Institute of International Bankers

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Invested in America

September 14, 2015

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

Re: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, RIN 3038-AC97

Dear Mr. Kirkpatrick:

The Institute of International Bankers ("IIB")[1] and the Securities Industry and Financial Markets Association ("SIFMA")[2] appreciate this opportunity to provide the Commodity Futures Trading Commission (the "Commission" or "CFTC") with comments on the Commission's proposed rules (the "Proposal")[3] regarding the cross-border application of initial and variation margin ("OTC margin") requirements for uncleared swaps for swap dealers and major swap participants ("Swap Entities") that do not have a Prudential Regulator[4] ("Covered Swap Entities" or "CSEs"). The

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1 The IIB is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions. Further information is available at www.iib.org.

2 SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

3 80 Fed. Reg. 41,376 (July 14, 2015).

4 In this letter, "Prudential Regulators" refers to the Board of Governors of the Federal Reserve System (the "Federal Reserve Board"), the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency and the Farm Credit Administration.

Commission published its proposed OTC margin rules in October 2014[5] (the "CFTC Margin Proposal") and the Prudential Regulators published their proposed OTC margin rules in September 2014[6] (the "Bank Margin Proposal"). We welcome the Commission's decision to seek further input from the public regarding this important topic.

INTRODUCTION

As the Commission recognizes, U.S. and foreign regulators have concurrent interests in regulating cross-border swap activity. Resulting differences in OTC margin requirements can lead to significant competitive disparities that are inherently undesirable and that degrade cross-border liquidity.

We appreciate the Commission's efforts to address these considerations. In particular, we have strongly supported the Commission's active participation in the work of the Basel Committee on Banking Supervision ("BCBS") and the International Organization of Securities Commissions ("IOSCO") to establish consistent international standards for OTC margin requirements (the "BCBS-IOSCO Framework").[7] The international harmonization reflected in the BCBS-IOSCO Framework, if incorporated in the OTC margin rules adopted by participating regulators,[8] should ensure a consistent level of risk mitigation and eliminate key sources of competitive disparity.

We are deeply concerned, however, that the Proposal's contemplated approach to, and limits on the availability of, substituted compliance would undermine the hard-won gains reflected in the BCBS-IOSCO Framework. The Proposal reveals a perspective on the comparability analysis that underpins substituted compliance in which the forest has been lost for the trees; this perspective is fundamentally at odds with the objectives of substituted compliance and mutual recognition. Particularly if foreign regulators adopt reciprocal positions, the resulting risks, costs and complexity would deter non-U.S. market participants from trading with U.S. market participants. Given the limited liquidity exhibited for many types of uncleared swaps, an increase in the concentration of trading and credit exposures among regional market participants should be highly undesirable from a systemic risk perspective.

Such a limited approach to substituted compliance is unnecessary in light of the broad scope of substantive international consensus reflected in the BCBS-IOSCO Framework. Among jurisdictions that adhere to the BCBS-IOSCO Framework, differences in OTC margin requirements should be limited to matters such as technical definitions for covered entities and lists of eligible collateral. Those differences are

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5 See 79 Fed. Reg. 59,898 (Oct. 3, 2014).

6 See 79 Fed. Reg. 57,348 (Sept. 24, 2014).

7 BCBS and IOSCO, Margin requirements for non-centrally-cleared derivatives (Sept. 2013, rev. Mar. 2015).

8 As noted in Part I.A.1 below, the CFTC Margin Proposal would depart from the BCBS-IOSCO Framework in certain respects that we believe to be unwarranted.

highly unlikely to result in material differences in the aggregate level of reduction in bilateral credit risk and leverage. The vast bulk of uncleared swaps will be subject to full, daily variation margin requirements and stringent initial margin requirements.

Further measures are also necessary to balance the benefits of OTC margin requirements against the costs of foreclosing access by U.S. and U.S.-controlled CSEs to key emerging foreign markets. Counterparties located in those markets are unlikely to want, and in some cases may be unable, to establish the specific documentation, collateral management and custodial arrangements necessary to satisfy U.S. OTC margin requirements. If U.S. and U.S.-controlled CSEs cannot effectively offer swaps to emerging market counterparties, they will not only lose swap business to regional competitors, they may also lose significant related banking relationships with counterparties in those markets. The negative impact on these other relationships would far outweigh the risks mitigated by the application of OTC margin requirements in those markets, due to the limited volume of swaps involved.

Direct limits on the risks incurred by U.S. and U.S.-controlled CSEs as a result of their trading in emerging markets could achieve the same intended outcome at less cost and with significantly less disruption. In order to promote competitive parity across jurisdictions that implement the BCBS-IOSCO Framework, the Commission should coordinate with the Prudential Regulators and key foreign regulators to adopt consistent approaches to emerging market counterparties based on such risk limits.

DISCUSSION

I. Substituted Compliance

The Proposal would institute a highly complex, and ultimately quite limited, approach to substituted compliance. Just to determine the extent to which it could rely on substituted compliance for its swaps with a CSE, a non-U.S. counterparty would need to determine which of five categories the CSE falls into and, depending on the CSE's category, which of eleven different elements of the OTC margin framework are eligible for substituted compliance. If substituted compliance is not available, then the non-U.S. counterparty would need to satisfy overlapping and sometimes conflicting rules. Faced with these obstacles, many non-U.S. market participants would simply avoid cross-border trading with U.S. counterparties.

As described in greater detail below, an alternative approach premised on a holistic, outcomes-based analysis of foreign OTC margin regimes would be equally protective to the U.S. financial system, less costly and disruptive, and more consistent with both Congress's intent in admonishing the Commission to seek international harmonization[9] and the BCBS-IOSCO Framework's requirement to promote consistent and non-duplicative OTC margin requirements.[10]

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9 See Section 752(a) of the Dodd-Frank Act.

10 BCBS-IOSCO Framework at p. 23.

A. Limited Availability of Substituted Compliance for U.S. CSEs and Guaranteed Non-U.S. CSEs

Under the Proposal, the Commission's OTC margin rules would apply to all uncleared swaps entered into by a CSE that is either a U.S. person[11] (a "U.S. CSE") or a non-U.S. person whose obligations under the swap are guaranteed[12] by a U.S. person (a "Guaranteed Non-U.S. CSE").[13] Such a CSE would not be eligible for substituted compliance except in connection with its obligation to post initial margin to a non-U.S. counterparty whose obligations under the swap are not guaranteed by a U.S. person.[14]

1. Limiting the Availability of Substituted Compliance is Not Necessary to Mitigate Risk to the U.S.

Because the BCBS-IOSCO Framework is both broad in scope and detailed in its prescriptions, comparable foreign OTC margin rules will be very similar to U.S. OTC margin rules. Those rules will cover all non-centrally-cleared derivatives (with limited exceptions for certain physically settled foreign exchange transactions)[15] entered into by all financial entities and systemically important non-financial entities.[16] They will require those covered entities to exchange initial margin calculated under an approved quantitative model calibrated using the same 99 percent confidence interval and 10-day liquidation horizon parameters contemplated under the CFTC Margin Proposal, subject to a €50 million threshold roughly equivalent to the Commission's proposed $65 million threshold.[17] Such initial margin will be subject to segregation requirements and limits on rehypothecation.[18] Covered entities will also be required to exchange full variation margin on a daily basis, without any threshold.[19] Eligible collateral will be limited to high-quality, liquid assets.[20]

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[11] Our comments on the Commission's proposed "U.S. person" definition are contained in Section III.A below.

[12] Our comments on the Commission's proposed "guarantee" definition are contained in Section III.B below.

[13] Proposed CFTC Rule § 23.160(b)(1)(i).

[14] Proposed CFTC Rule § 23.160(b)(1)(ii).

[15] BCBS-IOSCO Framework at p. 7-8.

[16] Id. at p. 10.

[17] Id. at p. 10-15.

[18] Id. at p. 19-20.

[19] Id. at p. 15-16.

[20] Id. at p. 17-19.

Even in the more detailed rule provisions where the CFTC Margin Proposal would depart from the BCBS-IOSCO Framework, we do not believe that requiring U.S. CSEs and Guaranteed Non-U.S. CSEs to comply with the Commission's OTC margin rules, instead of comparable foreign OTC margin rules, would, in the aggregate, have a material risk mitigation impact.

For example, the CFTC Margin Proposal includes a lower $3 billion aggregate notional threshold before initial margin requirements would apply to a financial end user,[21] instead of the €8 billion notional threshold contemplated by the BCBS-IOSCO Framework.[22] This lower notional threshold would require a CSE to exchange more initial margin with a financial end user only if the end user's aggregate notional swap portfolio falls between the $3 billion and €8 billion notional thresholds and its bilateral swap portfolio with the CSE results in an initial margin requirement that exceeds the $65 million initial margin threshold. Based on the Commission's estimate that initial margin requirements would equal approximately 2.1 percent of the notional amount of a bilateral swap portfolio, we note that the lower notional threshold would only affect financial end users who concentrate more than a quarter of their trading volume with a single CSE. Although the Commission might view it as desirable to require more initial margin in these circumstances, it is not possible to conclude that the higher BCBS-IOSCO notional threshold would result in a material aggregate increase in unmargined risk without further analysis as to the concentration of credit risk in the uncleared swaps markets.

The CFTC Margin Proposal would also depart from the BCBS-IOSCO Framework by limiting variation margin to U.S. dollars or a swap's settlement currency.[23] To satisfy this requirement, many financial end users (such as pension plans, insurance companies and mutual funds) would likely enter into so-called "collateral transformation" arrangements (such as committed repo lines) with CSEs and their affiliates. Entering into one of these arrangements with a financial end user in lieu of collecting non-cash variation margin would increase the financial end user's costs of trading, resulting in a significant anti-competitive impact on U.S. CSEs and Guaranteed Non-U.S. CSEs when trading abroad. Conversely, with stringent standards for eligible collateral and conservative collateral haircuts, it is simply not credible to conclude that the use of non-cash variation margin raises systemic concerns or materially increases risk to CSEs (either individually or in the aggregate), even though the Commission may

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21 See CFTC Proposed Rule § 23.151 (definition of "material swaps exposure").

22 See BCBS-IOSCO Framework at p. 10.

23 CFTC Proposed Rule § 23.156(b). In its November 2014 comments to the Commission on the CFTC Margin Proposal (the "November 2014 SIFMA Letter"), SIFMA recommended that the Commission permit non-cash variation margin in order to promote international consistency and prevent undue reliance on collateral transformation arrangements that will increase operational and settlement costs and risks, without demonstrable offsetting systemic risk mitigation benefits. November 2014 SIFMA Letter at p. 22-23.

rightly conclude (and many market professionals might agree) that cash variation margin is, as a general matter, preferable.

2. Limiting the Availability of Substituted Compliance Would Result in Overlapping Rules that Deter Cross-Border Trading and Increase Risk

There are also areas where the CFTC Margin Proposal could be regarded as less stringent than the BCBS-IOSCO Margin Framework and thus less protective to U.S. CSEs and Guaranteed Non-U.S. CSEs. One example involves the scope of covered entities. The CFTC Margin Proposal would not apply OTC margin rules at all to non-financial end users, even those that are systemically important and have significant swap exposures. Another example involves the scope of covered products. Statutory jurisdictional limits included in the Dodd-Frank Act limit the CFTC Margin Proposal to a narrower scope of products than those covered by the BCBS-IOSCO Framework. Specifically, as a result of the determination by the Department of the Treasury to exempt physically settled foreign exchange swaps and forwards from the Dodd-Frank Act's "swap" definition,[24] such products would be subject solely to prudential supervisory variation margin requirements,[25] not to CFTC margin requirements. Similarly, the exclusion from the "swap" definition for securities options excludes such options from CFTC margin requirements.

If the Commission limits the availability of substituted compliance, it will set an example that will influence foreign regulators to adopt reciprocal limits on equivalence based on factors such as those summarized immediately above. The result would be inconsistent with the Dodd-Frank Act's mandate for international harmonization[26] and the principle in the BCBS-IOSCO Framework that "[w]hen a transaction is subject to two sets of rules (duplicative requirements), the home and the host regulators should endeavour to (1) harmonise the rules to the extent possible or (2) apply only one set of rules, by recognising the equivalence and comparability of their respective rules."[27] Under this principle, if the lack of harmonization between U.S. and foreign OTC margin rules would be sufficient to cause non-U.S. counterparties to avoid trading with U.S. counterparties, but the two rule sets remain comparable to each other, then the Commission should recognize such comparability by permitting substituted compliance.

Absent harmonization beyond that contemplated under the CFTC Margin Proposal, overlapping application of U.S. and foreign OTC margin rules would give rise to risks, costs and complexities that would deter cross-border trading activity. For

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[24] See 77 Fed. Reg. 69,694 (Nov. 20, 2012).

[25] See Federal Reserve Board, Supervisory Letter SR 13-24: Managing Foreign Exchange Settlement Risks for Physically Settled Transactions (December 23, 2013).

[26] See Section 752(a) of the Dodd-Frank Act.

[27] BCBS-IOSCO Framework at p. 23.

example, unless the Commission clarifies how its OTC margin rules apply to netting sets that include both uncleared swaps and other OTC derivatives (such as OTC securities options) that fall outside the Commission's jurisdiction,[28] then a non-U.S. market participant could not simultaneously comply with home country and U.S. OTC margin rules when trading with a U.S. CSE or Guaranteed Non-U.S. CSE without breaking up its netting set by trading different products under different eligible master netting agreements. Because this step would increase bilateral credit risk, non-U.S. market participants are unlikely to take it.

The need for non-U.S. market participants to categorize themselves under U.S. rules would also deter cross-border trading activity. Specifically, the CFTC Margin Proposal would define as a "financial end user" any foreign entity that would be a financial end user if organized in the U.S.[29] Any such determination would require analysis under a wide range of U.S. Federal and State regulatory regimes. In practice, neither CSEs nor their non-U.S. counterparties would be well-positioned to make such a determination. CSEs will not know sufficient information about all the businesses engaged in by their foreign counterparties. Non-U.S. counterparties will not be familiar with all the U.S. laws that are relevant to the determination. They also will not understand why they must now retain U.S. legal counsel to advise on their status under dozens of U.S. registration or licensing requirements, at non-trivial legal cost, when they are not conducting business in the U.S. (or in some cases even with a U.S. person).

In addition, there will almost certainly be relatively minor differences in how U.S. and foreign regulators address technical issues, such as the impact of time zone differences on margin collection deadlines, the currency denomination of thresholds and minimum transfer amounts, the definitions for collateral asset categories (where those categories overlap), and the mechanics for holding, substituting and reinvesting segregated margin. If U.S. and foreign OTC margin rules apply in an overlapping manner, these minor differences would add significant complexity to the necessary systems, controls and documentation. Such complexity would increase the likelihood of inadvertent non-compliance and margin disputes.

Rather than face these issues, non-U.S. market participants would likely avoid trading with U.S. CSEs and Guaranteed Non-U.S. CSEs. Reducing the number of available counterparties would increase risks and liquidity costs to U.S. CSEs and Guaranteed Non-U.S. CSEs, especially during times of market stress when liquidity becomes more scarce. The resulting increased concentration of bilateral credit exposures among U.S. CSEs and Guaranteed Non-U.S. CSEs would also increase the risk of contagion in the U.S. markets. Neither of these consequences would be consistent with

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28 To address this issue, SIFMA previously recommended that the Commission permit risk offsets for positions in these other types of OTC derivatives. See November 2014 SIFMA Letter at p. 23-25.

29 See Proposed CFTC Rule § 23.151.

the safety and soundness objective in Section 4s(e) of the Commodity Exchange Act ("CEA").

Limiting the availability of substituted compliance to U.S. CSEs would also increase the likelihood that the Commission's proposal to require the two-way exchange of initial margin in connection with inter-affiliate swaps would discourage centralized, group-wide risk management.[30] In particular, one possible response to inter-affiliate initial margin requirements would be to limit the number of subsidiaries through which a group trades with third parties and thus reduce the need for inter-affiliate transactions. Under the Proposal, however, such an approach would be impractical because non-U.S. market participants would not want to trade with U.S. subsidiaries or their foreign branches. Instead, to trade abroad competitively, a U.S.-based holding company group would need to trade through a non-U.S. subsidiary whose swap obligations are not guaranteed by a U.S. person. At the same time, applying initial margin requirements to that non-U.S. subsidiary's swaps with U.S. affiliates would encourage the non-U.S. subsidiary instead to manage all its risk locally by hedging with local, non-U.S. third parties.[31] This result directly contradicts the Commission's requirement for CSEs to adopt centralized, group-wide risk management programs,[32] as well as common-sense regulatory policy.

It also would, on an aggregate basis, increase systemic risk and complicate resolution of systemically important financial institutions by increasing interconnectedness among CSEs, results squarely at odds with other fundamental policy objectives of the Dodd-Frank Act.

In light of the foregoing considerations, we recommend that substituted compliance be made available to U.S. CSEs and Guaranteed Non-U.S. CSEs with respect

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30 In the November 2014 SIFMA Letter, SIFMA recommended that the Commission adopt exceptions from initial margin requirements for inter-affiliate swaps, subject to appropriate risk-mitigating conditions. November 2014 SIFMA Letter at p. 13-16. IIB made a similar recommendation in its comment letter on the CFTC Margin Proposal. See Letter from Sarah A. Miller, CEO, IIB, dated November 24, 2014.

31 For example, consider a U.S. CSE that sells a €200 million notional credit default swap on a European index to a U.S. counterparty and hedges that swap by buying a mirror €200 million notional swap from a U.K. affiliate that is already long €100 million notional in protection on that index. The U.K. affiliate then hedges itself by buying an additional €100 million notional in protection from a third party. Assuming that initial margin requirements for these transactions equal approximately 4% of notional, the U.S. CSE's group would post €16 million in initial margin to third parties but would also have to segregate an additional €16 million in initial margin for the inter-affiliate swap, for a total of €32 million. If, in contrast, the U.S. CSE had bought €200 million notional in protection from a third party and its UK affiliate had sold €100 million in protection to a third party, the group's total initial margin burden would decrease 25% to €24 million. However, group-wide notional credit exposure to third parties would increase 50% to €600 million.

32 See CFTC Regulations § 23.600(c)(1)(ii) (requiring a CSE's risk management program to be integrated into risk management at the consolidated entity level).

to all aspects of OTC margin requirements, including posting and collecting both initial and variation margin, in all circumstances where either the CSE or its counterparty is located in a jurisdiction that has adopted a comparable OTC margin regime (or is otherwise subject to such a comparable OTC margin regime).

B. Element-by-Element Approach to Comparability Determinations

Under the Proposal, the Commission's analysis of a foreign margin regime would begin by determining whether that regime conforms to the BCBS-IOSCO Framework.[33] The Commission would then proceed to make a separate comparability determination (or not) with respect to each of eleven minimum elements of the OTC margin framework.[34]

Given the extensive similarity that will exist across BCBS-IOSCO-compliant margin rules, as described in Part I.A.1 above, element-by-element comparability determinations would neither be warranted nor consistent with the "outcomes-based approach" to substituted compliance that the Commission states it plans to take.[35] Indeed, we question whether such a granular approach to comparability determinations would be consistent with any meaningful concept of "substituted compliance," in particular because it would require consistency at a level of detail that ignores the overall risk mitigating impact of the compared regimes.

Element-by-element comparability determinations could often subject a CSE to a patchwork of U.S. and foreign margin rules. Reciprocal approaches by foreign regulators would in turn lead to overlapping rules for certain elements of the OTC margin framework. The resulting risks, costs and complexity would pose similar adverse consequences to those resulting from the Proposal's *per se* limits on substituted compliance for U.S. CSEs and Guaranteed Non-U.S. CSEs, which we described in Part I.A.2 above. As in that context, we are concerned that overlapping OTC margin rules would act as a significant deterrent to cross-border trading.

Element-by-element comparability determinations would also undermine the Commission's plan to use substituted compliance as a mechanism for balancing competing U.S. and foreign supervisory interests when applying its OTC margin rules to

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33 See Proposal, 80 Fed. Reg. at 41,389.

34 See id. at 41,389-90. Those elements would be: (1) the transactions subject to the foreign jurisdiction's margin rules; (2) the entities subject to the foreign jurisdiction's margin rules; (3) the methodologies for calculating the amounts of initial and variation margin; (4) the process and standards for approving models for calculating initial and variation margin requirements; (5) the timing and manner in which initial and variation margin must be collected and/or paid; (6) any threshold levels or amounts; (7) risk management controls for the calculation of initial and variation margin; (8) eligible collateral for initial and variation margin; (9) the requirements of custodial arrangements, including rehypothecation and the segregation of margin; (10) documentation requirements relating to margin; and (11) the cross-border application of the foreign jurisdiction's margin rules. Id.

35 Id. at 41,389.

other types of non-U.S. CSEs. Instead of balancing supervisory interests, element-by-element comparability determinations would impose a "stricter-rule-applies" framework that is the very antithesis of substituted compliance and mutual recognition.

The Commission should address the potential risks of deference to foreign OTC margin rules by focusing on the scope and comprehensiveness, rather than the granularity, of its comparability analysis, and not by limiting the availability of substituted compliance. The test for comparability should not be whether, on an individual transaction basis, between two specific counterparties, one OTC margin regime will result in a different outcome than the other. Instead, the test should be whether differences between the regimes would, in the aggregate, create a significant and unacceptable level of risk to CSEs or the U.S. financial system.

We recognize that, given different counterparty classifications, this test could present certain limited opportunities for regulatory arbitrage (*e.g.*, a U.S. CSE trading with an EU counterparty could decide whether to comply with U.S. or EU OTC margin rules depending on whether that particular EU counterparty would be excluded under one rule set versus the other). Given the extent of overlap in relevant counterparty definitions, and the fact that any unmargined credit exposure would still be subject to capital requirements, this issue should not be a material source of risk to the U.S. or the relevant CSE and thus should not serve as a basis for rejecting comparability or limiting the availability of substituted compliance.[36]

In light of the rigorous and comprehensive standards embodied in the BCBS-IOSCO Framework, we would expect all foreign OTC margin regimes that are BCBS-IOSCO-compliant to satisfy a test that looks to aggregate risk outcomes. The Commission should thus permit any CSE subject to a BCBS-IOSCO-compliant OTC margin regime, whether U.S. or non-U.S., guaranteed or not, to elect substituted compliance by complying with that regime in its entirety.[37]

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36 If the Commission nevertheless remains concerned about regulatory arbitrage, it could address its concerns without rejecting comparability or limiting substituted compliance. Specifically, the Commission could require a CSE to elect substituted compliance or not across all its transactions with counterparties located in a given jurisdiction that are not registered as Swap Entities (*e.g.*, assuming that the Commission determines EU OTC margin rules to be comparable, a CSE would be required to elect to comply with those rules (in lieu of U.S. OTC margin rules) for all its uncleared swaps with EU counterparties that are not registered Swap Entities). This condition would prevent opportunistic substituted compliance elections without imposing overlapping rules.

37 The Commission should also clarify that, if one counterparty to a swap is subject to comparable foreign regulation, the entire transaction is eligible for substituted compliance. For example, if a non-U.S., non-EU CSE entered into a swap with an EU counterparty, the swap should be eligible for substituted compliance with EU margin rules (even if the home jurisdiction of the CSE has not received a comparability determination from the Commission).

II. Limited Exclusion for Certain Swaps with Non-U.S. Counterparties

The Proposal contains a limited exclusion from the Commission's OTC margin requirements for a non-U.S. CSE that is not (i) a non-U.S. CSE whose operating results, financial position and statement of cash flows are consolidated with those of an ultimate parent entity that is a U.S. person (a "Foreign Consolidated Subsidiary" or "FCS"),[38] (ii) trading through its U.S. branch or (iii) guaranteed by a U.S. person.[39] This exclusion would only apply to such a non-U.S. CSE's uncleared swaps with a non-U.S. person that is not (i) an FCS, (ii) the U.S. branch of a non-U.S. CSE or (iii) guaranteed by a U.S. person.[40]

We support this exclusion, which appropriately recognizes the relatively greater supervisory interest of foreign regulators, and the absence of a nexus to the U.S., that would exist for the swaps covered by the exclusion.[41] We believe, however, that the Commission should also adopt limited exclusions in certain other cross-border trading contexts, in order to better address the different risks and issues raised in those contexts.

A. Trading by U.S. CSEs and Guaranteed Non-U.S. CSEs with Emerging Market Counterparties

U.S. CSEs and Guaranteed Non-U.S. CSEs have for years prior to the Dodd-Frank Act conducted cross-border swaps trading activity with counterparties outside the U.S., EU, Japan and other major financial centers. They typically conduct this trading activity as part of their overall commercial or investment banking business in those non-U.S. jurisdictions. For example, an emerging market counterparty might buy an interest rate cap from a U.S. CSE or Guaranteed Non-U.S. CSE in connection with a loan made by the CSE (or its affiliate) to that counterparty to finance business expansion. A U.S. CSE or Guaranteed Non-U.S. CSE might also enter into a non-deliverable foreign exchange forward with an emerging market counterparty to whom it (or its affiliate) extends trade finance. Emerging market counterparties also commonly enter into interest rate or foreign exchange hedges in connection with capital market issuances.

The aggregate risk of this emerging market swap trading is generally *de minimis* to a U.S. CSE or U.S. guarantor. At the same time, however, emerging market counterparties are not usually in a position to satisfy OTC margin requirements. They typically lack the operational infrastructure to exchange collateral on a daily basis, and

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38 Our comments on the Commission's proposed "Foreign Consolidated Subsidiary" definition are contained in Section III.B below.

39 See Proposed CFTC Rule § 23.160(b)(2)(ii).

40 See id.

41 As noted by the Commission, the risk to the U.S. of a default by a non-U.S. CSE would already be mitigated by the application of capital requirements to the non-U.S. CSE on an entity-wide basis and the requirement for the non-U.S. CSE to post margin to its U.S. counterparties.

the local legal regime may not support the netting determinations and third-party custodial arrangements that would be required under U.S. OTC margin rules. They may also simply resist compliance with requirements not imposed under local law.

Under these circumstances, emerging market counterparties are likely to move their business away from U.S. CSEs and Guaranteed Non-U.S. CSEs in order to avoid OTC margin requirements. This would not only directly affect the swap transactions subject to those requirements, it would also jeopardize the broader banking relationships and activity to which those swaps commonly relate.

Thus, the adverse consequences for U.S. CSEs and Guaranteed Non-U.S. CSEs resulting from applying OTC margin rules to emerging market counterparties would far outweigh the corresponding reduction in risk to U.S. CSEs and U.S. guarantors. Viewed from a broader perspective, risk might even increase, due to the ensuing loss of geographic diversification in U.S.-based firms' banking businesses and more concentrated lending and underwriting exposure to companies in large, well-developed financial centers.

Competitive imbalances will result if other jurisdictions that implement the BCBS-IOSCO Framework apply their OTC margin requirements to swaps with emerging market counterparties in materially different ways than the Commission. It is therefore essential that the Commission coordinate with the Prudential Regulators and relevant foreign regulators, especially in the EU and Japan, to adopt a consistent approach to swaps with emerging market counterparties. In this regard, we believe that the Commission's cross-border guidance (the "Cross-Border Guidance")[42] provides a model for BCBS-IOSCO working group members to facilitate trading in emerging market jurisdictions while limiting the extent of uncollateralized credit exposures resulting from such trading.

Specifically, as part of the Cross-Border Guidance, the Commission recognized that an alternative approach premised on transactional volume limitations would reduce risk to the U.S. and be consistent with the "direct and significant" statutory requirement for the extraterritorial application of swaps rules, as set forth in Section 2(i) of the CEA ("Section 2(i)"). Under this approach, transaction-level requirements do not apply to swaps between a U.S. swap dealer's foreign branch located outside Australia, Canada, the EU, Hong Kong, Japan and Switzerland, on the one hand, and a non-U.S. counterparty that is not a guaranteed or conduit affiliate, on the other hand, so long as the volume of such transactions does not exceed five percent of the total aggregate quarterly notional volume of swaps entered into by the U.S. swap dealer.[43] This exception is consistent with Section 2(i)'s requirement because, even though such swaps might have a "direct" connection with activities in, or effect on, U.S. commerce, that connection or effect is limited in extent so as to ensure that it is not "significant."

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42 78 Fed. Reg. 45,292 (July 26, 2013).

43 Id. at 45,351.

This logic applies equally to OTC margin requirements. It is also consistent with the recognition, implicit in the Commission's proposal to adopt margin thresholds and exceptions, that OTC margin requirements are intended to mitigate systemically significant risks arising from uncleared swaps, not to eliminate all risks arising from such swaps.

In the context of trading by a U.S. CSE with emerging market counterparties, a direct limit on the U.S. CSE's aggregate trading volume with such counterparties could accomplish this risk mitigation objective with much less disruption to broader business relationships than requiring the exchange of initial and variation margin. Specifically, we recommend that the Commission adopt an exclusion from OTC margin requirements for uncleared swaps between a U.S. CSE and an emerging market counterparty that is conditioned on the U.S. CSE satisfying an aggregate 5% limit on its notional trading volume in uncleared swaps with such counterparties relative to its total notional swap trading volume. For this purpose, an "emerging market counterparty" would be a non-U.S. person that is not a registered Swap Entity, guaranteed by a U.S. person or located in a jurisdiction covered by a comparability determination for OTC margin rules issued by the Commission.[44]

In the context of Guaranteed Non-U.S. CSEs, we recommend that the Commission adopt a similar exclusion from OTC margin requirements for uncleared swaps with emerging market counterparties, except that, instead of limiting the trading volume of the Guaranteed Non-U.S. CSE, the limit should apply to the aggregate volume of the uncleared swaps guaranteed by a particular U.S. person. This approach would be consistent with the fact that the risk to a U.S. guarantor would be the basis for the extraterritorial application of U.S. OTC margin rules to a Guaranteed Non-U.S. CSE's swaps with emerging market counterparties. As a result, it is that risk which the Commission should seek to limit in this context.

B. <u>Trading by Foreign Consolidated Subsidiaries with Non-U.S. Persons</u>

The Proposal would apply the Commission's OTC margin rules to all uncleared swaps entered into by an FCS, even if the FCS's obligations under those swaps are not

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44 At a minimum, the exclusion should cover any counterparty located in a jurisdiction in which netting, collateral or third party custodial arrangements may not be legally effective, including in the counterparty's insolvency. A CSE may be required to exchange variation margin with such a counterparty on a gross basis and, in the event of the counterparty's insolvency, the counterparty may be able to pick and choose individual swaps to terminate and foreclose on collateral posted by the CSE for those swaps even if, on a net basis, it owes money to the CSE. A CSE may also be exposed to the risk that the initial margin it posts becomes part of its counterparty's bankruptcy estate. Again, regardless of how the Commission determines to proceed, it should coordinate and, to the extent practicable, harmonize its application of OTC margin requirements to swaps with counterparties in emerging markets jurisdictions with the Prudential Regulators and foreign regulators.

guaranteed by a U.S. person and even if the FCS's counterparty is a non-U.S. person that is neither registered as a Swap Entity nor guaranteed by a U.S. person.[45]

For these swaps, the only nexus to the U.S. would be the inclusion of the FCS's related operating results, financial position and statement of cash flows in its U.S. ultimate parent entity's consolidated financial statements. Although this accounting treatment might provide the U.S. ultimate parent entity with an incentive to support the FCS, as the Commission acknowledges the U.S. parent entity is under no obligation to do so. We do not believe that Section 2(i) authorizes the Commission to regulate an FCS extraterritorially solely based on this mere possibility of support by (and risk to) a U.S. parent entity. Absent any legal obligation for the parent entity to provide support, the chain of intervening factors and events—such as the materiality of the FCS and its business relationships to the parent entity, the extent of the parent entity's investment in the FCS, and commitments (such as in the parent entity's resolution plan) to maintain the FCS without the parent entity's support—that might or might not lead to such support is far longer and more uncertain than those that courts have found to satisfy "direct" effects requirements similar to the one contained in Section 2(i).[46]

Moreover, when Congress has sought to regulate extraterritorial activity based on control by a U.S. parent entity, it has done so expressly. For example, when Congress sought to apply securities margin rules to non-U.S. borrowers controlled by a U.S. person, it did so expressly by amending Section 7 of the Securities Exchange Act of 1934 (the "Exchange Act").[47] Similarly, Congress extended U.S. prudential regulation based on common control with a U.S. bank expressly by enacting the Bank Holding Company Act of 1956 (the "BHCA"). Given that Section 2(i) contains no similar express language, we believe that the requirements applicable under those other provisions—such as the consolidated capital requirements that already apply to most FCSs—are more appropriate mechanisms through which to address the risks to the U.S. presented indirectly by the swap activities of FCSs.

In addition, applying the Commission's OTC margin rules to an FCS's swaps with a non-U.S. person that is not guaranteed by a U.S. person would require that non-U.S. counterparty to collect and post margin under U.S. rules even though it has done nothing to subject itself to U.S. jurisdiction. This extraterritorial application of Commission rules would go beyond those contexts that the Commission has previously

45 Proposed CFTC Rule § 23.160(b)(3)(i).

46 For example, in the Seventh Circuit case cited by the Commission as the basis for its interpretation of the term "direct" in Section 2(i), an offshore cartel colluded on prices in Brazil, China and India that the cartel then used as benchmarks for sales to U.S. customers. See Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 859 (7th Cir. 2012) (en banc). There was no intervening factor or event cited that might have derailed the effect that the extraterritorial collusion had on those U.S. customers.

47 See Section 7(f) of the Exchange Act (applying margin rules to a "foreign person controlled by a United States person").

determined to satisfy Section 2(i)'s "direct and significant" requirement. Specifically, under the Cross-Border Guidance, a Swap Entity's non-U.S. counterparty does not become subject to Commission rules unless it also has a direct contractual relationship with a U.S. person, either by virtue of a guarantee from a U.S. affiliate or a conduit relationship with a U.S. affiliate. In contrast, the Proposal would subject a non-U.S. counterparty to Commission rules without the counterparty ever contracting with a U.S. person or using any means or instrumentality of interstate commerce.[48]

We are further concerned that applying U.S. OTC margin rules extraterritorially in this context would foster an uneven playing field in foreign markets and further fragment swap market liquidity. We are not aware of any other jurisdiction that contemplates the application of its OTC margin rules to foreign, non-guaranteed subsidiaries. The adverse effects on competition and liquidity would be especially severe if the Commission maintains its element-by-element approach to comparability determinations, since that approach would prevent FCSs from trading effectively even in jurisdictions that adhere to the BCBS-IOSCO Framework. In order to avoid overlapping OTC margin rules, many non-U.S. person counterparties would likely avoid trading with an FCS. Given the resulting inability of U.S.-based financial institutions to enter into swaps with non-U.S. counterparties, even through non-guaranteed subsidiaries, applying the U.S. OTC margin rules in this way would further increase the concentration of bilateral credit risk among those institutions and negatively impact their ability to engage in lending and underwriting activities to which those swaps commonly relate.

In light of these considerations, we recommend that the Commission not extend its OTC margin rules to swaps between an FCS whose swap obligations are not guaranteed by a U.S. person, on the one hand, and a non-U.S. person that is not guaranteed by a U.S. person, on the other hand. These considerations also support the continued availability of such an exclusion from other transaction-level rules, such as mandatory clearing and trading requirements and real-time public reporting requirements. Any extraterritorial regulation of swap trading between an FCS and a non-U.S. person, neither of which is guaranteed by a U.S. person, would solely be authorized if necessary to satisfy a safety and soundness mandate applicable under a statute expressly providing for consolidated regulation and supervision, such as the BHCA.[49]

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[48] The proposed treatment of an FCS would also be inconsistent with the Commission's application of Section 2(i) to the swap dealer registration requirement. A non-U.S. person is not required to register unless its aggregate swap dealing activity with, or guaranteed by, U.S. persons exceeds the *de minimis* threshold. See Cross-Border Guidance, 78 Fed. Reg. at 45,319. It would be incongruous to take the position that dealing activity conducted on an unguaranteed basis with non-U.S. persons does not pose a direct and significant risk to the U.S. requiring registration but does pose such risk if it is conducted by a non-U.S. person that is already, for other reasons, registered as a swap dealer.

[49] We note that the Swap Entities that would be subject to OTC margin rules extraterritorially under the Bank Proposal would in all cases be banks or subsidiaries of bank holding companies and therefore subject to the Prudential Regulators' general safety and soundness authority.

If the Commission nevertheless decides to move forward with its proposed treatment of FCSs, then we recommend that, at a minimum, it grant a limited exclusion designed to minimize the extent of competitive disparities and disruption to non-U.S. counterparties. Specifically, the Commission should grant an exclusion for swaps between an FCS whose swap obligations are not guaranteed by U.S. person, on the one hand, and a non-U.S. person that is not guaranteed by a U.S. person, on the other hand, up to an aggregate 5% limit on the notional trading volume in uncleared swaps entered into by commonly controlled FCSs under the exclusion relative to the total notional swap trading volume of entities within the common U.S. ultimate parent entity's consolidated group. Such a limited exclusion would achieve the Commission's risk mitigation objectives without directly regulating wholly non-U.S. counterparties.

C. Trading by U.S. Branches of Non-U.S. CSEs with Non-U.S. Persons

The Proposal would apply the Commission's OTC margin rules to every uncleared swap entered into by the U.S. branch of a non-U.S. CSE, even if the non-U.S. CSE is not an FCS or guaranteed by a U.S. person.[50] The Proposal also requests comment about whether to distinguish a U.S. branch of a non-U.S. CSE from the non-U.S. CSE based on the location of personnel that arrange, negotiate or execute the non-U.S. CSE's uncleared swaps.[51]

The proposed distinction between a non-U.S. CSE and its U.S. branch is not necessary from a risk mitigation perspective. The risks incurred by the non-U.S. CSE as a result of its U.S. branch's transactions remain with the non-U.S. CSE outside the U.S., regardless of the involvement of U.S. branch personnel. For the same reason, any application of U.S. OTC margin rules to non-U.S. persons based solely on the involvement of U.S. personnel would be unwarranted.

In addition, applying a U.S. personnel test in determining whether U.S. OTC margin rules apply to a swap would increase risk by fragmenting netting sets, thereby frustrating multiple years of efforts by regulators to promote netting as a credit and market risk mitigant. This effect would arise because both the CFTC Margin Proposal and foreign margin rules would require a CSE to calculate and exchange margin on relationship-wide basis across all uncleared swaps documented under the same eligible master netting agreement. Thus, to comply with a U.S. personnel test, a non-U.S. CSE would need to execute multiple netting agreements with each of its non-U.S. counterparties, one covering uncleared swaps arranged, negotiated or executed by U.S. personnel and the other covering the parties' other uncleared swaps.[52] Although a non-U.S. CSE could alternatively seek to comply with U.S. OTC margin rules in

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50 See Proposed CFTC Rule § 23.160(b)(2).

51 See Proposal, 80 Fed. Reg. at 41,388.

52 A similar issue would arise if the Commission distinguished a U.S. branch from a non-U.S. CSE based on the non-U.S. CSE's booking location for its uncleared swaps because most non-U.S. CSEs execute their uncleared swaps under multi-branch netting agreements.

connection with all of its trading, even when U.S. personnel are not involved, non-U.S. counterparties will very likely resist this approach.

This complexity would provide a significant incentive for non-U.S. counterparties to avoid interacting with U.S. personnel. The ensuing need for non-U.S. CSEs to reorganize their sales and trading functions would impede effective risk management by creating artificial barriers between the U.S. trading personnel responsible for managing U.S.-related risks and the non-U.S. sales personnel responsible for interacting with non-U.S. counterparties. Alternatively, non-U.S. CSEs would need to relocate their U.S. trading personnel to foreign locations, away from the markets in which they trade.

The Commission can better reduce the potential for competitive disparities by directly reducing the extent to which the Proposal places U.S. CSEs at a competitive disadvantage when trading with non-U.S. counterparties. In particular, making U.S. CSEs fully eligible for substituted compliance and granting them a limited exclusion for uncleared swaps with emerging market counterparties would permit U.S. CSEs to compete effectively with non-U.S. CSEs without incurring undue risk or discouraging non-U.S. counterparties from interacting with U.S. personnel.

The Commission therefore should not distinguish between a non-U.S. CSE and its U.S. branch when applying the U.S. OTC margin rules or otherwise apply a U.S. personnel test in determining when OTC margin requirements apply.

III. Proposed Definitions

A. "U.S. Person"

The Proposal's "U.S. person" definition would be the same as the "U.S. person" definition in the Cross-Border Guidance, with three differences.[53] First, the definition would not include the prefatory phrase "includes, but is not limited to." Second, the definition would not include a prong for a collective investment vehicle that is organized and has its principal place of business outside the United States but is majority-owned by U.S. persons. Finally, the definition would not require a legal entity, for which a U.S. person bears unlimited responsibility for the obligations and liabilities of the legal entity, to be majority-owned by U.S. persons in order to be deemed a U.S. person. With one exception discussed immediately below, we support the proposed definition, which we believe would promote legal certainty by drawing from the established Cross-Border Guidance definition, while still following a bright-line rules-based approach in lieu of potentially open-ended guidance.

We believe that an otherwise non-U.S. person should not be included in the definition of "U.S. person" solely because a U.S. person bears unlimited responsibility for such non-U.S. person's obligations and liabilities. Such unlimited responsibility is largely equivalent to, and therefore should be provided the same regulatory treatment as,

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[53] See Proposed CFTC Rule § 23.160(a)(10).

a guarantee of such non-U.S. person's obligations. Though, as the Commission has recognized, a guarantee does not necessarily provide for unlimited responsibility for the obligations and liabilities of the guaranteed entity because a guarantor may be protected by legal defenses to the enforcement of the guarantee,[54] the risks to the U.S. associated with swaps for which a U.S. person bears unlimited responsibility remain similarly indirect and contingent (i.e., they exist only to the extent that the non-U.S. person incurs losses and fails to perform its obligations). These indirect risks would therefore be more appropriately addressed in the same targeted fashion that the Commission addresses the indirect risks associated with the swaps activities of guaranteed non-U.S. persons.

We also recommend that the Commission remove the collective investment vehicle majority-ownership prong from the "U.S. person" definition for purposes of other swaps-related provisions of the CEA. U.S. ownership does not, by itself, create a direct relationship between a collective investment vehicle's swaps activity and commerce in the United States. Such swaps are not the direct obligation of any of the owners of the collective investment vehicle, and the risk to the owners of any related losses is limited to the extent of their investment in the vehicle. U.S. ownership of a foreign collective investment vehicle therefore does not meet Section 2(i)'s "direct and significant" requirement and consequently does not, standing alone, occasion direct application of U.S. swaps rules to the extraterritorial activity of the vehicle and its non-U.S. counterparties.

There are significant practical impediments to the identification and tracking of U.S. beneficial ownership in foreign collective investment vehicles, including by the vehicle itself (and its management). Particularly in the case of collective investment vehicles formed before the adoption of the Commission's U.S. person definition in the Cross-Border Guidance, subscription documents did not capture the requisite information or include a framework to track it. And, as a result, in the case of new collective investment vehicles many non-U.S. asset managers have taken more blunt steps to restrict investments by U.S. persons. The resulting limits on investment options for U.S. persons impose costs when the competing benefits could be better addressed in other, less costly ways. In particular, concerns regarding U.S. ownership of foreign collective investment vehicles that engage in swaps activity are instead more appropriately addressed by applying the Commission's existing comprehensive investor protection requirements to investment by U.S. persons in collective investment vehicles, which does have a direct nexus to the United States.

B. "Guarantee"

The Proposal would define a "guarantee" to mean an arrangement pursuant to which a party to a swap with a non-U.S. person has a legally enforceable right of recourse against a U.S. person for such non-U.S. person's obligations under that swap.[55] This

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[54] See Cross Border Guidance, 78 Fed. Reg. at 45,312.

[55] Proposed CFTC Rule § 23.160(a)(2).

definition would also be relatively similar to the parallel definition from the Cross-Border Guidance, except that it would, properly in our view, not encompass certain risk-shifting arrangements (such as keepwells and liquidity puts) that typically do not provide a non-U.S. person's counterparty with recourse against a U.S. person.

We believe that this definition, like the Proposal's "U.S. person" definition, would promote legal certainty by drawing from the Cross-Border Guidance without resulting in the uncertainty inherent in guidance, as opposed to a rule. In addition, it would be appropriate and consistent with Section 2(i) for the Commission to limit the concept of a "guarantee" for purposes of the cross-border application of OTC margin rules to arrangements that involve legally enforceable recourse by a counterparty. Absent such a legal relationship to a U.S. guarantor, a non-U.S. counterparty would not have a sufficient connection with activities in U.S. commerce to warrant requiring that non-U.S. counterparty to post and collect margin under U.S. rules. Accordingly, we support the Proposal's definition of "guarantee" and further recommend that the Commission adopt the same definition for the purposes of determining the extraterritorial application of the CEA's other swap-related provisions.

C. "<u>Foreign Consolidated Subsidiary</u>"

The Proposal would define the term "Foreign Consolidated Subsidiary" to mean a non-U.S. CSE whose ultimate parent entity[56] is a U.S. person that includes the non-U.S. CSE's operating results, financial position and statement of cash flows in the parent entity's consolidated financial statements, in accordance with U.S. generally accepted accounting principles.[57]

As described in Part II.B above, we do not believe that the Commission should distinguish FCSs from other types of non-U.S. CSEs. If the Commission does so nonetheless, then in our view its proposed definition is more consistent with the promotion of legal certainty than the Bank Margin Proposal's parallel concept of a Swap Entity "controlled" by a person organized under the laws of the U.S. or a State.[58] By building on U.S. generally accepted accounting principles, the Proposal's consolidation-based test would prevent non-U.S. CSEs from having to apply a new and unfamiliar standard that is not otherwise relevant to their business. The test would also

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56 "Ultimate parent entity" would mean the parent entity in a consolidated group in which none of other entities in the consolidated group has a controlling interest, under U.S. generally accepted accounting principles. Proposed CFTC Rule § 23.160(a)(6).

57 Proposed CFTC Rule § 23.160(a)(1).

58 The Bank Margin Proposal would define a company to have "control" of another company if it had: (1) ownership, control or power to vote 25 percent or more of a class of voting securities of the other company, directly or indirectly or acting through one or more other persons; (2) ownership or control of 25 percent or more of the total equity of the other company, directly or indirectly or acting through one or more other persons; or (3) control in any manner of the election of a majority of the directors or trustees of the other company. Bank Proposed Rule §__.2.

generally foreclose the possibility of a non-U.S. CSE having multiple ultimate parent entities.[59]

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We would be pleased to provide further information or assistance at the request of the Commission or its staff. Please do not hesitate to contact the undersigned, or Edward J. Rosen (+1 212 225 2820) or Colin D. Lloyd (+1 212 225 2809) of Cleary Gottlieb Steen & Hamilton LLP, outside counsel to IIB and SIFMA, if you should have any questions with regard to the foregoing.

Respectfully submitted,

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cc: Honorable Timothy G. Massad, Chairman
Honorable Sharon Y. Bowen, Commissioner
Honorable J. Christopher Giancarlo, Commissioner
Commodity Futures Trading Commission

Honorable Janet L. Yellen, Chair
Honorable Stanley Fischer, Vice Chairman
Honorable Daniel K. Tarullo, Governor
Honorable Jerome H. Powell, Governor
Honorable Lael Brainard, Governor
Board of Governors of the Federal Reserve System

Honorable Thomas J. Curry, Comptroller of the Currency
Office of the Comptroller of the Currency

Honorable Martin J. Gruenberg, Chairman
Federal Deposit Insurance Corporation

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59 For this reason, we believe the Commission should generally adopt a consolidation-based test for affiliation under its OTC margin rules, including in connection with the proposed initial margin threshold, “material swaps exposure” definition and phase-in schedule.

Honorable Kenneth A. Spearman, Chair and Chief Executive Officer
Farm Credit Administration

Honorable Melvin L. Watt, Director
Federal Housing Finance Agency

Honorable Mary Jo White, Chair
Honorable Luis A. Aguilar, Commissioner
Honorable Daniel M. Gallagher, Commissioner
Honorable Kara M. Stein, Commissioner
Honorable Michael S. Piwowar, Commissioner
Securities and Exchange Commission