
September 26, 2011

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Commodity Futures Trading Commission
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Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
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Re: International Swap Regulation Study; Release No. 34-64926 and File Number 4-635

Ladies and Gentlemen:

Better Markets, Inc.[1] appreciates the opportunity to comment on matters identified in the above-captioned release requesting information ("Release") of the Commodity Futures Trading Commission ("CFTC") and the Securities Exchange Commission ("SEC") (the CFTC and the SEC being hereinafter collectively referred to as the "Commissions"). The Release seeks information relating to a study by the Commissions to be reported to Congress (the "Study and Report") on swap and security-based swap (collectively "Swaps") regulations in the United States, Asia and Europe which identifies areas of regulation that are similar, other areas of regulation that could be harmonized and certain related matters, pursuant to and in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

## INTRODUCTION

The Study and Report are mandated by Section 719(c) of the Dodd-Frank Act which specifies the scope and subject matter in detail. The Commissions are required to study Swap, clearinghouse and clearing agency regulations in the United States, Asia and Europe and identify areas of such regulation that are similar and areas that could be harmonized. The report to Congress must include, across all jurisdictions, a catalog of the major exchanges and clearing entities, as well as the Swap dealers which are associated with them,

[1] Better Markets, Inc. is a nonprofit organization that promotes the public interest in the capital and commodity markets, including in particular the rulemaking process associated with the Dodd-Frank Act.

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setting out volume data for each Swap class and subclass, and a description of clearing methods and systems for margining uncleared Swaps.

The Congressional decision to mandate the Study and Report was wise, indeed. Derivatives markets share unique characteristics, which distinguish them from capital markets and make them especially important subjects of regulatory harmonization on a global scale. Capital markets and lending markets involve assets, businesses and governments that have concrete, physical attributes. Capital markets investors own instruments with intrinsic value, and banks lend against assets, enterprises and governments which have intrinsic value. Traditional concepts of regulatory jurisdiction can rely on these concrete attributes of the markets.

Derivatives are fundamentally different, and this difference poses unique issues for regulatory jurisdiction. Derivatives are executory contracts which have no direct connection to assets, enterprises or governments, typically referencing prices of capital markets instruments, commodities, currencies and interest rates. They have no intrinsic value. Derivatives are conceptual, not concrete. It is best to view them as existing in cyberspace rather than in the tangible world. However, because they signal market price levels, they affect the values of capital market assets, commodities, currencies and lending rates. This effect can be profound, especially since, unlike capital markets instruments and loans, transaction volume is unconstrained by the quantity of assets or enterprise cash flows.

For derivatives markets, the harmonization of regulatory regimes is particularly important. Swap execution can occur anywhere where a telephone or internet connection exists or a trading platform server can be housed. The same is true of clearing. The fact that the worldwide effects of derivatives market activity bear little relationship to the location of servers and personnel and the site at which the organizational papers of an affiliate are filed argues strongly for harmonization.

## SUMMARY OF COMMENTS

The comments below first examine the jurisdictional scope of U.S. law as a threshold matter. We advocate that the Commissions should establish a set of interpretive principles that will help resolve some of the uncertainty surrounding the application of U.S. law to certain derivatives-related activities and market participants. This step will help maximize the reach of U.S. law within the parameters established in the Dodd-Frank Act, and it will also promote clarity for the benefit of market participants and domestic and international regulators alike.

Second, we advocate that the scope of the Study and Report be expanded to include the types of abuses and problems that regulators in Europe and Asia have encountered in the derivatives markets and how those challenges have shaped the approach to regulation in those regions. An exhaustive catalog of the problems associated with the derivatives markets on a global scale, ranging from systemic risk to outright fraud, will help ensure that any harmonization effort adequately addresses all potential problems and abuses.

Finally, we address several specific questions from the Release relating to the meaning of harmonization, its proper role, and specific substantive areas where harmonization is especially important, including—

- Derivatives transaction data capture and regulatory access to data;
- Position Limits;
- Standards for mandatory clearing;
- Margining of uncleared Swaps; and
- Clearinghouse capitalization.

**DISCUSSION**

**The Commissions should establish interpretive principles clarifying the application of U.S. law to certain activities and market participants with an international link.**

An important starting point in the analysis of international harmonization is an understanding of the scope of U.S. law as it applies to derivatives markets and participants with an international connection. Unlike the European and Asian law and regulation proposed to date, the Dodd- Frank Act establishes general principles defining its reach into the worldwide financial services industry. CFTC authority in respect of Swaps is defined as follows:

> The provisions . . . relating to Swaps that were enacted by the [Dodd-Frank Act] . . . (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 [Dodd-Frank Act].[2]

[2] Dodd-Frank Act, Section 722(c) (emphasis added).

The SEC's jurisdictional scope relating to Securities-based Swaps is somewhat different:

> No provision of this title that was added by the [Dodd-Frank Act] . . . , or any rule or regulation thereunder, **shall apply to any person insofar as such person transacts a business in security-based Swaps without the jurisdiction** of the United States, unless such person transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of any provision of [the Dodd-Frank Act] . . . .[3]

For the CFTC, jurisdiction is defined in terms of activities which are sufficiently connected with, or have an effect on, U.S. commerce, as well as activities that would evade the law. The language governing the SEC's jurisdiction does not include the explicit "connection" or "effects" test. However, even as to persons transacting a security-based swap business outside the jurisdiction of the United States, the statute reaches conduct that would allow market participants to evade the Dodd-Frank Act, under SEC rules and regulations.

Much debate has centered on the proper application of these jurisdictional provisions to various types of market participants and their affiliates. As a practical matter, two of the most important situations to analyze are:

- U.S. chartered financial institutions with affiliates organized under the laws of another jurisdiction, branches operating under the laws of another jurisdiction, or other non-US operations subject to the laws of another jurisdiction.

- Foreign chartered financial institutions with affiliates organized under U.S. laws, branches operating under U.S. laws or other U.S. operations subject to U.S. laws.

It has been suggested that the jurisdiction of organization should be definitive and that foreign branches should be treated the same as owned corporate affiliates operating outside of the U.S. Under this analysis, any of the non-U.S. activities of a U.S. institution acting through branches or affiliates organized under foreign law would be beyond Dodd-Frank Act jurisdiction. However, the jurisdiction of each of the Commissions under the express language of the Dodd-Frank Act is actually broader, since the statutory test focuses on the nature, impact, intent and location of the activities in question, rather than merely principles of legal incorporation.

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[3] Dodd-Frank Act, Section 772(b) (emphasis added).

The issue of jurisdiction cannot be based on simplistic notions such as the jurisdiction of organization. The reason is the very complexity of international financial organizations:

> The Lehman Brothers group consisted of 2,985 legal entities that operated in 50 countries. Most of these entities were subject to regulation by the host country as well as oversight by the SEC. The integration of the organization was such that a trade performed in one company could be booked in another, without the client necessarily being aware that the location of the asset had shifted.[4]

This complexity is the rule, not the exception, among international financial institutions.[5] As the Lehman experience showed, this complexity was itself a systemic risk issue. While the complex task of sorting through the organizational maze created further uncertainty in the stressed marketplace, there were more immediate issues. Lehman routinely swept unused cash out of subsidiaries for use throughout its complex organization. When the U.S. entity failed, the far flung operations were left without funds to operate, multiplying market failures throughout the world. Immediate and ongoing waves of chaos ensued.

To help remove some of the uncertainty surrounding these issues, the Commissions must establish a set of interpretative principles. The principles should clearly delineate jurisdiction as follows:

- The related entities of non-U.S. financial institutions described above must be subject to jurisdiction.
- If an entity executes on a U.S. registered exchange or Swap execution facility, jurisdiction attaches.
- If an entity clears a transaction on a U.S. registered clearinghouse, jurisdiction attaches.
- If the U.S. parent guarantees the obligations of the Swaps of a related entity, jurisdiction attaches. This must include direct guarantees, capital contributions agreements, letters of credit or other third party support paid for by the parent or under which the parent is ultimately liable.

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[4] R. Herring, "Wind-down Plans as an Alternative to Bail Outs – The Cross-Border Challenges," January 2010, *available at* http://fic.wharton.upenn.edu/fic/papers/10/10-08.pdf (incorporated herein as if fully set forth here).

[5] *Id.*

- Common decision-making and strategies, determined by reporting responsibilities and technological integration, are central to jurisdiction.

- If the entity's Swaps are consolidated on the books of the parent (therefore affecting the perceived value of the parent's Swap book), jurisdiction attaches.

- If an entity's cash is routinely swept into a parent or affiliate, jurisdiction attaches. In the derivatives business, which is dominated by cash liquidity and instantaneous changes in risk, this activity binds entities together into a single operation.

However, the principles must not define the ultimate scope of jurisdiction. The language of the Dodd-Frank Act is not so limited. The Commissions must retain the ability to pursue a case by case analysis that considers a variety of factors to determine jurisdiction, including domestic effects of foreign activity; foreign activity used to evade domestic laws and regulations; receipt of trading revenue; and the jurisdiction in which the greatest risk is concentrated.

Being subject to both U.S. and foreign jurisdiction is not an intolerable result for any entity. It means that the regulators have to harmonize the **practical consequences of jurisdictional overlap,** and regulators internationally are working toward that goal. In any event, it is far better to impose concurrent jurisdiction over market participants than to allow regulatory gaps to persist.

**The Study and Report should also analyze the types of abuses that have been witnessed in European and Asian derivatives markets, and the impact those abuses have had on shaping regulation.**

The scope of the Study and Report should be expanded to include a review and analysis of the types of abuses and problems that regulators in Europe and Asia have encountered in the derivatives markets and how those challenges have shaped their approach to regulation. The Release is admirably thorough in terms of soliciting information regarding the current regulatory structures for derivatives markets in Europe and Asia. However, it does not seek to gather background information about the specific types of abuses or specific instances of misconduct that have arisen in those markets, or how that experience has influenced the evolution of regulation in those markets. The study and the report should address those issues.

This information is important to ensure that any harmonization effort adequately addresses the full range of structural problems and abusive behaviors that have afflicted—or that may afflict—the derivatives markets. In short, when medical researchers are designing a vaccine, they must know as much as possible about all of the viral strains they are confronting.

At the same time, however, the Study and Report should caution that harmonization is no less important in jurisdictions that may not have witnessed chronic or systemic

abuses, since pockets of weak regulation eventually and inevitably become havens for unscrupulous practices. Thus, analyzing the history of problems in the foreign derivatives markets will not only better inform the harmonization effort, it will also highlight the importance of strong regulation as a prophylactic measure.

**Harmonization means, above all, the elimination of regulatory gaps.**

The following questions are posed in the Release under Part F – *Regulatory Comparison:*

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?

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?

To answer these and other questions in the Release, harmonization requires some definition. First, it does not mean "identical." Distinctions will always arise. It also does not mean that the regulatory regimes will fit together like a jurisdictional jigsaw puzzle.

While perfectly formed jurisdictional borders are neither practicable nor required, **gaps** cannot be tolerated in a harmonious international system. History and human behavior tell us that a gap will be exploited to enrich a few over the short term and imperil the many thereafter. A diabolical characteristic of derivatives (dubbed "financial instruments of mass destruction" by Warren Buffet) is that they are perfect devices for such exploitation.

In contrast, overlap is far preferable. **Regulatory overlap can be managed by the regulators; regulatory gaps cannot.**

Harmonization must be defined by its purpose: to assure that the intent of policy makers is that derivatives no longer put the world economies at great risk is achieved. The G20 has provided the scope of this purpose.[6] A good definition is that harmonization means

[6] Leaders' Statement, Pittsburgh Summit, 25 September 2009, *available at* http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf (incorporated herein as if fully set forth here).

that there is no geographical or conceptual space in which derivatives activity escapes regulation in accordance with the principles laid out by the G20.

**To be effective, harmonization must involve not only shared regulatory standards, but also strong standards.**

A different spin on harmonization is prominently articulated in the press and public discourse, and this spin requires mention. Representatives of the financial services industry often argue against a specific rule by threatening that their businesses will relocate to another jurisdiction with a preferable rule if the proposed regulation is adopted. Of course, in the other jurisdiction the same argument is used in opposition to a different proposed rule that they oppose. The obvious, hoped-for result is a common set of rules in which the least restrictive version of each rule survives.

The objective is no less than an attempt to prompt a global race to the bottom. These arguments seek to have regulatory authorities succumb to what are no more than extortionate threats. They are, of course, based on plainly erroneous assumptions. In reality, the differences in regulatory outcome would have to be dramatic to induce a substantial change in resources allocated to different geographical regions. Therefore, the very premise of these threats should be challenged as economically and financially foolish.

More to the point, these arguments inevitably lead to a hopelessly ineffective regulatory regime. Harmonization can address this problem only through standards that are shared **and** strong. Each regulatory authority should adopt powerful rules and an expansive interpretation of the extraterritorial reach of those rules, in effect creating a broad overlapping framework. With overlapping jurisdiction, moving operations to engage in regulatory arbitrage becomes futile. The two regulatory authorities can thereby avoid the whipsaw tactics of the industry.

Much more importantly, this is the only way to have rules that protect the public, the taxpayers and the public treasuries throughout the world from being forced to bail out the financial industry again from their reckless conduct. Such a repeat of the global financial crisis is guaranteed by either lowest common denominator rules or by different regulatory regimes that allow financial entities to play one jurisdiction against another.

A robust set of harmonized common rules across jurisdictions is also the best solution to protect the financial industry from itself. Without clear and strong rules, history proves the industry's proclivity for recklessness will always get the better of it and always to the detriment of the host country as well as others.

**Harmonization is especially important in certain key areas of derivatives regulation.**

The following question is posed in the Release under Part F – *Regulatory Comparison:*

> 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? Are there any areas where you believe the likely benefits of "optimal" market-specific regulation outweigh the likely benefits of harmonization?

This question raises the issue of variation among categories of regulation in terms of the value or necessity of harmonization. This is an extraordinarily enlightening and productive avenue of analysis. An in-depth examination of harmonization in the context of concrete examples will greatly enhance the value of the Study and Report. The following categories of regulation are discussed below:

- Derivatives transaction data capture and regulatory access to data.
- Position limits.
- Standards for mandatory clearing.
- Margining of uncleared Swaps.
- Clearinghouse resources.

*Derivatives transaction data capture and regulatory access to data.*

Harmonization issues for this category are qualitatively different from other regulatory subjects. The effects of distinctions between rules can be observed and managed, and even rectified, over time. But all of this is dependent on the ability to observe the marketplace in a meaningful way. The ability of regulators to maintain a comprehensive understanding of the global derivatives markets will depend upon their approach to putting in place systems in which barriers to observing and analyzing markets across jurisdictions and product classes are minimized or eliminated.

The required reporting of data to trade repositories is rooted in the 2009 statement of the G20 which was intended "to improve transparency in the derivatives markets, mitigate systemic risk, and protect against market abuse."[7] The concept of systemic risk in the context of derivatives trading and markets has been illuminated as follows:

> The recent financial crisis exposed weaknesses in OTC derivatives markets that had contributed to the build-up of systemic risk. These weaknesses included the build-up of large counterparty exposures between particular market participants which were not appropriately risk-managed; contagion risk arising from the interconnectedness of OTC derivatives market participants; and the limited transparency of overall counterparty credit risk exposures that contributed to the loss of confidence and market liquidity in time of stress.[8]

Thus, to fulfill the goals set by the G20, the trade data capture systems established by each jurisdiction and by the jurisdictions as a whole must address systemic risks and, in particular, counterparty credit risks.

A task force of the International Organization of Securities Commissions jointly with the Committee on Payments and Settlement Systems recently published a Report on OTC Derivatives Data Reporting and Aggregation Requirements.[9] This comprehensive report analyzed the issues of data reporting to trade repositories and the use of such data by regulatory authorities across jurisdictions. The report addresses a number of key topics including:

- Minimum data reporting and, in particular, data gaps in the historical and current evolution of transaction repositories, including counterparty information and event data.
- Access to data by regulatory authorities.
- Methodologies and mechanisms for aggregation of data.
- The importance of legal entity identifiers and standard international product classification systems.

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7 Leaders' Statement, *supra* note 6, at 9.

8 OTC Working Group Report adopted by the Financial Stability Board and submitted to the G20 financial ministers and central bank governors in October 2010, at page 1, *available at* http://www.financialstabilityboard.org/publications/r_101025.pdf (incorporated herein as if fully set forth here).

9 Found at http://www.bis.org/publ/cpss96.pdf.

The report focuses great attention on the need for aggregation in such a way that comprehensive and comprehensible bi-lateral portfolio analysis and collateralization levels can be available to regulatory authorities. It points out that the current models for trade repositories inadequately serve this purpose.

Better Markets filed a comment letter on this report which categorically supports the report's findings and conclusions.[10] It further sets forth detailed methodologies for achieving the stated goals. The ideal approach is the establishment by multiple regulatory authorities of a system which aggregates data from multiple trade repositories and evaluates market and credit risks on a comprehensive portfolio basis. Deviation from this ideal runs counter to the goals articulated by the G20, in particular the central goal of mitigation and monitoring of systemic risks.

*Position limits.*

The fundamental purposes of the commodities futures markets are to facilitate hedging by businesses which produce and consume basic commodities and to provide price discovery across a duration curve to allow businesses to transact with an efficient and reliable view of price expectations. Position limits protect the markets from effects of excessive speculation which undermine these purposes.[11]

Derivatives markets are no longer isolated from one another along jurisdictional boundaries. Trading activity in one venue can have important impacts on other venues, as described persuasively in the CFTC proposed rule on Foreign Boards of Trade.[12] Therefore, the value of position limitations applicable only to US markets is reduced to the extent that speculative trading activity in price-linked contracts simply re-emerges in a market subject to no position limits, replacing positions that would have existed but for U.S. limits. Therefore, internationally coordinated and harmonized position limits which target excessive speculation in ways that protect the hedging capacity and price discovery purposes of commodities markets would be an ideal outcome.

However, the practical roles which individual marketplaces play vary widely. Liquid U.S. marketplaces for energy and agricultural derivatives serve a unique function. Many physical market transactions are tied to them either contractually on a forward basis, through auction practices or through the procedures of index providers. While the price effect of non-U.S. speculation on U.S. markets is a concern, it is at least indirect. The direct

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[10] Better Markets Comment Letter, Large Swaps Trader Reporting for Physical Commodities, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26632&SearchText=better%20markets (incorporated herein as if fully set forth here).

[11] Better Markets Comment Letter, Position Limits, March 28, 2011, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=34010&SearchText=better%20markets (incorporated herein as if fully set forth here).

[12] CFTC Proposed Rule, Registration of Foreign Boards of Trade (CFTC RIN 3038-AD19). *See also* Comment Letter from Better Markets, Inc., Registration of Foreign Boards of Trade, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27212&SearchText=better%20markets (incorporated herein as if fully set forth here).

impact on hedging and price discovery of excess speculation in U.S. markets is an especially urgent problem, and it requires the imposition of strong U.S. position limits, apart from the willingness of other jurisdictions to impose position limits in these commodities.

There is a great value to harmonized and well-constructed position limits across multiple jurisdictions. However, U.S. position limits are desperately needed even if their global value is diminished by the absence of international harmonization.

*Standards for mandatory clearing.*

Standards for mandatory clearing under proposed rules in the U.S. and in Europe share many attributes. Both are based on the premise that there are derivatives which will be actively cleared, but will not be subject to mandatory clearing requirements. In addition, both allude to standards related to price liquidity of the contracts as being centrally significant. Indeed both subscribe to the same anomaly that a contract can have sufficient trading liquidity that a clearinghouse can prudently evaluate the price risk of liquidating a defaulted position, but nonetheless is insufficiently liquid to be mandatorily cleared. And neither set of proposed rules provides any basis for this illogical position.

However, the two sets of proposed rules are, nonetheless, in harmony, even in the illogical provisions.

Yet, disharmony looms in the application of these illusive standards and this disharmony will be deeply problematic if not corrected. Inconsistent results in the application of the rules would invite significant regulatory arbitrage as the counterparties shop for regulatory regimes permitting uncleared execution.

Of course, the practical concern would be mitigated by robust and consistent margining rules for uncleared Swaps, discussed below. If those rules discourage the bilateral management of credit risk in an uncleared environment, the value of avoiding mandatory clearing would be eliminated.

*Margining of uncleared Swaps.*

Margin requirements constitute a direct transaction cost, in the view of derivatives traders. If they are not harmonized across jurisdictions, they will constitute a clear and immediate incentive to engage in regulatory arbitrage.

Proposed detailed standards have emerged in the U.S. Detailed European standards have not been published, though the stated goal is that margin levels will dissuade market participants from foregoing clearing. Proposed margin rules in the U.S. are consistent with this standard, though the expressed rationale is that uncleared markets are less liquid and price-certain than cleared markets, requiring higher levels of margin. As a result, prudent regulation must impose margin levels that are higher than those used in clearing.

The rationale is unimportant. The actual levels will be decisive. Divergent margining requirements are a virtually guaranteed source of regulatory arbitrage because the consequences to transaction costs are direct and apparent. Harmonization so that there are no material differences is the only remedy for this potential and very destructive behavior.

*Clearinghouse resources.*

The use of derivatives clearing to address systemic risk is a common feature across jurisdictions. This device beneficially provides for transparent and prudent management of credit exposures by entities that are not **directly** subject to the influences which encourage credit risk-taking and which have plagued financial institutions engaging in trading businesses.

However, systemic risk will not disappear completely when clearing mandates go into effect. The danger associated with the failure of a significant clearinghouse must be contemplated. The system will still be interconnected through the clearinghouse members which are the ultimate (non-governmental) firebreak in the event of a failure. Harmonization of rules relating to the resources of clearinghouses, provided that the harmonized rules are sufficiently prudent, is critical to avoid failures in one jurisdiction migrating to another.

Measurement of minimum capital requirements in the U.S. and Europe uniformly rely on two components. First, a number of defaults of members representing large exposures is assumed. While rules are not yet finalized, the U.S. approach is more definitive and calibrated to systemic significance. In final form, harmonization along these lines is needed.

The second measurement component involves the market conditions assumed at the time of the default used to measure capital adequacy. Both jurisdictions employ the concept of "extreme but plausible conditions." It is critically important that this test be applied so that stress testing is not limited to historic price moves. Events, and combinations of events, which are unprecedented must be considered. To do less would be to ignore a fundamental cause of the financial crisis, the statistically unprecedented crash of the US residential mortgage market. Importantly, this standard must require the use of informed imagination and avoid the misuse of statistics.

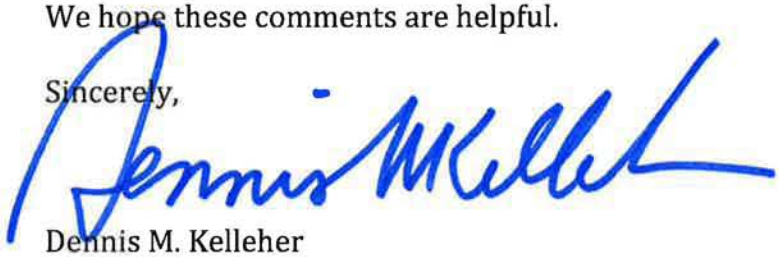
The establishment of principles which elaborate on the concept of "extreme but plausible conditions" is needed. Without clear principles, a divergence in the application of stress tests for capital adequacy for clearinghouses is quite possible. Since they are inevitably interconnected, the resulting systemic risk would pose a substantial danger that the financial crisis would be repeated, albeit via a different pathway.

**CONCLUSION**

The Study and Report address issues of overwhelming importance to the effective regulation of the derivatives markets. Interconnection of markets across jurisdictions is an inescapable feature of derivatives. As a result, meticulous attention to harmonization is required.

We hope these comments are helpful.

Sincerely,



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