March 9, 2020

VIA ELECTRONIC SUBMISSION

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, D.C. 20581

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

Dear Mr. Kirkpatrick:

BGC Partners[1] ("BGC") and Tradition America Holdings Inc.[2] ("Tradition" and, together with BGC, the "Companies") appreciate the opportunity to respond to the U.S. Commodity Futures Trading Commission's ("CFTC" or "Commission") proposal related to the cross-border application of the registration thresholds and certain requirements applicable to swap dealers and major swap participants (the "Proposal").[3]

The Companies respectfully request that the Commission confirms that non-U.S. introducing brokers ("IBs") engaged in soliciting or accepting swap orders from customers, including U.S. person swap dealers,[4] may comply with the applicable rules in the relevant non-U.S. jurisdictions without duplicative regulatory liability under the Commodity Exchange Act ("CEA") and

[1] BGC Partners is a leading global brokerage company servicing the financial and real estate markets. We are experts in our fields, agile and dynamic in our approach, and built upon the foundation of cutting edge technology and exceptional talent. Among our global businesses is BGC Brokers, L.P., a registered Investment Firm with the Financial Conduct Authority and a registered introducing broker ("IB") with the National Futures Association ("NFA"). BGC Partners also operates swap execution facilities ("SEFs") through its subsidiaries BGC Derivative Markets, L.P. and GFI Swaps Exchange LLC.

[2] Tradition America Holdings Inc. is the holding company for Compagnie Financière Tradition's U.S. brokerage businesses, which includes multiple registered IBs, broker dealers, and Tradition SEF, Inc., which was granted registration as a SEF by the U.S. Commodity Futures Trading Commission on January 22, 2016. Compagnie Financière Tradition is one of the world's top interdealer broking firms, with a presence in 29 countries, acting as a marketplace and an intermediary. Compagnie Financière Tradition facilitates transactions between financial institutions and other professional traders in the global capital, money, interest rate and currency derivative, equity and equity derivative, bonds and repurchase agreement, and credit derivative markets.

[3] 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) [hereinafter the "Proposal"].

[4] For purposes of this response, U.S. person swap dealers includes non-U.S. affiliated legal entities that are under the control of or guaranteed by U.S. persons.

corresponding Commission regulations. This regulatory certainty will allow operators of global swaps liquidity platforms to conduct business that does not constitute "direct and significant" U.S. activity with appropriate, but not duplicative, regulatory oversight in the jurisdiction in which it functions.

The Companies support the Commission's work to "support a cross-border framework that promotes the integrity, resilience, and vibrancy of the swap market while furthering the important policy goals of the [Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act")]."[5] We believe that written confirmation of the Commission's position on the narrow issue presented by the Companies will help promote a healthy regulatory relationship among jurisdictions and further foster global liquidity formation in a manner that will benefit end-user customers seeking to hedge interest rate, currency, and other commercial risk around the world. Furthermore, it will allow companies to deploy resources with regulatory certainty in the best manner to support future economic growth in response to customers' needs.

As described below, the Companies believe that, consistent with the Proposal, providing regulatory certainty for swaps between counterparties, including U.S. person swap dealers, initiated by non-U.S. IBs, even if executed on a SEF, (i) are not "direct and significant" under CEA section 2(i); (ii) would promote global liquidity formation, ultimately improving market prices for end-users; (iii) is consistent with statements issued at the 2009 G20 Pittsburgh Summit and principles of international comity; and (iv) reflects the cross-border approaches articulated by the Commissioners. Should the Commission decide not to provide this clarity, the Companies request that the CFTC provide guidance on how these foreign operations may avail themselves of relief through substituted compliance or another form of mutual recognition.

I. Non-U.S. Trading Venues and IBs Do Not Have a Direct and Significant Connection with Activities in, or Effect on, Commerce of the United States

The Companies support the Commission's analysis related to CEA section 2(i)[6] and what constitutes "direct and significant." Specifically, the Companies agree that the appropriate approach is "to apply the swap provisions of the CEA to activities outside the United States that have either: (1) A direct and significant effect on U.S. commerce; or, in the alternative, (2) a direct and significant connection with activities in U.S. commerce, and through such connection present the type of risks to the U.S. financial system and markets that Title VII directed the Commission to address."[7]

The Companies do not believe that the IB activity that takes place outside the United States merits application of the CEA swap provisions for either of the two enumerated reasons.

First, the activity does not have a direct and significant effect on U.S. commerce. For the Companies, their non-U.S IB activity is generally limited to interest rate swaps and foreign exchange ("FX") swaps and, even then, generally only for swaps activity between counterparties

[5] *Id.* at 954.

[6] 7 U.S.C. § 2(i).

[7] Proposal, *supra* note 3, at 956.

and related to fiat currencies directly connected to the jurisdiction. Collectively, our IBs operate in diverse markets around the world, including in Europe, the United Kingdom, Singapore, Hong Kong, Mexico, Chile, and Colombia. In many of these jurisdictions, the Companies facilitate trading across a range of instruments, including swaps, for a wide variety of customers, including some U.S. persons. It is the interaction between the non-U.S. IB and a U.S. person swap dealer customer that raises the issues of IB registration, and CFTC and National Futures Association ("NFA") oversight, despite the entity already being subject to the home country's regulations and oversight.

In terms of volume, when compared with the global swaps market, the non-U.S IB's role is minimal. The Companies estimate that less than five percent of their non-U.S. IB affiliates' volume is arranged on behalf of U.S. person customers and subsequently presented to a SEF. These transactions are largely in products such as non-U.S. dollar interest rate swaps and regional fiat currency FX swaps. The remaining 95% of the non-U.S. IB's business is executed in local markets on behalf of local or non-U.S. person counterparties. Non-U.S. dollar interest rate swaps and foreign exchange swaps comprise a small fraction of the total U.S. swaps market. From a risk or volume perspective, the cumulative impact of the five percent of the non-U.S. IB's activity is further diluted, as SEF transactions represent a fraction of the U.S. swaps market as a whole. This activity, which is certainly less than one percent of the overall swaps market in the United States, fails to rise to a level even remotely close to having a direct and significant effect on U.S. commerce.

Second, the activity has neither a direct and significant connection with activities in U.S. commerce (as described above) nor does the activity present the types of risks to the U.S. financial system and markets that Title VII of the Dodd-Frank Act directed the Commission to address. The non-U.S. IB's role does not have a direct and significant connection with U.S. commerce. The IBs conduct their business from outside the United States, meaning that the solicitation or acceptance of orders for the purchase or sale of a swap takes place outside the United States. Furthermore, the IB's activity fails to present any risks to the U.S. financial system or markets. The IB merely solicits or accepts orders. It does not take positions itself or act as the guarantor of any counterparty in a risk transfer transaction. By contrast, the U.S. person swap dealer (the entity engaged in the actual risk-generating activity) will still face comprehensive regulation by the CFTC. Thus, the IB activity does not have a direct and significant connection with U.S. commerce.

Finally, the three core goals of the Dodd-Frank Act are trade execution, central clearing, and post-trade reporting. Non-U.S. IB activity is not one of the risks that Title VII seeks to primarily address, further supporting the conclusion that the non-U.S. IB activity the Companies seek clarity on is not part of the activity that presents the types of risk Congress wants the Commission to address. To the extent the U.S. swap dealer is engaging in activity outside the United States in a manner that rises to a level meriting CFTC jurisdiction, the swap dealer remains subject to the Commission's rules and oversight for its swap dealing activity (including, for example, margin, capital, business conduct standards, and swap data repository reporting).

The Companies believe this position is consistent with the approach set forth in the Proposal with respect to a non-U.S. swap dealer that regularly uses personnel or agents located in the

United States to arrange, negotiate, or execute a swap with a non-U.S. person ("ANE Transactions"). In the Proposal, the Commission cites "respect for international comity, and the Commission's desire to focus its authority on potential significant risks to the U.S. financial system" to support a conclusion that "ANE Transactions will not be considered a relevant factor for purposes of applying the [Proposal]."[8]

We believe the same analysis, as described in this letter, applies for non-U.S. IBs engaged in the solicitation and acceptance of orders outside the United States and raised by questions 26-28 in the Proposal. Like the Commission did with respect to ANE Transactions, we encourage the Commission to exclude non-U.S. IBs from the CFTC's regulatory capture. We believe that the Commission's experience with ANE Transactions, finding that "the Commission has not found a negative impact on either its ability to effectively oversee non-US swap entities, nor the integrity and transparency of U.S. derivatives markets,"[9] should provide the Commission with the relevant experience to grant the clarity requested by the Companies without concern about regulatory oversight or market integrity.

II. Excluding Non-U.S. Trading Venues and IBs Would Promote Liquidity Formation and Improve Market Conditions

As operators of global marketplaces, the Companies appreciate the Commission's recognition that

> financial groups typically prefer to operate their swap dealing businesses and manage swap portfolios in the jurisdiction where the swaps and the underlying assets have the deepest and most liquid markets. In operating their swap dealing businesses in these market centers, financial groups seek to take advantage of expertise in products traded in those centers and obtain access to greater liquidity. These arrangements permit them to price products more efficiently and compete more effectively in the global swap market, including in jurisdictions different from the market center in which the swap is traded.[10]

BGC, Tradition, and other similar firms that service customers around the world are sensitive to how regulation can impede market expansion. Indeed, even the Commission recognizes that "[m]arket fragmentation can reduce the capacity of financial firms to serve both domestic and international customers."[11]

In response to question 37 in the Proposal, from a liquidity formation perspective, allowing non-U.S. IBs to solicit and accept offers in non-U.S. jurisdictions, even from U.S. person customers, without CFTC/NFA registration would provide meaningful relief to reduce the prevalence of bifurcated markets between U.S. and non-U.S. pools of liquidity. In response to questions 35 and 36 in the Proposal, providing the requested clarity might encourage U.S. banks to transact globally using a U.S. entity rather than conducting some activity through non-guaranteed foreign

[8] *Id.* at 978.

[9] *Id.*

[10] *Id.* at 954.

[11] *Id.*

affiliates. The market would benefit from improved, consolidated liquidity, while from a regulatory transparency standpoint, the CFTC would still, for example, enjoy access to U.S. swap dealers' transaction activity through swap data reporting and registrant books and records requirements, as well as anti-fraud and anti-manipulation authority over the U.S. person swap dealer. Furthermore, this clarity would allow non-U.S. IBs to provide U.S. swap dealers with access to regional or local liquidity, benefiting the counterparties and markets by creating a more competitive price discovery environment.

Rather than applying the traditional futures IB regime on non-U.S. swaps IBs predominantly servicing customers in non-U.S. markets, we believe the Commission should provide clarity to this important part of the market, allowing IBs (and IB customers) to conduct non-U.S. swaps activity with regulatory certainty about the application of the CFTC's rules on these entities.

III. Allowing Non-U.S. Trading Venues and IBs to Comply Solely with Home Country Rules Reflects the G20 Global Approach to Global Swaps Regulation and is Consistent with Principles of International Comity

We were encouraged the Commission recognizes the Proposal, and by extension its rules, should reflect "the continued operation of markets that are much more comprehensively regulated than they were before the Dodd-Frank Act and the actions of governments worldwide taken in response to the Pittsburgh G20 Summit."[12] This observation is particularly true for the larger, more sophisticated global financial markets, where liquidity attracts market participants from around the world. For those geographic venues where transaction volumes may reach systemic importance, particularly those that pose a risk to the United States financial markets, the regulatory landscape has significantly shifted in the last decade.

For example, many countries in which the Companies have registered IBs have adopted comparable regulations for swaps market oversight. Unlike a decade ago, many of these countries now have clear rules for entities engaged in the solicitation or acceptance of orders in local swaps markets in a manner consistent with the agreements reached at the 2009 G20 Pittsburgh Summit.

The Companies are subject to regulation in multiple jurisdictions. We assume significant operational and compliance burdens, and we work tirelessly to comply with each jurisdiction's regulations. For example, in Europe and the United Kingdom, the Companies operate multiple regulated Investment Firms, including registered multilateral trading facilities and organized trading facilities subject to European and United Kingdom regulatory authorities. In Singapore, the Companies operate registered derivatives trading venues subject to the regulation of the Monetary Authority of Singapore. The CFTC has granted mutual recognition and orders exempting several of these venues from SEF registration with the Commission.

The lack of a clear nexus between our activity and the United States raises questions about the utility of CFTC and NFA oversight, particularly when non-U.S. IBs are already subject to domestic regulation. Maintaining a foreign swaps IB registration solely for the purpose of

[12] *Id.*

facilitating the introduction of swaps transactions in non-U.S. jurisdictions to SEFs is a costly, resource-intensive expenditure with no, or limited, benefit to the IB, the IB's customer, and the local marketplace. It also does not provide any meaningful, additional regulatory benefit to the Commission, which already conducts oversight of the swap dealer counterparties and the swap data reported to the swap data repository.

Finally, as the Commission discusses in the Proposal regarding principles of international comity, requiring non-U.S. IBs to maintain their CFTC and NFA regulatory status would fail to "mitigate burdens associated with potentially conflicting foreign laws and regulations in light of the supervisory interests of foreign regulators in entities domiciled and operating in their own jurisdictions."[13] We urge the Commission, for each of these reasons, to provide the clarity necessary so that global market participants can more efficiently deploy compliance resources, establish the primacy of home country regulation, and focus attention on market liquidity formation and business services expansion.

IV. Allowing Non-U.S. Trading Venues and IBs to Comply Solely with Home Country Rules is Consistent with Commissioners' Statements

We believe that our request closely aligns with Chairman Heath Tarbert's observation that the Commission "must not regulate swaps activities in far flung lands simply to prevent every risk that might have a nexus to the United States."[14] Allowing non-U.S. IBs to engage in this limited activity without CFTC or NFA regulatory oversight, when laid on top of the IB's home country regulations, would be inconsistent with the Chairman's philosophy that the Commission "should adopt a regulatory regime that we would like all other jurisdictions to follow as if it were a universal law."[15] In other words, for reasons related to limited resources and international comity, among others, the Commission should allow non-U.S. IBs to conduct business outside the United States in compliance with the home country's local rules, regulations, and customs, and in return, other jurisdictions will grant comparable deference to the CFTC for its regulations governing U.S. markets and U.S. market participants.

For these same reasons, we support Commissioner Brian Quintenz's approach that the Commission should "avoid duplicative regulation or disadvantaging U.S. commercial and financial institutions acting in foreign markets."[16] We believe Commissioner Quintenz's stated principle can be applied to the case of non-U.S. IBs and reach a reasonable conclusion that the non-U.S. IB, even if soliciting or accepting offers from U.S. swap dealers, merits CFTC regulation that duplicates efforts undertaken in the home country's jurisdiction.

We hope that Commissioner Rostin Behnam and Commissioner Dan Berkovitz will be receptive to these comments and consider, as part of the Commission's effort to periodically review the

[13] *Id.* at 958.

[14] *Id.* at 1006.

[15] *Id.*

[16] *Id.* at 1008.

Commission's Title VII suite of rules, this important and discrete set of issues related to swap dealing and related activities outside the United States.

V. Alternative Affirmative Steps the Commission Can Take to Promote Global Liquidity Formation through IBs

We reiterate our request that the Commission confirm that non-U.S. IBs engaged in soliciting or accepting swaps orders from customers, including U.S. person swap dealers, may comply with the applicable rules in the relevant non-U.S. jurisdictions without duplicative regulatory liability under the CEA and corresponding Commission regulations.

However, if the Commission will not provide that clarity, the Companies request that the Commission provide guidance on how these foreign operations may avail themselves of substituted compliance or another form of mutual recognition. The Commission could look, for example, to the NFA's model for "foreign registrants" to establish a regime that provides clarity on the CFTC's registration requirements and when deference to home country regulation is appropriate. The Companies believe that the activity described in this letter fails to rise to the level of "direct and significant" activity that Congress contemplated when fashioning CEA section 2(i).

Non-U.S. operations that promote price discovery and market liquidity should neither face duplicative regulation by the home country regulator and the CFTC nor bear the unnecessary regulatory costs and burdens associated with competing rule sets. Furthermore, a path to regulatory clarity would remove impediments that obstruct global liquidity formation. And, on top of all of these factors, the IB oversight fails to provide the CFTC with any particular regulatory insight or information that provides any material benefit beyond that already made available through swap dealer registration, regulation, and post-trade swap data reporting.

Finally, consistent with the Commission's approach in the Proposal to ANE Transactions, we respectfully request that the Commission consider including trade execution in the same manner as the Proposal's Group C Requirements.[17] This would ensure that regulated swaps trading, like the risk-neutral activities addressed in the Proposal, are treated in a similar fashion. Similarly, the Commission should consider the issuance of corresponding relief from the CFTC's swaps trading rules for ANE Transactions where U.S. intermediaries or platforms are merely operating in an execution capacity for non-U.S. swap entities. Absent such relief, the global swaps market will continue to face regulatory uncertainty regarding the application of trading rules in a cross-border context.

[17] *Id.* at 982.

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We appreciate the opportunity to provide our comments to the CFTC on these issues and look forward to discussing them with you. Any questions about this letter may be directed to the undersigned.

Sincerely,

William Shields Head of Compliance, Americas BGC Partners	Judith Ricciardi Chief Financial Officer Tradition America Holdings Inc.