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Melissa Jurgens
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, RIN 3083-AD85 (the "Further Proposed Guidance")[1]

Dear Secretary Jurgens:

The Institute of International Bankers (the "Institute") appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "Commission") with respect to the Further Proposed Guidance. The Institute welcomes the Commission's efforts to respond to comments on the cross-border guidance it proposed in July 2012 (the "Proposed Guidance")[2] by refining its proposal and seeking additional feedback through the Further Proposed Guidance. We also strongly support the important step taken by the Commission toward recognizing international comity and facilitating compliance by non-U.S. persons with Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") through its adoption of the Final Exemptive Order Regarding Compliance with Certain Swap Regulations (the "Final Order").[3]

The Further Proposed Guidance addresses two key elements of the Title VII regulatory regime: the aggregation of affiliates' swaps for purposes of the *de minimis* exception from the swap dealer definition, and the definition of "U.S. person." In each case, although the

[1] 78 Fed. Reg. 909 (Jan. 07, 2013).

[2] 77 Fed. Reg. 41,214 (July 12, 2012).

[3] 78 Fed. Reg. 858 (Jan. 07, 2013).

Further Proposed Guidance takes into account comments received by the Commission on the Proposed Guidance, additional modifications are necessary to respond fully to those comments and facilitate good faith compliance with Dodd-Frank.

In particular, based on the experience that market participants have had in the months since the comment period for the Proposed Guidance closed on August 27, 2012, we believe that additional steps are necessary to address some of the practical issues that have arisen as firms have sought to comply with Dodd-Frank. In addition, as the Commission seeks to build on the foundation established by the Final Order by adopting final guidance regarding the cross-border application of Dodd-Frank, it is important for it to take into account the steps that firms already have taken to comply with the Final Order. It is also critical that the Commission seek to ensure an orderly transition from the interim regime established by the Final Order.

In this letter, we have made suggestions for how we believe that the Commission should address these considerations. Our suggestions address three key topics: (i) the aggregation rule, (ii) the "U.S. person" definition and (iii) matters relating to the transition from the Final Order.

I. Aggregation of Affiliates' Swaps for Purposes of the *De Minimis* Test

Rule 1.3(ggg)(4) generally requires that a person, in determining whether it is eligible for the *de minimis* exception from the swap dealer definition, to aggregate its swap dealing transactions with counterparties with those of its commonly controlled affiliates. When it was established as part of the adoption of the swap dealer definition in May 2012,[4] this aggregation rule was almost entirely unexpected and, for financial holding company groups that already anticipated registering an entity as a swap dealer, raised serious practical difficulties. Since that time, the aggregation rule has gone through multiple iterations, including a proposal to allow a non-U.S. person to exclude the swap dealing activities of its U.S. affiliates (as part of the Proposed Guidance),[5] broad-ranging relief for non-U.S. persons engaged in swap dealing with U.S. persons as of December 21, 2012 (as part of the Final Order)[6] and a proposal to allow a non-U.S. person to exclude the swap dealing activity of any non-U.S. affiliate that is registered as a swap dealer (as part of the Further Proposed Guidance).[7]

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[4] *See* 77 Fed. Reg. 30,596 (May 23, 2012) (the "Entity Definitions Release").

[5] Proposed Guidance at 41,220.

[6] Specifically, paragraph (3) of the Final Order permits a non-U.S. person that was engaged in swap dealing with U.S. persons as of December 21, 2012 to exclude (a) the swap dealing activity of its U.S. affiliates and (b) if it is affiliated with a registered swap dealer, the swap dealing activity of another non-U.S. affiliate that (i) was engaged in swap dealing with U.S. persons as of December 21, 2012 or (ii) is registered as a swap dealer.

[7] Further Proposed Guidance at 911.

A. General Considerations Relating to the Aggregation Rule

Before turning to consideration of any of these specific permutations, we believe that it is important to put the aggregation rule into its practical context. The Commission adopted the aggregation rule to prevent persons from avoiding dealer regulation by dividing up dealing activity in excess of the *de minimis* threshold among multiple affiliates.[8] The Commission reiterated this concern in the Further Proposed Guidance.[9]

In our view, however, this concern is not a significant one in the case of an affiliated group that includes an entity that is registered as a swap dealer. In such a case, there are very substantial commercial and credit risk incentives to centralize trading activity in the registered entity. Doing so maximizes the potential for offsetting transactions to net against each other. It also results in a more efficient use of scarce capital, since otherwise the firm would be forced to separately capitalize multiple legal entities to a level sufficient to satisfy the creditworthiness considerations of its counterparties and applicable prudential requirements. In addition, centralizing trading activity is much more efficient from operational and documentation perspectives. For these reasons, firms typically do not split up their dealing activities into multiple legal entities unless there is a unique and overriding customer documentation, insolvency, tax, regulatory, or other consideration. The most common such consideration is that some foreign jurisdictions require firms to operate through local subsidiaries, as acknowledged by the Commission.[10]

In contrast, it seems highly unlikely that avoiding swap dealer regulation for an affiliate of a registered swap dealer would provide sufficient advantages to forego the benefits of centralizing swap dealing in the registered affiliate. In particular, once a firm has registered one affiliate as a swap dealer, it has already incurred the very substantial fixed costs associated with registration, including developing and installing extensive operational infrastructure, drafting and adopting detailed policies and procedures and engaging in necessary reorganization of compliance, risk management and business personnel. None of these costs would be saved by conducting a *de minimis* amount of dealing activity in an unregistered affiliate of the swap dealer. Further, the unregistered affiliate would still be subject to the full range of transaction-level rules applicable to a financial entity, including clearing, reporting and trade execution requirements.

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[8] Entity Definitions Release at 30,631.

[9] Further Proposed Guidance at 911-12 ("The Commission is concerned that permitting such affiliates whose swap dealing activities individually fall below the *de minimis* level, but whose swap dealing activities in the aggregate exceed the *de minimis* level, to avoid registration as SDs would provide an incentive for firms to spread their swap dealing activities among several unregistered affiliates rather than centralize their swap dealing in registered firms.").

[10] Further Proposed Guidance at 911.

Consequently, requiring aggregation with a registered affiliate is less likely to capture attempts at avoiding swap dealer regulation than it is to capture entities that engage in a handful of swap dealing transactions with U.S. persons either inadvertently or because such persons wish to access a local market that can only be accessed through a locally organized subsidiary. Without relief of the sort contained in the Final Order, the number of such entities that would be captured by the aggregation rule would be very significant. For instance, we understand that some individuals firms might be required to register more than two dozen entities within a single corporate group, absent relief from the aggregation rule.

The potential magnitude of additional registrants would be exacerbated by the "common control" standard contained in the aggregation rule, which requires a far lesser extent of ownership than the majority standard used elsewhere in the Commission's Dodd-Frank rules. For instance, the aggregation rule's common control standard would require a joint venture to aggregate its swap dealing activities with those of both its minority and majority owners, and require the other subsidiaries of those owners to aggregate their swap dealing activities with those of the joint venture, in effect double counting those activities. This is even the case if, for instance, the minority owner could not shift activities to the joint venture, nor the joint venture shift activities to the minority owner, without the majority owner's approval.[11]

Additionally, many entities affiliated with registered swap dealers were already organized and operating long before Dodd-Frank was implemented. That such entities continue to engage in a *de minimis* level of swap dealing activities with U.S. persons after the effective date of swap dealer registration is not evidence of evasion. Rather, it reflects a continuation of an existing, *de minimis* level of business. Indeed, the *de minimis* threshold provides a clear limit to the extent to which new business could be shifted to such entities instead of being conducted in a registered affiliate.

B. <u>Aggregation under the Final Order</u>

In light of the above considerations, we strongly support the aggregation relief contained in the Final Order, which permits a non-U.S. person that was engaged in swap dealing with U.S. persons as of December 21, 2012[12] to exclude (a) the swap dealing activity of its U.S. affiliates and (b) if it is affiliated with a registered swap dealer, the swap dealing activity of

[11] In such a case, we believe that it would be more appropriate and consistent with commercial reality to aggregate the joint venture's swap dealing activities solely with those of its majority owner.

[12] We note that using December 21, 2012 as the cut-off date for whether an entity is grandfathered does not account for those firms that, because of the uncertain future application of the aggregation rule, ceased engaging in swap dealing activity through entities that they did not intend to register as swap dealers in anticipation of the effectiveness of the swap dealer registration requirement on October 12, 2012. Accordingly, we recommend that the Commission permit entities that were engaged in swap dealing with U.S. persons at any time between the publication of the aggregation rule on May 23, 2012 through December 21, 2012 also to rely on the exemption.

another non-U.S. affiliate that (i) was engaged in swap dealing with U.S. persons as of December 21, 2012 or (ii) is registered as a swap dealer. In our view, this relief appropriately reflects the fact that permitting existing entities that are affiliated with a registered swap dealer to engage in *de minimis* swap dealing activities with U.S. persons presents little, if any, potential for evasion or abuse.

Undoing the relief, on the other hand, would be very disruptive. Existing entities benefitting from grandfathering under the Final Order would face registration requirements just two months after the expiration of the relief. Such a period would not be sufficient to obtain local regulatory and corporate approvals, gather the information necessary to complete registration applications, modify systems to reflect the changed registration status and train local personnel. It also would violate notions of fairness because it would subject entities to registration because of activity conducted in reliance on the Final Order's exemption. Specifically, because the *de minimis* test takes into account all activity conducted since October 12, 2012, an entity that relied on the Final Order from December 21, 2012 until its expiration July 13, 2013 would become subject to registration because of activity during that period, even though the permanent contours of the aggregation rule may not become clear until shortly before the expiration of the Final Order.

C. Aggregation under the Further Proposed Guidance

As noted above, the Further Proposed Guidance contains a proposal to allow a non-U.S. person to exclude the swap dealing activity of any non-U.S. affiliate that is registered as a swap dealer.[13] We are very concerned that the limitation of this relief to the disaggregation of a registered non-U.S. affiliate would give rise to unintended competitive disparities and disincentives to the conduct of swap dealing in a registered U.S. affiliate.

In particular, this proposal would mean that the non-U.S. affiliate of a foreign bank that registered its head office as a swap dealer would not be required to aggregate its swap dealing activities with U.S. persons with those of its registered affiliate, but the non-U.S. affiliate of a foreign bank that registered a U.S. subsidiary as a swap dealer would be subject to such aggregation. This would disadvantage firms that chose to register a U.S. subsidiary, even though doing so entails some inherent regulatory and supervisory benefits for the Commission and the National Futures Association. It also would encourage groups having their principal swap dealer located outside the United States to relocate offshore any residual swap dealing activity conducted by U.S. affiliates to avoid registering additional entities as swap dealers.

In our view, it is not necessary for the Commission to adopt such a distinction between a U.S. registered swap dealer affiliate and a non-U.S. registered swap dealer affiliate. The underlying policy justification for relief – that aggregation with a registered affiliate is not

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[13] Further Proposed Guidance at 911.

necessary or appropriate – applies equally regardless of the U.S. or non-U.S. status of the registered affiliate. In addition, because the aggregation rule was adopted by the Commission without any statutory obligation for it to do so, restrictions on its authority to adopt exemptions from the statutory "swap dealer" definition should not apply to its authority to adopt exemptions from the aggregation rule. As a result, there is no need for the Commission to tie relief from the aggregation rule to its authority to adopt exemptions from the territorial scope provision contained in Section 2(i) of the Commodity Exchange Act (the "CEA").

D. Recommendations

For the reasons described above, we recommend that the Commission (i) adopt the aggregation exemption contained in the Final Order on a permanent basis and with grandfathering extended to entities engaged in swap dealing with U.S. persons at any time between May 23, 2012 and December 21, 2012[14] and (ii) for entities not eligible for that exemption, including U.S. entities and newly formed entities, adopt an exemption from aggregation with any affiliate, U.S. or non-U.S., that is registered as a swap dealer.

II. "U.S. Person" Definition

Under paragraph (1) of the Final Order, the term "U.S. person" is defined to mean (i) a natural person who is a resident of the United States; (ii) a corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or (B) effective as of April 1, 2013 for all such entities other than funds or collective investment vehicles, having its principal place of business in the United States; (iii) a pension plan for the employees, officers or principals of a legal entity described in (ii) above, unless the pension plan is primarily for foreign employees of such entity; (iv) an estate of a decedent who was a resident of the United States at the time of death, or a trust governed by the laws of a state or other jurisdiction in the United States if a court within the United States is able to exercise primary supervision over the administration of the trust; and (v) an individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in (i) through (iv) above.

This definition does not contain three prongs that were included as part of the Proposed Guidance's "U.S. person" definition: prong (ii)(B) (pertaining to entities with U.S.

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[14] At a minimum, if the Commission does not adopt the Final Order's aggregation exemption on a permanent basis, we urge it to extend the exemption so that it does not expire until 18 months after the Commission adopts a final exemption or interpretation pertaining to the aggregation rule. This transition period would ensure that firms have 6 months to restructure their activities to comply with the final exemption or interpretation before new swap dealing transactions will count toward a registration requirement.

beneficial owners who are responsible for their liabilities); prong (iv) (pertaining to commodity pools with majority direct or indirect U.S. beneficial ownership); and prong (v) (pertaining to commodity pools the operator of which is required to register with the Commission). The Further Proposed Guidance sought comment regarding modified versions of prongs (ii)(B) and (iv).

A. General Considerations Relating to the "U.S. Person" Definition

It is critical for the "U.S. person" definition to be clear and simple, with a party's status under the definition determinable using readily available information. The clearer and simpler the definition, the more likely that a party will be able to provide a written representation as to its status under the definition, thereby facilitating compliance with Dodd-Frank. We strongly support the Commission's confirmation that parties can reasonably rely on such representations and urge the adoption of a final definition of U.S. person that will further support such representations and reasonable reliance thereon.

However, our members' experience over the past several months has shown that a complex or ambiguous definition may make obtaining counterparty representations difficult. Indeed, one of the reasons why there has been so little uptake on the Dodd-Frank Protocol that is the foundation for compliance with the Commission's business conduct rules is the complexity of those rules; parties have found those rules difficult to understand and have faced difficulties gathering the information necessary to complete the Protocol and comply with those rules.[15]

This consideration is even more important in the context of the "U.S. person" definition than the business conduct rules because whether a party needs to understand Dodd-Frank at all depends on whether it qualifies as a U.S. person or trades with counterparties who do. Although the U.S. market is a sizable portion of the global swap markets, many swap transactions, if not a majority, still take place between non-U.S. market participants. For a non-U.S. market participant to be comfortable representing as to its status under the definition may require engaging U.S. legal counsel to determine its status and advise on the implications of it. It is simply not practical for all market participants globally to incur the expense of doing this when the majority of their activity is with other non-U.S. persons.

In the absence of written representations from their counterparties, non-U.S. swap dealers have found themselves in the position of either attempting to determine their counterparties' status as a U.S. person based on the information already available to them or assuming that they are U.S. persons. In this regard, non-U.S. swap dealers have faced particular difficulties in the time since the Final Order was released on December 21, 2012 in determining

[15] *See* 78 Fed. Reg. 17, 20 (Jan. 2, 2013) (noting that "ISDA has represented that more time is needed for these counterparties to understand the Commission's requirements, to understand the legal consequences of adhering to the protocol, and to gather the information needed to complete the questionnaire from principals and beneficial owners.").

which of their corporate counterparties have their principal place of business in the United States. For private companies, the location of their headquarters is not publicly available, nor is it necessarily a piece of information that the swap dealer has collected for other, non-Dodd-Frank purposes. Counterparties, in turn, have often been unresponsive to requests for additional information.[16] As it considers whether to modify the Final Order's "U.S. person" definition, we urge the Commission to take into account this experience over the last several months with the Dodd-Frank Protocol and the Final Order's principal place of business prong.

Turning to the definition of U.S. person itself, the Final Order's definition has generally proven to be clear and readily implementable and we strongly support it, with the exception of the principal place of business prong. Further, as stated above, we strongly support the Commission's confirmation that parties can reasonably rely on written representations regarding a counterparty's U.S. or non-U.S. status and urge the adoption of a final definition of U.S. person that will further support such representations and reasonable reliance thereon. However, we have greater reservations than we previously had with respect to adding other prongs to the definition, particularly any that would require parties to gather certain ownership information.

Adding other prongs to the definition requires the Commission to balance the incremental systemic risk mitigation benefits of covering activity by entities organized outside the United States but that have some U.S. connections against the (i) additional conflicts with foreign law that will arise under a definition that is extraterritorial in scope, (ii) additional compliance burdens placed on non-U.S. swap dealers and other non-U.S. market participants and (iii) likelihood that many such entities will inadvertently not be covered due to the issues noted above. The incremental benefits of an expanded definition will, in turn, decrease as other jurisdictions adopt comparable rules to Dodd-Frank, a factor that will only come into focus over time. Also, as the definition is implemented the Commission will gain further experience with its requirements that will inform the nature and the extent to which it may need to adopt a prophylactic "U.S. person" definition. Absent this further information, we are concerned that the Commission may not be in a position to make an adequate judgment regarding the costs and benefits of new prongs to the definition.

Accordingly, we urge the Commission to retain the Final Order's definition, except for the principal place of business prong, and defer the addition of other prongs until the Commission determines that doing so is necessary in light of extent to which other jurisdictions

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[16] Similar issues have arisen in the context of the Foreign Account Tax Compliance Act ("FATCA"), which was signed into law in March 2010 prior to the enactment of Dodd-Frank. FATCA places non-U.S. financial institutions in the position of reporting on the status of their non-U.S. customers as a "U.S. person" for federal income tax purposes. As a result of the difficulties associated with providing this information, Treasury and the Internal Revenue Service recently decided to extend the timelines for compliance with a number of FATCA provisions until January 1, 2014 at the earliest. *See* IRS Announcement 2012-42 (Oct. 25, 2012).

have or have not adopted comparable rules and its experience with implementation of the final definition. If, alternatively, the Commission decides to add other prongs in the near-term, it should provide a transition period of at least 180 days and should clarify that it will not bring an enforcement action against a swap dealer for a failure to comply with Commission rules because of an inadvertent mis-categorization of its counterparty, provided that the swap dealer has, in good faith, taken reasonable steps to determine the status of its counterparty.

B. Additional Comments

As described above, we have reservations regarding the addition of new prongs to the "U.S. person" definition, especially in the near term. However, in the event that the Commission decides to add new prongs, we have set forth below our comments regarding those prongs.

a. Prong (ii)(B) – Entities with U.S. Beneficial Owners

The Proposed Guidance would have defined as a "U.S. person" any non-U.S. legal entity in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person.[17] As part of the Further Proposed Guidance, the Commission has proposed an alternative prong that would limit its scope to a non-U.S. legal entity that is directly or indirectly majority-owned by one or more U.S. persons, in which such U.S. person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity (other than a limited liability company or limited liability partnership where partners have limited liability).[18] The Commission also clarified that this alternative prong would not cover a non-U.S. legal entity simply because its swap obligations are guaranteed by a U.S. person.

If the Commission decides that it is necessary to adopt this prong at all, then we support the proposal to restrict it to non-U.S. entities that are majority-owned by U.S. persons and to clarify that only those entities for which the owners bear unlimited responsibility would be covered. However, we believe that three further modifications to the prong are necessary in order for its application to be clear and capable of being implemented.

First, we are concerned about the inclusion of indirect owners in the proposed prong. While we have sympathy to the Commission's objective of ensuring that U.S. persons cannot use indirect ownership structures to evade Dodd-Frank, we question whether the benefits of addressing that objective through a broad, prophylactic "U.S. person" definition outweigh the costs. In the time since the Commission adopted the Final Order, which does not include any

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[17] Proposed Guidance at 41,218.

[18] Further Proposed Guidance at 912.

look-through to indirect owners, there is no evidence of which we are aware of firms that have sought to use indirect ownership structures for the purpose of evading Dodd-Frank. Additionally, unless the direct owners of a legal entity were themselves organized under an unlimited liability structure, the indirect owners of that entity would not have unlimited responsibility for the obligations of the legal entity. As a result, requiring a look-through to indirect owners would in most cases not be necessary to achieve the objective of the prong. Accordingly, the benefits of the look-through would be minimal at best.

At the same time, however, the costs would be quite substantial. Very few, if any, companies have the ability to identify the status of their indirect owners, since in many cases they do not have direct relationships with those indirect owners. Additionally, the status of indirect owners would not only need to be identified by a company on a static basis; instead, ongoing, real-time monitoring would be necessary. Moreover, swap counterparties to companies would also be responsible for determining whether the company is a U.S. person under this prong; such counterparties have even less ability to identify the status of indirect owners. Indeed, many swap counterparties may simply decide to assume that any entity organized under an unlimited liability structure is a U.S. person. This would, as a practical matter, extend the application of Dodd-Frank far beyond those circumstances where the conduct of non-U.S. legal entities has a direct and significant effect on, or connection with, U.S. commerce.

For these reasons, we strongly urge the Commission, if it adopts prong (ii)(B), to delete the look-through to indirect investors.

In addition, it appears that the Commission’s intent is to identify participants in general partnerships and unlimited liability corporations as those owners that bear “unlimited liability.” However, as written, alternative prong (ii)(B) requires clarification from the Commission regarding whether the parenthetical excluding limited liability companies and limited partnerships was an exhaustive list or only illustrative of the types of structures that would not have unlimited liability. In the interest of clarity, we propose that, if adopted, prong (ii)(B) simply and clearly cover only general partnerships and unlimited liability companies that are directly majority-owned by U.S. persons who, under the terms of applicable law (except pursuant to a guarantee or similar agreement), bear unlimited responsibility for the obligations and liabilities of the partnership or company.

Finally, the proposed revisions to prong (ii) would modify the definition in the Final Order to include not only any “fund” that is either organized or incorporated under the laws of a state or other jurisdiction in the United States, but also any fund that has its principal place of business in the United States or is directly or indirectly majority owned by U.S. persons that bear unlimited responsibility for the fund’s obligations and liabilities. However, the Commission recognized, as part of the Final Order, that applying a principal place of business test to funds raises serious practical difficulties. The Commission also has proposed a separate prong to address funds with U.S. beneficial owners, which is discussed below. Accordingly, if the Commission adopts revisions to the definition of U.S. person with respect to funds, we request that it exclude any fund, commodity pool, pooled account or collective investment vehicle from

prong (ii), and instead address such entities in a separate prong that addresses each scenario under which such an entity that is not organized or incorporated under the laws of a state or other jurisdiction in the United States would be considered to be a U.S. person.

b. Prong (iv) – Commodity Pools with Majority U.S. Beneficial Ownership

The Proposed Guidance would have defined as a “U.S. person” any commodity pool, pooled account or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership or equity interest is held, directly or indirectly, by U.S. person(s).[19] The Further Proposed Guidance would create an exception from this prong for a publicly-traded vehicle that is not offered, directly or indirectly, to U.S. persons.[20] If the Commission adopts prong (iv), we strongly support the proposed modification to exclude publicly-traded funds, although we also respectfully urge the Commission to make several other modifications to the prong, as described below.

Publicly offered and listed funds cannot track, restrict or ascertain their beneficial ownership composition. U.S. persons are typically able, whether through their broker or directly when acting outside the United States, to purchase shares in a publicly listed fund, and beneficial owners are not generally identified on the company’s ownership register. However, to promote clarity and consistency with the way in which funds are offered outside the United States, we suggest that the Commission clarify the exception to the prong by referring simply to any “commodity pool, pooled account, investment fund or other collective investment vehicle that is initially offered outside the United States (in a manner compliant with Regulation S under the Securities Act of 1933) and listed principally on an exchange located outside the United States.”

In addition, as described in the preceding section, we are very concerned about any look-through to indirect investors. The concerns noted in that section would be exacerbated in the context of funds and other collective investment vehicles, given that such entities are in the business of having multiple, unaffiliated owners. No fund currently in existence has the subscription documentation and monitoring capability that would enable it to make the requisite determinations or to ensure that the fund is or is not a U.S. person. Moreover, ongoing, real-time monitoring would be required at all investment levels as funds take on new investors or as old investors withdraw or cease to qualify as U.S. or non-U.S. persons. This would require systems and processes that funds do not currently have in place and that would be difficult, time consuming and expensive to implement.

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[19] Proposed Guidance at 41,218.

[20] Further Proposed Guidance at 913.

Requiring pools to take the steps necessary to comply with the proposed unrestricted U.S. person look-through would not only inject considerable uncertainty into a process that currently benefits from clarity, but would also create significant operational and compliance costs to the extent compliance with the requirement could be accomplished prospectively. This problem is compounded by the fact that contracting parties must know whether Dodd-Frank is applicable to a swap before undertaking the transaction. If a non-U.S. counterparty incorrectly assumes that a swap is governed solely by non-U.S. rules, non-compliance and potentially significant liabilities could result. Again, non-U.S. counterparties may simply assume that funds are U.S. persons due to the uncertain application of the look-through, further extending the application of Dodd-Frank beyond its intended scope.

Thus, as with prong (ii)(B), we strongly urge the Commission, if it adopts prong (iv), to delete the look-through to indirect investors.

Finally, there are two further considerations that we wish to reiterate from our comment letter on the Proposed Guidance.[21] First, the composition of fund ownership commonly shifts over time as new investors are admitted to a fund and existing investors redeem their investments or contribute capital. So, to prevent frequent fluctuations in funds' U.S. person statuses, we respectfully reiterate our suggestion that a fund's U.S. person status be evaluated on the basis of its average ownership composition over a fiscal quarter, subject to a reevaluation period of an additional fiscal quarter if the U.S. ownership level of a fund that was a non-U.S. person as of the end of the previous quarter exceeds 50 percent but does not exceed 60 percent. We also note that, for structured finance issuers in particular, it is not possible to track fund ownership over time. Accordingly, for such issuers, we respectfully suggest that the level of U.S. ownership be evaluated solely upon issuance.

Second, since other jurisdictions are likely to regulate locally organized funds, even if those funds are majority-owned by U.S. persons, we respectfully reiterate our suggestion that the Commission seek to avoid conflicts with local law by adopting an exclusion from prong (iv) for a fund organized in a foreign jurisdiction that applies a regulatory regime that the Commission has determined to be comparable to Dodd-Frank.

c. Prong (v) – Commodity Pools with Registered Operators

We note that prong (v) of the Proposed Guidance's "U.S. person" definition was neither adopted by the Commission as part of the Final Order nor the subject of a request for comments as part of the Further Proposed Guidance. Prong (v) would define as a "U.S. person" any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA.[22] We respectfully

[21] *See* Letter from Sarah A. Miller, the Institute, to David Stawick, the Commission, dated Aug. 27 2012, at 6-7.

[22] Proposed Guidance at 41,218.

reiterate our prior comments pertaining to this prong. Due to the different objectives of the CEA's commodity pool operator ("CPO") regime and the swap provisions of Dodd-Frank, whether a fund's operator is registered as a CPO will often have little connection to whether the fund's swap activities have a direct and significant effect on, or connection with, U.S. commerce. Accordingly, if the Commission adopts prong (v), we continue to believe that it would be more appropriate to base the test on whether a fund is domiciled and principally operated in the United States (but without regard to whether it has a U.S. investment manager). For these purposes, for example, a fund whose operator solicits U.S. residents from within the United States would be deemed to be a U.S. person.

d. Other Prongs of the "U.S. Person" Definition

As part of the Final Order, the Commission (i) adopted clarifications to the trust and estate and pension plan prongs of the "U.S. person" definition and (ii) on a delayed basis, adopted a prong based on a legal entity's principal place of business, subject to an exclusion for funds or other collective investment vehicles. We generally support the clarifications to the trust and estate and pension plan prongs, and recommend that the Commission adopt them as part of its final "U.S. person" definition. Not only would doing so promote legal certainty, but it would also prevent the need for additional modifications to documents, systems and trading relationships for firms that have implemented the Final Order's definition. However, as noted above, the principal place of business prong has proven very difficult to implement. Accordingly, we respectfully request that the Commission delete it.

III. Transition Matters

A transition from the Final Order to compliance with permanent guidance regarding the cross-border application of Dodd-Frank will necessarily take a substantial amount of time. In part, the time needed for a transition period can be minimized by the Commission through adopting, wherever possible, elements of the Final Order as part of the final guidance. We have identified above instances where we believe doing so would be appropriate in the context of the aggregation rule and the "U.S. person" definition. Even so, however, firms will need time to adjust. Modifications to the aggregation rule, if any, will lead to changing registration plans and necessitate time for entities to prepare for registration. Changes to the "U.S. person" definition will necessitate additional modifications to documents, systems and trading relationships, as noted above. Finally, and most fundamentally, the Commission's final determination regarding the standard under which it will evaluate whether a foreign jurisdiction's rules are comparable to Dodd-Frank will drive very significant decisions by both firms and their local regulators regarding the extent and nature of cross-border swap activities.

In light of these issues, we are concerned that, even if the Commission were to adopt final cross-border guidance within the next two months, there may not be sufficient time for firms to come into compliance with that guidance prior to the currently scheduled expiration of the Final Order on July 13, 2013.

As the periods leading up to the effectiveness of Title VII on October 12, 2012 and swap dealer registration on December 31, 2012 illustrated, the presence of substantial legal uncertainty as a regulatory deadline approaches can be very disruptive to the market. If final guidance is not adopted a sufficient period before the July 13, 2013 expiration of the Final Order, similar consequences undoubtedly will result. At the same time, we recognize that the Commission cannot rush its engagement with foreign regulators in the development of a consistent cross-border derivatives regulatory regime. We also fully support the continuation of the Commission's efforts in that regard. Accordingly, we respectfully request that the Commission, well in advance of July 13, 2013, extend the Final Order until the end of 2013 to provide necessary legal certainty while it continues its consideration of the matters to be addressed by its final cross-border guidance.[23]

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The Institute appreciates the Commission's consideration of these matters. If the Commission or its staff has any questions regarding this letter, please do not hesitate to contact the undersigned at (212) 421-1611.

Respectfully submitted,

Sarah A. Miller
Chief Executive Officer
Institute of International Bankers

[23] If the Commission's adoption of final cross-border guidance is delayed past June 2013, we believe it should consider extending the Final Order past the end of 2013 to provide at least 180 days to transition to the final guidance.