June 26, 2013

The Honorable Jacob Lew
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20110

Re: Senators' June 26, 2013 Letter and Cross Border Regulations

Dear Mr. Secretary:

We are writing to you to express our concerns regarding a letter sent to you today by Senators Gillibrand, Carper, Hagan, Heitkamp, Bennett and Schumer regarding the cross border regulation of derivatives. As noted below, their letter failed to note a number of material facts essential to understand the issues and properly evaluate them.

First, the recently proposed rule by the Securities and Exchange Commission ("SEC") is inapplicable to the Commodities Futures Trading Commission ("CFTC") as a legal matter due to entirely different statutory mandates. Second, it is also inapplicable as a practical matter: the CFTC has jurisdiction for more than 96.5 percent of the derivatives markets and the SEC less than 3.5 percent. Third, the SEC just proposed it's 650 page rule in May, while the CFTC has been considering cross border regulation for more than 2 ½ years, has received and reviewed more than 322 comment letters, and proposed its guidance a year ago.

The CFTC should delay no more and the SEC should follow its process as appropriate. Neither should be held hostage to each other, particularly because they are largely irrelevant to each other.

Five years ago now, the American people suffered the worst financial crash since 1929 and are still suffering from the worst economy since the Great Depression. The human and monetary costs inflicted on the American people have been enormous, ultimately costing more than $12.8 trillion. Given that much of this was caused by cross border derivatives trading and investments, it is already past time for the CFTC to protect the American people by finalizing its regulation.

The SEC's Proposed Rule is based on fundamentally different legal authority

The SEC was given very limited statutory authority in the Dodd-Frank Act related solely to anti-evasion and no mandate at all regarding cross border jurisdiction. In stark and clear contrast, the CFTC was given the same anti-evasion authority **plus** an affirmative statutory mandate to regulate cross border derivatives activities that "have a direct and significant connection with activities in, or effect on, commerce of the United States." (Compare DFA Section 772 (b) [SEC] with Section 722(d) [CFTC], attached as Exhibits 1 and 2).

Thus, the SEC proposed rule is inapplicable to the CFTC's statutory mandate to regulate the risks from cross border derivatives trading and related activities (as distinguished from their shared desire to prevent evasion).

This strong statutory mandate to the CFTC makes sense, of course, because the dark, unregulated derivatives markets was where the last financial crisis was invisibly incubated, grew exponentially and acted as a conveyor belt to transmit the crisis throughout the globe.

The SEC oversees a tiny segment of the derivatives market

The CFTC's broader statutory mandate also makes sense because the CFTC has decades of expertise and jurisdiction for virtually the entire derivatives markets. Indeed, the SEC has jurisdiction for no more than 3.5 percent of those markets (see attached Exhibit 3).

The CFTC has jurisdiction for more than 96.5 percent of the combined swaps and security-backed-swaps markets,[1] in addition to the unique, broad statutory mandate. To think that the CFTC should follow or be influenced by the SEC's recently proposed rule under such circumstances is nonsensical (or perhaps pretextual). It would be as if the SEC deferred to the CFTC to set the regulatory standards for all mutual funds simply because the CFTC required less than 1 percent of mutual funds to also register as a CPO. That would never happen, of course, and it should not be permitted in connection with cross border derivatives regulation.

The CFTC has fully considered its cross border guidance for 2 ½ years, while the SEC is just beginning

It would be irresponsible for the CFTC to wait for the SEC, even as to its very limited anti-evasion provisions.

As you know, the SEC just proposed a rule regarding the anti-evasion cross border provisions on May 1, 2013. Comments are not even due for months, until August 22, 2013. Moreover, given the sprawling 650 page proposal, an extension substantially beyond that deadline is likely.

In contrast, the CFTC has had 2 ½ years of meetings, consideration, deliberation and virtually unlimited input from industry and others. Indeed, the CFTC worked for 1½ years before proposing its initial guidance in June 2012 and then worked for another 6 months before issuing further guidance in December 2012. At the same time that it issued the further guidance in December 2012, the CFTC also issued an exemptive order, pushing back the effective date for yet another seven months, to July 12, 2013. The CFTC has received and considered at least 322 filed comment letters and had dozens of meetings.

Thus, the CFTC has thoroughly considered the cross border guidance and has already delayed its effective date multiple times. The time for delay is over and the timing of the SEC's rule is irrelevant.

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1 BIS Annual derivatives market report, 2012. If either DTCC or CFTC-reported data were used, the SEC portion of the markets would decrease to less than 3 percent. *See*, e.g. http://dtcc.com/products/consent.php?id=tiwd/products/derivserv/data/index.php.

The Costs to the United States of the Last Financial Crisis Have Been Staggering and Must be Prevented from Happening Again

Too much of the financial reform discussion is antiseptic, academic, bloodless and ahistorical. Too many focus on each regulation as if it were an end in itself. The purpose of a regulation, its connection to comprehensive reform, and the financial and economic crises giving rise to it are almost never mentioned, particularly by those importuning the regulators to write rules that protect or enhance their business lines and profits.

The financial crash of 2008 was the worst financial collapse since 1929 and it ushered in the worst economy since the Great Depression. The ongoing costs of those historic events to the people, communities and government of the United States will be more than $12.8 trillion over ten years (not including the costs of the Fed's zero interest rate policy and asset purchases, all of which have been necessitated by the massive damage done by the financial collapse).[2]

Of course, the dollar cost, almost unimaginably large, will still never capture the human suffering and economic wreckage inflicted on our country from coast to coast by the financial and economic crises. Financial reform in general and Title VII in particular were passed to prevent that from happening again. The regulation of cross border derivatives trading and activities that have a direct and significant effect on the U.S. are an essential part of that framework.

CONCLUSION

After 2 ½ years of consideration, and massive and unlimited input from Wall Street and others, it is time for the CFTC to protect the American people now from high risk cross border derivatives trading that has a direct and significant impact on the U.S. The SEC should proceed with its recently proposed rule, receive and review the comments due in months, deliberate how best to regulate the less than 3.5 percent of the market it has anti-evasion authority for and finalize its rule in due course. If there happens to be a conflict with the CFTC or anyone else, then that can be addressed at the appropriate time factually rather than hypothetically.

Better Markets appreciates your consideration of these facts.

Sincerely,

Dennis M. Kelleher
President and CEO

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2 *See* Better Markets, The Cost Of The Wall Street Collapse And Ongoing Economic Crisis Is More Than $12.8 Trillion (Sept. 15, 2012), *available at* http://bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis.pdf.

CC: The Honorable Kirsten Gillibrand, U.S. Senate
The Honorable Thomas Carper, U.S. Senate
The Honorable Kay Hagan, U.S. Senate
The Honorable Heidi Heitkamp, U.S. Senate
The Honorable Michael Bennet, U.S. Senate
The Honorable Charles Schumer, U.S. Senate
The Honorable Gary Gensler, Chairman, CFTC
The Honorable Mary Jo White, Chairman, SEC

EXHIBITS ATTACHED BELOW

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Exhibit 1: SEC Statute:

"(c) Rule of construction. No provision of this title [15 USCS §§ 78a et seq,] that was added by the Wall Street Transparency and Accountability Act of 2010, or any rule or regulation thereunder, **shall apply** to any person insofar as such person transacts a business in security-based swaps **without the jurisdiction of the United States, unless** such person transacts such business in contravention of such rules and regulations as the Commission may prescribe as **necessary or appropriate to prevent the evasion of any provision of this title** [15 USCS §§ 78a et seq,] that was added by the Wall Street Transparency and Accountability Act of 2010…."

Section 772(b) of the DFA

Exhibit 2: CFTC Statute:

"(i) Applicability. The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), **shall not apply to activities outside the United States unless** those activities—

(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or

(2) contravene such rules or regulations as the Commission may prescribe or promulgate as are **necessary or appropriate to prevent the evasion of any provision of this Act** that was enacted by the Wall Street Transparency and Accountability Act of 2010."

Section 722(d) of the DFA

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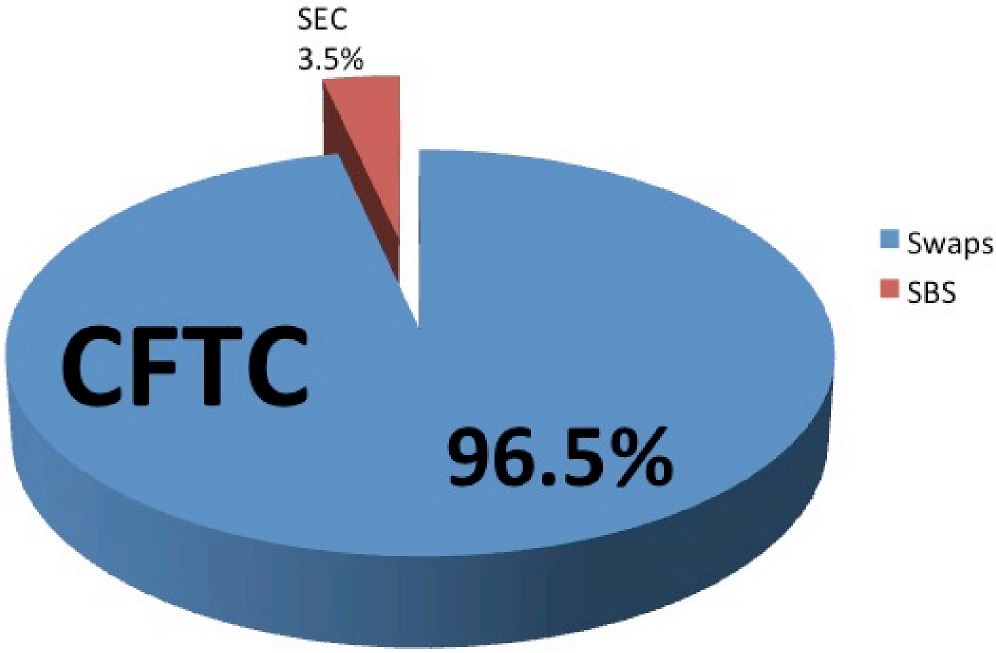
Relative Proportions of Swaps and Security Based Swaps



Source: BIS Annual derivatives market report, 2012. Note, if either DTCC data or CFTC-reported data were used, the SEC portion of the market would be under 3%. Thus, 3.5% is the maximum.