Statement for the Record

by

The Honorable Kenneth E. Bentsen, Jr.

on behalf of the Securities Industry and Financial Markets Association

before the Senate Agriculture Committee

United States Senate

Re: Reauthorization of the Commodity Futures Trading Commission

Wednesday, July 17, 2013

Committee Chairwoman Stabenow and Ranking Member Cochran. My name is Ken Bentsen and I am President of the Securities Industry and Financial Markets Association (SIFMA).[1] SIFMA appreciates the opportunity to provide input on the reauthorization of the Commodity Futures Trading Commission (the "CFTC"). As the Committee considers the Commodity Exchange Act ("CEA"), we encourage consideration of the following issues, as discussed below.

Title VII of the Dodd-Frank Act ("Dodd-Frank" or the "Act") created a new regulatory regime for derivative products commonly referred to as swaps. Title VII seeks: to reduce systemic risk by mandating central clearing for standardized swaps through clearinghouses, capital requirements, and the collection of margin for uncleared swaps; to protect customers through enhanced collateral safeguards and external business conduct requirements; and to promote transparency through reporting requirements, new business conduct rules, and required trading of swaps on exchanges or swap execution facilities ("SEFs"). To date, there have been significant reforms put in place that market participants have and are working to implement. Late last year, firms engaged in significant swap dealing activities were required to register with the CFTC as swap dealers ("SD") or major swap participants ("MSP") and became subject to reporting, recordkeeping and other requirements, many more of which will be phased in over

[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. 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.

time. Recently, the first wave of mandatory central clearing of swap transactions took effect, and soon certain cleared swap transactions will also be required to be traded on exchanges or SEFs. The establishment of global standards for margin requirements for uncleared swaps is near completion, with the final BCBS-IOSCO consultation on margin requirements for uncleared swaps expected this fall; soon after we can expect U.S. regulators to re-propose margin rulemaking for implementation in the U.S.

SIFMA supports many of the goals of Dodd-Frank's Title VII with respect to swaps. However, we remain concerned about how regulators, especially the CFTC, are interpreting and implementing many of these provisions. Indeed, in a few instances we also believe it is necessary that Congress amend the Act, as some provisions are duplicative and, at times, counterproductive. Poor implementation of Title VII has the potential to detrimentally limit the availability and increase the cost of derivatives, which are a valuable risk management tool for American businesses, including manufacturers and the agricultural industry.

We recognize the tremendous undertaking required by regulators in their efforts to implement derivatives reform. The volume and scope of the new rulemaking is unprecedented, with substantial implementation requirements for both the sell and buy side, and the end user community. Throughout this process, SIFMA has continually sought to engage with regulators in a constructive way as provided for under the Administrative Procedures Act.

As an overarching matter, it is our belief that the implementation of these new rules must be coordinated between the various regulators responsible for derivatives reform, both at home and abroad. This is critical to the successful implementation of Title VII and other similar regulatory frameworks, as our member firms are making dramatic changes to their business, operational, legal, and compliance systems in order to adapt to the new OTC derivatives regulatory regime. The implementation of these new rules is not as simple as flipping a switch. They require significant and multiple systems builds, testing, training, and new documentation involving both dealers and customers. Conflicting or redundant rules, at best, add unnecessary cost and, at worst, increase risk.

In the remainder of my testimony, I will focus on a few specific issues that are under the jurisdiction of the CFTC, which could have a profound impact on the success of Title VII and its effects on the marketplace. We urge you to consider them as part of the CFTC and CEA reauthorization.

Cross-Border Application of Title VII:

Section 722 of the Dodd-Frank Act limits the CFTC's jurisdiction over swap

transactions outside of the United States to those that "have a direct and significant connection with activities in, or effect on, commerce of the U.S." or are meant to evade Dodd-Frank. Section 772 similarly limits the SEC's jurisdiction over security-based swap transactions to those conducted without the jurisdiction of the U.S., with like anti-evasion provisions. In seeking to clarify its jurisdiction, on July 12, 2013, the CFTC voted to approve final cross-border guidance, as well as a phase-in exemptive order, by a vote of 3-1.

As of this writing, while the phase-in exemptive order has been released and made effective, the CFTC has yet to release the final guidance, despite frequent cross-references between the two documents. Additionally, the CFTC has recently revised the phase-in exemptive order following its initial release. Given the short time frame between these actions and this hearing, as well as the delay between the releases and additional revisions, we have not had sufficient time to fully review and assess their impact, nor develop a clear understanding of their interplay.

Nonetheless, I would like to reiterate a few key points which SIFMA has stressed with regard to the cross-border application of derivatives regulation. First and foremost is the need for coordination and consistency, both between the CFTC and the SEC in the U.S., and among the global regulators working on implementing laws and regulations to meet the G20 commitments on OTC derivatives regulation.

Additionally, while encouraged by the joint actions of the CFTC and EU as discussed below, SIFMA continues to emphasize the importance of consistency and coordination between international regulators in implementing OTC derivatives reform in furtherance of G20 commitments. We believe that the international nature of the swap markets makes such global coordination, in addition to domestic coordination, critical in order to achieve an appropriate level of oversight of swaps activities. As you are aware, on July 8 SIFMA and 12 other trade associations sent a letter to the Chairs and Ranking Members of this Committee and the Senate Banking Committee sharing this concern, further noting that a premature finalization of cross-border guidance could cause market disruption and confusion, and additionally could hinder on-going efforts to allow for such consistent and coordinated regulation with the SEC and foreign regulatory authorities.[2]

In the days leading up to July 12, we saw some progress made in this area. On July 11, 2013, CFTC Chairman Gary Gensler and European Commissioner Michel Barnier issued a statement entitled, "Cross-Border Regulation of Swaps/Derivatives Discussions between the CFTC and the European Union - A Path Forward".[3] The announcement discussed a "joint

[2] http://www.sifma.org/issues/item.aspx?id=8589944333

[3] http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/jointdiscussionscftc_europeanu.pdf

understanding" on how cross-border approaches to derivatives regulation will work between the CFTC and EU, including instances in which the CFTC would allow for compliance with EU rules for certain requirements. The CFTC later issued four no-action letters to address aspects of this general agreement.[4] The "Path Forward" document references the need for both the CFTC and EU to take a series of actions to accomplish the coordinated approach described therein; however, there are still little details on how the laudable goal of implementing coordinated and consistent regimes is to be reached. Notwithstanding these developments, as the CFTC has now moved forward with its final guidance, much work remains to be done in aligning the CFTC's positions with the rules of other jurisdictions and with the SEC's rules for security-based swaps. As the rules of other regulators and other jurisdictions come into being, it will likely be necessary for market participants to seek further no-action relief and guidance from the CFTC to avoid inconsistencies and duplicative regulation. In addition, legislative action may facilitate better coordination.

As for the substance of the CFTC's final guidance, we are still in the process of reviewing the available information. While we have not seen the actual text, we would like to reiterate the critical importance of the definition of "U.S. Person" that is intended to be focused on real, direct and significant connections to the United States, rather than nominal ones. Both our asset management and dealer members remain concerned that the definition adopted by the CFTC (as described during the July 12 Open Meeting) is too ambiguous and will be too difficult to implement in practice as opposed to a simple and objective standard.[5]

Lastly, but equally significant, the CFTC has issued its final cross-border release as "guidance", rather than through a formal rulemaking process subject to the Administrative Procedure Act. By doing so, the CFTC has avoided the need to conduct a cost-benefit analysis, which is critical for ensuring that the Commission appropriately weighs any costs imposed on market participants against perceived benefits. Conversely, the SEC proposed its cross-border rules and guidance on May 1, 2013, through a formal rulemaking process emphasizing the importance of providing sufficient opportunity for public comment and the need for a cost-benefit analysis.

Last Congress, Congressmen Himes and Garrett introduced bipartisan legislation (H.R. 3283) that would provide clarity on this issue. The Himes-Garrett bill would permit non-U.S.

[4] See CFTC No-Action Letters 13-43; 13-44; 13-45; 13-46

[5] SIFMA Comments to CFTC Proposed Interpretive Guidance (August 27, 2012), *available at* http://www.sifma.org/issues/item.aspx?id=8589940053; SIFMA/TCH/FSR Comments to CFTC on Further Proposed Guidance (Feb. 6. 2013), *available at* http://www.sifma.org/issues/item.aspx?id=8589941955http://www.sifma.org/issues/item.aspx?id=8589941955; SIFMA AMG Comments on the Definition of U.S. Person (July 2, 2013) *available at* http://www.sifma.org/issues/item.aspx?id=8589944385

swap dealers to comply with capital rules in their home jurisdiction that are comparable to U.S. capital rules and to adhere to Basel standards. The legislation also prevents the requirement that registered swap dealers post separate margin for each jurisdiction under which they are regulated. During the 112th Congress, the House Financial Services Committee acted to support this legislation by a vote of 41 to 18. SIFMA strongly supported this effort to clarify the jurisdiction of U.S. regulators.

More recently, Congressmen Garrett, Carney, and Scott introduced bipartisan legislation, the "Swaps Jurisdiction Certainty Act" (H.R. 1256), which calls for a consistent and coordinated approach to the cross-border application of Title VII by requiring the CFTC and SEC to jointly issue a rule within 270 days, and further be in accordance with the Administrative Procedures Act. Second, this measure would ensure that foreign countries with broadly equivalent regimes for swaps would not be subject to U.S. rules. Finally, this legislation requires that the Commissions jointly provide a report to Congress if they determine that a foreign regulatory regime is not broadly equivalent to United States swap requirements. This legislation was recently approved by the House of Representatives by a vote of 301-124, with broad bipartisan support. SIFMA urges that Senate Agriculture Committee to include H.R. 1256 in the CEA reauthorization legislation.

SIFMA appreciates the comments of the Senate Agriculture Committee regarding the timely implementation of swaps regulations since the passage of the Dodd-Frank Act. Chairman Stabenow has applauded CFTC efforts in addressing complex issues and consideration of public comments in response, but has also expressed concern that "after two years of deliberation, it is time to get the rules written and to fully implement this strong reform bill."[6] We also appreciate the Committee's efforts in noting the importance of coordinated and consistent rules across agencies and jurisdictions, but remain troubled by the overreach of the CFTC's cross-border guidance.

The Swap Push-Out Rule:

The Swaps Push-Out Rule, contained in Section 716 of the Dodd-Frank Act, was added to the Act at a late stage in the Senate and was not debated or considered in the House of Representatives. It would force banks to "push out" certain swap activities into separately capitalized affiliates or subsidiaries by providing that a bank that engages in such swap activity would forfeit its right to the Federal Reserve discount window or Federal Deposit Insurance Corporation ("FDIC") insurance.

The Swap Push-Out Rule has been opposed by senior prudential regulators from the time

[6] http://www.ag.senate.gov/newsroom/press/release/chairwoman-stabenow-it-is-time-to-fully-implement-wall-street-reform

it was first considered. Ben Bernanke, Chairman of the Federal Reserve, stated in a letter to Congress that "forcing these activities out of insured depository institutions would weaken both financial stability and strong prudential regulation of derivative activities."[7] Sheila Bair, former FDIC Chairwoman, said that "by concentrating the activity in an affiliate of the insured bank, we could end up with less and lower quality capital, less information and oversight for the FDIC, and potentially less support for the insured bank in a time of crisis" further adding that "one unintended outcome of this provision would be weakened, not strengthened, protection of the insured bank and the Deposit Insurance Fund."[8]

In addition to the increase in risk that would be caused by the Swaps Push-Out Rule, the limitations will significantly increase the cost to banks of providing customers with swap products as a result of the need to fragment related activities across different legal entities. As a result, U.S. corporate end-users and farmers will face higher prices for the instruments they need to hedge the risks of the items they produce. Mark Zandi, Chief Economist at Moody's Analytics, stated in a letter to Congressman Garrett that "Section 716 would create significant complications and counter the efforts to resolve [large financial] firms in an orderly manner."[9]

In January 2013, the Office of the Comptroller of the Currency (the "OCC") published guidance allowing Federally-chartered insured depository institutions to apply to delay compliance with Section 716 for up to two years.[10] On June 5, 2013, the Federal Reserve (the "Fed") approved an interim final rule clarifying that "insured depository institutions that are swaps entities" are eligible for a two year transition period to comply and for "certain statutory exceptions." The interim rule also noted that "uninsured U.S. branches and agencies of foreign banks will be treated as insured depository institutions" and thus are eligible for the same transition period.[11] Following the Fed's release the OCC notified uninsured institutions that they may also request a transition period.[12]

Bipartisan legislation, the Swaps Regulatory Improvement Act (S. 474), has been introduced by Senators Hagan, Johanns, Toomey, and Warner to modify Section 716 of the

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[7] Letter from Ben Bernanke, Federal Reserve Chairman, to Senator Christopher Dodd (May 13, 2010), *available at* http://blogs.wsj.com/economics/2010/05/13/bernanke-letter-to-lawmakers-on-swaps-spin-off/.

[8] Letter from Sheila Bair, FDIC Chairman, to Senators Christopher Dodd and Blanche Lincoln (Apr. 30, 2010), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2010-05-04/pdf/CREC-2010-05-04-pt1-PgS3065-2.pdf#page=5.

[9] Letter from Mark Zandi, Chief Economist, Moody's Corporation, to Congressman Scott Garrett (Nov. 14, 2011).

[10] http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-2a.pdf

[11] http://www.federalreserve.gov/newsevents/press/bcreg/20130605a.htm

[12] http://www.occ.gov/topics/capital-markets/financial-markets/trading/derivatives/706f.html

Dodd-Frank Act by requiring only structured finance swaps based on asset-back securities to be pushed out of banks and would not apply 716 to equity or commodity swaps. The net effect of these changes would be to expand permissible swap activities within a bank, and to only exclude swaps based on asset-backed securities that do not meet qualifications to be established by regulation.[13]

In the House, Congressmen Hultgren and Himes introduced bipartisan legislation (H.R. 992) identical to S. 474. On March 20, 2013, the House Agriculture Committee favorably approved this bill by a vote of 31 to 14 and on May 7, 2013 the House Financial Services Committee favorably reported the legislation by a vote of 53 to 6. SIFMA urges the Senate Agriculture Committee to include S. 474/H.R. 992 in CEA reauthorization legislation.

Swap Execution Facilities and Block Trades:

As I noted above, the Act requires certain standardized swaps to be traded on an exchange or a new platform known as a "swap execution facility," commonly called a "SEF." Congress generally defined what constitutes a SEF, but left further definition to the CFTC and SEC. To date, the CFTC has finalized its SEF regulation while the SEC has not yet acted to approve its proposed regulation.

An appropriately flexible definition of "SEF" is critical for ensuring that SEF trading requirement does not negatively impact the swap markets. Understanding this reality, the SEC has proposed a rule that would permit securities-based SEFs to naturally evolve their execution mechanisms for those securities-based swaps that are widely traded. These securities-based SEFs could be structured in many different ways, similar to how electronic trading platforms have evolved in the securities markets.

The CFTC's final rule, on the other hand, requires customers to either trade swaps on SEFs, as if they were traded on exchanges, or to solicit prices by issuing requests for quotes, generally known as "RFQs," from a minimum of three market participants for each swap subject to the SEF trading requirement.[14] This differs from current market practice where asset managers exercise their discretion, consistent with their fiduciary duties to their clients, to determine how widely to broadcast their intended trading strategies. This change could have a significant negative impact on pricing and liquidity in the swap market. By signaling to the market the desire to purchase a swap, customers may be telegraphing important information that

[13] In addition, the bill would fix a drafting error acknowledged by the Swaps Push-Out Rule's authors, under which the limited exceptions to the rule that apply to insured depositing institutions appear not to include U.S. uninsured branches or agencies of foreign banks.

[14] Traders will be required to seek quotes from a minimum of two providers during a one-year phase-in period of this rule.

may impede best execution of their orders. While we appreciate the CFTC's goal of encouraging competition among dealers to decrease the price of swaps, the reality is that this practice will do just the opposite and drive up the cost of transactions, ultimately harming the asset managers and other swap end-users this rule aims to protect. In turn, market participants may seek other means of hedging their risks and other products to trade, thereby impairing liquidity in swap markets. By imposing a standard that requires RFQs to be sent to multiple providers, the CFTC has effectively tied the hands of our asset manager members and created unnecessary adverse effects on the swap market.

Congressmen Garrett, Hurt, Meeks, and Moore sent a letter to CFTC Chairman Gensler, in April, expressing concern about the RFQ requirement and noted that an arbitrary requirement for a minimum may undermine the goal of enhancing transparency in the marketplace and would "result in deleterious effects on the marketplace, while not adding any measurable transparency benefit."[15]

In addition to the CFTC's SEF rules themselves, we believe that the CFTC's mandatory SEF trading determination, known as Made Available to Trade ("MAT"), is also flawed. Rather than setting real criteria to be met before requiring SEF execution for cleared trades, the CFTC has created a methodology by which virtually any cleared swaps can easily be required to be executed on SEFs upon listing by any SEF. Similarly, once a swap is Made Available to Trade, there is no robust methodology for reversing this determination if liquidity for trading this swap on SEFs proves to be insufficient.

Last Congress, the House Financial Services Committee supported, by voice vote, legislation that would require the CFTC and the SEC to adopt SEF rules that allow the swaps markets to naturally evolve to the best form of execution (H.R. 2586). H.R. 2586 would not require a minimum number of participants to receive or respond to quote requests and would prevent regulators from requiring SEFs to display quotes for any period of time. Finally, this bill would prevent regulators from limiting the means by which these contracts should be executed and ensuring that the final regulation does not require trading systems to interact with each other. SIFMA urges the Senate Agriculture Committee to support similar legislation in CEA reauthorization.

We also have concerns with the block trade rules that were adopted by the CFTC along with these other rules. The CFTC originally proposed block trade sizes in its proposed real-time reporting rules, but then re-proposed block trade thresholds in March 2012 after acknowledging

[15] Letter to CFTC Chairman Gary Gensler from Reps. Garrett, Hurt, Meeks, and Moore dated April 5, 2013

that its original formulation was too restrictive.[16] However, the re-proposed thresholds did not represent a significant improvement. And despite receiving a substantial number of comments from various constituencies suggesting that the CFTC refer to more recent data collected from swap data repositories, the CFTC proceeded to adopt final thresholds that are largely in line with its re-proposal. These thresholds are based on outdated data from a three-month window in 2010, prior to the imposition the CFTC's new rules including those requiring swap data reporting.

The block trade rules also include some requirements which would be disruptive and burdensome to the way that asset managers trade swaps. In particular, the rule contains a prohibition on aggregating client orders for purposes of meeting the minimum block size for managers to avail themselves of the delay from real-time reporting made available to block trades under Title VII. Although this prohibition does contain an exception, the language is ambiguous with respect to large trades that are executed off of SEFs. These trades are exempted from mandatory SEF trading by the CFTC in order to avoid information leaking in to the marketplace and being used opportunistically by other traders before the block trade can be finalized. If asset managers are not permitted to aggregate client orders, as they do today, for purposes of the real-time reporting delay, then their trading information may not be adequately protected from front running. In addition, asset managers will now be required to obtain specific consents from clients for including their swaps within block trades, creating additional unnecessary work for managers at a time when they are already heavily burdened by implementing the new swap rules. Aggregation of client orders in block trades is typically disclosed by investment advisers to their clients.

Basel III:

Implementation of the Basel III capital standards accord is an area of great interest and concern for our members and the financial services industry as a whole. The industry is in strong support of efforts to promote consistent international standards.

Accordingly, Congressman Fincher introduced the Financial Competitive Act, (H.R. 1341), that would direct the Financial Stability Oversight Council (FSOC) to examine differences in the implementation of derivatives capital requirements and the CVA. Further, the bill would require FSOC to assess the effects on the U.S. financial system and to make recommendations to minimize any negative impact on U.S. financial firms and end-users. This legislation was favorably reported to the House Financial Services Committee by vote of 59 to 0 and was recently approved by the House of Representatives by a vote of 353 to 24. SIFMA

[16] Procedures To Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 77 Fed. Reg. 15,460 (Mar. 15, 2012) (amending 17 CFR Part 43).

urges the Senate Agriculture Committee to include H.R. 1341 in CEA reauthorization legislation.

Margin Requirements:

The CFTC is currently considering rulemaking detailing margin requirements for uncleared swap transactions. The Commission originally proposed rules during the summer of 2011, and later reopened its comment period in light of consultative guidance from the Basel Committee on Banking Supervision ("BCBS") and International Organization of Securities Commissions ("IOSCO") released during the summer of 2012 (a second consultation was released in February 2013). Many market participants have expressed great concern over the various regulatory proposals regarding initial margin requirements. SIFMA has urged regulators to utilize daily variation margin requirements to meet G20 efforts aimed at reducing systemic risk and increasing market stability, while avoiding the imposition of onerous mandatory initial margin requirements, which would drain liquidity and have negative pro-cyclical impacts on markets during times of stress.[17] We have urged the CFTC to formally re-propose its margin rule proposal based on the final BCBS-IOSCO report that is expected in September. SIFMA urges the Senate Agriculture Committee to consider SIFMA's comments regarding proposed margin requirements for uncleared swaps in the CEA reauthorization legislation.

Cost-Benefit Analysis:

As noted above, it is critical that regulators carefully balance the benefits of swap-related regulation with the potential decreases in liquidity and increased costs to customers wishing to hedge their activities. As a result, throughout the Title VII rulemaking process, SIFMA has encouraged regulators to conduct comprehensive cost-benefit analysis for all Dodd-Frank rules.

This is consistent with the Obama Administration's efforts to promote better cost-benefit analysis for federal agencies through Executive Order 13563,[18] which requires all agencies

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[17] SIFMA has responded to various regulatory proposals on initial margin requirements. These include responses to the CFTC's re-opened comment period on proposed rules on margin for uncleared swaps, submitted Sept. 14, 2012; http://www.sifma.org/issues/item.aspx?id=8589940303), and to the first and second BCBS/IOSCO consultative documents on margin requirements for non-centrally cleared derivatives, submitted Sept. 28, 2012 (http://www.sifma.org/issues/item.aspx?id=8589940507) and March 15, 2013 (https://www.sifma.org/issues/item.aspx?id=8589942551), respectively. SIFMA has also provided comments in response to SEC (http://www.sifma.org/issues/item.aspx?id=8589942116) and U.S. Prudential Regulator proposals (http://www.sifma.org/issues/item.aspx?id=8589941054) on margin requirements for uncleared swaps.

[18] http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order

proposing or adopting regulations to include cost-benefit analyses in an attempt to minimize burdens, maximize net benefits and specify performance objectives. The President also stated that regulations should be subject to meaningful public comment, be harmonized across agencies, ensure objectivity and be subject to periodic review. In 2012, in testimony before the House Committee on Government Reform, the SEC Chairman Schapiro stated "I continue to be committed to ensuring that the Commission engages in sound, robust economic analysis in its rulemaking, in furtherance of the Commission's statutory mission, and will continue to work to enhance both the process and substance of that analysis."[19]

Congressmen Conaway has introduced legislation (H.R. 1003) that would improve the consideration by the CFTC of the costs and benefits of its regulations and orders by requiring the Commission to "assess the costs and benefits, both qualitative and quantitative, of the intended regulation and propose or adopt a regulation only on a reasoned determination that the benefits of the intended regulation justify the costs of the intended regulation" and "shall evaluate considerations of the impact on market liquidity in the futures and swaps markets". SIFMA strongly supports H.R. 1003 and urges the Committee to support this vital initiative that would enhance cost-benefit analysis done by the CFTC.

Thank you for giving me this opportunity to explain our views related to several important measures to be considered by the Senate Committee on Agriculture.

[19] http://www.sec.gov/news/testimony/2012/ts041712mls.htm