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February 21, 2013

David A. Stawick
Secretary
U.S. Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

Re: Intercompany Swaps

Dear Mr. Stawick:

We represent a number of large public companies. We are grateful for the opportunity to provide comments and recommendations to the Commodity Futures Trading Commission (the "Commission") as to the treatment of certain intercompany hedging transactions under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). While we believe there are sound economic and policy reasons to exempt users of other types of inter-affiliate transactions from some or all requirements under the Dodd-Frank Act, our comments and recommendations in this letter are limited to corporate end-users who enter into intercompany hedging transactions that have the characteristics described in Section II below (the "Intercompany Swaps"). We are requesting that the Commission provide a complete and unrestricted exemption for Intercompany Swaps from all of the requirements under the Dodd-Frank Act, and confirm that the end-user exception is available for Intercompany Swaps such that it would also be available for the offsetting market facing swaps.

I. Background

Our clients include public companies whose businesses are predominantly non-financial in nature, and whose parent is organized in, and whose principal place of business is located in, the United States (each, a "US Parent"). Each US Parent has numerous subsidiaries organized in various United States ("US") and non-US jurisdictions (such subsidiaries being the "Subsidiaries"; the US Parent and the Subsidiaries collectively being the "Corporate Group") who incur foreign exchange and interest rate risk in the ordinary course of their business activities. Neither the US Parent nor the Subsidiaries are actively involved in hedging the risks of fluctuations in the prices of physical commodities used, produced or processed in their businesses or in using credit or broad-based equity index derivatives for any purpose. These Corporate Groups primarily rely on derivatives to hedge and manage foreign exchange risk and interest rate risk associated with the assets and liabilities of the Corporate Group or certain of its members.

A 2009 study by the International Swaps and Derivatives Association, Inc. ("ISDA") revealed that over 94% of the 500 largest companies in the world use derivatives to manage and hedge their business and

financial risks.[1] The ISDA survey further delineated derivatives usage by product type and sector. In particular, 88% of these companies use foreign exchange derivatives, 85% use interest rate derivatives, 49% use commodity derivatives, 20% use credit derivatives, and 29% use equity derivatives. Two of the largest sectors of the US economy are health care and technology. According to the ISDA survey, 95% of the largest technology companies use foreign exchange derivatives and 86% use interest rate derivatives. However, only 8% of health care companies and 15% of technology companies use commodity derivatives. The numbers are similarly low for credit and equity derivatives.[2] Other sectors, such as consumer goods, industrial goods, and services, reported commodity derivatives usage of below 40%. Based on these results, companies representing a sizable segment of the US economy limit their derivatives activities to interest rate and foreign exchange hedging.

Each US Parent exists principally to conduct non-financial business operations of the Corporate Group, is not in the primary business of trading swaps or other derivatives, and has not established an affiliate or subsidiary for the primary purpose of trading swaps or other derivatives internally or with third parties. Each US Parent is a company that files its financial statements with the Securities and Exchange Commission on a consolidated basis with its Subsidiaries and whose shares trade on a national securities exchange. Incidental to its function as the primary operating entity of the Corporate Group, each US Parent also serves as the Corporate Group's primary market-facing entity in respect of the Corporate Group's external hedging activities.

The vast majority of the number of derivatives entered into by a typical large, multinational Corporate Group is intended to hedge foreign exchange risk associated with the Corporate Group's sales and operating expenses occurring outside the US. For example, appreciation of the US Dollar relative to foreign currencies reduces the value of a Corporate Group's net sales and gross margins as expressed in US dollars on the Corporate Group's consolidated financial statements. To protect against the foreign exchange risks associated with its international sales and operations, a typical Corporate Group routinely enters into foreign exchange derivatives with financial institutions.

While foreign exchange derivatives could be entered into separately by each of the various Subsidiaries in jurisdictions where, for instance, the Corporate Group will generate revenue or incur expenses, for a number of reasons, including those described in Section III below, the US Parent often faces the market on behalf of the entire Corporate Group and enters into the foreign exchange derivative transactions with financial institutions to hedge the foreign exchange exposures incurred by its Subsidiaries. The US Parent often serves as the only (or the primary) market facing derivatives party and retains the sole obligation to perform each swap entered into with a financial institution or other unaffiliated swap

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[1] Over 94% of the World's Largest Companies Use Derivatives to Help Manage Their Risks, According to ISDA Survey, ISDA News Release, April 23, 2009, available at http://www.isda.org/press/press042309der.pdf.

[2] *Id.* For technology companies, 6% use credit and 15% use equity. For health care companies, 4% use credit and 20% use equity.

counterparty. When transacting directly with the US Parent, the US Parent's dealer counterparties typically are indifferent to the ultimate risk being hedged in a particular market facing transaction and look to the US Parent and the Corporate Group on a consolidated basis when assessing counterparty credit risk. Although these foreign exchange hedges are transacted between the US Parent and a third party dealer, the US Parent and its Subsidiaries often engage in intercompany parent-subsidiary swaps to re-allocate the economics of the transaction to the Subsidiary whose operations give rise to the risk.

The US Parent similarly may enter into market facing interest rate hedges to reduce interest rate risk incurred on behalf of the US Parent or in the business of a Subsidiary. To the extent the US Parent hedges interest rate risk of a Subsidiary, it may enter into an offsetting transaction with the Subsidiary in a manner similar to intercompany parent-subsidiary foreign exchange hedges. As these transactions tend to be longer in duration than foreign exchange hedges, they tend to be fewer in number than foreign exchange hedges for a typical Corporate Group, although the aggregate notional amounts of these transactions can be significant for a large Corporate Group that is exposed to the risk of the fluctuations in interest rates on large amounts of assets or liabilities.

Interest rate and foreign exchange transactions between the US Parent and a Subsidiary primarily are intended to fulfill internal accounting and prudent risk management practices by allocating risks within the Corporate Group to the entity that actually assumes the risk. In practical terms, these transactions are economically equivalent to internal accounting or booking entries and do not change the risk profile of the Corporate Group to the financial system. These interest rate and foreign exchange transactions are the Intercompany Swaps that are the subject of this letter and are described in more detail below.

II. Characteristics of Intercompany Swaps

The Intercompany Swaps that are the subject of this letter generally have the following characteristics:

1. The Intercompany Swaps are foreign exchange or interest rate derivatives that qualify as "swaps" under the Dodd-Frank Act or have been exempted from the definition of "swap" pursuant to an exemption granted by the US Department of the Treasury.[3]

2. The Intercompany Swaps are substantially identical to corresponding transactions (each, an "Outward Facing Transaction") between the US Parent and a third party that is a registered swap dealer or a dealer in swaps that is exempt from registration (either being an "SD"), but the US Parent assumes the position of the SD and the Subsidiary assumes the position of the US Parent in the Outward Facing Transaction, such that the US Parent has an offsetting position in the Outward Facing Transaction and the related Intercompany Swap. The US Parent is the sole obligor with respect to the Outward Facing

[3] Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69694 (Nov. 20, 2012).

Transaction, and the SD counterparty has no direct recourse to the Subsidiary. The US Parent may book a small spread or otherwise receive a fee from the Subsidiary in consideration for services provided to the Subsidiary in connection with both legs of the transactions.

3. Both the Outward Facing Transactions and the Intercompany Swaps are designed to hedge or mitigate commercial risks incurred in the business of the Subsidiary.

4. The Intercompany Swaps are documented pursuant to an intercompany agreement, trade ticket, spreadsheet and/or accounting entry such that both the US Parent and the Subsidiary are required to make the payments and deliveries specified in such transactions, although such transactions may be settled by an intercompany transfer or allocation of cash or currency.

III. Benefits of Consolidating Hedging Activities with US Parent

Consolidating external hedging activities in the name of the US Parent is beneficial to market participants and the US economy for several reasons.

First, the US Parent is the ultimate source of credit for the SD counterparty, and therefore the counterparty can have direct recourse to the ultimate source of funds that support the underlying obligations. Since dealers price derivatives in part based on the credit of their counterparty, and dealers generally consider a US Parent to be a stronger credit than one of its Subsidiaries, it is generally the case that a corporate end-user will receive better pricing and more market access from SDs when trading in the name of the US Parent.

Second, both the Corporate Group and the SD counterparty enjoy the benefits of collateral netting, close-out netting and multiple transaction payment netting, which results in operational efficiencies and reduces systemic risk. In the case of collateral netting, the mark-to-market values of all Outward Facing Transactions between the US Parent and a counterparty are netted, and the party with the larger net collateral obligation posts the excess of the larger net amount over the smaller net amount, subject to applicable minimum transfer amounts and thresholds. If each Subsidiary of a Corporate Group transacted directly with the SD counterparty, these obligations would not be netted and some Subsidiaries of the Corporate Group could be required to send collateral on the same day different Subsidiaries in the Corporate Group call for identical collateral from the same SD counterparty. Since a US Parent may have dozens of hedging Subsidiaries, making collateral calls and posting collateral separately for each Subsidiary not only would be administratively burdensome, it would result in an inefficient use of capital as the amount of collateral posted and received could exceed the US Parent's exposure to the counterparty and vice versa. This inefficient use of collateral both increases systemic risk and discourages parties from pursuing risk reducing collateral arrangements. In the case of close-out netting, in the event of an insolvency of the US Parent or an SD counterparty, all Outward Facing

Transactions would be terminated simultaneously, and the termination value of all transactions would be netted, such that the party with the larger net payment obligation would make a single net payment to the party with the smaller net obligation. If each Subsidiary of a Corporate Group transacted directly with the SD counterparty, these obligations would not be netted and some Subsidiaries of the Corporate Group could be required to make termination payments to an insolvent counterparty while different Subsidiaries in the Corporate Group are making claims for termination payments owed to those Subsidiaries in the insolvency of the same counterparty. Conversely, in the event of insolvencies of the US Parent and its Subsidiaries, SD counterparties could be required to make termination payments to some insolvent Subsidiaries while being left to make claims in the insolvencies of other Subsidiaries. Both outcomes would significantly exacerbate systemic risk. For insolvent Corporate Groups who have significant numbers of counterparties and dozens of Subsidiaries, there could be hundreds of additional bankruptcy claims in multiple jurisdictions from SD counterparties. The systemic risk that would occur in the event of a major dealer insolvency would be more acute due to the multiplier effect of SDs having simultaneous trading relationships with hundreds of Corporate Groups and similarly situated end-users. If most corporate hedging is not centralized in the US Parent or another member of the Corporate Group, there would be thousands of additional claims in an SD bankruptcy. For example, the settlement of claims in the Lehman Brothers bankruptcy would have been infinitely more complex if each Subsidiary who was the beneficiary of Outward Facing Transactions separately was forced to close out and settle their transactions with Lehman Brothers entities and make claims in the various Lehman Brothers bankruptcy cases.

Third, each Subsidiary of a Corporate Group would be advised, and may be required under the Dodd-Frank Act, to enter into a separate trading agreement with the SD counterparty. As many large Corporate Groups have hundreds of Subsidiaries located in dozens of countries, it would be administratively inefficient (if not impossible in some jurisdictions due to different legal requirements in those jurisdictions) for Corporate Groups to enter into separate trading agreements with SDs for each applicable Subsidiary.

IV. Status of Intercompany Swaps and Request for Relief

As a general matter, the Dodd-Frank Act does not distinguish between inter-affiliate swaps and swaps with unaffiliated parties.[4] However, the Commission proposed a rule (the "Proposed Rule") that, subject to the satisfaction of certain conditions, would exempt Intercompany Swaps from the clearing and margining requirements of the Dodd-Frank Act, but would subject those swaps to documentation,

[4] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping Regarding Rulemaking, 77 Fed. Reg. 48208, at n. 27 (August 13, 2012) (in which the Commission, declining to provide guidance in the definitional release with respect to "inter-affiliate swaps", noted that it is considering whether inter-affiliate swaps should be treated differently).

reporting, recordkeeping and risk management requirements.[5] It is also unclear whether the end-user exception would be available for Intercompany Swaps and, by extension, the Outward Facing Transactions where the US Parent is not hedging or mitigating its own commercial risk and where the Outward Facing Transaction represents an offsetting position to the position taken by the US Parent in the Intercompany Swap.

Pursuant to Section 4(c)(1) of the Commodity Exchange Act (the "CEA"), the Commission may exempt "any agreement, contract or transaction (or class thereof)" from any or all provisions of the CEA. The Proposed Rule does not adequately address Intercompany Swaps, and does not address the availability of the end-user exception. Therefore, we recommend that the Commission use its powers to (1) exempt Intercompany Swaps from all provisions of the CEA, including reporting, clearing and margining, and (2) confirm that the end-user exception is available for Intercompany Swaps such that it would also be available for Outward Facing Transactions.[6]

V. Regulating Intercompany Swaps Does Not Advance the Purposes of the Dodd-Frank Act

As described in the Proposed Rule, the Dodd-Frank Act "was enacted to reduce systemic risk, increase transparency, and promote market integrity within the financial system."[7] The regulation of Intercompany Swaps does nothing to advance these objectives. The following describes how potential reporting, recordkeeping, clearing and margining requirements on Intercompany Swaps increase systemic risk and impede risk reducing hedging activity.

A. Reporting and Recordkeeping

1. Reporting of Intercompany Swaps Increases Systemic Risk

The imposition of reporting requirements on Intercompany Swaps increases systemic risk by distorting the risk in the financial system through duplicate reporting. Under the Commission's Part 45 reporting rules, an SD counterparty would be required to report the Outward Facing Transaction to a registered swap data repository (an "SDR") and the US Parent would be required to report the Intercompany Swap to the same SDR or another SDR if at such time multiple SDRs are available. The aggregate of the information reported would show the US Parent having double the notional amount of outstanding swaps than is actually the case, but zero net exposure to the financial system, in each case not considering any swaps entered into by the US Parent for its own account and that are not offset by Intercompany Swaps.

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[5] Clearing Exemption for Swaps Between Certain Affiliated Entities, 77 Fed. Reg. 50425 (August 21, 2012).
[6] The foregoing recommendations are consistent with Congressional intent, as evidenced by letters written by chairmen of the major Congressional committees (*see* footnote 14, *infra)* and by legislation that has previously passed the House of Representatives with bi-partisan support (H.R. 2779, 112th Cong. (2012)) and has been effectively reintroduced in the current Congress (*see, e.g.*, H.R. 634 and H.R. 677, 113th Cong. (2013)).
[7] 77 Fed. Reg. at 50425.

The reported information would show each applicable Subsidiary in the Corporate Group, on an individual basis, having exposure to the financial system. In fact, no such exposure exists since the US Parent is the only member of the Corporate Group required to settle swaps with third parties and the Subsidiary is only required to settle swaps with its US Parent into which its financial statements are consolidated. In other words, if the Subsidiary defaults on its payment obligations to the US Parent, the US Parent still will be required to perform the Outward Facing Transaction in accordance with its terms. In any case, the likelihood of a Subsidiary default to the US Parent that could affect the financial system is highly remote where the US Parent provides public financial reports on a consolidated basis with all of its Subsidiaries.

2. *Reporting Intercompany Swaps Is Unduly Burdensome on Corporate Groups*

The imposition of regulatory reporting requirements on Intercompany Swaps creates an unusual dynamic in which the US Parent has no reporting obligations in connection with its Outward Facing Transactions with SDs, but would be required to report to SDRs every non-systemic Intercompany Swap. Corporate Groups also will be required to comply with the historical swap reporting requirements set out in Part 46 of the Commission's regulations with respect to their Intercompany Swaps.

Corporate Groups are particularly concerned about the broad application of the reporting rules to Intercompany Swaps. Corporate Groups do not currently maintain the back-office systems necessary to keep the required level of detail in respect of their Intercompany Swaps that is necessary to satisfy the Part 45 and 46 reporting rules. In order to comply with these rules, many Corporate Groups will need to develop costly systems and procedures, and employ additional back-office personnel, which will indirectly increase their hedging costs and divert resources away from activities that are productive to the US economy. As some Corporate Groups may enter into large numbers of Intercompany Swaps during a calendar year, meeting these requirements could be both challenging and expensive, particularly given that Corporate Groups generally have no experience developing or maintaining trade reporting systems and do not use trading as a means to generate revenue.

3. *Recordkeeping Requirements Are Unnecessary for Intercompany Swaps*

The imposition of recordkeeping requirements on Intercompany Swaps would result in significant additional burdens on Corporate Groups with little or no regulatory benefit. The Part 45 recordkeeping rules make no distinction between Intercompany Swaps and market facing swaps, and would require each party to an Intercompany Swap to maintain "full, complete and systematic records"[8] in respect of each Intercompany Swap in addition to the records that a US Parent is required to keep as a party to the corresponding Outward Facing Transaction. Because Intercompany Swaps are purely internal, each US Parent typically maintains records only to the extent necessary for internal purposes. Such internal

[8] 17 CFR 45.2(b).

records may not contain all the information, and may not be in the format, required by the Part 45 recordkeeping rules. Therefore, imposing recordkeeping requirements on a US Parent for Intercompany Swaps will require a typical US Parent to make costly updates to its systems and procedures with respect to Intercompany Swaps. In addition, each Subsidiary will have a duplicate recordkeeping requirement for itself. Since the hedging activities of many Corporate Groups are centralized with the US Parent, many Subsidiaries do not maintain a separate treasury function and therefore would not have the ability to comply with their own independent recordkeeping requirements without restructuring their operations or outsourcing the function in a manner that complies with the rules, each at a significant cost.

Each party to an Intercompany Swap also would be required to comply with the Part 46 historical swap recordkeeping requirements. Given that Corporate Groups may not have expected these requirements to apply to Intercompany Swaps and may not maintain the same robust recordkeeping procedures as for Outward Facing Transactions, it may not be possible, and in any case would be costly and burdensome for either, let alone both, the US Parent and the Subsidiary counterparty to recreate the data necessary to comply with the Part 46 historical swap recordkeeping requirements for Intercompany Swaps.

Intercompany Swaps do not pose any systemic risk to the financial system. Therefore, there is little or no regulatory benefit to imposing recordkeeping requirements on such transactions. Since imposing such requirements would be both burdensome and costly, Intercompany Swaps should be expressly exempt from the Part 45 and Part 46 recordkeeping rules.

B. Clearing and Margining

1. There Are no Benefits to Clearing Intercompany Swaps

Clearing of any Intercompany Swaps would increase, rather than reduce, systemic risks to the financial system. By requiring clearing of foreign exchange and interest rate hedges within the same Corporate Group, a systemically risk-free transaction that is contained within the same consolidated financial entity would be moved to a clearing organization such that both parties within the Corporate Group are now exposed to the financial risks of a futures commission merchant and the clearing organization, and the futures commission merchant, the clearing organization and the financial system as a whole are now exposed to new risks of both members of the Corporate Group. Therefore, any clearing requirements on Intercompany Swaps are detrimental to the financial system.

We respectfully disagree with the assertion in the Proposed Rule that, at least in relation to Intercompany Swaps, "uncleared inter-affiliate swaps could pose risk to corporate groups and market participants generally."[9] Any liabilities between the US Parent and any of its Subsidiaries would be settled internally

[9] 77 Fed. Reg. at 50427

such that there would not be any contagion effect from a Subsidiary not performing its obligation to its US Parent under an Intercompany Swap. An internal "default" should have no impact on unaffiliated market participants as the US Parent has the sole obligation to perform the Outward Facing Transaction, and the net loss to the Corporate Group on the Intercompany Swap on a consolidated basis always would be zero. Such a default would not affect the US Parent's obligations under the Outward Facing Transaction, and any losses incurred by US Parent on the Outward Facing Transaction would be reflected on the US Parent's consolidated financial statements and would be no different for that particular swap than the loss that would have been sustained if the Subsidiary transacted directly with the SD counterparty. Therefore, the existence of Intercompany Swaps within a Corporate Group cannot increase risk to the system beyond any risk resulting from the Outward Facing Transaction. Although Intercompany Swaps may reallocate risk within the Corporate Group, they do not alter the risks that the Corporate Group as a whole or the US Parent presents to the market.

2. The Clearing Exemptions in the Proposed Rule Are too Narrow

The Proposed Rule conditions availability of the clearing exemption on satisfaction of at least one of the following four conditions: (1) both parties must be located in the US; (2) both parties must be located in a jurisdiction that has a comparable and comprehensive clearing requirement like that in the US; (3) both parties are required to clear swaps with non-affiliated parties in compliance with US law; or (4) neither party enters into swaps with non-affiliated parties. It is likely that the parties to many Intercompany Swaps will fail each of these requirements. First, most Intercompany Swaps that are foreign exchange swaps will, by their very nature, be with a non-US based Subsidiary. Second, many non-US Subsidiaries are located in jurisdictions in which no clearing requirement has been enacted or is contemplated. Third, Intercompany Swaps by definition are between non-financial entities who would not be required to clear swaps with third parties based on the availability of the end-user exception. Finally, the US Parent necessarily enters into offsetting swaps with non-affiliated parties, and it may be the case that (and it should be irrelevant to the analysis whether) the Subsidiary has third party swaps that are unrelated to the Intercompany Swaps. Therefore, it would appear that the clearing exemption under the Proposed Rules would not be available to many Intercompany Swaps.

3. The Documentation Requirements in the Proposed Rule Are Unnecessary

The Proposed Rule further requires non-registered affiliates to enter into a written swap trading relationship document that includes all terms governing the trading relationship between the affiliates, including, without limitation, payment obligations, netting of payments, events of default, close-out netting, transfer rights, governing law, valuation and dispute resolution procedures. While these provisions are customary and beneficial in arms-length, third party transactions, they are unnecessary and unduly burdensome for Intercompany Swaps that are typically documented by a simple intercompany agreement, trade tickets and/or accounting entries rather than ISDA Master Agreements or other industry

standard or bespoke trading documentation. Since Intercompany Swaps are settled completely within the Corporate Group, it should be at the sole discretion of the parties to determine what documentation and terms are required to evidence their transactions. In addition, it is unclear what benefits would be achieved by imposing burdensome documentation requirements on transactions between two parties that are not required to be registered with the Commission and who would settle their respective obligations internally and without the involvement of any unrelated third parties.

4. Intercompany Swaps Should Be Expressly Exempt from Margin Requirements

Under the Proposed Rule, variation margin is required when both parties to inter-affiliate swaps are financial entities. Since neither party to Intercompany Swaps will be a financial entity, the Proposed Rule should not require variation margin for Intercompany Swaps. Imposing initial and variation margin requirements on Intercompany Swaps would serve no risk reducing purpose, but would divert capital that is available to Corporate Groups from use for productive means. Consequently, we urge the Commission to provide Corporate Groups with legal certainty that no margin requirements will be imposed on any Intercompany Swaps.

C. End-User Exception

A party to a swap may elect the end-user exception if, among other things, that party "[i]s using the swap to hedge or mitigate commercial risk."[10] The Commission has clarified that a swap is used to hedge or mitigate commercial risk, among other things, if the swap is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise where the risks arise from any potential change in value related to interest rate or foreign exchange rate movements or fluctuations in exposures arising from a person's current or anticipated assets or liabilities.[11] The Intercompany Swaps entered into by the US Parent may not meet these conditions from the perspective of the US Parent since the US Parent is taking the position of the SD counterparty and not a position that hedges or mitigates a commercial risk incurred by the US Parent. In the Outward Facing Transaction, the US Parent takes a position that it offsets with its position in the Intercompany Swap. While in the Outward Facing Transaction the US Parent hedges or mitigates its Subsidiary's commercial risk, and that of the Corporate Group considered as a whole, the US Parent does not take a position that hedges or mitigates the US Parent's own commercial risk. In adopting the end-user exception, the Commission "determined that 'matched book' or 'back-to-back' swaps that hedge or mitigate the risks of other swaps may qualify for the end-user exception if the swap is used to reduce risks in the conduct of a commercial enterprise as set forth in Section 39.6(c)(1) and the 'other swap' itself qualifies for the end-user exception."[12] While it

[10] Section 2(h)(7)(A)(ii) of the CEA, 7 U.S.C. 2(h)(7)(A)(ii).
[11] 17 CFR 39.6(c)(1).
[12] 77 Fed. Reg. at 42574.

appears that the Commission's intention is to permit the end-user exception to apply to Outward Facing Transactions given that the US Parent is not a financial entity and the Subsidiary uses the Intercompany Swap to hedge or mitigate its own commercial risk, unless the Commission expressly states that the Intercompany Swap qualifies for the end-user exception, absent further guidance, it could be ambiguous as to whether the Commission would consider the Outward Facing Transaction to have satisfied the criteria for hedging or mitigating commercial risk set forth in Section 39.6(c).

VI. Conclusion

The presence of Intercompany Swaps as part of the ordinary hedging activities of a Corporate Group does not increase risk to the financial system beyond any risks posed by the presence of Outward Facing Transactions. On the contrary, the use of Intercompany Swaps tends to decrease the risks, if any, posed to the system by the hedging activities of Corporate Groups.[13] Any regulation of Intercompany Swaps and unavailability of the end-user exception for Outward Facing Transactions would incentivize Corporate Groups to either (1) structure their hedging activities in a more costly, but less burdensome, manner that further increases systemic risk, such as having Subsidiaries face third party SDs directly, or (2) abandon risk reducing hedging activities altogether.

As a result, regulating Intercompany Swaps in a similar manner to market-facing swaps is contrary to the purposes of the Dodd-Frank Act, especially in light of the significant burdens and costs that would be placed on Corporate Groups to develop systems and procedures to comply with certain substantive provisions governing the regulation of swaps.

Applying any Dodd-Frank requirements applicable to market-facing swaps to Intercompany Swaps will affect large numbers of end-users across various industries, all of whom operate non-financial businesses and most of whom are wholly unfamiliar with operating in compliance with a financial regulatory regime. To require end-users and, in particular, Corporate Groups to comply with any regulatory requirements in respect of their internal risk management transactions would result in unintended additional systemic risks and make it prohibitively burdensome and costly for end-users to hedge their commercial risk, thereby expressly contravening Congressional intent in passing the Dodd-Frank Act.[14] Therefore, we request that the Commission use its powers to (1) exempt Intercompany Swaps from all provisions of the CEA, including reporting, clearing and margining, and (2) confirm that the end-user exception is available

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[13] We are not aware of any plausible assertion that hedging activities by US corporate end users contributed in any way to the financial crisis that resulted in enactment of the Dodd-Frank Act.

[14] *See* Letter to The Honorable Chairman Barney Frank and The Honorable Chairman Colin Peterson from Chairman Christopher Dodd and Chairman Blanche Lincoln, at page 1 (June 30, 2010) ("[r]egulators, namely [the Commission], must not make hedging so costly it becomes prohibitively expensive for end users to manage their risk"). *See also* Letter to The Honorable Chairmen Timothy Geithner, Ben Bernanke, Gary Gensler and Mary Schapiro from Chairmen Debbie Stabenow, Tim Johnson, Frank Lucas and Spencer Bachus, at page 1 (April 6, 2011) ("regulators should exempt end-users from margin requirements and seek to limit other regulatory burdens that could have the unintended effect of driving up costs for end users and increasing systemic risk for our economy").

for Intercompany Swaps and therefore also would be available for a Corporate Group's Outward Facing Transactions.

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Thank you for the opportunity to comment and for your consideration of the foregoing concerns. We would be pleased to meet with the Commission to discuss the issues raised in this letter in greater detail. Please feel free to contact the undersigned at 312 368-3433 or marc.horwitz@dlapiper.com with any questions you may have regarding the contents of this letter.

Very truly yours,

DLA Piper LLP (US)

Marc A. Horwitz