CME Group

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VIA ELECTRONIC MAIL

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: 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

Dear Ms. Murphy:

CME Group Inc. ("CME Group")[1] appreciates the opportunity to comment on the rules and interpretive guidance proposed by the Securities and Exchange Commission (the "Commission" or "SEC") on the applicability of certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "DFA") to entities and markets outside the U.S. (the "cross-border release" or "Release").

We agree with the Commission that it is important to ensure an orderly transition to DFA's regulatory framework and provide greater certainty to market participants with respect to U.S. regulation of their cross-border activities. We also acknowledge the difficulty the Commission

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[1] For the record, CME Group is the holding company for five separate Exchanges, including the Chicago Mercantile Exchange Inc. ("CME"), the Board of Trade of the City of Chicago, Inc. ("CBOT"), the New York Mercantile Exchange, Inc. ("NYMEX"), the Commodity Exchange, Inc. ("COMEX") and the Board of Trade of Kansas city Missouri, Inc. ("KCBT") (collectively, the "CME Group Exchanges" or "Exchanges"). The CME Group Exchanges offer the widest range of benchmark products available across all major asset classes, including futures and options on futures based on interest rates, equity indexes, foreign exchange, energy, metals, agricultural commodities, and alternative investment products. Moreover, the Exchanges serve the hedging, risk management, and trading needs of our global customer base by facilitating transactions through CME Globex® electronic trading platform, our open outcry trading facilities in New York and Chicago, and privately negotiated transactions. CME Clearing is one of the largest central counterparty clearing services in the world; it provides clearing and settlement services for exchange-traded contracts and over-the-counter ("OTC") derivatives contracts through CME ClearPort®. The CME ClearPort® service mitigates counterparty credit risks, provides transparency to OTC transactions, and brings to bear the exchange's market surveillance monitoring tools.

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faces in adopting and implementing an effective rule that would give effect to the DFA's objective of providing oversight to a previously unregulated security-based swaps ("SBS") market while balancing issues of international comity. Furthermore, we note that, in developing a cross-border approach to SBS regulation, the SEC should seek harmonization not only with international regulators, but also with the Commodity Futures Trading Commission (the "CFTC"), which has recently adopted its final cross-border guidance for swaps regulation. With these considerations in mind, CME Group respectfully submits comments as follows:

I) The location of clearing a SBS should not be a factor in assessing whether a non-U.S. person qualifies as a security-based swap dealer ("SBSD") or major security-based swap participant ("MSBSP") for purposes of the DFA and the Commission's regulations; and

II) Any system that requires a clearinghouse to make data reports regarding cleared SBS to a third-party repository is inefficient and costly (and not statutorily mandated as far as regulatory reporting is concerned); any required reporting should allow the clearing agency that clears an SBS to select the SDR to which the cleared SBS is reported.

I. CME Group Comments on Implications of Clearing in the U.S.

We submit that the location of clearing should not be a factor in assessing whether a non-U.S. person qualifies as an SBSD or MSBSP. Indeed, neither the act of clearing nor the location of the clearing house is relevant under DFA or the Commission's final regulation to assessing a market participant's status as an SBSD or MSBSP. Rather, the definitions of SBSD and MSBSP hinge on the trading activity of these market participants. In particular, these definitions focus on the registrants' SBS activities vis-à-vis "counterparties." For example, the definition of "security-based swap dealer" in DFA covers any person who, *inter alia*, "regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account." Similarly, the definition of "major security-based swap participant" in DFA covers any person who is not a SBSD and, *inter alia*, "whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets."

With respect to assessing SBSD status, the SEC proposes an approach that appears to be consistent with the position that CME Group advocates and with the CFTC's final cross-border guidance. In the Release, the Commission states that "submitting a [SBS] transaction for clearing in the United States" would not cause that transaction to count toward the *de minimis* SBSD registration threshold. Release at 90. For the reasons noted above, CME Group agrees with the Commission's treatment of clearing in the U.S. as irrelevant to assessing SBSD status.

CME Group does not agree, however, with the Commission's proposal to treat clearing in the U.S. as relevant for purposes of assessing MSBSP status. In particular, CME Group is concerned by the following statement in the Release: "[W]here a non-U.S. person enters into a security-based swap transaction with a security-based swap dealer, and that transaction is submitted for clearing and novated from the dealer to a CCP, the non-U.S. person would look to

the U.S. person status of the CCP that became its counterparty as a result of such novation when determining whether the transaction must be included in such non-U.S. person's major security-based swap participant calculation." Release at 166 & n.612. This statement is problematic and should not be adopted for several reasons:

- First, the statement rests on a mistaken characterization of the clearing house (or CCP) as the non-U.S. person's counterparty for purposes of the MSBSP calculation. Although through the novation process in central counterparty clearing, the credit of the clearing house is substituted for the credit of each counterparty, a clearing house is not a "counterparty" as contemplated by the SBSD and MSBSP definitions. Indeed, whereas the MSBSP definition is meant in part to capture market participants with SBS that create "substantial counterparty exposure," a CCP effectively reduces the exposure of market participants to each other's credit risks. Moreover, treating the clearing house as a "counterparty" within the meaning of MSBSP could render every person who clears in the U.S. a MSBSP under DFA and Commission regulations. Congress clearly did not intend such an extreme result. The statutory definitions of "derivatives clearing organization" and "clearing agency" underscore this point—there is no indication from the plain text or otherwise of an intention to treat a derivatives clearing organization or a clearing agency as a "counterparty."

- Second, the statement is inconsistent with the CFTC's final cross-border guidance which stated that a "when a non-U.S. person . . . clears a swap through a registered derivatives clearing organization ('DCO'), *such non-U.S. person would generally not have to count the resulting swap (i.e., the novated swap) against its swap dealer* de minimis *threshold or MSP threshold.*" 78 Fed. Reg. 45292, 45325 (July 26, 2013) (emphasis added). The CFTC's approach in this regard implicitly recognizes that the non-U.S. person's counterparty to the original swap—not the CCP to which the swap is novated if it is cleared—is what is relevant for purposes of assessing SD and MSP status.

- Third, if the statement is adopted and clearing through U.S.-registered clearing houses is treated as relevant in assessing MSBSP status, the Commission will be discouraging foreign counterparties from clearing with U.S. clearing houses and placing such clearing houses at a competitive disadvantage with respect to their foreign colleagues. We do not believe that the Commission intends to adopt such a policy.

Rather than adopt the Commission's proposed approach which, as discussed above, would be problematic, the Commission should unambiguously state in its final release that clearing a SBS with two non-U.S. persons as the counterparties through a clearing house registered in the U.S. is irrelevant for purposes of assessing either counterparty's status as an SBSD or MSBSP under Commission regulations. This clarification would encourage persons located both in and outside the U.S. to use clearing houses that are governed by U.S. regulation and whose customers are afforded the robust protections of U.S. law.

II. CME Group's Comments on SBSDR Reporting Issues

The Exchange Act, as modified by DFA, requires two types of reports to be made to security-based swap data repositories ("SDRs"): (i) data on "each security-based swap (whether cleared or uncleared)" must be reported to an SDR for real-time public reporting purposes;[2] and (ii) data on "each security-based swap *that is not accepted for clearing by any clearing agency or [DCO]*" must be reported to an SDR to ensure the Commission has access to such data for regulatory purposes (hereinafter referred to as "regulatory reporting purposes").[3]

Congress did not require that data on SBSs which are accepted for clearing by a clearing agency be reported to a SDR for regulatory reporting purposes.[4] To the contrary, the text of DFA itself recognizes that there is no need for cleared SBS to be reported to an SDR for regulatory reporting purposes because this same data will already be collected and maintained by the clearing agency or DCO that clears the SBS and made available to the Commission on that basis.[5] A choice by the Commission to require that data on cleared SBS be reported to a third-party SDR would impose substantial costs on market participants which greatly outweigh the benefits (if any).[6] The Commission already has access to this data via the clearing agency.

There are other important reasons besides cost and efficiency to avoid creating redundant warehouses of trades. A system that includes separate sets of trade details at a clearing agency and at a third-party SDR introduces potential ambiguity about the true state of a trade or position. When a SBS is cleared on a clearing agency, the clearing agency must always be the holder of the "gold copy" of the SBS. This is required because the clearing agency must margin the position, calculate open interest and interact with the back office systems of its clearing members.

For all of these reasons, CME believes that the Commission should not require a clearing agency to make regulatory reports regarding the SBS it clears to any third-party entity. To the extent the Commission chooses to adopt a rule that requires cleared SBS be reported to an

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[2] *See* new Section 13(m)(1)(G) of the Exchange Act, as amended by Section 763(i) of DFA.

[3] *See* new Section 13A(a)(1) of the Exchange Act, as amended by Section 766(a) of DFA.

[4] *See id.*

[5] *See id; see* new paragraphs (4)(B) and (C) in Section 13(n) of the Exchange Act, as amended by Section 763(i) of DFA wherein Congress explicitly directs the Commission to "adopt data collection and maintenance standards for security-based swap data repositories" that are "comparable to the data standards imposed by the Commission on clearing agencies in connection with their clearing of security-based swaps."

[6] Given that the Commission's proposed reporting proposals would already require the Commission to aggregate information across SDRs, there is little added benefit to the Commission of requiring the data maintained by the clearing agency to also be maintained by an SDR.

SDR for regulatory reporting purposes, CME believes that the clearing agency that accepts the SBS for clearing should be permitted to select the SDR to which the data will be reported as this approach would minimize the added costs and risks incurred as a result of the choice to have duplicative SDR reporting.

With respect to the question of which party should be responsible for reporting SBS for the separate purpose of real time reporting, the Commission itself noted that the Exchange Act does not address this question.[7] In the Regulation SBSR Proposing Release, the SEC elected to propose rules that give apply the statutory reporting hierarchy that applies to uncleared SBS on cleared SBS. The Commission made this proposal "for the sake of uniformity and ease of applicability" and because it preliminarily believed that SBS dealers and major SBS participants are "more likely than other counterparties to have appropriate systems in place to facilitate reporting." CME supports the objective of reducing costs and agrees that placing the duty to report on the entity that is most likely to have appropriate systems in place to facilitate reporting is the best rulemaking approach. In CME's view, however, the entity that is most likely to have appropriate systems in place to facilitate reporting of cleared SBS is the clearing agency that cleared the SBS.

In addition to the above, CME has the following additional comments relating to swap reporting issue that we believe require further guidance or clarification:

- The principal place of business of a Clearing Agency should not determine whether a cleared SBS is reported to an SBSDR. Proposed rules 242.908(a)(1)(iv) and (a)(2)(v) provide that a SBS that is "cleared through a clearing agency having its principal place of business in the United States" must be reported to an SDR for regulatory reporting purposes and publicly disseminated.[8] The location of a clearing agency's principal place of business should not be a factor in assessing whether a cleared SBS must be reported as a threshold matter. To the extent the Commission requires by rule that SBS cleared by a registered clearing agency be reported to an SBSDR, all clearing agencies registered with the Commission should be subject to such requirements regardless of location.

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[7] *See* Section 13A(a)(3) of the Exchange Act; 75 Fed. Reg. 75208, 75211 (Dec. 2, 2010)("Regulation SBSR Proposing Release")(stating that "[t]the Exchange Act, as modified by the Dodd-Frank Act, does not explicitly specify which counterparty should be the reporting counterparty for those SBSs that are cleared by a clearing agency or derivatives clearing organization.").

[8] *See also* Release at 236 (stating that "a security-based swap—even if both counterparties were non-U.S. persons—would be required to be reported if the security-based swap were executed in the United States or through any means of interstate commerce, ***or cleared through a clearing agency having its principal place of business in the United States***." (p. 236) (emphasis added)

- Post-novation SBS that are cleared by a clearing agency are not "executed". There is language within the Release suggests that the Commission believes that the two new SBS resulting from the clearing of a SBS are "executed."[9] As discussed above, this is another mistaken characterization of the role of a central counterparty clearing house. It is also a departure from the CFTC's regulations which state that upon a clearinghouse's acceptance of a swap for clearing, the original swap that is extinguished and "replaced" by an equal and opposite swap between the clearinghouse and each clearing member acting as principal for a house trade or acting as agent for a customer trade.[10] If the Commission treats the two SBS resulting from the clearing of a SBS as being executed on the clearing agency, is a clearing agency required to analyze whether it is required to register as a security-based swap execution facility?

- Will three public reports be confusing to the public? The reporting rules re-proposed in the Release appear to require public reports regarding an initial SBS that is submitted for clearing as well as the two new SBS resulting from the clearing process.[11] The CFTC's reporting requirements do not require an SDR to make public reports regarding post-novation cleared swaps that are reported to it. Has the Commission considered whether it will be confusing to the public if its reporting rules require public dissemination of the initial SBS submitted for clearing and also the two separate post-novation cleared SBS?

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[9] *See* Release at 243 (stating that "When a security-based swap is cleared through a clearing agency, the initial transaction is novated and two new transactions take its place, with the clearing agency becoming the seller to the buyer and the buyer to the seller. If the clearing agency is located within the United States, the new transactions necessarily would be ***executed*** within the United States.")(emphasis added).

[10] *See* CFTC Rule 39.12(b)(6)(providing that:

"A derivatives clearing organization that clears swaps shall have rules providing that, upon acceptance of a swap by the derivatives clearing organization for clearing:

(i) The original swap is extinguished;

(ii) The original swap is ***replaced*** by an equal and opposite swap between the derivatives clearing organization and each clearing member acting as principal for a house trade or acting as agent for a customer trade;

(iii) All terms of a cleared swap must conform to product specifications established under derivatives clearing organization rules; and

(iv) If a swap is cleared by a clearing member on behalf of a customer, all terms of the swap, as carried in the customer account on the books of the clearing member, must conform to the terms of the cleared swap established under the derivatives clearing organization's rules.")(emphasis added).

[11] *See* proposed rule 242.908((a)(2)(v).

CME Group thanks the Commission for the opportunity to comment on this matter. We would be happy to discuss any of these issues with Commission staff. If you have any comments or questions, please feel free to contact me at (312) 930-3488 or via email at Kathleen.Cronin@cmegroup.com, or Christal Lint, Executive Director and Associate General Counsel at (312) 930-4527 (or Christal.Lint@cmegroup.com) or Tim Elliott, Executive Director and Associate General Counsel at (312) 466-7478 (or Tim.Elliott@cmegroup.com).

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