MEMORANDUM

To: File

From: Ty Gellasch, Counsel to Commissioner Kara Stein
U.S. Securities and Exchange Commission

Date: June 13, 2014

Re: Meeting with Institute of International Bankers

On June 12, 2014, Commissioner Kara Stein, Ty Gellasch, and Robert Peak met with Sally Miller from the Institute of International Bankers and Colin Lloyd from Cleary Gottlieb. The parties discussed the Commission's proposed release regarding regulation of cross-border swaps, and IIB provided a copy of a March 10, 2014 letter to the CFTC regarding the topic.

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March 10, 2014

Melissa D. Jurgens
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States[1]

Dear Secretary Jurgens:

The Institute of International Bankers (the "Institute") welcomes the opportunity to provide comments to the Commodity Futures Trading Commission (the "Commission") with respect to the issues raised by the staff advisory published by the Commission's Division of Swap Dealer and Intermediary Oversight ("DSIO") on November 14, 2013 ("Advisory 13-69").[2] Because the Commission's final cross-border guidance (the "Final Guidance")[3] and its predecessor proposals and exemptions[4] generally focused on a "status-based" approach to the

[1] 79 Fed. Reg. 1,347 (Jan. 8, 2014).

[2] Division of Swap Dealer and Intermediary Oversight, Applicability of Transaction-Level Requirements to Activity in the United States, CFTC Staff Advisory No. 13-69 (Nov. 14, 2013).

[3] Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013).

[4] See Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,214 (July 12, 2012); Exemptive Order Regarding Compliance With Certain Swap Regulations, 77 Fed. Reg.

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application of U.S. rules to cross-border transactions, the important legal, policy, and practical issues raised by the "personnel-based" approach envisioned by Advisory 13-69, under which Commission regulations would apply to swaps between non-U.S. swap dealers and their non-U.S. counterparties solely as a result of the involvement of personnel or agents of the non-U.S. swap dealer located in the U.S., have not previously been the subject of public comment. While we do not consider it to be a substitute for a comprehensive cross-border rulemaking in compliance with the Administrative Procedure Act (the "APA") and the cost-benefit provisions of the Commodity Exchange Act (the "CEA"), we support the Commission's decision to grant relief from the application of Advisory 13-69[5] in order to seek input from market participants and the public on these complex and consequential issues. For the reasons described below, we do not believe that the Commission should adopt the personnel-based approach contained in Advisory 13-69.

BACKGROUND

During the year preceding the Commission's adoption of the Final Guidance, including a period of over six months during which non-U.S. swap dealers were registered with the Commission and complying with Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[6] the Commission's proposed and actual application of "transaction-level" requirements under the CEA[7] to swaps involving non-U.S. swap dealers depended entirely on the U.S./non-U.S. person status of a non-U.S. swap dealer's counterparty. Accordingly, non-U.S. swap dealers, as well as market participants more generally, have established and continue to implement extensive policies, procedures, documentation and systems premised on this status-based approach. At the same time, non-U.S. swap dealers and other market participants are in the process of implementing measures to comply with swaps rules coming into effect in a number of foreign jurisdictions that likewise have been adopting cross-border regulations that do not involve personnel-based approaches. In this regard, we note

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41,110 (July 12, 2012); Final Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013); Further Proposed Guidance Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013).

5 See CFTC No-Action Letter No. 13-71 (Nov. 26, 2013); CFTC No-Action Letter No. 14-01 (Jan. 3, 2014).

6 Pub. L. 111-203, 124 Stat. 1376 (2010).

7 For this purpose, "transaction-level" requirements include mandatory clearing and swap processing, mandatory trade execution, margin and segregation for uncleared swaps, swap trading relationship documentation, portfolio reconciliation and compression, trade confirmation, real-time public reporting, daily trading records, and external business conduct requirements.

that the "Path Forward" agreement between the Commission and European authorities never contemplated a personnel-based approach.[8]

Implementing a status-based approach to the application of Title VII of Dodd-Frank is fundamentally different from implementing a personnel-based approach. A given swap transaction often involves activity occurring in multiple jurisdictions: each counterparty's performance of its obligations under the swap, the location of which depends on its booking location; and the activities of the personnel arranging, negotiating or executing the swap, which could occur in one, two or potentially more locations spanning several jurisdictions, depending on how and over what period of time the swap is executed. (In this regard, the over-the-counter ("OTC") swap market differs significantly from listed financial markets.) As a result, a personnel-based approach requires firms to account for a range of factors encompassing all the different permutations under which two parties could arrange, negotiate or execute a swap transaction.

Moreover, the Final Guidance's status-based approach reflects a belief by the Commission that this approach was necessary to achieve Dodd-Frank's systemic risk mitigation objective. But this approach departs from pre-Dodd-Frank markets regulation in the U.S. and abroad, which generally embrace a more territorial approach focused on customer protection. Applying one approach *simultaneously* with the other leads to irreconcilable jurisdictional conflicts and market fragmentation, without any marginal mitigation of risk, systemic or otherwise.

Against this backdrop, the position taken by Commission staff in Advisory 13-69 that they would consider U.S. transaction-level rules to apply to a non-U.S. swap dealer's swaps with non-U.S. counterparties based on the U.S. location of personnel or agents of the non-U.S. swap dealer has raised great concern for our members and the global markets more broadly.

DISCUSSION

A. Key Issues

The potential application of U.S. transaction-level rules to a swap between non-U.S. persons, as envisaged by Advisory 13-69, raises several important questions.

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[8] See "Cross-Border Regulation of Swaps/Derivatives: Discussions between the Commodity Futures Trading Commission and the European Union – A Path Forward" (July 11, 2013) at p. 2 ("For example, EU registered dealers who are neither affiliated with, nor guaranteed by, US persons, would be generally subject only to US transactional rules for their transactions with US persons or guaranteed affiliates.").

i. Commission Jurisdiction Under Section 2(i)

As a threshold matter, the Commission must determine whether Section 2(i) of the CEA authorizes it to regulate a swap between non-U.S. persons based on the arrangement, negotiation or execution of the swap by U.S.-based personnel or agents. Section 2(i) states that the swaps provisions of the CEA and the Commission's rules thereunder "shall not apply to activities outside the United States" unless those activities have a "direct and significant connection with activities in, or effect on, commerce of the United States" or are undertaken to evade Commission rules.

Advisory 13-69's analysis of the Commission's jurisdiction under Section 2(i) is premised on DSIO's belief that "the Commission has a strong supervisory interest in swap dealing activities that occur within the United States, regardless of the status of the counterparties."[9] However, in the case of a swap between non-U.S. persons that is arranged, negotiated or executed by U.S. personnel or agents, the only activities that occur within the U.S. are those of the U.S. personnel or agents. Those personnel or agents are engaged in front office activities occurring solely at the inception of the swap. In contrast, the legal entities that are the parties to the transaction—both non-U.S. persons—are responsible for the ongoing performance of obligations under the swap from its inception until its expiration or termination, and accordingly those non-U.S. persons have incurred all of the risks attendant to the swap transaction. As a result, the Commission's jurisdiction over activities "inside" the U.S. must be limited, at most, to jurisdiction over the front office activities actually performed in the U.S. Commission jurisdiction over any other activity not performed in the U.S. or non-U.S. counterparties must satisfy the requirements and limitations of Section 2(i) of the CEA.

Accordingly, Commission jurisdiction over the non-U.S. legal entities that are the counterparties to the swap depends on whether the front office activities of their U.S. personnel or agents at the inception of the swap give rise to a "direct and significant" connection with activities in, or effect on, U.S. commerce when the related risks and obligations that arise over the life of the swap reside entirely with legal entities that are non-U.S. persons.[10] The Commission's stated policy is to interpret Section 2(i)'s "direct and significant" prong "in a manner consistent with the overall goals of [Dodd-Frank] to reduce risks to the U.S. financial system and avoid future financial crises."[11] Given that a swap between non-U.S. persons gives

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9 Advisory 13-69 at p. 2.

10 We have assumed, for purposes of our discussion, that neither non-U.S. person is a guaranteed or conduit affiliate. We note, however, that even if that were not the case, the activities of U.S. personnel or agents would not affect the risk profile of the activity, and that the salient aspects of the guarantee or conduit relationship would be addressed by other aspects of the Final Guidance.

11 Final Guidance at 45,300.

rise to no risks to the U.S. financial system, regardless of where that swap is arranged, negotiated or executed, under the Commission's construction of Section 2(i)'s "direct and significant" prong there is not a sufficient basis for Commission jurisdiction over the non-U.S. persons' performance of the swap.

ii. International Comity Principles and Cost-Benefit Considerations

Assuming, *arguendo*, that limited U.S. activity of personnel or agents of a non-U.S. swap dealer could form the basis for Commission jurisdiction under Section 2(i), the Commission is presented with the further question of whether and how it should appropriately exercise that jurisdiction. In this regard, the Commission has stated that it will, consistent with the principles of international comity, evaluate both its interests and those of other jurisdictions.[12]

The Commission's interest in the swaps covered by Advisory 13-69 is generally limited; as noted above, they present no risks to the U.S. financial system. In addition, unless the parties choose to transact on a U.S. designated contract market ("DCM") or swap execution facility ("SEF"), a fact pattern not at issue here, their activities do not affect the integrity of trading on a Commission-regulated platform or facility. Indeed, it is the very application of transaction-level rules set forth in Advisory 13-69 that would give rise to a basis for the exercise of Commission jurisdiction by requiring that non-U.S. persons trade on a U.S. DCM or SEF, clear through a U.S. derivatives clearing organization and report data to a U.S. swap data repository for dissemination to the U.S. public. It would stand international comity on its head for the Commission affirmatively to foster U.S. supervisory interests, where none existed in the first place, by taking the position that the limited activities of U.S. personnel or agents should serve as the basis for imposing regulatory requirements that mandate non-U.S. firms to engage in the wider range of U.S. activities necessary for the Commission's broader assertion of jurisdiction over those firms.

The home country regulators of the non-U.S. person counterparties to a swap, in contrast, have strong supervisory interests in the risks arising from the swap wherever they are incurred, just as the Commission has found itself to have such interests in connection with swaps entered into by U.S. persons abroad. Particularly with respect to swaps involving non-U.S. counterparties located in the G20 jurisdictions, it is highly likely that such transactions would fall under the direct supervisory jurisdiction of the parties' home country regulators and the parties could not evade non-U.S. requirements through the arrangement, negotiation or execution of their swaps by U.S. personnel or agents. The imposition of U.S. law in such situations would directly violate principles of comity, resulting in duplicative and potentially conflicting dual

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[12] Final Guidance at 45,301.

regulatory regimes. For example, under Advisory 13-69, a non-U.S. swap dealer established in the EU and trading through U.S. personnel or agents with a counterparty also established in the EU would be subject simultaneously to both U.S. and EU laws without any possibility of substituted compliance or equivalence. At a minimum, in this example and others, compliance with comparable foreign requirements that otherwise separately apply to the swap should obviate the need for specific compliance with U.S. law.

In addition, where a transaction would already be subject to foreign regulation, the marginal benefits of dual regulation are likely to be outweighed by the costs of compliance with duplicative or conflicting regulation and resulting incentives for market fragmentation. In this regard, the Commission is directed by the CEA to consider the costs and benefits of its actions.[13]

Finally, to the extent that the Commission is concerned with promoting competitive parity between U.S. and non-U.S. swap dealers, we note that Dodd-Frank sought to address competitive parity issues by mandating international harmonization.[14] In this regard, substantive swaps rules are in the process of being implemented in key non-U.S. jurisdictions.[15] Until those rules are fully implemented, it is not possible for the Commission to evaluate the long-term competitive impact of a personnel test because the costs and benefits of U.S. rules relative to non-U.S. rules are not yet fully knowable. Once the relevant non-U.S. rules are in place, and assuming that they are comparable to U.S. rules, any competitive concerns will be substantially reduced or eliminated. Applying a personnel test in the interim would therefore address a potential issue that is only temporary in nature, in circumstances where the test is not necessary, either for U.S.- or non-U.S. swap dealers, to mitigate risks to the U.S. financial system, all at great cost to market participants and with significant disruption of global markets.

B. Principled and Practical Solutions if the Commission Adopts Any Personnel Test

In light of the foregoing considerations, it is clear that the Commission should not adopt Advisory 13-69 or any other personnel-based approach to transaction-level rules. A personnel-based approach would not subject any activity with a direct and significant effect on, or connection with, the U.S. to Commission regulation that is not already subject to Commission regulation under the Commission's very broad status-based approach contained in its Final

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[13] CEA § 15(a). As discussed below, in order to obligate market participants to follow Advisory 13-69, the Commission must treat it as a rulemaking under the CEA.

[14] See § 752 of Dodd-Frank.

[15] See Financial Stability Board, OTC Derivatives Market Reforms: Sixth Progress Report on Implementation (Sept. 2, 2013).

Guidance. Additionally, the Commission has separate authority to regulate the activity of U.S.-based agents and personnel, whether through its direct regulation of the U.S. DCMs and SEFs on which they might choose to transact, or through direct regulation of the U.S. activity of introducing brokers and associated persons. A separate personnel test for the application of transaction-level rules is not necessary.

However, if the Commission does decide to adopt any guidance under which the activity of U.S. personnel or agents acting on behalf of a non-U.S. swap dealer is relevant to the application of U.S. transaction-level rules to swaps between the non-U.S. swap dealer and its non-U.S. counterparties, policy and practical considerations make it imperative that the Commission do so under different circumstances and with greater nuance than Advisory 13-69.

i. Appropriate Rulemaking Procedures

Despite its presentation as "guidance" and a "policy statement," the Final Guidance and its related substantive modifications of previously adopted Commission rules clearly represents a binding, normative rulemaking subject to legislative rulemaking requirements under the APA[16] and the cost-benefit analysis requirement applicable to Commission regulations under the CEA.[17] Accordingly, the Commission should only adopt cross-border policies (however labeled) through a comprehensive rulemaking process involving the full Commission, and not through advisories (such as Advisory 13-69) or other communications from the Commission's staff or "guidance" that contravenes the APA and the CEA. It is through such processes that the Commission will be able to properly assess the costs and benefits associated with a personnel-based approach.

The personnel-based approach described in Advisory 13-69 would require global firms to redesign and overhaul their operational and compliance infrastructure to evaluate factors beyond their status and the status of their counterparties. It is important to note in this regard that there are significant practical limitations with respect to any compliance regime that is predicated on the location of front office personnel in connection with the application of rules to inherently global transactions. For example, systems are not designed to take into account the location of individual actors who may touch a transaction only because of the time of day of the counterparty's order or the underlier for the transaction.[18] A more likely result is that non-U.S.

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[16] See 5 U.S.C. § 553(b) (requiring federal agencies to publish, prior to promulgating a rule, a "notice of proposed rulemaking" and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments").

[17] CEA § 15(a), supra Note 13.

[18] For example, consider a G10 foreign exchange options book, which dealers are typically required to operate as a truly global book given the volatility of the underlying and the fact that there is no "closed" time for G10 foreign exchange markets. Global clients who actively use these instruments to manage their risks are also

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swap dealers, in order to accommodate the demands of their non-U.S. counterparties, move front office personnel outside the U.S. and impose policies generally prohibiting U.S.-based personnel from interacting with non-U.S. counterparties. In other words, a personnel test would fragment previously global markets into separate U.S. and non-U.S. markets, resulting in increased market risk, particularly with respect to transactions with U.S. underliers.

Additionally, given the scale and complexity of the changes that would be necessary to implement a personnel test, if the Commission adopts one it will be critical to provide a substantial transition period before any personnel test comes into effect.

ii. Distinctions Between Transaction-Level Rules

The Institute does not believe that any transaction-level rules should apply to swaps between non-U.S. swap dealers and non-U.S. counterparties. To the extent, however, that the Commission decides to apply transaction-level rules to those swaps based on the activity of U.S.-based personnel or agents, the determination of which transaction-level rules should apply should be based on the nature of that activity. When a separately organized U.S. affiliate of a non-U.S. swap dealer acts on behalf of a non-U.S. swap dealer, that affiliate will already be subject to specific regulation of its activities under the CEA and Commission rules.[19] Those are the regulations that should appropriately apply to the affiliate's activities. Further, when U.S. personnel of a U.S. branch of a non-U.S. swap dealer engage in activity on behalf of the non-U.S. swap dealer, only the regulations relevant to the activity performed by those personnel should be implicated.

Accordingly, because the activity of front office personnel alone does not give rise to risk, the Commission's "Category A" transaction-level rules should not apply to a swap between non-U.S. persons solely as a result of the U.S. location of front office personnel.[20]

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required to monitor their risk on a 24-hour basis. They therefore need to have dealer coverage in different regions, depending on the time of day.

[19] We note that the Commission previously determined that agency activity does *not* constitute swap dealing activity. See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30,596, 30,610 n.202 (May 22, 2012). Instead, the Commission has specifically recognized the position of agent affiliates of swap dealers and has granted them relief from introducing broker and commodity trading advisor registration in certain circumstances where such affiliates were subject to regulation in another capacity. See CFTC No-Action Letter No. 12-70 (Dec. 31, 2012).

[20] We recognize that, to the extent a swap is not only negotiated and agreed to by the personnel of a U.S. branch of a non-U.S. swap dealer but also booked to the branch, additional U.S. supervisory interests may be implicated. While we do not believe it to be necessary, if the Commission did choose to recognize a distinction between U.S. and non-U.S. branches of a non-U.S. swap dealer, we believe the Commission must appropriately

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Allowing front office personnel in different regions, including the U.S., to book transactions with non-U.S. persons in a global non-U.S. booking entity has significant risk management and liquidity benefits for the global dealer as well as for the financial system at large. Diversification and netting of exposures across transactions and counterparties allows for the overall reduction of market and credit risk. Furthermore, such risk will not flow back to the U.S. due to the activity of U.S. front office personnel; rather, the risk remains with the legal entities to which the swap is booked, both of which are non-U.S. persons.

Based on the Commission's analysis in the Final Guidance, "Category A" transaction-level rules include risk mitigation rules, such as mandatory clearing, margin and segregation for uncleared swaps, swap trading relationship documentation, portfolio reconciliation and compression, and swap confirmation.[21] The Commission also took the view in the Final Guidance that transparency-related rules, such as real-time public reporting and mandatory trade execution, are underpinned by the objective of risk mitigation and by their relationships with mandatory clearing, and it included those rules in "Category A" as well.[22]

Accordingly, we believe that, consistent with the categorization of transaction-level rules in the Final Guidance, both risk mitigation and transparency-related rules should not be triggered by a personnel test, if any, adopted by the Commission. We note, however, that the Commission's pre- and post-trade transparency and market integrity rules would continue to apply to U.S. markets through their application to all transactions involving U.S. persons, as well as all transactions executed on or subject to the rules of DCMs and SEFs subject to registration with the Commission. Thus, any incremental diminution of market transparency in the U.S. would occur only with respect to those transactions with the barest of ties to U.S. markets, *i.e.*, OTC trades between non-U.S. persons, many of which have a U.S. connection only because U.S. front office coverage was needed to accommodate the time of day when the swap was executed.

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balance the interests of the swap dealer's home and host country regulators. Therefore, if the Commission makes such a distinction, as it did in footnote 513 of the Final Guidance, it should clarify that the additional application of transaction-level rules to a swap entered into by a U.S. branch is triggered only if the swap meets all five prongs of the test for determining when a swap is considered to be one that is executed "with the foreign branch" of a U.S. bank, subject to modifications to the first prong of that test to ensure the consistent application of a personnel test, if any, across all the fact patterns and for all purposes that the test is relevant. See Final Guidance at 45,330. In such a case, given the strong supervisory interests of the counterparties' home country regulators in applying their rules to such a swap due to the fact that the risks arising from it are ultimately borne by non-U.S. persons, the swap should be eligible for substituted compliance with respect to any transaction-level rules that may apply to it.

21 See Final Guidance at 45,366-68.

22 See id.

With respect to the Commission's "Category B" transaction-level rules, *i.e.*, external business conduct rules, we believe that only the rules relevant to the types of communications that occur between U.S. front office personnel and non-U.S. counterparties should apply. In our view, those rules comprise only the requirements to provide disclosures of material information, as well as anti-fraud, anti-manipulation, and fair and balanced communication rules.[23] In this regard, we believe a non-U.S. swap dealer should be permitted to satisfy disclosure rules applicable to swaps with non-U.S. counterparties through disclosure the content of which is consistent with Commission requirements and which the swap dealer delivers through means acceptable for the disclosure of material information under the rules of the relevant non-U.S. jurisdiction(s).

In contrast, the other, relationship-wide external business conduct rules should not apply based on specific communications by U.S. personnel or agents under the personnel test. Such an approach would require wholesale amendments to relationship documentation merely because of communications that may not even be material to the overall trading relationship. Given that these relationships are already governed by non-U.S. law and regulation, and non-U.S. counterparties are unlikely to be familiar with Dodd-Frank and Commission rules, requiring these counterparties to amend their documentation to comply with Dodd-Frank and Commission rules is likely to act as a strong disincentive to interacting with U.S. personnel or agents.

However, even if the Commission did decide to apply the personnel test to relationship-level external business conduct rules, foreign regulators have a strong supervisory interest in regulating sales practices between non-U.S. persons, as the Commission has recognized.[24] As a result, at a minimum, substituted compliance should be available with respect to relationship-level external business conduct rules so that non-U.S. counterparties subject to comparable protections under local sales practices rules that apply to their transactions can comply with those rules instead of complying with Commission rules.[25]

In this regard, we note that the objectives of many of the Commission's relationship-level external business conduct rules would be adequately addressed through

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[23] See 17 C.F.R. §§ 23.410(a)-(b), 23.431 and 23.433.

[24] See Final Guidance at 45,340 ("[T]he Commission believe that the foreign jurisdiction in which non-U.S. persons are located are likely to have a significant interest in the type of business conduct standards that would be applicable to transactions with such non-U.S. persons within their jurisdiction.").

[25] The Commission should also clarify that if one counterparty to a swap is subject to comparable foreign regulation, the entire transaction is eligible for substituted compliance. For example, if a non-U.S., non-EU swap dealer enters into a swap with an EU counterparty through the swap dealer's U.S. branch, the swap should be eligible for substituted compliance with relevant EU rules (even if the home jurisdiction of the swap dealer has not received a comparability determination from the Commission).

compliance with home country or other applicable non-U.S. laws, particularly in the jurisdictions where most non-U.S. swap dealers are located.[26] For example, it is typical for these jurisdictions to have rules providing special protections to (or prohibiting) OTC derivatives activity with retail customers, which accomplish the same goals as the Commission's counterparty eligibility requirements.[27] Similarly, pursuant to coordinated international anti-money laundering efforts, most foreign jurisdictions have implemented "know your customer" ("KYC") rules similar to the Commission's KYC and true name and owner rules.[28] Key foreign jurisdictions have also enacted disclosure and suitability requirements for dealers when recommending transactions to counterparties, akin to the Commission's institutional suitability requirements.[29] In contrast, while other jurisdictions have largely failed to adopt enhanced protections for counterparties that are Special Entities, these protections would generally not be relevant to a substituted compliance analysis because non-U.S. persons would not generally fall within the definition of a Special Entity.[30]

iii. Need for a Clear, Objective and Ascertainable Test

The Commission should provide a clear, objective and ascertainable test for when it intends to regulate the activities of U.S. personnel or agents. As discussed above, in our view, only disclosure, anti-fraud, anti-manipulation, and fair and balanced communication rules are relevant to communications between the U.S.-based front office personnel of non-U.S. swap dealers and non-U.S. counterparties. The key objective of those rules is to provide protection to counterparties in their interactions with front office personnel in circumstances where they would

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[26] To the extent the swap dealer's or its counterparty's home country jurisdiction does not apply comparable sales practice requirements, the Commission should consider, as a matter of policy, allowing sophisticated non-U.S. institutional counterparties to "opt-out" of Commission sales practice rules, thereby allowing those counterparties to continue to trade under their existing documentation rather than requiring them to agree to U.S.-specific documentation that they may find more confusing than helpful.

[27] See 17 C.F.R. § 23.430.

[28] See 17 C.F.R. §§ 23.402(b) and (c).

[29] See 17 C.F.R. § 23.434.

[30] In this regard, we note that the Securities and Exchange Commission, interpreting the parallel definition of "Special Entity" under the Securities Exchange Act of 1934, has found that non-U.S. persons, including foreign endowments, do not fall within that definition. See Securities and Exchange Commission, Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants; Proposed Rule, 78 Fed. Reg. 30,968, 30,997 n.286 (May 23, 2013) (noting that Special Entities "would be U.S. persons because they are legal persons organized under the laws of the United States"). We believe that the Commission should also take this position or, at a minimum, should, as a matter of policy, not apply its Special Entity requirements to swaps between non-U.S. swap dealers and non-U.S. counterparties.

reasonably expect the protection of such rules. When entering into transactions with non-U.S. swap dealers, non-U.S. counterparties may reasonably expect the protection of the sales practice rules applicable in the jurisdiction of the personnel responsible for committing the non-U.S. swap dealer to the swap. Conversely, it would not be reasonable for a non-U.S. counterparty to expect the protection of sales practice rules applicable in the jurisdiction of personnel who merely provide ancillary services, such as personnel providing market color or pricing or legal, compliance, or back-office support services. Likewise, it would not be reasonable for a non-U.S. counterparty trading with a non-U.S. swap dealer on a non-U.S. trading platform or through a non-U.S. broker to expect the protection of U.S. sales practice rules since in these circumstances the non-U.S. counterparty cannot readily determine the location of the non-U.S. swap dealer's personnel or agents.

The Commission also should make clear that U.S. personnel or agents of a non-U.S. swap dealer, acting pursuant to product, credit, and market risk parameters established by non-U.S. personnel of the non-U.S. swap dealer, who commit the non-U.S. swap dealer to swaps with a non-U.S. counterparty outside the counterparty's local market hours, do not trigger U.S. rules. The involvement of U.S. personnel or agents, on an exception basis, under such circumstances is provided only as an accommodation to the counterparty to allow trading in off-market hours. Given the exceptional nature of such trading, a counterparty to such a swap would reasonably expect the sales practice rules of its or the non-U.S. swap dealer's home country jurisdiction to continue to apply instead of U.S. rules. This clarification would facilitate continued U.S. participation in markets that operate across multiple time zones, consistent with exceptions that the Commission has long recognized in similar contexts.[31]

Not only would the above approach be consistent with the customer protection objectives of the Commission's sales practice rules, but it is the only approach that could reasonably be implemented as a personnel test. In contrast, any other approach would, if implemented in other jurisdictions, result in the possibility that a single swap transaction could be subject to multiple jurisdictions' rules based on the location of personnel alone.

To reiterate, the location of the counterparty's personnel or agents should not be relevant to the analysis. The Commission already addressed the location of counterparty personnel in the Final Guidance through the "principal place of business" prong of the U.S. person definition. Separately incorporated U.S. agents acting on behalf of a non-U.S. counterparty will already be subject to Commission regulation as introducing brokers, futures commission merchants, or commodity trading advisors, depending on their role and relationship with the counterparty. At the same time, since swap transactions are so commonly negotiated

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[31] See, e.g., CFTC Interpretive Letter No. 93-83 (Aug. 9, 1993); CFTC Advisory for Interpretive Letter No. 93-21 (Apr. 1, 1993) (permitting U.S. futures commission merchants to "pass the book" to non-U.S. affiliates by allowing non-U.S. affiliates to enter U.S. customer orders into CME Globex terminals outside regular U.S. trading hours without requiring the non-U.S. affiliates to register with the Commission).

over e-mail, instant messaging and electronic trading platforms, swap dealers cannot readily determine the location of their counterparty's personnel or agents. Thus, the benefits of looking to the location of the counterparty's personnel or agents would be limited at best, but the costs and potential for inadvertent non-compliance under that approach would be extremely significant.

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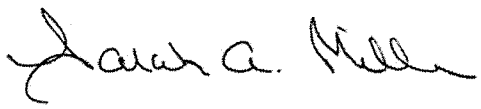
The Institute appreciates the Commission's consideration of these matters. If the Commission or its staff has any questions regarding this letter, please do not hesitate to contact the undersigned at (212) 421-1611.

Respectfully submitted,



Sarah A. Miller
Chief Executive Officer
Institute of International Bankers

cc: Mark Wetjen, Acting Chairman
Bart Chilton, Commissioner
Scott O'Malia, Commissioner

Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight
Ananda Radhakrishnan, Director, Division of Clearing and Risk
Vincent A. McGonagle, Director, Division of Market Oversight