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October 2, 2013

Elizabeth M. Murphy, Esq.
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: **Cross-Border Security-Based Swap Activities; Reproposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, SEC Release No. 34-69490; File Nos. S7-02-13; S7-34-10; S7-40-11 (the "Cross-Border Proposing Release" or "Release")**

Dear Ms. Murphy:

This letter is submitted on behalf of the Federal Regulation of Securities Committee ("Committee") of the Business Law Section ("Section") of the American Bar Association ("ABA"), in response to a request for public comment from the Securities and Exchange Commission ("Commission") regarding the Cross-Border Proposing Release. Our comments are focused on: (1) the Commission's proposed "U.S. Person" definition and its conduct-based approach to regulation of cross-border security-based swap activity; (2) the Commission's rulemaking process under the Administrative Procedure Act; and (3) the Commission's proposed policy and procedural framework for making "substituted compliance" determinations with respect to cross-border security-based swaps transactions.

The comments presented in this letter represent the views of the Committee only, and have not been approved by the ABA's House of Delegates or Board of Governors. Accordingly, these comments do not represent the official position of either the ABA or the Section. The Committee appreciates the opportunity to comment on the Release.

I. The Commission's Proposed "U.S. Person" Definition and its Conduct-Based Approach to Regulation of Cross-Border Security-Based Swap Activities

The Committee commends the Commission for its clear and objective approach to the proposed definition of "U.S. Person" in the Cross-Border Proposing Release.

A linchpin of the Commission's jurisdictional reach in this proposal is the definition of "U.S. Person." The Commission proposes a definition that includes:

- any natural person resident in the United States;

- any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States or having its principal place of business in the United States; and

- any account (whether discretionary or non-discretionary) of a U.S. person.

As the Commission points out in the Cross-Border Proposing Release, its concerns in framing the above definition, rooted in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), include "the effects of security-based swap activity on the financial stability of the United States, on the transparency of the U.S. financial system, and on the protection of counterparties." Other key considerations identified as informing the Commission's proposed jurisdictional analysis are the authority expressly conferred by new Section 30(c) of the Securities Exchange Act of 1934, as amended ("Exchange Act"),[1] the impact of the proposed rulemaking and interpretive guidance on efficiency, competition and capital formation given the global nature and interconnectedness of the world's derivatives market, the need for harmonization with the Commodity Futures Trading Commission ("CFTC") and prudential regulators in the United States to ensure regulatory consistency and comparability to the extent possible, and the statutory duties of both the Commission and the CFTC to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards for the regulation of swaps and security-based swaps.

Because the Commission's proposed "U.S. Person" definition is clear and objective, we believe that it can be efficiently and effectively implemented by market participants. We also believe that the definition is consistent with the Commission's statutory responsibility to protect the U.S. financial system against undue systemic risk while minimizing regulatory complexity and uncertainty. In our view, the Commission's proposed definition is consistent with its statutory authority outlined in new Section 30(c) of the Exchange Act, which states that the Commission's rules shall not apply:

> to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States, unless such person transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of any provision of this chapter that was added by the [Dodd-Frank Act].

Although we believe that the simple, three-pronged definition of "U.S. Person" will facilitate compliance without compromising the Commission's legitimate interest in protecting the U.S. financial system against excessive risk, we do have one suggested modification. It would be helpful to market participants if the Commission clarified the

[1] Section 772(b) of the Dodd-Frank Act added new Section 30(c) to the Exchange Act.

scope of the term "principal place of business" as contained in the second prong of the proposed definition (above). In so doing, we recommend that the Commission confirm the appropriateness of reasonable reliance on a counterparty's written representations regarding its principal place of business as part of a broader due diligence process (absent evidence to the contrary).[2]

In addition to focusing on the definition of "U.S Person" for its jurisdictional nexus, the Commission also has proposed looking more holistically to whether the "transaction is conducted within the United States" in applying security-based swap requirements. This conduct-based approach appropriately focuses on those transactions that are most likely to impact the United States—those transactions that are "solicited, negotiated, executed or booked within the United States." By contrast with the CFTC's approach as reflected in its Final Interpretative Guidance and Policy Statement (the "Final Guidance")[3] and Exemptive Order,[4] the Commission's proposed approach more carefully targets U.S. Persons and transactions likely to implicate the jurisdictional interests of the United States.

The Commission's conduct-based approach is consistent with the longstanding Commission practice of applying U.S. regulations to transactions conducted within United States borders. It is also arguably consistent with the expectation of the parties that U.S. regulations would apply to these transactions. That said, there is potential ambiguity regarding the range of activities the phrase "transaction conducted within the United States" actually covers. Again, the Commission's definition includes any security based-swap transaction that is "solicited, negotiated, executed or booked within the United States." In a marketplace in which transactions are often conducted across multiple borders, it may be difficult to determine whether there is sufficient U.S. involvement in a given transaction to warrant the exercise of Commission jurisdiction under Section 30(c) of the Exchange Act. For instance, if the negotiation of the transaction includes negotiating standard International Swaps and Derivatives Association ("ISDA") documentation, and that function is performed in the United States, but the negotiation of substantive economic terms, solicitation and execution occur offshore, such transaction would not appear to have a sufficient jurisdictional nexus to the United States to warrant the application of U.S. regulation. Accordingly, we suggest that the Commission provide further clarification with respect to the scope of its conduct-based transactional analysis, in order to minimize unnecessary U.S. regulation.

In addition, the Committee recommends that the Commission explicitly exclude from this analysis the location of a firm's centralized risk management and legal and

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[2] *Cf.* CFTC, Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations; Rule, 78 Fed. Reg. 45292, 45315 (Jul. 26, 2013)("The Commission agrees with commenters that a party to a swap should generally be permitted to reasonably rely on its counterparty's written representation [depending on the relevant facts and circumstances] in determining whether the counterparty is within the Commission's interpretation of 'U.S. Person.'"). The Committee is not suggesting that the Commission extend the concept of "reasonable reliance" to a counterparty's written representation regarding its "U.S. Person" status, but rather that this concept apply more narrowly to a counterparty's written representations as to its principal place of business.

[3] *Id.*

[4] CFTC, Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 43,785 (July 22, 2013).

compliance functions. U.S. banks and broker-dealers commonly organize these functions on a global basis, rather than following a business "silo" approach, with the result that a center of gravity of these functions will normally be in the United States. It would unfairly disadvantage U.S. institutions if, solely as a consequence of this centralized approach, all of their security-based swap activities were treated as being conducted within the United States.

As noted earlier, the Commission cited as one of its regulatory goals the harmonization of its rules with those of other regulators, both domestically and abroad. In this regard, we have some concern that the global regulatory environment remains highly fluid, and thus highly uncertain. We therefore urge the Commission to continue its ongoing consultations with the CFTC and foreign regulators, and to adapt its proposed approach as necessary or appropriate – in accordance with the purposes of Title VII of the Dodd-Frank Act – in light of evolving international regulatory standards and any significant changes in the global derivatives marketplace. We understand that this undertaking presents the Commission with a "chicken-and-egg" dilemma; however, the agency properly acknowledges that it may have to re-calibrate the proposed framework as regulators around the world hammer out overlapping and potentially conflicting regulations that may apply to a single cross-border transaction, thereby creating opportunities for regulatory arbitrage or evasion.

Ultimately we believe that the Commission, with respect to its proposed "U.S. Person" definition and its conduct-based approach, has struck a reasonable balance between considerations of comity and the potential risk to the U.S. financial system posed by cross-border security-based swaps activity that has a substantial U.S. nexus. As the Commission aptly observed in the Release, "the security-based transactions of U.S. persons give rise to ongoing liability that is borne by a person located in the United States and thus are likely to pose the types of financial stability risks to [the] U.S. financial system that Title VII was intended to address."[5]

II. The Commission's Rulemaking Process under the Administrative Procedure Act

The Committee commends the Commission for taking a measured, deliberative approach to implementation of its Title VII rulemaking responsibilities in accordance with the notice-and-comment provisions of the Administrative Procedure Act ("APA"). As part of this process, the Commission has undertaken a rigorous economic analysis spanning almost 200 pages of the 650-page Cross-Border Proposing Release. While there may be pressure on the Commission to accelerate the rulemaking process in light of the CFTC's publication in late July of the Final Guidance and Exemptive Order, respectively, we urge the Commission to consider carefully all public comments received, continue its ongoing consultations with interested U.S. and foreign regulators and otherwise work toward developing the strong evidentiary foundation required for

[5] Cross-Border Proposing Release at 80 n. 276. Or, as the Commission explained elsewhere in this Release, "a security-based swap gives rise to ongoing obligations between transaction counterparties during the life of the transaction .... [which] means that each counterparty to the transaction undertakes the obligation to perform the security-based swap in accordance with its terms and bears the counterparty credit risk and market risk until the transaction is terminated." Id. at 38 (citation omitted).

the sweeping Title VII regulatory scheme proposed to cover cross-border security-based swap transactions.[6] In this connection, as discussed above, we believe that the Commission's exhaustive analysis of the existing derivatives market and other factors discussed in detail in Part II of the Cross-Border Proposing Release provides a reasonable basis for the proposed "holistic" approach to Commission non-fraud regulation of cross-border activity in security-based swaps.

III. Substituted Compliance

The Committee supports the Commission's proposed "outcome-based" approach to "substituted compliance" decisionmaking relating to cross-border security-based swaps transactions. In our view, the regulatory approach the Commission has proposed is superior to the alternatives presented in the Cross-Border Proposing Release; e.g., regime-wide and/or rule-by-rule comparisons.

The Cross-Border Proposing Release would permit foreign security-based swap dealers to comply with entity-level and transaction-level requirements of Section 15F of the Exchange Act by complying with foreign requirements the Commission deems comparable. The Commission will make substituted compliance determinations based on an analysis of regulatory objectives rather than a rule-by-rule or line-by-line analysis, an approach which we fully support. However, we recommend that the Commission further clarify the details of its proposed substituted compliance analysis; for example, by indicating that it will consider deferring the application of relevant entity-level requirements pending final action on a particular request.

Consistent with the harmonization objective of Title VII of the Dodd-Frank Act, we believe that foreign regulators should be permitted to make substituted compliance requests in addition to regulated entities. These regulators clearly have a stake in the outcome of the Commission's substituted compliance determinations, and are in a favorable position to provide constructive input to the Commission.

In response to the Commission's specific question, we agree that the Commission should analyze the various ways in which a foreign regulatory system achieves its overall goals and purposes in weighing the appropriateness of permitting substituted compliance. In addition, we believe that the Commission's comparability analysis should extend to the existence and effectiveness of the foreign jurisdiction's supervisory examination and enforcement programs. However, we urge the Commission to provide further guidance as to how these factors will be analyzed in particular scenarios.

In our view, the Commission should not limit the availability of a substituted compliance determination to situations in which the U.S. counterparty of a foreign dealer is a Qualified Institutional Buyer ("QIB") as defined in Rule 144A under the Securities Act of 1933, as amended, or some other type of "qualified" investor (e.g., a

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[6] *Cf.* CFTC Final Guidance, supra n. 2, 78 Fed. Reg. at 45372 (Dissenting Statement of CFTC Commissioner Scott D. O'Malia) (footnote omitted) (expressing disagreement with, among other things, the CFTC majority's "decision to issue its position on the cross-border application of its swaps regulations in the form of 'interpretive guidance' instead of promulgating a legislative rule under the Administrative Procedure Act ('APA').").

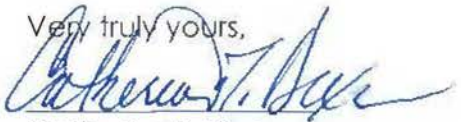
"Qualified Purchaser" within the meaning of Section 2(a)(51) of the Investment Company Act of 1940, as amended). Generally speaking, we do not believe that the Commission should impose investor eligibility restrictions unless and until its experience in administering the substituted compliance regime (assuming its adoption) indicates that some U.S. counterparties require more protection than others in a cross-border transactional context.

Finally, we agree with the Commission's proposed retention of discretion to modify its determinations over time and in light of changing conditions, although we urge the Commission to do so pursuant to public notice and comment (subject to the availability of confidential treatment under the Commission's Freedom of Information Act rules). Commission transparency with regard to the new substituted compliance decisionmaking process will be essential to maintaining market participants' confidence in the U.S. regulatory system.

* * *

The Committee appreciates the opportunity to submit these comments to the Commission. Members of the Committee are available to meet and discuss these matters with the Commission and its staff, and to respond to any questions.

Very truly yours,



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