Chris Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street NW
Washington, DC 20581

Submitted online via: http://comments.cftc.gov

March 3, 2020

Re: RIN number 3038-AE84; Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants

Dear Mr Kirkpatrick,

The Alternative Investment Management Association[1] ("AIMA") welcomes the opportunity to respond to the Commodity Futures Trading Commission ("CFTC") regarding its proposed rule on the Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants ("the Proposed Rule").[2]

It is clear that significant progress has been made in terms of the implementation of regulatory requirements by the regulators of the world's primary swap trading jurisdictions since the publication by CFTC of its interpretative guidance and policy statement regarding the cross-border application of certain swap provisions of the Commodity Exchange Act ("Guidance").[3] This now warrants a renewed focus on the way in which cross-border transactions are regulated to minimize the potential for duplicative or conflicting regulatory requirements between the U.S. and foreign regulatory regimes. We appreciate the acknowledgement by the CFTC that such conflict has a range of adverse consequences, including the possibility of regulatory arbitrage, competitive distortions and – crucially – a negative impact on the efficiency of the swaps market.[4]

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[1] AIMA is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry.

[2] See Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 952 (Jan. 8, 2020). https://www.cftc.gov/sites/default/files/2020/01/2019-28075a.pdf.

[3] Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292 (July 26, 2013). For purposes of this submission, the Commodity Exchange Act has been abbreviated as CEA.

[4] Supra note 2 at 954.

We believe that it is feasible to regulate the swaps market in a way that promotes market integrity and fosters investor protection while also allowing that market to function effectively for the benefit of those seeking to hedge risk or deliver returns for their investors. The Proposed Rule demonstrates that an effective approach towards cross-border regulation and its interaction with global derivatives trading can be found.

One aspect of the Proposed Rule that we strongly support is the new U.S. Person definition, particularly where it comes to collective investment vehicles.[5] We note that, consistent with the final rule on the cross-border application of the CFTC's margin requirements for uncleared swaps ("Cross-Border Margin Rule")[6], the Proposed Rule does not include a majority ownership prong in respect of collective investment vehicles.

As detailed in our prior submission[7] regarding the CFTC's 2016 Proposed Rule on the Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants[8], the definition of U.S. Person as set out in the Guidance is deeply problematic for funds managed by investment managers that are authorized in the E.U. under the Alternative Investment Fund Managers Directive ("AIFMD").[9] Such funds fall within the definition of Financial Counterparty under the European Market Infrastructure Regulation[10] ("EMIR") and are therefore subject to European rules on clearing, margining and risk mitigation. To the extent that those funds also have a majority of U.S. investors, they are also captured by the majority ownership prong of the U.S. Person definition in the Guidance, leading to overlap – and possible conflict – with the requirements of EMIR.

We applaud the CFTC for removing this problematic aspect of the U.S. Person definition in the Proposed Rule. We strongly encourage the CFTC to use the new U.S. Person definition universally across all Title VII requirements and the CEA, including Part 4 related to commodity pool operators, commodity pools, and commodity trading advisors, as a matter of priority to ensure that its approach to cross-border transactions is consistent and coherent with the overall CFTC regulatory regime.[11]

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5 See proposed CFTC Rule 23.23(a)(22). 85 FR at 960. Specifically, proposed CFTC Rule 23.23(a)(22)(B) is applicable to AIMA members: A U.S. Person means: "(B) A partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States…"

6 Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016).

7 See https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1752.

8 Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 FR 71946 (proposed October 18, 2016).

9 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010. Available online at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0061&from=EN. For ease of presentation, capitalized terms not otherwise defined in this submission have the meaning set forth in the cited reference.

10 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. Available online at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=EN.

11 The Proposed Rule notes that "The Commission intends to separately address the cross-border application of the Title VII requirements addressed in the Guidance that are not discussed in this release (e.g., capital adequacy, clearing and swap processing, mandatory trade execution, swap data repository reporting, large trader reporting, and real-time public reporting). With respect to capital adequacy requirements for SDs and MSPs, the Commission notes that it has proposed but not yet adopted final regulations." 85 FR at n. 254. AIMA urges the CFTC to address these other aspects of cross-border, perhaps even before it finalizes the proposal because otherwise it will be a piecemeal result (i.e. Guidance for some aspects

We also believe that the CFTC should consider further the scope of its substituted compliance framework to ensure that it is sufficiently broad in its design to be available in all situations in which it will be legitimately required to ensure that there is no overlap between CFTC and foreign regulatory obligations (to the extent that the rules of a foreign jurisdiction are comparable). This is particularly important in the context of the clearing obligation. In so doing, the CFTC should be mindful of the need to avoid any unnecessary complexity in terms of how it defines its regulatory perimeter in order to avoid excessive compliance costs and ensure consistency in approach across regulated entities.

In the Annex that follows, we provide more detailed comments in response to the questions included in the Proposed Rule. In particular, we make the following points:

- We believe that alignment with the SEC U.S. Person definition is preferable and encourage the CFTC to take a consistent approach across all the substantive aspects of its rules associated with Title VII.
- We believe it is fully appropriate to exclude from the definition of U.S. Person commodity pools, pooled accounts, investment funds, or other CIVs that are majority-owned by U.S. persons.
- In our view it is not necessary or appropriate to apply certain transaction-level requirements to ANE transactions. We agree that existing anti-fraud and anti-manipulation powers under the CEA provide an appropriate baseline of regulation.
- We continue to see value in taking a broad approach to substituted compliance and believe that it should be broadly available. It is important to appreciate that substituted compliance is a tool to ensure that the CFTC's supervisory expectations are met; it is not a means to bypass regulation.
- We believe that the CFTC should use its dialogue with other regulators – both bilaterally and with IOSCO – to promote better alignment of respective regulatory regimes, while focusing on the broader comparability of the outcomes they achieve rather than whether rules are exactly aligned.

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If you would like to discuss any aspect of this submission further, please contact Adam Jacobs-Dean (ajacobs-dean@aima.org).

Yours sincerely,

/s/ Jiří Król

Jiří Król
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and rule for others). For further discussion of the definition of U.S. Person, please also see AIMA's 'Petition for Rulemaking to Harmonize Registration Exemptions for CPOs and CTAs with Registration Exemptions for Investment Advisers' (February 17, 2020).

ANNEX

(1) The "U.S. person" definition the Commission is proposing here aligns with the definition of that term adopted by the SEC in the context of its cross-border swap regulations. Should the Commission instead adopt the U.S. person definition used in its Cross-Border Margin Rule? Alternatively, should the Commission instead harmonize the "U.S. person" definition in the Proposed Rule to the interpretation of U.S. person included in the Guidance?

Overall, we believe that alignment with the SEC approach is preferable and encourage the CFTC to take a consistent approach across all of the substantive aspects of rules associated with Title VII.

(2) Is it appropriate, as proposed, that commodity pools, pooled accounts, investment funds, or other CIVs that are majority-owned by U.S. persons not be included in the proposed definition of "U.S. person"? Would a majority of such funds or CIVs be subject to margin requirements of foreign jurisdictions? Is it accurate to assume that the exposure of investors to losses in CIVs is generally capped at their investment amount? Does tracking a CIV's beneficial ownership pose challenges in certain circumstances?

Yes, we believe it is fully appropriate to exclude from the new definition of U.S. Person commodity pools, pooled accounts, investment funds, or other CIVs that are majority-owned by U.S. persons. Such a fund is in practice generally subject to the regulatory framework of the jurisdiction in which its management company has its principal place of business. Inclusion of such funds within the scope of the new U.S. Person definition and, by extension, the scope of CFTC regulatory requirements is therefore highly likely to lead to such funds being subject to competing regulatory requirements.

It is also reasonable to assume that the potential investment losses to which U.S. investors in such funds are exposed are limited to their initial capital investment. It is further correct to note that tracking the beneficial ownership of positions in a fund is potentially complicated and could necessitate conservative assumptions being made to avoid the risk of breaching regulatory requirements that depend on the status of investors in the vehicle.

(3) When determining the principal place of business for a CIV, should the Commission consider including as a factor whether the senior personnel responsible for the formation and promotion of the CIV are located in the United States, similar to the approach in the Cross-Border Margin Rule?

No, we believe that there are more relevant indicia of U.S. nexus than the activities of forming and promoting a CIV. The location of staff who control the investment activities of the CIV is, on the other hand, more relevant in determining the principal place of business of that CIV.

(18) Are the definitions of "foreign-based swap," "foreign branch," "foreign counterparty," and "swap conducted through a foreign branch" effective to appropriately capture transactions that should be considered to be foreign rather than domestic, such that they are eligible for certain exceptions from the group B and group C requirements and substituted compliance for the group B requirements (discussed in section VI below)? If not, what changes should be made to the definitions?

AIMA is supportive of the definition of "foreign counterparty" for the reasons stated above. Specifically, the definition of "foreign counterparty" and by application a non-U.S. Swap Entity (i.e. non-U.S. Person) would exclude the majority ownership prong with respect to collective investment vehicles. This means if the location of the staff who control the investment activities of the CIV is not in the U.S. or the principal place of business of that CIV is not in the U.S., then that CIV would be a "foreign counterparty." AIMA is supportive of this approach.

(25) Should the Commission apply certain transaction-level requirements (e.g., § 23.433 (fair dealing)) to SDs and MSPs with respect to ANE Transactions, or are the existing anti-fraud and anti-manipulation powers under the CEA and Commission regulations adequate safeguards to address any wrongdoing arising from ANE Transactions.

We agree with the CFTC's assessment that in order to respect the principle of international comity and target regulatory provisions towards those risks that are most significant for the U.S. financial system, it is not necessary or appropriate to apply certain transaction-level requirements to ANE transactions. However, AIMA would encourage the CFTC to adopt the SEC's approach with respect to ANE, which does apply reporting requirements to ensure a baseline level of transparency is maintained. We agree that existing anti-fraud and anti-manipulation powers under the CEA provide an appropriate baseline of regulation, whilst endorsing the CFTC's view that the regulator in the home jurisdiction of a non-U.S. Person engaged in ANE transactions has a clear interest in overseeing such transactions, the risk of which ultimately lies in the home jurisdiction more than it does in the U.S.

(26) Should the Commission consider adopting a territorial approach similar to the SEC, where non-US counterparties engaging in ANE Transactions would count such transactions towards their de minimis thresholds and be subject to certain transaction-level requirements, rather than the proposed comity-based approach of excluding ANE Transactions from the Proposed Rule?

AIMA would encourage the CFTC to adopt the SEC's approach with respect to ANE in order to harmonize the rules of the two regulators.

(27) On the classification of group A, group B, and group C requirements, should the Commission use these classifications, revert to the ELR and TLR classifications used in the Guidance, or otherwise classify the relevant Title VII requirements?

In general AIMA believes that a swap involving a non-U.S. Person should also be able to use substituted compliance, particularly for AIMA members are disadvantaged by duplicative regulatory regimes, particularly related to reporting, trading and clearing. We would encourage the CFTC to review the group B and group C requirements with this approach in mind. This approach coincides with the CFTC's holistic, outcomes-based approach, which permits

substituted compliance where the transaction is still regulated in another jurisdiction. As noted above, a fund is in practice subject to the regulatory framework of the jurisdiction in which its management company has its principal place of business.

(28) To the extent that you agree with the Commission's proposed use of the group A, group B, and group C requirements classification, should any of the requirements be re-classified or removed from such groups? Should requirements not included of any of the groups be added to any of them? If so, which requirements?

See response to Question 27.

(31) Should the Commission continue to treat group A requirements differently than group B requirements for purposes of substituted compliance? Should the Commission adopt a universal entity-wide or transaction-by-transaction approach?

Our overall preference is for a universal, entity-wide approach to substituted compliance, whereby substituted compliance is fully available for cross-border transactions, as discussed further in our response to question 32.

(32) Should the Commission expand or narrow the availability of substituted compliance for swaps involving U.S. persons?

Yes, we strongly believe that the CFTC should expand the availability of substituted compliance by making it available to cross-border transactions as far as possible. The Proposed Rule rightly notes that substituted compliance is central to the avoidance of duplicative or conflicting requirements and plays an important role in mitigating the risk of market fragmentation.[12] We are not convinced by the argument[13] that the CFTC's supervisory interest in the swap activities of U.S. Persons means that it is not appropriate to make substituted compliance available to U.S. Persons. In our view, this overlooks the fact that substituted compliance is intended as a tool to ensure that the CFTC's supervisory expectations are met: it is not a means to bypass regulation.

We note that the availability of substituted compliance should in any case by contingent on the foreign jurisdiction having in place rules that achieve comparable outcomes based on a substantive analysis of the relevant entity-level or transaction-level requirement, as relevant (even if their precise formulation differs), including in areas such as impartial access to trading venues.

(33) Is it practicable for non-U.S. swap entities to utilize substituted compliance for transactions with non-U.S. persons?

See response to Question 27.

[12] 85 FR 997.

[13] Ibid.

(37) How did/does the approach to substituted compliance in the Guidance positively and negatively impact market practices? Please provide any data in support of your comment.

The approach to substituted compliance in the Guidance must be viewed in light of the U.S. Person definition provided therein. Given the overly expansive nature of that definition, particularly with respect to collective investment vehicles, the lack of availability of substituted compliance for transactions involving U.S. Persons effectively subjected funds to CFTC rules even when their primary nexus was in another jurisdiction, while providing them with no means with which to deal with the consequent overlap in regulatory regimes.

As noted in our response to Question 32, we continue to see value in taking a broad approach to substituted compliance that recognizes that a U.S. Person might be a party to a swap transaction with a non-U.S. Person that is subject to the rules of another jurisdiction. It is important that substituted compliance is available in such situations. This is comparable to the approach taken under EMIR, whereby equivalence is available when either one or both of the parties to an in-scope transaction is subject to the rules of an equivalent jurisdiction.

(39) Should comparability determinations contain an element-by-element assessment of comparability?

We believe that comparability determinations should have regard to the comparability of outcomes achieved by regulatory requirements, rather than being based on an assessment of whether they fully correspond in terms of their detailed elements. For each relevant entity-level or transaction-level requirement, a substantive analysis should be performed to ensure the foreign regulatory regime achieves a comparable outcome.

(40) How should the Commission address inconsistencies or conflicts between U.S. and non-U.S. regulatory standards?

We believe that the CFTC should use its dialogue with other regulators – both bilaterally and with IOSCO – to promote better alignment of respective regulatory regimes, while focusing on the broader comparability of the outcomes they achieve.