis* threshold calculation all swap transactions with non-U.S. branches of U.S. swap dealers. This exclusion "is intended to address the concerns of non-U.S. persons who may be required to register as a swap dealer, notwithstanding the fact that their dealing activities with U.S. persons as counterparties are limited to foreign branches of registered U.S. swap dealers."[8] The concerns expressed by non-U.S. dealers are equally applicable to U.S. dealers that are not acting through a foreign branch. Non-U.S. persons that are licensed banks or broker-dealers and who are subject to local regulation should also be eligible for this exclusion to the same extent when dealing with U.S. swap dealers. The burden of registering as a swap dealer for non-U.S. persons that are already subject to foreign regulatory oversight creates a disincentive to non-U.S. persons from dealing with U.S. swap dealers. Not providing a similar exclusion to non-U.S. persons when dealing with U.S. swap dealers will also create a competitive disadvantage when compared with U.S. swap dealers that do not transact through non-U.S. branches since such non-U.S. persons will limit their inter-dealing activity to non-U.S. branches. U.S. swap dealers would be competitively disadvantaged as compared to non-U.S. branches of U.S. swap dealers by not being able to access the liquidity of the local market offered by such non-U.S. persons in the inter-dealer market. Therefore, based on principles of comity and in order to create a level

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7 Most, if not all, global financial companies headquartered in the United States are subject to regulation by prudential regulators, such as the Federal Reserve, which impose capital and other regulatory requirements on these entities.

8 77 Fed. Reg. 41219.

playing field for all registered U.S. swap dealers in the inter-dealer market with non-U.S. persons, we believe that such regulated dealer activity between non-U.S. persons and U.S. swap dealers should be excluded not only from the swap dealer *de minimis* calculations, but also from the major swap participant ("MSP") calculations.

III. The Regulation of Inter-Affiliate Transactions

Treatment of Conduits

While we understand that the CFTC seeks to prevent any U.S. swap dealer from evading regulation by acting through a foreign affiliate or subsidiary, the CFTC has not tailored its definition of "non-U.S. affiliate conduit" to meet this objective. For example, under this definition, an entity could be rendered a conduit by executing even a single trade, despite the fact that the entity otherwise would be eligible for substituted compliance, or would not fall within Title VII's jurisdiction at all. Such treatment will negatively impact the ability of the U.S. entity to utilize its affiliates' and subsidiaries' risk management functions and will likely place excessive regulatory burdens on foreign swap dealers and end-users seeking to enter into transactions with foreign affiliates or subsidiaries of U.S. swap dealers. These restrictions will place foreign affiliates and subsidiaries of U.S. swap dealers at a significant competitive disadvantage, despite the fact that "in many cases, the conduits could be subject to prudential and risk management requirements and may lay off the risk of its dealing activities on an individual or portfolio basis through transactions that would be subject to and reported under the Dodd-Frank Act."[9] In addition, the definition of conduit is broad enough to pick up not only financial companies, but non-financial operating companies, and could impair their ability to enter into hedging transactions and engage in commercial activities. We urge the CFTC to either omit the conduit concept, or else more narrowly tailor the conduit definition to capture evasive behavior that would not otherwise be regulated by foreign regulators or under Dodd-Frank.

Treatment of Booking Entities

We have similar concerns regarding the treatment of booking entities under the Proposed Guidance; however, as a general matter, the provisions in the Proposed Guidance relating to the treatment of booking entities are unclear. The following discussion, therefore, is based on our interpretation of the Proposed Guidance, but we urge the CFTC to explain more carefully its proposal on the treatment of booking entities. It appears that a U.S. entity serving as a central booking facility must register as a swap dealer if the *de minimis* threshold is exceeded, even if its foreign affiliates and subsidiaries conduct all dealings with, and effectively execute transactions with, third parties, regardless of whether the third parties are U.S. persons or foreign persons. Based on this reading, the use of a central booking model could require registration of both the affiliate engaging in a swap with a counterparty and the central booking entity to which the position is transferred through an inter-affiliate swap. Effectively, this requires registration of the central booking entity based on an inter-affiliate swap, even though the final rules further defining "swap dealer," explicitly exclude all swaps between majority-owned affiliates from the

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9 77 Fed. Reg. 41228-9.

swap dealer determination. We believe that the treatment of booking centers is unnecessary and unworkable, and will make it difficult for U.S. swap dealers to centralize their operations through the use of a non-U.S. booking entity.

IV. Competitive Disparities

Disparity between Compliance Dates for U.S. and Non-U.S. Entities

We share Commissioner Sommers' concern that "different compliance dates in the Proposed Exemptive Order may unnecessarily disadvantage U.S.-based swap dealers and MSPs from the moment the document is published in the Federal Register," since U.S. swap dealers and MSPs will be subject to additional costs and other limitations not faced by their foreign competitors.[10] The CFTC has not identified any appropriate reasons to place U.S. swap dealers at such a competitive disadvantage vis-à-vis foreign swap dealers. Therefore, U.S. swap dealers should be eligible for exemptive relief – with respect to transaction-level as well as entity-level requirements – for the same period as the relief that would be available to non-U.S. swap dealers. Furthermore, we agree with Commissioner O'Malia that "the Commission should tie the expiration of this relief to the adoption of a final exemptive order," rather than to the publication of the Proposed Exemption in the Federal Register.[11] The proposed relief is inadequate notice of final relief; given the possibility that the CFTC may revise its proposed relief, market participants may be reluctant to rely on it. To protect U.S. entities from being at an unnecessary competitive disadvantage to their foreign peers, and to give all entities sufficient time to adjust to the actual (rather than anticipated) Dodd-Frank regulatory regime, we propose that the exemption apply for all entities required to register as swap dealers until one year from the date the CFTC issues final exemptive relief.

Disparity with Eligibility for Substituted Compliance for Transaction-level Requirements

U.S. swap dealers should be eligible for substituted compliance for transaction-level requirements to the same extent as non-U.S. swap dealers and non-U.S. branches of U.S. swap dealers. If non-U.S. swap dealers operating in the United States are permitted to use substituted compliance for transaction-level requirements when transacting with non-U.S. counterparties, but U.S. swap dealers are not permitted to do so in the same circumstances, U.S. swap dealers will clearly be at a competitive disadvantage vis-à-vis their foreign counterparts operating in the United States. Moreover, the CFTC should not have the same counterparty protection concerns when U.S. entities transact with non-U.S. counterparties, and should defer to foreign regulators for the protections to be afforded to counterparties within their jurisdiction. Given that compliance with transaction-level requirements will impose similar operational burdens on both U.S. swap dealers and non-U.S. swap dealers operating in the United States, we urge the CFTC to provide the same relief to U.S. and non-U.S. swap dealers when entering into transactions with non-U.S. counterparties.

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[10] 77 Fed. Reg. 41239.

[11] 77 Fed. Reg. 41242.

Disparity in Application of External Business Conduct Standards

For the reason noted above, the external business conduct standards should not, as a general matter, apply to non-U.S. counterparties, regardless of whether they transact with US swap dealers or non-U.S. swap dealers. As the CFTC noted, "The Commission believes that sales practice concerns related to swaps between non-U.S. persons taking place outside the United States implicate fewer U.S. supervisory concerns and, when weighed together with the supervisory interests of foreign regulatory regimes, may not warrant application of these requirements."[12] Therefore, the nature and applicability of such protections should more properly be the focus of foreign regulators. Accordingly, applying these rules to non-U.S. entities goes beyond the scope of Section 722 of Dodd-Frank. At the same time, the application of these rules exclusively to U.S. swap dealers creates a substantial competitive disparity for U.S. entities. There is little question that many non-U.S. entities will find the process of executing swaps to be more efficient and less expensive when transacting with counterparty dealers that are not subject to the external business conduct rules.

Disparity in Application of Emerging Market Exemption

The Emerging Market Exemption should be available to transactions that non-U.S. swap dealers enter into with non-U.S. persons guaranteed by U.S. persons and with non-U.S. affiliate conduits, to ensure consistency of treatment between similarly situated swap entities and to prevent the imposition of duplicative and unnecessary regulations on entities that are already subject to regulation by foreign regulators. In addition, we believe the emerging market exemption should be available to any U.S. swap dealer whose aggregate notional value of swaps in the relevant markets does not exceed 15% of that dealer's total swap activities.[13]

V. The Relative Timing of Various Registration and Compliance Requirements Creates Numerous Unnecessary and Potentially Inequitable Costs

The CFTC Should Finalize Cross-Border Guidance before Swap Dealer Registration

Given the significant costs associated with registration, we believe that the deadline for registration is premature in relation to the overall rulemaking timeline. We urge the

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12 77 Fed. Reg. 41229. Indeed, the CFTC further states, "[J]ust as the Commission would have a strong supervisory interest in regulating and enforcing sales practices associated with activities taking place within the United States, the foreign regulators would have a similar claim to overseeing sales practices occurring within their jurisdiction." Id., text at FN 110.

13 We support SIFMA's "Foreign Ancillary Activity Exemption" proposal that would permit any foreign affiliate, branch, or subsidiary of a U.S. swap dealer to engage in a minimal amount of swap dealing activity in markets in which comparable regulation is not in effect, so long as its swap dealing activity in such markets does not exceed 15% of the aggregate notional value of all of the U.S. swap dealer's swaps. We urge the CFTC to give this proposal serious consideration.

CFTC to delay the swap dealer registration compliance date until after sufficient time has passed to allow entities to consider registration decisions and compliance plans in light of any final exemptive order and/or guidance.[14] As discussed above, we believe that both U.S.-based and non-U.S. based entities will need sufficient time following the publication of final guidance and final exemptive relief to determine the extent to which they are subject to Dodd-Frank and whether they must register as swap dealers. We believe that the CFTC should provide a 90-day compliance period following the publication of final guidance and final exemptive relief, to allow entities to assess their Dodd-Frank regulatory requirements. Without such relief, entities would be required to register based on rules that may change upon the adoption of final guidance and exemptive relief.

In addition, the CFTC recently issued a proposed rule on the treatment of transactions between affiliates under Dodd-Frank, and the CFTC and the SEC are expected to address the status of guarantees provided to non-U.S. entities, and guarantees by non-U.S. holding companies, in separate releases.[15] Given that the treatment of these issues will likely have a significant impact on the regulatory status and obligations of market participants, we believe that market participants should be permitted to consider and comment on the releases at the same time and have the benefit of definitive final guidance in all relevant areas before they are required to register as swap dealers.

Timing of Substituted Compliance Determinations and the Development of Foreign Regulation Regimes

Under the Proposed Guidance, an entity seeking to comply with the requirements of a foreign jurisdiction through substituted compliance must, upon registration, provide a

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[14] On June 11, 2012, the SEC proposed its policy on the sequencing of compliance dates for the rules adopted under Title VII for security-based swaps. In its policy statement, the SEC noted that it expects to propose rules concerning the treatment of cross-border security-based swap transactions and non-U.S. persons engaging in security-based swap activities *prior* to the finalization of any rules other than the Definitional Rules and the procedures for mandatory clearing. *See* Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 77 Fed. Reg. 35625 (June 22, 2012).

[15] As noted under the final joint rules to further define "swap dealer," the CFTC and the SEC are expected to address guarantees provided to non-U.S. entities, and guarantees by non-U.S. holding companies, in separate releases. 77 Fed. Reg. 30596, text at FN 1134. The CFTC also intends to propose a rule that would impose reporting requirements on guarantees of swaps under CFTC Regulations Part 43 and Part 45, 77 Fed. Reg. 48226, text at FN 189 and to propose a separate rule addressing swaps between an affiliate and a third party, where the swaps are used to hedge or mitigate commercial risk arising from inter-affiliate swaps for which the end-user exception has been elected. 77 Fed. Reg. 50425.

comprehensive compliance plan addressing whether a foreign jurisdiction's evolving laws and regulations are comparable to the numerous particular (and likewise evolving) rules regulating Title VII transactions. This requirement will be all the more burdensome because many jurisdictions will not have comparable regulatory frameworks in place by the time swap dealers are required to register. As a result, non-U.S. swap dealers will need to work with their home country regulatory authorities to develop and implement appropriate regulatory schemes, and to apply to the CFTC for a comparability determination, all of which will require a substantial amount of time. In order to accomplish its goals more efficiently, and to promote consistency with other aspects of its regulatory scheme, the CFTC should adopt its Part 30 approach to substituted compliance for Title VII, and change the swap dealer registration deadline to account for the time it will take foreign governments to develop comparable regulatory structures. However, in implementing this approach, we note that while the CFTC has been a leader in implementing new rules, we believe the CFTC should give effect to the time it will take other G-20 participants to implement their own regulations. Therefore, the CFTC should delay the adoption of Part 30 until foreign governments have developed comparable regulatory regimes for swap transactions. While the Proposed Guidance notes that the CFTC "will use its experience exempting foreign brokers from registration as FCMs under its rule 30.10 'comparability' findings in developing an approach for swaps,"[16] the CFTC failed without justification to use its general Part 30.10 approach for Title VII transactions. We believe that the CFTC should continue to rely on its historical approach under Part 30, as this approach will allow the CFTC, through existing agreements with foreign governments, to accomplish its regulatory objectives under Dodd-Frank, while providing market participants with a consistent regulatory structure.

Coordination with U.S. and Foreign Regulators

The CFTC and the SEC are directed by Section 712 of Dodd-Frank to coordinate their rules and regulations prescribed under Title VII to the maximum extent possible, taking into consideration differences in instruments and in the applicable statutory requirements. Therefore, it would be an untenable result if the CFTC and the SEC promulgated different definitions of U.S. person for the purpose of Dodd-Frank, resulting in a counterparty being a U.S. person for a swap transaction, but a non-U.S. person for a security-based swap transaction. Without concerted and substantive efforts between the CFTC and the SEC, as well as between the CFTC and foreign regulators, to harmonize the regulatory requirements and timing of compliance of such requirements, entities could be subject to different and potentially incompatible regulatory requirements for swap transactions. Given that the Proposed Guidance and the Proposed Exemption define the extraterritorial effects of the CFTC's Title VII regulatory regime, we also urge the CFTC to coordinate directly with foreign regulators.

VI. The Proposed Guidance Should be Reissued under the CFTC Rulemaking Process

We believe the Proposed Guidance must be issued under the CFTC's rulemaking process, not merely as interpretive guidance, as the Proposed Guidance is a substantive rule and is therefore subject to the APA. While the Guidance references Section 2(i) of the Commodity

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16 77 Fed. Reg. 41232.

Exchange Act to justify the cross-border application of Dodd-Frank, a plain reading of Section 2(i) does not require or compel the application of Dodd-Frank to non-U.S. entities, which is the effect of the Proposed Guidance. The Proposed Guidance would create a detailed regulatory regime for various types of non-U.S. entities, and impose requirements on non-U.S. entities, including the swap dealer registration requirement and the various Dodd-Frank entity-level and/or transaction-level regulatory requirements. Accordingly, we believe that the Proposed Guidance should be reissued as a substantive rulemaking and should be subject to a rigorous cost-benefit analysis.

As Commissioner O'Malia noted in his concurrence,

> The Commission's artful use of the terms "expect" and "expectation" in the Proposed Guidance does not disguise the fact that it is requiring applicants to satisfy significant ongoing monitoring and compliance obligations in order to maintain its comparability finding. If the CFTC wanted to require a non-U.S. swap dealer or non-U.S. MSP applicant to submit these additional documents in connection with such applicant's ongoing registration-related obligations, the CFTC should have included these requirements in the swap dealer and MSP registration rulemaking, which the CFTC finalized in January of this year.[17]

As discussed above, the status of the cross-border guidance in the form of an interpretive release, as opposed to a formal rule, provides less certainty to market participants, especially given that the Proposed Guidance is seemingly at odds with the Congressional intent to limit the application of Dodd-Frank to activities that "have a direct and significant connection with activities in, or effect on, commerce of the United States."[18] Furthermore, by avoiding the rulemaking process, the CFTC is not required to perform a cost-benefit analysis of the cross-border application of Dodd-Frank, despite the significant cost to the non-U.S. operations of market participants.

[17] 77 Fed. Reg. 41241.

[18] Section 722(d)(i) of Dodd-Frank.

While Commissioner Sommers has confirmed that the CFTC will follow the APA's notice-and comment process for the initial version of the Proposed Guidance, it is not clear if the CFTC will do so in the future, giving the CFTC the authority to revise or amend the interpretation at any time without providing market participants with any notice or opportunity to comment. We believe that a formal rulemaking will provide all affected market participants with the additional certainty and clarity that is needed in order to avoid any potential challenges to the Proposed Guidance. Therefore, we urge the CFTC to confirm that, in its final form, the Proposed Guidance will be issued as a formal rule, not as interpretive guidance, if the CFTC does not reissue the Proposed Guidance as a proposed rule.

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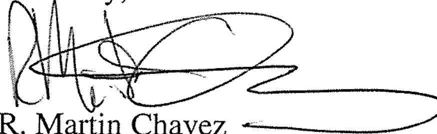
Thank you very much for this opportunity to submit our comments. We would be pleased to discuss any of the comments or recommendations in this letter with the CFTC in further detail.

Sincerely,



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