

July 9, 2013

The Honorable Tim Johnson, Chairman
The Honorable Mike Crapo, Ranking Member
534 Dirksen Office Building
U.S. Senate Committee on Banking, Housing
and Urban Affairs
Washington, DC 20510

The Honorable Debbie Stabenow, Chairwoman
The Honorable Thad Cochran, Ranking Member
328A Russell Office Building
U.S. Senate Committee on Agriculture, Nutrition
and Forestry
Washington, DC 20510

Dear Chairmen and Ranking Members:

As trade groups representing businesses and financial institutions of all size and type, we are writing to express our strong process and policy concerns with the controversial “cross-border” application of Title VII of Dodd-Frank. Specifically, we are very concerned about the looming July 12th expiration of an “Exemptive Order” from the Commodity Futures Trading Commission (CFTC), given previous market disruptions and the existing misalignment between the CFTC and both the Securities and Exchange Commission (SEC) and foreign jurisdictions. Ultimately, failure to extend the existing Exemptive Order, or rushed efforts to finalize more permanent cross-border guidance before July 12th, would have avoidable consequences for U.S. competitiveness and business certainty, and could undermine sound and coordinated regulation that better protects our financial markets and the job creators they serve.

As you know, Dodd-Frank delegates authority to implement the Title VII derivatives reforms of the Dodd-Frank Act to the CFTC and SEC. Despite considerable debate over the congressional intent, the CFTC proposed guidance last year that would extend its regulatory reach overseas; but the Commission subsequently provided an exemptive order to avoid market disruption when rules went into effect at year end without final guidance in place. The SEC has chosen a more deliberate approach, through a rulemaking process which includes a public comment period through August 21st. Additionally, the SEC also has re-opened comment periods for some of its rules through July 22nd, in light of the potential impact of the SEC Cross Border Proposal. Notably, the SEC comment periods extend beyond the current July 12th expiration of the CFTC’s Exemptive Order, creating a most certain mismatch on both content and timing.

We believe it is of critical importance that the CFTC and SEC harmonize their views on the cross-border application of swap rules, and that they also align the timing of comment periods and implementation to minimize market disruptions and promote consistent regulation. Further, it is crucial that the CFTC take the necessary time to consider comments received by the SEC in response to the SEC’s Cross Border Proposal before issuing final Title VII cross-border guidance. Such due diligence will best serve market participants by ensuring that regulators have a full understanding of these rules before making a final determination and would be consistent with congressional intent, as stated in Dodd-Frank, that “the [CFTC] shall consult and coordinate to the extent possible with the [SEC] and the prudential regulators for the purposes of assuring regulatory consistency and comparability.”¹

Significantly, the U.S. House of Representatives recently reinforced the importance of harmonization between the CFTC and SEC on the cross-border application of swap rules, passing H.R. 1256 – the “Swap Jurisdiction Certainty Act” – with a supermajority of broad bipartisan support. This thoughtful compromise bill – authored by Reps. Scott Garrett (R-NJ), John Carney (D-DE), Mike Conaway (R-TX) and David Scott (D-GA) – would simply ensure that the CFTC and SEC coordinate, through joint rulemaking, any rules they wish to extend overseas. We encourage the Senate to take similar action to harmonize the U.S. application of Dodd-Frank, as consistency is much needed to provide clarity to market participants and to avoid unintended consequences, such as market disruptions or regulatory arbitrage. In this regard, SEC Chairman Mary Jo White stressed about

¹ The Dodd Frank Act, Title VII, Subsection A, Section 712. Review of Regulatory Authority.

U.S. rules, “[i]t’s not required that they be joint, but plainly, you know, it’s extraordinarily important for the marketplace that we try to reach that common ground.”

In addition to greater coordination between the CFTC and SEC, leading policymakers have stressed the importance of ongoing international dialogue and harmonization at all levels. In this regard, former Treasury Secretary Timothy Geithner previously raised serious concerns about misalignment among U.S. regulators, concluding, “[i]f you don’t have alignment among them, then you’re right to say how are we going to convince the rest of the world.” Additionally, Federal Reserve Chairman Ben Bernanke has noted the extensive efforts to coordinate U.S. and international rules, concluding that failure to harmonize regulation could lead to unnecessary outcomes, including a “significant competitive disadvantage” for certain businesses.

Equally concerning, in a recent letter to CFTC Chairman Gary Gensler on May 28th, the European Commission indicated that expiration of the CFTC Exemptive Order could jeopardize the productive and cooperative efforts underway towards meeting G20 commitments on an international basis. In good faith, the European Commission has agreed to push back from June to September a request for technical advice with regard to rules governing the recognition of “equivalent” foreign regulation in order to “better take into account on-going international discussions and developments.”² This action clearly shows that international discussions are still very much in process. Like the European Commission, we are concerned that expiration of the Exemptive Order at this time would be counterproductive and disruptive to the markets, and believe that an extension of the Exemptive Order for at least six months would provide the necessary time for better and consistent policy, both in the U.S. and abroad.

Accordingly, we urge you to work with the CFTC, SEC and U.S. regulators more broadly, to ensure that all necessary steps are taken to implement derivatives reforms in a responsible and harmonized manner. To this end, we believe an extension of the CFTC’s Exemptive Order for at least six months is critical to give market participants clarity and to allow for such harmonization to occur.

Respectfully submitted,

American Bankers Association
ABA Securities Association
Business Roundtable
Financial Services Forum
Financial Services Roundtable
Futures Industry Association
Institute of International Bankers
International Swaps and Derivatives Association
Investment Company Institute
Partnership for New York City
Securities Industry and Financial Markets Association
The Clearing House
U.S. Chamber of Commerce

cc: The Honorable Harry Reid, Majority Leader
The Honorable Mitch McConnell, Republican Leader
Members of the U.S. Senate

² European Commission Letter to Steven Maijor, Chair of ESMA; June 13, 2013
http://www.esma.europa.eu/system/files/2013_14_june_2013_letter_esma.pdf