Financial Services Authority

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
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Dear Mr Stawick,

FSA COMMENT ON *PROPOSED INTERPERATIVE GUIDANCE AND POLICY STATEMENT ON CROSS-BORDER APPLICATION OF CERTAIN SWAPS PROVISIONS OF THE COMMODITY EXCHANGE ACT* ("PROPOSED CROSS-BORDER GUIDANCE") AND *PROPOSED EXEMPTIVE ORDER REGARDING COMPLIANCE WITH CERTAIN SWAP REGULATIONS* ("PROPOSED EXEMPTIVE ORDER")

We appreciate the ongoing dialogue between the CFTC and FSA in relation to the cross-border application of the US Dodd-Frank legislation, and we would like to take this opportunity to provide comments on behalf of the FSA on the two papers released by the CFTC last month.

Our comments focus on a few areas of concern the FSA has with the proposed cross-border guidance and proposed exemptive order.

Deadline for registration of non-US Swap Dealers ("SDs") and Major Swap Participants ("MSPs")

We understand that, in accordance with previous CFTC Dodd-Frank rulemakings, those SDs and MSPs required to register with the CFTC will be required to do so within 60 days of the publication in the US Federal Register of a joint final rule with the SEC providing further definitions of "swap" and related terms[1]. We understand that this means that SDs and MSPs will need to register with the CFTC by 12 October, 2012.

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[1] CFTC/SEC Joint Final Rule and Interpretation; *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping.*

The CFTC acknowledges in its proposed cross-border guidance that there is uncertainty over whether a non-US person's swap dealing activities will be sufficient to require registration as an SD. The proposed guidance is designed, in part, to provide clarity on this issue. Non-US firms will therefore not be in a position to determine whether they are required to register as an SD or MSP before the final cross-border guidance is published. If this is close to, or after 12 October 2012, there is a risk that firms will incorrectly register (or conversely, not register when they should), which exposes them to regulatory risk.

We therefore suggest that the CFTC delays imposing the registration requirement on non-US persons until a defined period (perhaps 6 months) after the CFTC has finalised its cross-border guidance. This would allow firms time to interpret the guidance and make an informed and considered decision on the appropriate entities to register.

Application of transaction-level requirements to all registered SDs and MSPs

Section III.B.5 of the proposed cross-border guidance outlines the application of Dodd-Frank transaction-level requirements, specifically *"to require non-U.S. swap dealers and non-U.S. MSPs to comply with Transaction-Level Requirements for all of their swaps with U.S. persons, other than foreign branches of U.S. persons, as counterparties"*.

The corresponding European Union legislation (the Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories - "EMIR") takes a fundamentally different approach. Under EMIR, where a foreign regime is deemed to be equivalent, "counterparties entering into a transaction subject to this Regulation shall be deemed to have fulfilled the obligations contained in *[relevant articles]* where at least one of the counterparties is established in that third country."[2]

We are concerned that the proposed cross-border guidance does not allow for a similar equivalence-based process, and will instead require firms to meet Dodd-Frank transaction-level requirements where one of the counterparties is a US person. In our view this has the potential to have a real impact on trades between UK and US firms. For example, it is likely to result in the Dodd-Frank requirements being exported to a wide range of UK (and other EU) firms, for example resulting in any UK firm doing business with a US firm needing to trade on a CFTC-registered Swap Execution Facility and clear the trade on a CFTC-registered clearing organisation. Were any non-US legislation/regulation to take a similar approach to the proposed cross-border guidance, then a real risk of regulatory conflict for cross-border trades, potentially prohibiting such business, would exist.

We would therefore encourage the CFTC to take an approach similar to that taken in EMIR. This would build on the substantial work done at an international level to ensure a consistently strong level of regulation of global derivatives markets, enabling each jurisdiction to determine independently which other jurisdictions it considers equivalent, to ensure there is no dilution in the strength of local regulations.

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[2] Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories. Article 13(3).

Impact of proposed exemptive order on non-US persons

The proposed exemptive order would *"allow non-US SDs and non-US MSPs to delay compliance with certain Entity-Level Requirements"*[3]. We believe this is appropriate as it will provide time for those firms for whom substituted compliance is possible to make an application to meet CFTC requirements through that route.

However, the proposed exemptive order only provides limited relief in relation to transaction-level requirements. Related to the previous point on the general application of transaction-level requirements to non-US SDs and MSPs, we believe that the delays in required compliance in the proposed exemptive order should extend to also cover transaction-level requirements for non-US SDs and MSPs. This would provide time for the CFTC to undertake determinations of substituted compliance before the requirements become binding on firms.

Substituted compliance process

We broadly support the process outlined in Section V of the proposed cross-border guidance for the determination of substituted compliance for an individual jurisdiction. We do however believe there are a number of additional points or changes that could be made in the proposed cross-border guidance that would help provide clarity to market participants on the process for determining substituted compliance.

- EU entities will be subject to highly harmonised regulation on derivatives issues, with the EMIR regime for OTC derivatives clearing, reporting and margining, the Markets in Financial Instruments Directive (soon to be updated) for trading-related issues and the Capital Requirements Directive for banking and investment firm solvency. It would therefore seem duplicative to require each EU entity seeking to benefit from substituted compliance to separately demonstrate the equivalence of these EU rules with Dodd Frank. In the EU, assessments of equivalence will be undertaken at a jurisdictional level. As far as possible, we believe it would be beneficial, and more efficient, if the CFTC were to take a jurisdictional rather than firm-by-firm approach.

- In our view, the guidance could also outline more clearly in what circumstances a particular foreign jurisdiction will be acceptable for substituted compliance, and where substituted compliance will only be able to be determined for specific requirements as opposed to the entire set of CFTC swap requirements.

- As a further point we would encourage you to consider outlining in the guidance how the CFTC will make a determination of substituted compliance when regulatory reform in another jurisdiction is underway but not yet complete. For example, it remains unclear whether the CFTC could deem another jurisdiction to be acceptable for substituted compliance on the basis that a jurisdiction has rules entering shortly into force.

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[3] Proposed Exemptive Order, Section III.

- We also believe it would be beneficial for the guidance to outline the anticipated timing of the CFTC's substituted compliance assessments, so that firms can have some certainly around whether there will be a gap between the expiry of the exemptive order and the relevant substituted compliance determinations.

- Finally on this point, we would encourage the CFTC to take into consideration compliance with relevant international standards in the determination of acceptability for substituted compliance. In general, compliance with relevant international standards (such as the CPSS-IOSCO Principles for Financial Markets Infrastructure or various reports of IOSCO) should be an important factor in determining if a jurisdiction has a regime acceptable for substituted compliance.

Treatment of US branches of non-US persons

We are concerned there is a lack of clarity about the treatment of US branches of non-US persons in the proposed cross-border guidance.

Section II.D.3 of the proposed cross-border guidance suggests that, in certain circumstances, a US branch of a non-US person could be required to register with and be subject to oversight by the CFTC. We are particularly concerned that a non-US person, who may trade only with other non-US persons, could become subject to CFTC registration and oversight due only to the activities of a US branch of the non-US person.

As an example, it appears under the proposed cross-border guidance that a New York branch of a UK bank that is facilitating trades between the UK bank and another non-US bank could result in the New York branch, or the UK bank itself, being required to register with the CFTC despite the legal person being located outside the US and trading only with non-US persons. We believe in this scenario that the transaction entered into by the non-US person through a US branch is unlikely to introduce any risk into the US.

We therefore believe the guidance could be clarified to make clear that the presence of a branch in the US should not, in itself, result in the branch or parent entity becoming subject to CFTC registration and prudential requirements, unless they are required to do so on some other basis.

Definition of a US person

We understand the CFTC's desire to avoid a situation where the US financial system is exposed to undue risks through links to a foreign entity. However, defining an entity which is not resident or established in the US as a US person comes with a risk of conflict of laws, particularly where that person is resident or established in a jurisdiction with a highly developed regulatory system. For example, a collective investment vehicle managed from the EU, but with a majority ownership by US persons, would be subject to the Alternative Investment Fund Managers Directive and EMIR in the EU and to Dodd-Frank in the US, and the multiple registration requirements could present a significant possibility of conflict of

laws. We would encourage a qualification to be added to the definition of US person to state that an entity which is neither established nor resident in the US will not be classed as a US person where it is established or resident in a jurisdiction which has in force regulations with equivalent effect to Dodd-Frank.

We thank you again for providing the opportunity to comment on these important releases, and we look forward to continued strong engagement between the CFTC and the FSA. We would be happy to discuss any of these issues raised with you further.

Yours sincerely,

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