Alternative Investment Management Association

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Submitted via the CFTC website

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26 September 2011

Dear Sir and Madam,

Study on International Swap Regulation Mandated by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Comment on CFTC and SEC Staffs Public Roundtable on International Issues relating to the Implementation of Title VII of the Dodd-Frank Act

The Alternative Investment Management Association (AIMA)[1] welcomes the opportunity to provide comments as part of the Commodity Futures Trading Commission (CFTC) Study on International Swap Regulation Mandated by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Consultation). As there is significant overlap in the topics, we additionally provide comments in relation to the Securities and Exchange Commission (SEC) and the CFTC Title VII rulemaking and their request for input following the 1 August 2011 Public Roundtable on International Issues relating to the Implementation of Title VII of the Dodd-Frank Act (the Roundtable).

AIMA's comments

AIMA supports the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) reforms and, in particular, those moves to meet G20 commitments around trading, clearing and reporting of over-the-counter (OTC) derivative and swap contracts[2].

We are equally supportive of similar legislation being implemented in Europe and certain Asian countries and encourage other G20 nations to expediently take forward their commitments on trading, clearing and reporting of

[1] AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector – including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, accountants and lawyers. Our membership comprises over 1,200 corporate bodies in over 40 countries.

[2] The leaders of the G20 nations' commitment at the September 2009 summit in Pittsburgh that "All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories."

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OTC derivatives. However, we are aware that, as the proposals in the US and outside of the US are taken forward, there is divergence in the details of the rules and the requirements which they place on certain institutions. Certain of these requirements reflect necessary features of local regulation that correspond to the features of local markets, while others appear to have diverged through insufficient international coordination to date. We believe that convergence and consistency of many of the requirements would be highly desirable. Further, we are concerned that the territorial scope of the Title VII requirements is, at best, unclear or, at worst, applies requirements to non-US counterparties which may have very little connection to the United States. A major consequence of extraterritorial regulation is that the requirements imposed may well overlap with the domestic requirements in another jurisdiction. Where the rules diverge, this will cause confusion and may create conflicting obligations for US and non-US parties. This could ultimately lead to non-US parties severing connections with US investors and counterparties in order to allow them to comply with their domestic regimes.

Summary of AIMA's comments:

- AIMA supports the full and prompt implementation of Title VII of the Dodd-Frank Act.
- There is insufficient certainty around the territorial scope of Title VII and formal rulemaking or guidance is requested from the Commissions in this regard.
- Asset management firms act as intermediaries for their investors and, therefore, the location of their trading office, operations office or the fund vehicle is not relevant for determining the territorial scope of Title VII and its application to those firms.
- Relevant considerations for determining what will impact the 'commerce *of* the United States' include the location of the underlying investors, the counterparty to a trade and the underlying of a swap.
- 'Evasion' of the Dodd-Frank Act should be the subject of a clear definition, which should carve out legitimate business conducted outside of the United States for, *inter alia*, reasons of efficiency and compliance with fiduciary obligations.
- The Commissions should make further efforts to ensure consistency of the Title VII rulemaking with similar provisions in Europe and Asia. Doing so will create significant benefits for all parties, including the reduction of costs, reduction of systemic risk and the ability of market regulators to effectively oversee the global markets.
- The Commissions should provide for recognition of OTC derivative regulatory regimes which have equivalent effect to that of Title VII.
- Key areas where greater consistency is desirable include: the features of swaps trading venues; segregation models for client collateral; and CCP ownership and governance.
- The Commissions should proceed promptly to implement the Title VII rules. However, due consideration must be given to the timing of equivalent regulation outside the US that will impact US counterparties and the US markets.

The Consultation

As listed in the Consultation, questions in sections A to E regarding the regimes in various jurisdictions around the world are best answered by the local regulators and policy-makers in those jurisdictions. Further, the Financial Stability Board (FSB) has already undertaking a similar project to gather information from the G20 countries regarding the OTC derivative market reforms in each[3]. The FSB made its first progress report on 15 April 2011. In this, it detailed the regimes as currently enacted and proposed in various jurisdictions. The FSB is due to publish a further progress report in October 2011. The various exchanges and clearing houses will likely provide the most

[3] http://www.financialstabilityboard.org/publications/r_110415b.pdf

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complete set of answers to the questions in section G of the Consultation. AIMA, therefore, concentrates its answers on the questions posed in section F – see Annex 1.

We believe that, because many jurisdictions have attempted to implement new requirements for trading, reporting and clearing of OTC derivatives in line with their G20 commitments, there are broad similarities in the regimes which are now developing. The details of each regime, however, vary in key areas. The first consequence of this divergence will be that international financial institutions will face increased difficulties and costs since they will be required to meet different standards in different jurisdictions for the same types of business or trading activity. The second and, perhaps, more severe consequence may be that individual jurisdictions may prove unwilling to recognise entities registered under another jurisdiction's regime, where that regime varies on material details. This will prevent those registered entities from accessing the jurisdiction's markets. This could have a significant impact for international trade and global markets, leading to market fragmentation.

The Roundtable

The CFTC's public roundtable meeting held on 1 August 2011 provided a useful and interesting discussion of the international aspects of swap regulation. Those on the CFTC's panel raised a number of specific points on which they requested further comment, which we now provide.

Defining territorial scope

AIMA is concerned that the territorial scope of the Dodd-Frank Act is not clear. The Act itself does not provide sufficient guidance as to which activities are caught within Title VII and we respectfully request formal written guidance or rule-making from the SEC and CFTC on how the Dodd-Frank Act rules will be applied (or are not applicable) in specific circumstances.

Section 722(d) of the Dodd-Frank Act states that:

> *"The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—*
>
> *(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or*
>
> *(2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010."*

The question as to what activities have a 'direct and significant connection' with activities in, or effect on, the commerce of the United States is a particularly difficult and open one, and we would note that the text refers to "commerce *of* the United States" rather than "commerce *in* the United States" (our emphasis). Further, it is difficult to distinguish between activities conducted as a way of evading provisions of the Dodd-Frank Act and activities which are legitimately conducted outside of the US for any number of reasons.

AIMA, as the trade association for the global hedge fund industry, represents both small managers, which may have limited international business, and large managers, whose businesses are often truly global. Those asset management firms with international scope may be thought to have an impact on a given jurisdiction (including its commerce) due to the location of any of the following:

- the manager's head office;
- the manager's office from which it conducts trades;

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- the manager's office from which it conducts its operations;
- the fund vehicle;
- the investor/s on whose behalf they act;
- their counterparties;
- the markets on which they trade;
- in the case of derivative contracts, the underlying reference entity, security, rate or other variable; or
- the currency in which the trades are denominated or settled.

It is important, however, to realise that the role of an asset manager is not the same as that of a swaps dealer or a futures commission merchant (FCM). Whilst the latter are principals to all their trades, asset managers are intermediaries, acting on behalf of their clients – the funds for which they invest and the fund's underlying high-net worth individuals, institutional investors and funds of funds. Asset managers generally do not place their own money or assets for the purposes of the trade and act under tight control of their investment mandates, as set out in detailed investment management agreements. For this reason, of the list of possible jurisdictional factors the Commissions should not look to the location of the asset management firm, which is simply not relevant for determining territorial scope of these rules[4]. This is equally true of the funds, which the asset managers trade for. A fund is simply a vehicle, which allows the pooling of assets. Where it is situated is not a relevant consideration for assessing the impact on US commerce of swaps trading. In global markets, asset managers arrange their businesses in ways that are most efficient, including the locality of their various offices. The locations of the head office or trading offices are not relevant considerations. To an even greater extent, the jurisdiction of the offices responsible for back-office operations, such as trade confirmations and collateral management, are different to the manager's trading operations and could equally be said to have no impact on the commerce of the United States.

Other factors, in particular, the location of the counterparty to the trade and of the ultimate clients/investors, are of greater importance when determining the territorial scope of legislation. For example, if a manager is regulated and situated in the US but is contracting with a European dealer bank on behalf of a number of non-US clients, in a swaps contact denominated and settled in Euros and which references securities listed on the London Stock Exchange, it is very difficult to see why that US manager should be subject to US regulation under Title VII in this regard – the circumstances simply have no bearing on the US economy. Where a non-US manager is acting for US clients, trades with a US counterparty in a swaps contract listed on a US regulated swap execution facility (SEF), there is a much stronger case that the manager should fall under the authority of the Commissions and Title VII.

It is clear that there any number of variables and a combination of factors that could be used to determine if the Title VII rules apply to a particular firm. We believe detailed guidance for asset management firms is required from the Commissions in this regard.

Evasion of the Dodd-Frank Act and related rules

Within the financial services industry, the second limb of the section 722 test regarding 'evasion' of the provisions of Dodd-Frank Act is causing particular concerns. Whilst we understand and support the spirit of the provision, which is aimed at ensuring that parties do not set up unnecessary contrivances with the sole intention of avoiding the Dodd-Frank Act, many legitimate activities could be mistaken for evasion. Asset management firms, like some other financial institutions, are under fiduciary obligations to act in the best interests of their investors (or clients) and, as part of this obligation, to achieve the best execution for investors. Best execution obligations

[4] We refer only to the rules in relation to Title VII. AIMA has supported the SEC's proposals to require registration of Investment Advisers, which has other policy considerations behind it.

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include conducting trades that seek the best outcome for the investors with regard to a number of criteria including price, speed of execution, brokers' fees, likelihood of execution and other factors important to the investors. To achieve best execution, investment advisers may be required to select either US or non-US brokers, to select US or non-US financial instruments or to trade in US or non-US markets. Such decisions would be made to satisfy best execution obligations and not with the intention of avoiding the Dodd-Frank Act. A further example would be the structuring of business operations and activities according to the jurisdiction where it is most efficient to do so, such as using a non-US sub-adviser when trading in Asia to take advantage of their local knowledge and local regulatory status. This should equally not amount to 'evasion'.

AIMA believes that the Commissions must be very clear and state publicly what they do and do not consider to be evasion of the Dodd-Frank Act. At the very least, the Commissions should provide specific examples of behaviour that is, and behaviour that is not, evasion.

Alignment of the US and international regimes

Some ambiguity regarding the territorial scope of rules promulgated under Title VII is inevitable. Once the Commissions have developed a framework for their rules that considers the international nature of the swaps markets, they should further consider the ways in which the provisions can be aligned with those of other jurisdictions and how the Commissions can formally recognise equivalent non-US regimes.

We note that the Consultation speaks of "harmonization" of swap regulation and clearinghouse regulation in the United States, Asia, and Europe. The term "harmonization" has a specific meaning outside of the US and other jurisdictions' regulators often speak about "convergence" and "consistency" of regulation. Harmonisation often implies (particularly in Europe) that two sets of rules are nearly identical in their drafting. 'Convergence' is generally taken to mean the use of the same concepts, techniques and tools in rulemaking, which, therefore, applies very similar requirements to parties under two different regimes. 'Consistency' is a third idea and implies the use of different concepts, techniques and tools, often for reasons related to the local structure of rule writing, that achieves the same outcome or goal. Each concept defines a way of aligning different regulatory regimes. We believe that provisions in the US and in other jurisdictions should be converged where possible and elsewhere, at least, made consistent and that consistency, not full harmonisation, is a sufficient condition for mutual or even unilateral recognition.

For US entities, a large proportion of the derivatives trades that take place outside the US do so with counterparties in Europe and many asset managers have offices and operations in both the US and the EU. The EU is taking forward the same G20 commitments regarding trading, clearing and reporting of OTC derivatives in two areas of EU legislation, that will be implemented in all European Member States. These are the proposed European Market Infrastructure Regulation (EMIR) and the revision to the Markets in Financial Instruments Directive (MiFID). We set out below areas where we believe the provisions of the Dodd-Frank Act and its rules differ from the proposals in EMIR and MiFID[5].

If the provisions of legislation in the US and the EU could be converged or made consistent, such that provisions contain similar wording or, at least, have similar effect, this would have several key benefits. From the position of regulated firms, significant time and cost is spent ensuring in compliance with applicable rules in the jurisdictions in which the firm operates. If provisions are aligned, then less time and resources need to be committed to understanding different rules; this, in turn, will encourage greater trading activity and will reduce the fees payable by investors and so boosting returns. For example, if reporting obligations for derivatives data are aligned, then firms can prepare one common report of applicable data and submit this to two or more regulators, rather than preparing multiple but slightly differing reports. Much of the modern compliance operations are partly automated and computerised. If provisions are converged across the different jurisdictions, again, a saving can be made on the creation of two or more computer systems rather than one that understands a common set of rules.

[5] We have assumed, for the purposes of this letter, that the proposals in the European Commission's consultation of 8 December 2010 will be included within the legislative proposal expected to be publish by the European Commission in October 2011.

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Convergent or consistent regulation, additionally, creates a level-playing field in terms of regulation in different jurisdictions. Regulatory arbitrage opportunities are inevitable if legislation is not broadly similar across the different regimes, leading to a 'race to the bottom' in terms of standards and, potentially, a significant move of trading activities from well regulated markets, such as the US, to lighter-touch regimes. This would have a negative impact in terms of the ability of regulators globally to prevent and monitor the build up of systemic risks and could adversely affect the amount of financial activities that occur in the US and, ultimately, the US economy.

Beyond alignment of provisions, which if truly harmonised, may be difficult to achieve, the Commissions should consider how they may recognise the legal regimes of other jurisdictions where they have similar effects. For example, one of the goals of Title VII is to require mandatory clearing with a robust central counterparty of certain suitable swap contracts to reduce and manage firms' counterparty credit risk. Where the European EMIR proposal sets similar high standards for central counterparties (CCPs) as the Dodd-Frank Act, there is no reason why US counterparties should not be able to use EU-established CCPs that equally offer central clearing and reduce the US entities' counterparty credit risk. If the US authorities do not recognise the EU regime, firms may become subject to conflicting obligations where both the Dodd-Frank Act and EMIR may equally impose obligations on counterparties to a transaction. For example, if a US manager, trading on behalf of US investors transacts with an EU dealer in a Euro FX forward trade, both regimes could claim that they are applicable to the trade, even though it is impossible for the contract to be cleared by two CCPs (one in the US and one in the EU). In practice, mutual recognition would allow counterparties to comply with both regimes by clearing a trade at either a US registered derivative clearing organisation (DCO) or an EU registered CCP. A further example would be the possibility for the Commissions to align rules and coordinate with other market regulators on the details of reporting obligations and the collection of swaps data. Like the clearing obligation, both the Dodd-Frank Act and EMIR will require parties to report details of their derivative trades to trade repositories for the purpose of monitoring the build up of risk in the markets or particular instruments. Whilst both regimes would see that firms report their trade data to a swap data repository (US) or a trade repository (EU) under their own regimes, an ideal solution would be for firms to report to a single repository with appropriate sharing of necessary information among the regulators. This has the advantage of avoiding duplication of reports and preventing double-counting of trades, and allows the Commissions to take an overview of total global exposures in certain types of derivative contracts and to compare, like-for-like, the data in one country and another. This goal should be achievable as we understand the International Organization of Securities Commissioners (IOSCO) is currently coordinating efforts to agree common templates for data reporting and coordination and information sharing systems among the largest financial regulators. AIMA strongly supports this IOSCO initiative and encourages the Commissions to take up their recommendations.

Once a clear territorial scope of the Dodd-Frank Act Title VII rules is determined, the Commissions should work intensively to establish mutual recognition agreements with other key financial centres that have similar regimes to Title VII.

Timing of implementation

The US has moved commendably quickly with the implementation of Title VII of the Dodd-Frank Act. However, as noted, other international jurisdictions have not yet finalised their legislation. Although ensuring that there is clear territorial scope for the US rules and, ideally, alignment of those rules with other jurisdictions' rules are our key concerns, it is also important that the effective date of provisions in the US take into account the implementation schedules outside of the US. Although it may not be practical to delay implementation until others have advanced their own legislation, there should be clear guidance as to when US legislation takes effect, when US legislation takes effect for non-US counterparties and which measures may be necessary on a temporary basis for international counterparties until foreign regimes are established.

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Conflicts with European Regulations

Only the US, Japan and the EU have made significant advances in their OTC derivative trading, clearing and reporting regimes to date. A substantial amount of OTC derivative trading occurs in the European Union (including between EU and US entities) and thus much attention has been given to the EU's proposed EMIR. We set out in Question 1 in Annex 1 areas where we believe there are conflicts/divergence between the US and EU regimes.

Conclusion

AIMA supports the introduction of central clearing globally and believes that it is of the utmost importance for the Commissions to work towards ensuring alignment of the regulatory rules with other international jurisdictions and to provide for mutual recognition of the non-US regimes. These two features are absolutely necessary if the US is to achieve a successful regime that takes account of the international nature of the markets.

We thank you for this opportunity to comment on the Consultation and provide comments following the Roundtable and we are, of course, very happy to discuss with you in greater detail any of our comments.

Yours faithfully,

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Director of Government & Regulatory Affairs

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Annex 1

F. Regulatory Comparison

1. Across jurisdictions, for any or all items listed above, which areas of regulation are similar and which areas are different?

Broadly, the details and the effects of the different regimes are similar and take forward the G20 commitments around trading, clearing and reporting of OTC derivatives. In particular, the US and EU regimes require clearing of 'eligible' trades with CCPs, the exchange of collateral to cover the exposure of the counterparties to the trades, the ability for the authorities in the jurisdictions to designate other contracts as suitable for clearing and authorisation regimes for CCPs and trade repositories. There are many other similarities beyond these.

However, we are aware of many key differences. We refer the Commissions to the FSB's latest report on the progress of implementing the G20 Commitments. However, we wish to highlight the following differences, which we feel should be considered further and should be addressed either in the US (to be aligned with the EU position) or in the EU (to be aligned with the US position).

Trading venues (SEFs)

The G20 nations have committed not just to clear OTC derivative contracts but to move suitable contracts on to organised trading venues. The Dodd-Frank Act does this through the requirement to clear eligible swaps on newly established 'swap execution facilities' (SEFs). In Europe, such proposals are expected to be included within proposed amendments to MiFID and the details of such a trading venue are not yet known. In January 2011, the CFTC consulted upon whether the definition of a SEF, as detailed in the Dodd-Frank Act, should be implemented into CFTC rulemaking as a request for quote system, an order book system (similar to a futures exchange) or some other type of organised trading venue. Final rules in this regard have not yet been promulgated. It is uncertain which of these options the European Commission will propose later in the year. US persons, who are required to trade specific swaps on a registered SEF or a non-US equivalent, may be prevented from trading that type of swap on European markets if a different type of organised trading venue is established in Europe.

Segregation of collateral

One of the many benefits of the move of derivative trades to CCPs is that it is allowing policy-makers to reconsider the needs of market participants with regards to the mechanisms by which customer collateral is protected from the insolvency of the counterparty. Whilst the futures / omnibus model has been a long used and relatively successful model, the Commissions continue to consult on whether a different model, that does not exposure customers to 'fellow customer risk', is more appropriate. In its 9 June 2011 notice of proposed rulemaking, the CFTC stated its preference for a segregation model described as 'legal segregation with operational commingling (complete legal segregation model)' (LSOC). Although no firm position has been reached in Europe, the European Parliament, in a text approved on 24 May 2011, has proposed a model which seems to offer a greater level of protection of client collateral than the LSOC model proposed by the CFTC, being closer to a physical segregation model (i.e., individual accounts are used). We note that this is indicative of a general approach that Europe has taken to segregation and collateral protection, which has historically always been stronger than that proposed in the US.

CCP ownership and governance

CCPs (DCOs) are at the heart of the new swaps regimes in the US and the EU. Their quasi-public utility role, together with the fact that parties will be mandated to use their services, means that managing conflicts of interest through ownership caps and proper corporate governance procedures is particularly important. Whilst the Commissions have proposed several alternative options for caps on the amount of equity ownership any

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clearing member or other entity may have in a DCO, they have not yet agreed a solution or published final rules in this regard. The EMIR proposal, in contrast, is silent on this point containing no provisions regarding the ownership of CCPs. Corporate governance provisions will establish important bodies and committees to oversee key decisions of the CCPs. These include the CCP risk committee, which will advise the governing Board on which clearing members may join the CCP and which products the CCP can clear. The composition of the membership of the governing Board and of the risk committee has been the subject of significant debate in both the US and in Europe. The CFTC has proposed that 10% of both the Board and the risk committee of a DCO be comprised of representatives of the clients of clearing members. In Europe, the European Parliament has taken a view that all of the relevant parties should be represented on the risk committee and that no one group should represent a majority of the committee. The European Parliament has also proposed that clients be represented on CCP governing Boards.

There are further examples of differences that could be given. Such differences could be used as reasons to not recognise a third country's legal regime and, thus, its counterparties, in the interest of enhancing protectionism in the local market.

2. In viewing the existing laws, institutions, and enforcement mechanisms of each respective jurisdiction as a whole, are such similarities and differences appropriate and desirable for regulatory purposes, or do certain aspects of a particular jurisdiction's Swap market warrant a different regulatory approach?

AIMA is supportive of the fact that, broadly, the regimes being developed in the US, the EU, Japan and elsewhere are similar and place similar obligations on market participants regarding trading, clearing and reporting of OTC derivatives. As discussed above, however, there are a great many small differences which may be significant. Differences in the details of the regime will create opportunities for regulatory arbitrage and the ability of some international market participants to avoid certain requirements that the G20 leaders wished to implement. An example of this may be the proposed exemption for certain FX swap contracts in the US, currently under consideration by the US Treasury. Although we agree that an exemption for some FX swap contracts is desirable, the broad nature of the exemption means that a large amount of the significant FX market will be excluded from the US regime. The EU has not proposed equal exemptions for FX swaps and forwards. Therefore, although there is no special need for the exemption in the US compared with the EU, many firms will, where possible, ensure to book these trades with US counterparties where it is likely to now be cheaper and less burdensome to contract bilaterally. The EU has its own exemptions not seen in the US Dodd-Frank Act and rules, including an exemption for intragroup trades, where equally intragroup trading will now, where possible, be conducted primarily in Europe. These differences are not desirable from the perspective of ensuring a consistently robust regime in all G20 countries.

It is difficult, in fact, to see any key differences between the different markets in the US, Europe and Asia that would warrant unique treatment. For this reason, we would encourage the Commissions to seek to align their provisions with those of other countries to the greatest extent possible. This would have advantages including reducing the burden on firms seeking to comply with the different regimes, coordinated monitoring and mitigation of systemic risks and creating a level playing field between countries. Full harmonisation would be difficult to achieve but, once regimes are aligned as much as possible, decisions on mutual recognition of similar regimes should be made so that firms may continue to transact in a competitive international marketplace, complying with those rules in any jurisdiction with a similar regime.

3. What are the potential costs and benefits (in terms of investor protection, market efficiency, competition, or other factors) that may arise from further consistency/harmonization of regulations across borders?

As discussed above, the benefits of aligning regulations across borders are numerous. Being consistent in this regard will allow parties to trade with counterparties in any one of a number of different jurisdictions, trading on different market and clearing with different counterparties. This will foster a competitive international

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market to ensure the greatest choice and lowest costs for parties that rely on swaps for both investment and risk management (hedging) purposes. Joined up regulation avoids parties being able to take advantage of arbitrage opportunities and equally avoids a 'race to the bottom' in terms of standards to attract business, which is bad for the long term financial stability of the global markets and economies. For users of the markets, convergent or harmonised regulation makes compliance with those rules simpler. Common monitoring and compliance solutions can be implemented to meet the requirement of multiple different regimes, which ultimately takes less time to comply with and saves those parties money on compliance staff and systems. This cost saving and added efficiencies may lead to less costs being passed on to investors, including institutional investors such as pension funds, and the ability to increase activities in the market. Aligned regulation will also allow for the important ability for the regulator of one jurisdiction to recognise the regime of another jurisdiction as being equivalent to its own. Therefore, parties in that jurisdiction may have the choice to trade / clear on a domestic SEF / DCO or on a foreign equivalent, depending on their needs and requirements. Further, recognition may allow counterparties to clear contracts outside the jurisdiction where there is not yet a domestic alternative, improving the take up of clearing worldwide. Overall, alignment of regulation will improve the take up of clearing services, the mitigation of counterparty credit and systemic risks and the ability of market regulators to monitor trading.

It is fair to point out that convergence may also bring with it additional cost or negative consequences where, for example, in the interests of finding a convergent position, policy makers agree a position which is not optimal or is even disruptive for the markets. If the measure which is aligned happens to be a bad one, the goals of the regimes will not be effectively achieved. Strict harmonisation or high levels of convergence are additionally not easy things to achieve and many long established pieces of legislation (e.g., the Securities Exchange Act) or market practice (e.g., omnibus account segregation) may be disrupted. Policy makers and market regulators from all jurisdictions should work together to achieve effective alignment of rules and find the right solutions, in consultation with market actors.

4. How should consistency in regulation across jurisdictions be measured and are there factors other than the harmonized text of a regulation that should be taken into consideration when assessing the degree to which cross-border regulatory harmonization has been implemented in practice?

Given the different approaches that are needed in different jurisdictions to implement the G20 commitments, including amending existing legislation, reaching a truly harmonised text of provisions is likely to be nearly impossible. On this basis, it is difficult to measure exactly and to what extent two pieces of legislation are consistent. The onus will be on policy makers and market regulators to make a judgement on consistency looking at the effect of the legislation and comparing the outcomes. One way in which consistency may broadly be measured is whether the regime complies with the internationally agreed standards and principles espoused by the Committee on Payment and Settlement Systems (CPSS) and IOSCO. Again, this is a judgement-led decision. However, if two regimes both comply with the CPSS-IOSCO standards and principles (i.e., they have the requisite features) then it is easy to say they are consistent. A further way of measuring consistency is whether standardised industry documentation can be produced to cover the scope of two regimes' rules.

Ultimately, consistency in regulation across jurisdictions is a matter of judgement. The level of consistency will need to be such that a jurisdiction can consider the texts 'equivalent' or 'comparable' under the domestic regime to allow for recognition of third country parties.

5. Assuming that a theoretically "optimal" set of regulations for a particular jurisdiction might take into consideration elements unique to a specific market in ways that might make cross-border harmonization difficult, to what extent do the benefits of greater regulatory harmonization across borders outweigh the costs associated with having regulations that might be less tailored to a particular market's circumstances? In what areas do you believe the benefits of harmonization most outweigh any potential downsides?

Whilst regimes that are adapted to specified conditions of a market may benefit certain types of participants,

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this also creates arbitrage opportunities which are harmful for the robustness of the overall regime and its goals. The use of OTC derivatives, the way in which parties wish to trade and overall business structures are very similar among the G20 countries and there is, therefore, very little need for specific tailoring of requirements to specific aspects of the domestic regime. Further, today's derivatives markets are global in nature and parties are able to quickly and easily transaction with counterparties around the world. A significant amount of trading is today conducted 'cross-border'. Despite this, certain jurisdictions have set up sufficient market infrastructure and support for the derivatives industry and the vast majority of all cross-border trading now occurs between just a small number of financial centres. These jurisdictions (the US, the EU, Japan, etc.) have successful financial industries and have broadly the same concerns that must be addressed in their legislation.

To truly harmonise requirements, the optimal solution would be adopt a common text or wording of key provisions so that the market could be certain that the rules in one jurisdiction are identical to those in another. We appreciate that this is not possible and that swaps regulation must fit within a framework of other financial services regulation. There must, therefore, be some degree of tailoring to ensure a convergent or consistent regime that is workable with other domestic laws.

6. In the United States, what steps should or could be taken to better harmonize statutory requirements under the Dodd-Frank Act with statutory requirements implemented in other jurisdictions? Are there any areas where you believe the likely benefits of "optimal" market-specific regulation outweigh the likely benefits of harmonization?

To ensure alignment of the rules, the Commissions are encouraged to continue constructive dialogue with policy-makers and regulators at all levels in other key jurisdictions in order both to encourage them to align their rules with the US and to reach agreement over where US regulations may be adapted to meet sensible positions adopted elsewhere. Conformity with the CPSS-IOSCO Principles for Financial Market Infrastructures and encouraging all parties to conform to the Principles is a positive step towards alignment. The Commissions should conduct a thorough assessment of the US regime against the Principles and make amendments where necessary. In areas where the Dodd-Frank Act diverges significantly from internationally agreed principles, we believe the Commissions may reasonable request that Congress review the provisions of the Act to consider amendments.

As already stated, harmonisation is only possible to a certain extent and, beyond this, the Commissions should be preparing themselves to make sensible decisions about which regimes are considered 'comparable' to the regime established under the Dodd-Frank Act.

7. In the United States, what steps could be taken to harmonize CFTC or SEC regulations with regulations promulgated by authorities in other jurisdictions?

Further to our response to question 6, the Commissions should, following this consultation, conduct a thorough 'gap analysis' of the US and other regimes. From this, they can continue and structure dialogues with other jurisdictions about their rules to work towards alignment. This must include both high-level political discussions on key decisions (e.g., the timing of implementation of the rules) and regulator-level discussions and agreements on technical details that will be necessary to (i) reduce burdens on international firms (e.g., mutual recognition, clear territorial boundaries for rules); and (ii) allow recognition of non-US firms trading in the US or with US counterparties (or for US investors).

Of great value would be formal written guidelines as to how the US regime will interact with the regimes in other jurisdictions and the Dodd-Frank Act rules' territorial scope.

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