SEC PROPOSED RULES ON CROSS-BORDER SECURITY-BASED SWAP ACTIVITIES

A Comment Letter by the Futures and Options Association

21 AUGUST 2013

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1. INTRODUCTION

1.1 The Futures and Options Association (the "FOA") is the principal European industry association for over 170 firms and organisations engaged in the carrying on of business in futures, options and other derivatives. Its international membership includes banks, financial institutions, brokers, commodity trade houses, energy and power market participants, exchanges, clearing houses, IT providers, lawyers, accountants and consultants (see Appendix 1).

1.2 Given the international diversity of its membership, the FOA has paid particular attention to developments relating to the cross-border application of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The FOA therefore appreciates the opportunity to comment on the proposed rules relating to the regulation of cross-border activities in security-based swaps (the "Proposed Rules")[1] published on 23 May 2013 by the Securities and Exchange Commission ("Commission" or "SEC"), which address the international application of Subtitle B of Title VII of the Dodd-Frank Act to intermediaries, participants and infrastructures for security-based swaps as well as reporting, disseminating, clearing and trading of security-based swaps.

1.3 The FOA anticipates that other industry associations, in particular, the Futures Industry Association, the Securities Industry and Financial Markets Association and the Financial Services Roundtable (together, the "Associations"), will respond in detail to the questions raised in the Proposed Rules. For this reason, the FOA has restricted its responses to comments of a general nature and is particularly grateful to Katten Muchen for their very substantial contribution in drafting this response.

1.4 The FOA welcomes the publication of the Proposed Rules, which provide US and international derivatives market professionals the opportunity to consider the full scope of the application of the cross-border provisions of Title VII of the Dodd-Frank Act. The FOA notes in this regard that the Proposed Rules must be read in conjunction with recently-finalised cross-border guidance issued by the Commodity Futures Trading Commission ("CFTC")[2] in order for non-US firms and market infrastructures to assess the potential compliance obligations under Title VII of the Dodd-Frank Act. The SEC has facilitated this process by publishing Proposed Rules that touch on all aspects of the security-based swaps markets, including not only key intermediaries and market participants but also a detailed set of proposals on the cross-border application of reporting, clearing and trade execution requirements.

1.5 In general, and as noted in our comment letter to the CFTC, the FOA firmly believes that the global, interdependent nature of the derivatives markets requires coordinated

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[1] *See* 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. 30968 (May 23, 2013).

[2] *See* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations; Rule, 78 Fed. Reg. 45292 (July 26, 2013) (the "Final CFTC Guidance"). The FOA submitted a comment letter to the CFTC in respect of its proposed cross-border guidance published in July 2012. *See* "CFTC Proposed Guidance on Cross-Border Swap Regulation: A Comment Letter by the Futures and Options Association" (13 August 2012).

action by international regulators. As the Transatlantic Coalition on Financial Regulation (of which FOA is the founding member) noted in June 2012, cross-border regulatory issues should be addressed "through regulatory cooperation rather than unilateral action"[3] (see Appendix 2 for a summary of the Report). For this reason, the recent announcement of the "Path Forward" agreed between the CFTC and the European Commission on the cross-border regulation of the swaps markets was a positive sign that such coordination is taking place.[4] The FOA was also gratified by the SEC's statement that, in preparing the Proposed Rules, its deliberations were informed by its participation in bilateral and multilateral discussions with international regulators, including in particular "the possibility of conflicts and gaps, as well as inconsistencies and duplications" between US and non-US regulatory regimes.[5] However, international regulatory coordination must occur within, as well as between, states, and the FOA would urge the SEC to engage in a similar process of coordination not just with the European Commission, but also the CFTC, in order to achieve a comparable result for the transatlantic regulation of the security-based swaps markets.[6]

The FOA has been a longstanding supporter of the G-20 mandate for an integrated, coordinated approach to financial regulatory reform.[7] From the FOA's international standpoint, there are several elements of the Proposed Rules that are likely to inhibit, rather than facilitate, such an integrated, coordinated approach, which may raise compliance costs and legal risks for intermediaries, participants, infrastructures and customers in the security-based swaps markets. The FOA has sought to identify several areas in which the Proposed Rules may be improved upon, including strengthening and clarifying the proposed "substituted compliance" regime, reconsidering the SEC's assertion of jurisdiction of transactions that are conducted "within the United States", and to the extent possible limiting gaps and discrepancies with the CFTC's cross-border approach.

2. THE SEC'S PROPOSED REGIME FOR SUBSTITUTED COMPLIANCE COULD BE ENHANCED

2.1 Regulatory recognition – *i.e.*, where one national regulator determines that the regulatory framework of another national regulator is comparable to its own and, as a result, relies on its supervision and oversight of persons and entities licensed or authorised by it in its jurisdiction – is a particularly suitable tool where the basic policies, principles and outcomes of regulation are highly correlated across national

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3 "Inter-Jurisdictional Regulatory Recognition: Facilitating Recovery and Streamlining Regulation", report from the Transatlantic Coalition on Financial Regulation (June 2012), p. 12 (the "Coalition Report"). In addition to the FOA, the other members of the Coalition were then: the American Bankers Association Securities Association, the Association of Financial Markets in Europe / Global Financial Markets Association, the Bankers' Association for Finance and Trade, the British Bankers' Association, the Futures Industry Association, the International Capital Markets Association, the Investment Industry Association of Canada, the International Swaps and Derivatives Association, the Securities Industry and Financial Markets Association, and the Swiss Bankers Association.

4 *See* "Cross-Border Regulation of Swaps/Derivatives: Discussions between the Commodity Futures Trading Commission and the European Union – A Path Forward" (July 11, 2013), available at: http://www.cftc.gov /ucm/groups/public/@newsroom/documents/file/jointdiscussionscftc_europeanu.pdf.

5 Proposed Rules, pp. 30974-75.

6 While the FOA would not want to prejudge the form or content of such discussions, the FOA would recommend that any SEC-EC arrangements are as closely aligned to the agreed CFTC-EC arrangements in order to provide a maximum amount of convergence in the transatlantic regulation of all derivatives asset classes.

7 *See, e.g.*, Coalition Report, pp. 9-10 (providing excerpts of communiqués from the G-20 Leaders' Summits).

jurisdictions. As noted above, the G-20 set out in 2009 a series of common principles for the regulation of the international swaps markets, and the FOA believes that these shared regulatory objectives, combined with the more detailed 38 IOSCO Principles of Securities Regulation (originally published 1998, updated 2010), provide a basic foundation for establishing a meaningful regulatory recognition regime.

2.2 The Proposed Rules set out the SEC's plans for a policy and procedural framework that would permit persons otherwise subject to Title VII obligations in respect of security-based swap activities to comply with comparable requirements in a non-US jurisdiction as a substitute for compliance with the Exchange Act. The SEC has indicated that it will make substituted compliance determinations in four areas: (1) registered security-based swap dealer compliance obligations; (2) regulatory reporting and public dissemination requirements; (3) clearing of security-based swaps; and (4) trade execution for security-based swaps. Rather than making a rule-by-rule comparison, the SEC intends to use a "comparability" standard for making such determination by assessing the regulatory outcomes in the relevant non-US jurisdiction, taking into consideration "any relevant principles, regulations or rules...to the extent they are relevant to the analysis" (31086). The FOA strongly supports the SEC's outcomes-based approach.

2.3 The SEC has reserved for itself a substantial amount of flexibility for making substituted compliance determinations, noting (correctly in the FOA's view) that it would be improper to take an overly prescriptive approach given the heterogeneity of derivatives regulatory regimes across non-US jurisdictions. (cf. proposed Rule 3a71-5(a)(2)(i).) To that end, proposed Exchange Act Rule 0-13 sets out in very general the substantive and procedural obligations in connection with submitting a request for substituted compliance.

2.4 While the FOA agrees in principle with the SEC that flexibility is a virtue in a substituted compliance regime, in the FOA's view such flexibility must be balanced against an appropriate level of certainty and predictability regarding the process for market participants. As noted in our comment letter to the CFTC, the continued success of the international (and, in particular, transatlantic) marketplace depends on the presence of a consistent, predictable legal and regulatory framework within which market participants can transact business. In that regard, the FOA recommends that the SEC consider refining its approach to making substituted compliance determinations in the following ways.

2.5 *Standard Timeframe for Review*

The FOA recognises that the timeline for reviewing a request for substituted compliance and reaching an informed decision will likely vary, for example due to the nature of the regulatory regime in a given jurisdiction or the SEC staff's lack of familiarity with a particular jurisdiction's approach. Nevertheless, the FOA believes that it is essential that there be a standard timeframe for the SEC to reach a substituted compliance determination. Any uncertainty regarding the timeline for compliance with regulatory obligations creates a significant amount of additional complexity for market participants that are already faced with substantial operational and compliance burdens in preparing for the compliance dates of new regulations. This is especially true in the context of substituted compliance, where an affirmative determination by the SEC means, in effect, that a market participant need only comply with the regulations in its own jurisdiction versus a situation in which the same market participant may need to be prepared to compare with two separate regulatory regimes at the same time. The compliance challenge becomes even more

acute in the context where the SEC makes a substituted compliance determination in respect of some, but not all, aspects of a non-US jurisdiction's regulatory regime.

2.6 *The SEC Should Identify the Relevant Regulatory "Outcomes"*

The FOA urges the SEC to provide additional detail regarding the process of assessing non-US jurisdictions. As noted above, the SEC has stated that, when making substituted compliance determinations, it will assess "regulatory outcomes as a whole" rather than making rule-by-rule comparisons with a non-US jurisdiction. However, proposed Exchange Act Rule 0-13(e) requires than an applicant includes "any supporting documentation [the applicant] believes necessary for the [SEC] to make such determination". In effect, this provision puts the burden of interpretation wholly on the applicant, which is not in the FOA's view appropriate. By leaving market participants to make inferences about the types of outcomes that are relevant to the SEC's determinations, there is a risk that different applicants from the same jurisdiction may prepare requests that are substantially different from each other both in scope and in content. There are also incentives for preparing applications that are structured at too high a level and do not contain sufficient detail for the SEC to make a reasoned comparison, which would be a loss of time both for the SEC and for the marketplace. The FOA is not, however, suggesting that the SEC adopt a more prescriptive approach to substituted compliance, but rather provide additional guidance to facilitate identification of appropriate "outcomes" for those that are preparing requests for substituted compliance. The SEC would also benefit from greater specificity in its rules by ensuring that the applications it receives address a similar range of compliance issues and contain a similar amount of supporting detail.

2.7 *Non-US Regulators Should Be Able to Submit Requests for Substituted Compliance*

The SEC's proposed rules suggest that, unlike the CFTC's approach, only market participants are permitted to submit requests for substituted compliance determinations (cf. *e.g.*, 3a71-5(c)). By contrast, the FOA believes that the SEC should permit non-US regulators to submit requests for substituted compliance and to permit all market participants from a given jurisdiction (or such classes thereof as are identified by the SEC) to rely on a substituted compliance determination. This approach, which has been recognised by the CFTC as an acceptable form of application for substituted compliance, has several significant advantages over the SEC's proposal. Most importantly, the SEC has engaged in ongoing bilateral and multilateral discussions with non-US regulators regarding cross-border regulatory issues and the pace and scope of the regulatory reform efforts in their jurisdictions. Therefore, the SEC already has a good working knowledge of the regulatory approach taken in other key jurisdictions, particularly the European Union; more importantly, the SEC has already established appropriate contacts and working relationships with the relevant personnel of key non-US regulatory agencies. It would be difficult for a single market participant, or a group of market participants, to improve upon these existing arrangements for exchanges of information and forums for discussions on regulatory matters. In addition, direct regulator-to-regulator contact makes it much easier to resolve matters of interpretation or other questions rather than having to relay such information through market participants. Direct regulator-to-regulator contacts would also eliminate the likelihood of duplicative effort in preparing requests by market participants.[8]

[8] The FOA notes that it would not be tenable for the SEC to permit substituted compliance in response to one application from a given jurisdiction but not make an identical determination for all other similarly-situated applicants from the same jurisdiction. If that is the case, then the Proposed Rules may actually create an incentive for certain market participants to wait until some other applicant or group of applicants from the same

2.8 *Phased Implementation*

The SEC should consider establishing a phased implementation process for substituted compliance. In particular, the SEC should consider delaying the effectiveness of the compliance obligations applicable to non-US security-based swap dealers and major security-based swap participants until such time as the SEC has been able to make substituted compliance determinations in respect of those jurisdictions that are most active in the international derivatives markets.

The SEC should also consider adopting a "temporary" substituted compliance regime whereby, once a properly-drafted substituted compliance request has been submitted to the SEC, market participants from that jurisdiction would be permitted to continue to comply with home country regulations until such time as the SEC determines that it will not permit substituted compliance in respect of some, or all, of such home country's regulatory requirements. Doing so would limit the costs for non-US market participants that could be faced with the obligation to comply with Exchange Act requirements up until a substituted compliance determination is made, following which only compliance with home country regulatory requirements would be necessary.

For the same reasons, any decision by the SEC to modify or withdraw a substituted compliance determination should be subject to an appropriate phased timetable to permit market participants sufficient time to adjust their systems and operations to the new compliance obligations.

2.9 *Multi-Jurisdictional Substituted Compliance Determinations*

The FOA also wishes to express its concern that the Proposed Rules reflect an assumption that substituted compliance determinations can be made in a straightforward manner by reference to the rules of only a single non-US jurisdiction.[9] It is not clear how the SEC intends to approach situations where more than one non-US jurisdiction's rules may be relevant. To some extent, these risks may be mitigated in the European Union to the extent that the SEC makes a substituted compliance determination on an EU-wide basis. However, multi-jurisdictional scenarios are quite common and the SEC must provide additional guidance on how it intends to address substituted compliance when a bank headquartered in one country (*e.g.*, the UK) may have a swap dealing branch that operates in another country (*e.g.*, Hong Kong). Any substituted compliance determination by the SEC must account for the interplay of the regulatory regimes in the relevant non-US jurisdictions.

In making this point, the FOA recognises that a careful distinction needs to be drawn between recognising, on the one hand, the regulatory outcomes, standards and rules of another jurisdiction – and this is particularly an issue with federated jurisdictions – and, on the other hand, the experience, resources and capability of a regulatory authority within that jurisdiction to supervise, investigate and enforce compliance with those rules (e.g. in a federated jurisdiction, this kind of capability may vary significantly between individual national competent authorities). As a result, the

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jurisdiction has done the hard work of submitting a request for substituted compliance and then effectively "free ride" on their efforts.

[9] The SEC has implicitly recognised this in the Proposed Rules when it noted that "security-based swap business currently takes place across national borders, with agreements negotiated and executed between different counterparties often in different jurisdictions (and at times booked and risk-managed in still other jurisdictions". Proposed Rules, p. 30976. The FOA notes in this regard that, although it raised a similar point in respect of the CFTC's proposed cross-border guidance, the CFTC's final cross-border guidance does not address this issue.

degree of reliance that the SEC (or CFTC) may place upon a given non-US regulatory authority may vary depending on the SEC's (or CFTC's) assessment of the extent to which it can properly rely on such non-US authority to exercise its oversight authority and enforce compliance with its rules.

2.10 *"Partial" Substituted Compliance Increases Operational and Compliance Risks*

As already noted, the FOA recognises the benefit of the flexibility that characterises the SEC's intended approach to substituted compliance. Nevertheless, the FOA urges the SEC to consider, when making "partial" substituted compliance determinations, the risk that such an approach could increase, rather than decrease, the likelihood that a given swaps market participant will be subject to duplicative and/or inconsistent regulations. In particular, "partial" substituted compliance could introduce additional complexities in the compliance obligations for non-US persons that could pose significant operational difficulties. Market participants are already required to assess their Dodd-Frank compliance obligations based on the nature of their counterparty and the mechanics of how and where the swap is booked. The further obligation to identify within each such category the sub-set of requirements that are subject to substituted compliance and those that are likely to challenge the compliance capacities of even the most well-prepared market participant, which may increase instances of non-compliance and add costs and reduce the timeliness of execution in the derivatives markets. The FOA urges the SEC – as it urged the CFTC – to be sensitive to the possible consequences of "partial" substituted compliance determination for market participants and, wherever possible, to presume that where a significant portion of a jurisdiction's regulatory regime is determined to be comparable to Title VII of the Dodd-Frank Act, the remainder of the jurisdiction's regulatory regime should also be deemed to be comparable.[10]

2.11 *Access to Books and Records; Inspections and Examinations*

In the Proposed Rules, the SEC refers to its earlier proposal to require that a non-US security-based swap dealer must certify that it can provide the SEC with prompt access to its books and records and can submit to onsite inspection and examination by members of the SEC staff.[11] However, the discussion on substituted compliance for non-US security-based swap dealers does not expressly address whether these access, inspection and examination requirements would continue to apply in respect of a non-US security-based swap dealer that is eligible to rely on a substituted compliance determination. In the Proposed Rules, the SEC has indicated that, prior to making a substituted compliance determination, the SEC "must have entered into a supervisory and enforcement [Memorandum of Understanding] or other arrangement with the appropriate financial regulatory authority" and that through such arrangements the SEC and the foreign regulator(s) "would express their commitment to cooperate with each other to fulfil their respective regulatory mandates".[12]

The FOA believes that the SEC's access to the books and records of, and the right to conduct on-site examinations and inspections of, a non-US security-based swap dealer relying on a substituted compliance determination should be subject to the terms of the relevant Memorandum of Understanding (or other agreement) governing such substituted compliance arrangements. The FOA therefore urges the SEC to

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10 Any such presumption could be rebutted in extenuating circumstances.

11 Proposed Rules, p. 31015 (referring to proposed Exchange Act Rule 15Fb-2).

12 *Id.* at 31088.

clarify in its final cross-border rules that, as part of a substituted compliance determination, the SEC agrees to access books and records, and conduct on-site examinations and inspections, of non-US security-based swap dealers through the cooperative arrangements entered into with the relevant non-US regulator(s).

3. THE SEC SHOULD REASSESS ITS JURISDICTION OVER TRANSACTIONS "WITHIN THE UNITED STATES"

3.1 A central element of the Proposed Rules is the SEC's assertion of jurisdiction over transactions "conducted within the United States". Proposed Exchange Act Rule 3a71-3(a) defines this term to mean "a security-based swap transaction that is solicited, negotiated, executed, or booked within the United States, by or on behalf of either counterparty to the transaction, regardless of the locations, domicile or residence status of either counterparty to the transaction".[13] Based on this definition, the SEC would have jurisdiction over security-based swap transactions that are entered into between two non-US person counterparties where some level of activity occurs within the United States.

3.2 In the FOA's view, it is *a priori* unclear why the SEC's jurisdiction would attach to such trades.[14] As the SEC noted in the Proposed Rules, the nature of security-based swaps differs from that of other securities in that security-based swaps "give rise to an ongoing obligation between the counterparties to the trade".[15] In a security-based swap transaction between two non-US persons, these ongoing obligations apply to the non-US person counterparties rather than to any persons or entities in the United States. Given that the main goals of Title VII of the Dodd-Frank Act include preserving the integrity of the US financial markets and protecting US counterparties, it is not obvious how either of these goals is served by subjecting security-based swap transactions with such a limited US nexus to the SEC's jurisdiction. Instead, the SEC should defer to the regulatory oversight and supervision of the home state regulators of the relevant counterparties to the security-based swap.[16]

3.3 In addition, to the extent that any security-based swap transactions have more than a *de minimis* connection to the United States – perhaps because they are being solicited or negotiated from within the United States – the SEC's regulatory interest would appear to be more appropriately focused on the US-based intermediary conducting the solicitation or negotiation. Title VII of the Dodd-Frank Act has expanded the SEC's jurisdiction by requiring broker registration over such intermediaries. The SEC can therefore assure itself through its oversight of such intermediaries that the security-based swap transactions are not being entered into in violation of applicable provisions of the Exchange Act.

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[13] The FOA notes that the SEC has clarified that the act of clearing a security-based swap or reporting a security-based swap in the United States, without more, would not bring such swap within the scope of the SEC's cross-border jurisdiction. *See* Proposed Rules, p, 31000.

[14] The FOA would also refer the SEC to the more detailed discussion on pages A-4 to A-6 of the Associations' comment letter setting out the limits imposed by Section 30(c) of the Exchange Act on the SEC's cross-border jurisdiction over security-based swaps.

[15] Proposed Rules, p. 30984. Security-based swaps fall within the Exchange Act definition of "security". *See* Section 3(a)(10) of the Exchange Act.

[16] The FOA notes in this regard that would appear to be contradictory to the SEC's intention to adopt a substituted compliance regime which defers to home country regulators in connection with security-based swaps between a non-US person and a US person but would not do so in connection with a swap that has an only tenuous connection to the United States and is entered into between two non-US persons.

3.4 Finally, the consequences of the SEC having jurisdiction over these security-based swap transactions would be extensive. Under the Proposed Rules, non-US persons would be required to include such transactions in their *de minimis* calculations relating to security-based swap dealer registration requirements. There would also be consequences for transacting in security-based swaps that are subject to mandatory clearing and trade execution requirements: a security-based swap that it is conducted "within the United States" and for which one of the counterparties is a non-US security-based swap dealer must be submitted for clearing through an SEC-registered security-based swap clearing agency and executed on an SEC-registered security-based swap execution facility. The FOA does not believe that the limited connections of such transactions to the United States in any way justifies the regulatory consequences set out in the Proposed Rules.

4. THE SEC'S APPROACH SHOULD CONVERGE, AS APPROPRIATE, WITH THE CFTC'S APPROACH

4.1 As has been often remarked, the international derivatives markets were not designed with the peculiarities of US financial market regulation in mind. International market participants have not therefore historically organised their business models to account for the fact that the SEC has jurisdiction over security-based swaps and that the CFTC has jurisdiction over all other swaps. This regulatory divide is further complicated for the credit default swap ("CDS") market, where single-name and "narrow-based" index CDS are security-based swaps subject to SEC oversight and "broad-based" index CDS are swaps subject to CFTC oversight. The FOA notes that there are gaps and differences between the SEC's approach and the CFTC's approach, in particular as regards the assertion of jurisdiction over transactions conducted "within the United States" as well as regarding the imposition of cross-border clearing and trading requirements (and exemptions therefrom). There are also gaps in the definition of "US person".[17]

4.2 Given the breadth of the regulatory reforms set out in Title VII of the Dodd-Frank Act and the likely extent of the cross-border application of such requirements by both the SEC and the CFTC, it is crucial for both agencies to coordinate, to the extent possible, on their approaches in order to minimise distortions or other unintended consequences for market participants that already face substantial challenges in adapting to a single set of US regulations. The FOA accepts that there may be cases in which separate approaches are preferable, or even necessary, however it is an inescapable fact that each divergence between the approaches taken by the SEC and the CFTC will increase, often significantly, the compliance obligations (and thereby increase compliance complexity) for market participants and exacerbate legal risk far out of proportion to the regulatory interests being served by maintaining such difference. In this context, the FOA notes that, despite the difference in the underlying, the type of market and the class of financial instrument which fall within the remit of the SEC and the CFTC are the same and therefore the need for a convergent approach is that much more pressing. To the extent possible, and notwithstanding the concerns expressed in the remainder of this letter, the FOA's preference would be for the CFTC's approach to converge to that of the SEC.

4.3 To take one significant example, the SEC and CFTC should coordinate in connection with making substituted compliance determinations. The CFTC has indicated that it will assess substituted compliance across 13 subject areas, whereas the SEC will make assessments across 4 subject areas. The SEC and CFTC should ensure that, to the maximum extent possible, determinations in congruent subject areas are the

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17 *See* Proposed Exchange Act Rule 3a71-3(a)(7); Final CFTC Guidance, pp. 45316-17.

same. It would be exceedingly difficult to justify how one agency could determine that a given non-US jurisdiction qualifies for substituted compliance in respect of a given subject matter but the other agency, looking at the same regime, could reach a different conclusion.

4.4 Both agencies should also consider whether to accept joint submissions from non-US market participants or non-US regulators in order to ensure each agency is presented with the same arguments in favour of making a substituted compliance determination and is working from the same set of supporting documents. To the extent that the CFTC has made substituted compliance determinations prior to the SEC, both agencies should consider whether it would be appropriate for the SEC to inform – or even accelerate – its deliberations on the basis of the CFTC's decision. For similar reasons, any decision to modify or withdraw an existing substituted compliance determination should be reached in a joint, coordinated fashion by both the SEC and the CFTC.

4.5 Finally, and as noted above, the FOA urges the SEC to begin discussions with the European Commission (which may include, as appropriate, the CFTC) in order to establish an agreed approach for the coordinated oversight of the transatlantic security-based swaps markets.

5. CONCLUSION

5.1 The FOA appreciates the opportunity to provide its comments on the Proposed Rules. The FOA is encouraged by the SEC's intention to pursue a substituted compliance approach for cross-border security-based swaps activities. However, the FOA believes that the SEC's more pragmatic and proportionate approach towards substituted compliance could be further improved in the areas and for the reasons stated earlier in this letter. In addition, the FOA believes that the SEC should consider limiting the scope of its jurisdiction to those transactions that involve US persons rather than those that occur "within the United States. We therefore urge the SEC to consider carefully all comments received regarding the Proposed Rules and to craft an approach that will provide clear guidance so that market participants can apply it in a consistent, predictable manner.

APPENDIX 1

LIST OF FOA MEMBERS

FINANCIAL INSTITUTIONS

ABN AMRO Clearing Bank N.V.
ADMISI
Altura Markets S.A./S.V
AMT Futures Limited
Jefferies Bache Limited
Banco Santander
Bank of America Merrill Lynch
Banca IMI S.p.A.
Barclays Capital
Berkeley Futures
BGC International
BHF Aktiengesellschaft
BNP Paribas Commodity Futures
BNY Mellon Clearing International
Citadel Derivatives Group (Europe)
Citigroup
City Index
CMC Group Plc
Commerzbank AG
Crédit Agricole CIB
Credit Suisse Securities (Europe)
Deutsche Bank AG
ETX Capital
FOREX.COM UK
FXCM Securities
GFI Securities
GFT Global Markets UK Ltd
Goldman Sachs International
HSBC Bank Plc
ICAP Securities Limited
IG Group Holdings Plc
International FC Stone Group
JP Morgan Securities
Liquid Capital Markets
London Capital Group
Macquarie Bank
Mako Global Derivatives
Marex Spectron
Mitsubishi UFJ Securities International Plc
Mizuho Securities USA, Inc London
Monument Securities
Morgan Stanley & Co International
Newedge UK Financial Limited
Nomura International Plc
Rabobank International
RBC Europe Limited
Saxo Bank A/S
Scotia Bank
S E B Futures
Schneider Trading Associates
S G London
Standard Bank Plc
Standard Chartered Bank
Starmark Trading
State Street GMBH , London Branch
The Kyte Group
The RBS
UBS Limited
Vantage Capital Markets LLP
Wells Fargo Securities

EXCHANGE/CLEARING HOUSES

APX Group
CME Group, Inc.
Dalian Commodity Exchange
European Energy Exchange AG
Global Board of Trade
ICE Futures Europe
LCH.Clearnet Group
MCX Stock Exchange
MEFF RV
Nasdaq OMX
Nord Pool Spot AS
NYSE Liffe
Powernext SA
RTS Stock Exchange
Shanghai Futures Exchange
Singapore Exchange
Singapore Mercantile Exchange
The London Metal Exchange
The South African Futures Exchange
Turquoise Global Holdings

SPECIALIST COMMODITY HOUSES

Amalgamated Metal Trading
BASF SE. EIL
Cargill Plc
ED & F Man Capital Markets
Glencore Commodities
Gunvor SA
Hunter Wise Commodities LLC
Koch Metals Trading Ltd
Metdist Trading Limited
Mitsui Bussan Commodities
Natixis Commodity Markets
Noble Clean Fuels
Phibro GMBH
J.P. Morgan Metals
Sucden Financial
Toyota Tsusho Metals
Triland Metals
Vitol SA

ENERGY COMPANIES

BP International IST
Centrica Energy
ChevronTexaco
ConocoPhillips Limited
E.ON EnergyTrading SE
EDF Energy
EDF Trading Ltd
International Power plc
Phillips 66 TS Limited
National Grid Electricity Transmission Plc
RWE Trading GMBH
Scottish Power Energy Trading
Shell International
SmartestEnergy Limited

PROFESSIONAL SERVICE COMPANIES

Ashurst LLP
ATEO Ltd
Baker & McKenzie
Berwin Leighton Paisner LLP
BDO Stoy Hayward
Clifford Chance
Clyde & Co
CMS Cameron McKenna
Deloitte
FfastFill
Fidessa Plc
Freshfields Bruckhaus Deringer
Herbert Smith LLP
Holman Fenwick Willan LLP
ION Trading Group
JLT Risk Solutions Ltd
Katten Muchin Rosenman LLP
Linklaters LLP
Kinetic Partners LLP
KPMG
McDermott Will & Emery LLP
Mpac Consultancy LLP
Norton Rose LLP
Options Industry Council
Orrick, Herrington & Sutcliffe LLP
PA Consulting Group
R3D Systems Ltd
Reed Smith LLP
Rostron Parry
RTS Realtime Systems
Sidley Austin LLP
Simmons & Simmons
SJ Berwin & Company
SmartStream Techologies
SNR Denton UK LLP
Speechly Bircham LLP
Stellar Trading Systems
SunGard Futures Systems
Swiss FOA
Traiana Inc
Travers Smith LLP
Trayport

APPENDIX 2

EU-US COALITION ON FINANCIAL REGULATION REPORT: "INTER-JURISDICTIONAL REGULATORY RECOGNITION: FACILITATING RECOVERY AND STREAMLINING REGULATION"

EXECUTIVE SUMMARY

EU-US Coalition on Financial Regulation Report

"Inter-jurisdictional Regulatory Recognition: Facilitating Recovery and Streamlining Regulation"

Executive Summary

Background

In 2005, a group of transatlantic financial service trade associations established the EU-US Coalition on Financial Regulation with the objective of energising the transatlantic dialogue to deliver on the three 'gateways' to establishing a more coherent framework of regulation for the conduct of cross-border business, namely, regulatory recognition, exemptive relief and targeted rules' convergence. To that end, and in the years preceding the crisis, the Coalition produced a number of reports, including a 'gap analysis' of the business conduct rules of the EU, the US and Switzerland.

On 1st February 2008, the European Commission and the US SEC, in their Joint Statement on Mutual Recognition in Securities Markets, mandated their respective organisations to *"intensify work on a possible framework for EU-US mutual recognition for securities in 2008"* on the basis that *"the concept of mutual recognition offers significant promises and means for better protecting investors, fostering capital formation and maintaining fair, orderly and efficient transatlantic securities markets"*.

The subsequent emergence of the sub-prime financial crisis resulted in a refocusing of regulatory priorities away from regulatory recognition to restructuring financial services regulation at both the macro- and micro-levels. Nevertheless, the importance of developing a framework of coherent and coordinated regulation for the carrying-on of cross-border business remains as true today as it was before the crisis.

In this context, it is noteworthy that the G20, in its first post-crisis Leaders' Summit in November 2008, underscored *"the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty"*. For its part, the European Commission, in its first report after the crisis, cautioned that *"protectionism and a retreat towards national markets can only lead to stagnation, a deeper and longer recession and lost prosperity"* ('Driving Economic Recovery' (4/3/09)).

While it is true that the post-crisis regulatory agenda of the various transatlantic constituencies has adopted in large part the objectives and standards set by the G20, the FSB, Basel and IOSCO, regulatory convergence is nevertheless being increasingly undermined by growing regulatory differentiation, protectionism and extraterritoriality. This, in turn, has generated needless legal risk and compliance complexity, restricted customer choice and increased cost in relation to the carrying on of cross-border business.

As a result, the Coalition, noting the global importance of energising business recovery and economic growth in the current climate and recognising that the transatlantic marketplace (through which 80% of the world's financial business flows) has a potentially significant contribution to make in achieving those key targets, commissioned Clifford Chance to produce a report emphasising the post-crisis importance of an urgent resumption of the pre-crisis dialogue to establish a framework of regulatory recognition in the transatlantic marketplace. This report, called *'Inter-Jurisdictional Regulatory Recognition: Facilitating Recovery and Streamlining Regulation'* was published on 19th June 2012.

Summary of the Report's Findings

The Report emphasises that regulatory recognition must be based on acceptable comparability in shared regulatory policy objectives, standards and outcomes, but recognises that there will inevitably be regional differences in overarching legal systems, market practices, etc. It identifies the key areas where regulatory recognition should be concentrated and the kind of regulatory criteria necessary for it to be credible and reliable. The Report also recognises the critical importance of accommodating operational differentiation within Memoranda of Understanding entered into between regulatory authorities, insofar as while they may all be subjected to common regulatory objectives, standards and outcomes, they will be fundamentally different in terms of experience and resources and this will impact on the degree of operational inter-reliance that can take place between differentiated authorities.

More particularly, the report recommends:

- that the international standard setting bodies should move beyond expressing policy objectives and aspirations to defining the negotiating architecture for progressing the dialogue on regulatory recognition, setting timetables and actively 'mentoring' the dialogue;

- that the 38 IOSCO Principles and Objectives for Securities Regulation (exhibited to the Report) are the only international agreed measure regulatory adequacy and, as such, should serve as the foundation for the dialogue, but this should be supported by additional tiers of due diligence and in-depth analysis, particularly in the area of supervision and enforcement; and that the IOSCO Multilateral Memorandum of Understanding should be widely adopted and extended beyond its scope of facilitating information-sharing and evidence-gathering;

- that a dedicated working group drawn from the key regulatory authorities on both sides of the Atlantic should be established (or the work outsourced on a collective basis to a major law firm) to undertake a regulatory gap analysis; and establish a process whereby new regulations with potential extraterritorial effect or which depart from the basis for regulatory recognition are made subject to inter-regulatory consultations prior to their introduction (other than in cases of extreme market stress or urgency);

- that an advisory group comprising investment banks, non-bank broker-dealers, market infrastructures and corporate and institutional end-users of the markets should be established to identify areas of regulatory conflict which impose significant cost or other resource burdens or unnecessary complexity on financial service providers and/or consumers and/or market infrastructures (and regulatory authorities) and provide input into the dialogue in terms of ensuring that it delivers commercial and business efficiency alongside regulatory efficiency for the key 'stakeholders' in the outcome.

List of Coalition Members

American Bankers Association Securities Association (ABASA)

Association of Financial Markets in Europe (AFME) / Global Financial Markets Association (GFMA)

Bankers' Association for Finance and Trade (BAFT)

British Bankers' Association (BBA)

Futures Industry Association (FIA)

Futures and Options Association (FOA)

International Capital Market Association (ICMA)

Investment Industry Association of Canada (IIAC)

International Swaps and Derivatives Association (ISDA)

Securities Industry and Financial Markets Association (SIFMA)

Swiss Bankers Association (SBA)

Observer: European Banking Federation (EBF)