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September 14, 2015

Mr. Christopher Kirkpatrick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

Re: *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants — Cross-Border Application of the Margin Requirements (RIN 3038–AC97)*

Dear Mr. Kirkpatrick:

ICI Global<sup>1</sup> appreciates the opportunity to comment on the proposed rule by the Commodity Futures Trading Commission (“Commission” or “CFTC”) on the cross-border application of margin requirements for uncleared swaps for swap dealers and major swap participants<sup>2</sup> under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).<sup>3</sup> The Proposal relates to initial and variation margin requirements for swap dealers and major swap participants that do not have a prudential regulator (collectively, “CSEs” or “Covered Swap Entities”) in the context of cross-border transactions. The Proposal also includes a definition of “U.S. person” for purposes of the Proposed Margin Rules.

As discussed in more detail below, we have the following comments.

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<sup>1</sup> The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US\$19.7 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

<sup>2</sup> The CFTC re-proposed its margin requirements for uncleared swaps for swap dealers and major swap participants in October 2014. See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 FR 59898 (Oct. 3, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2014-22962a.pdf> (“Proposed Margin Rules”). We refer to “Margin Rules” to mean the margin rules that the CFTC will adopt as final rules.

<sup>3</sup> Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 80 FR 41376 (July 14, 2015), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2015-16718a.pdf> (“Proposal”).

- The Commission should revise the Proposal to include an exception from the definition of “U.S. person” for a pool, fund or other collective investment vehicle if it is publicly offered only to non-U.S. persons and not offered to U.S. persons.
- The Commission should permit substituted compliance without qualification if the Commission finds a foreign jurisdiction’s margin requirements to be comparable to the Margin Rules.
- The Commission should adopt a method for comparability determinations that considers the margin rules of a jurisdiction in their entirety, rather than making separate determinations for each element of the margin rules.
- The Commission properly excludes from the margin requirements transactions between certain non-U.S. CSEs and a non-U.S. person (such as a non-U.S. regulated fund) in which neither party has a significant nexus with the United States. The Commission should expand the exclusion to cover transactions between a non-U.S. person and a U.S. branch of a non-U.S. CSE or a foreign consolidated subsidiary (“FCS”)<sup>4</sup> of a non-U.S. CSE whose obligations are not guaranteed by a U.S. person.
- The Commission, the U.S. prudential regulators, the Securities and Exchange Commission (“SEC”), and non-U.S. regulators should continue to work together to develop consistent margin rules (and a consistent cross-border approach to their margin rules) before adopting the final rules.

### Background

Our members – investment companies that are registered under the U.S. Investment Company Act of 1940 (“Investment Company Act”) and other regulated funds in jurisdictions around the world (collectively, “regulated funds”)<sup>5</sup> – find swaps, as well as other derivative instruments, particularly useful portfolio management tools that offer considerable flexibility in

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<sup>4</sup> The Proposal includes a definition of FCS to “identify swaps of those non-U.S. CSEs whose obligations under the relevant uncleared swap are not guaranteed by a U.S. person but that raise substantial supervisory concerns in the United States....” Proposal, *supra* note 3, at 41385. A FCS is defined as “a non-U.S. CSE in which an ultimate parent entity that is a U.S. person has a controlling financial interest, in accordance with U.S. GAAP, such that the U.S. ultimate parent entity includes the non-U.S. CSE’s operating results, financial position and statement of cash flows in the U.S. ultimate parent entity’s consolidated financial statements, in accordance with U.S. GAAP.” *Id.*

<sup>5</sup> For purposes of this letter, the term “regulated fund” refers to any fund that is organized or formed under the laws of a nation, is authorized for public sale in the country in which it is organized or formed, and is regulated as a public investment company under the laws of that country. Generally, such funds are regulated to make them eligible for sale to the retail public, even if a particular fund may elect to limit its offering to institutional investors. Such funds typically are subject to substantive regulation in areas such as disclosure, form of organization, custody, minimum capital, valuation, investment restrictions (*e.g.*, leverage, types of investments or “eligible assets,” concentration limits and/or diversification standards). Examples of such funds include: U.S. investment companies regulated under the Investment Company Act; EU “Undertakings for Collective Investment in Transferable Securities,” or UCITS; Canadian mutual funds; and Japanese investment trusts.

structuring funds' investment portfolios. Regulated funds employ swaps and other derivatives in a variety of ways, including to hedge other investment positions, equitize cash that the fund cannot immediately invest in direct equity holdings, manage a fund's cash positions more generally, adjust the duration of a fund's portfolio or manage a fund's portfolio in accordance with the investment objectives stated in the fund's prospectus. Although ICI Global members, as market participants representing millions of investors, generally support the goal of providing greater oversight of the swaps markets, we strongly believe that any regulation thereof should be coordinated and consistently applied across jurisdictions.

As the Commission recognizes, the swaps market is global in nature and swap transactions are "routinely entered into between counterparties located in different jurisdictions."<sup>6</sup> Given the international nature of these transactions and efforts by regulators worldwide to regulate these activities, ICI Global has emphasized repeatedly the importance of global coordination among regulators with respect to cross-border application of derivatives regulations to avoid imposing, at best, duplicative and, at worst, conflicting regulatory requirements on counterparties.<sup>7</sup> Duplicative or conflicting regulatory requirements may lead to market uncertainty, increased operational and compliance burdens and trading disruptions, which would increase systemic risk. Additionally, we have expressed our concern that there may be reluctance to engage in cross-border derivatives transactions, unless regulators coordinate the requirements that would apply to such activities. International comity and practical considerations dictate that there be real and meaningful coordination among regulators on how cross-border transactions between counterparties in different jurisdictions should be appropriately regulated.

Fully understanding the importance of global coordination, we supported the efforts of the Basel Committee on Banking Supervision ("BCBS") and the International Organization of

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<sup>6</sup> Proposal, *supra* note 3, at 41377.

<sup>7</sup> See Letter from Dan Waters, Managing Director, ICI Global, to Brent Fields, Secretary, U.S. Securities and Exchange Commission, dated July 13, 2015; Letter from Dan Waters, Managing Director, ICI Global, to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, Barry F. Mardock, Deputy Director, Office of Regulatory Policy, Farm Credit Administration, Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, Alfred M. Pollard, General Counsel, Federal Housing Financing Agency, Legislative and Regulatory Activities Division, Office of Comptroller of the Currency, and Christopher Kirkpatrick, Secretary, CFTC, dated November 24, 2014; Letter from David W. Blass, General Counsel, ICI, to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, Barry F. Mardock, Deputy Director, Office of Regulatory Policy, Farm Credit Administration, Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, Alfred M. Pollard, General Counsel, Federal Housing Financing Agency, Legislative and Regulatory Activities Division, Office of Comptroller of the Currency, and Christopher Kirkpatrick, Secretary, CFTC, dated November 24, 2014; Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to Elizabeth Murphy, Secretary, Securities and Exchange Commission, dated August 21, 2013; Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to Wayne Byres, Secretary General, Basel Committee on Banking Supervision, Bank for International Settlements, and David Wright, Secretary General, International Organization of Securities Commissions, dated Mar. 14, 2013; Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to Melissa Jergens, Secretary, CFTC, dated Feb. 6, 2013; Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to Wayne Byres, Secretary General, Basel Committee on Banking Supervision, Bank for International Settlements, and David Wright, Secretary General, International Organization of Securities Commissions, dated Sept. 27, 2012; Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to David Stawick, Secretary, CFTC, dated Aug. 23, 2012.

Securities Commissions (“IOSCO”) to adopt an international framework on margin requirements for non-cleared derivatives.<sup>8</sup> We appreciate the Commission’s efforts to work with international regulators (and other U.S. regulators) to propose rules regarding margin for uncleared swaps that are generally consistent with the International Margin Framework.<sup>9</sup> Given these efforts, we believe that the Commission (and other regulators) should be able to harmonize their proposals and adopt rules that minimize the operational burdens on market participants. We are concerned, however, that certain aspects of the Proposal, and in particular the fact that substituted compliance would not be available in all circumstances (even for a transaction that complies with the requirements of a regulatory regime that the CFTC has determined is comparable with the CFTC’s requirements), could significantly undermine those international efforts. It is unlikely that every requirement of every jurisdiction will be exactly the same, but we believe the international regulators have agreed to a core set of requirements that should be sufficient for jurisdictions to find margin rules that are consistent with the International Margin Framework to be comparable. Requiring transactions to comply with two (or more) regulatory regimes with respect to every single requirement under the margin rules would create unnecessary burdens that do not address the material concerns that the Proposed Margin Rules are intended to address and would disregard the benefits of harmonizing the critical components of the margin rules for uncleared swaps.

Commission Should Exclude from the Definition of “U.S. Person” Certain Non-U.S. Regulated Funds

*Lack of an Exclusion for Certain Non-U.S. Regulated Funds from the Definition  
Could Extend Inappropriately the Territorial Reach of the CFTC’s Swap Rules*

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<sup>8</sup> Margin Requirements for Non-Centrally-Cleared Derivatives, Basel Committee on Banking Supervision and Board of the International Organization of Securities Commissions, September 2013, *available at* <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD423.pdf> (“International Margin Framework”).

<sup>9</sup> Testimony of Commissioner Mark Wetjen before the U.S. House Committee on Agriculture Subcommittee on Commodity Exchanges, Energy, and Credit Subcommittee (Apr. 14, 2015) (“In finalizing this rule, the commission must continue to coordinate with regulators both in the United States and abroad. The importance of global harmonization cannot be overstated given the risk of regulatory arbitrage if material differences in margin requirements exist among major financial markets”); Keynote Address by Chairman Timothy G. Massad before the Institute of International Bankers (Mar. 2, 2015) (“In addition to harmonizing with the U.S. bank regulators, it is very important that we try to make our rules as similar as possible with the rules that Europe and Japan are looking to adopt, and so we have spent considerable time in discussions with our international counterparts”); Testimony of Chairman Timothy G. Massad before the U.S. House Committee on Agriculture, Washington, DC (Feb. 12, 2015) (“In formulating our approach, we coordinated closely with the relevant bank regulators, because Congress mandated that margin requirements be set by different regulatory agencies for the respective entities under their jurisdiction. . . . We have also been working with our international counterparts to harmonize our proposed margin rule for uncleared swaps with corresponding rules in other jurisdictions. Europe, Japan and the United States have each proposed rules which are largely consistent, and which reflect a set of standards agreed to by a broader international consensus. . . . While there were some differences in the proposals, we are working closely with our counterparts in Europe and Japan, as well as the U.S. banking regulators, to try to further harmonize these rules”).

As we have previously commented,<sup>10</sup> developing a practical definition of “U.S. person” for non-U.S. regulated funds is critical to the successful application of the Commission’s Dodd-Frank Act regulations. Under the Commission’s cross-border guidance,<sup>11</sup> the definition of “U.S. person” identifies those persons that could be expected to satisfy the jurisdictional nexus under section 2(i) of the Commodity Exchange Act (“CEA”) based on their swap activities and would trigger obligations under the swap provisions of the Dodd-Frank Act. When the Commission adopted the Cross-Border Guidance, the Commission appropriately included an exclusion from the definition of “U.S. person” for funds that are publicly offered only to non-U.S. persons and not offered to U.S. persons. Specifically, the Cross-Border Guidance states that “a collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons generally would not fall within any of the prongs of the interpretation of the term ‘U.S. person.’”<sup>12</sup> Although the exclusion did not cover all regulated funds as we had requested originally,<sup>13</sup> we are of the view that the Commission correctly included an exclusion to avoid imposing the swap provisions of the Dodd-Frank Act on entities that have only a nominal nexus to the United States.

We therefore are perplexed and gravely concerned that the Commission did not include in the Proposal the same exclusion from the definition of “U.S. person” for purposes of the Proposed Margin Rules. If the Proposal does not provide an exclusion from the definition of U.S. person for certain non-U.S. regulated funds, the Margin Rules could apply to transactions entered into by non-U.S. publicly offered, substantively regulated funds that do not have a “direct and significant connection” with U.S. commerce.<sup>14</sup>

Without an exclusion, a non-U.S. regulated fund would be required to analyze whether it is a U.S. person under the Proposed Margin Rules, including whether it has its principal place of business in the United States. To determine a fund’s principal place of business, the CFTC has stated in its Cross-Border Guidance that the analysis should focus on the location of senior personnel who are responsible for implementing the investment and trading strategy of the fund and its risk management.<sup>15</sup> Under certain facts and circumstances, a non-U.S. regulated fund the portfolio of which is being managed by a U.S. investment adviser or that is sponsored by a U.S. entity may be considered to have its principal place of business in the United States, and accordingly would be a U.S. person.

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<sup>10</sup> See Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to Melissa Jergens, Secretary, CFTC, dated July 5, 2013 (“July 2013 ICI/ICI Global Letter”); Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to Melissa Jergens, Secretary, CFTC, dated February 6, 2013; Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to David Stawick, Secretary, CFTC, dated August 23, 2012.

<sup>11</sup> Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 FR 45291 (July 26, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf> (“Cross-Border Guidance”).

<sup>12</sup> See Cross-Border Guidance, *supra* note 11, at 45314 (emphasis added).

<sup>13</sup> July 2013 ICI/ICI Global Letter, *supra* note 10.

<sup>14</sup> Section 2(i) of the CEA.

<sup>15</sup> See Cross-Border Guidance, *supra* note 11, at 45310.

Applying the Proposed Margin Rules to transactions involving a non-U.S. regulated fund (particularly with a non-U.S. CSE) would go beyond the intent of the Dodd Frank Act. As we have previously commented,<sup>16</sup> we do not believe that these transactions have a direct and significant nexus to the United States because investors of non-U.S. regulated funds would not expect the funds' transactions to be subject to U.S. swap regulations and the risks of these transactions reside outside the United States.

*Defining Non-U.S. Regulated Funds with a Nominal Nexus to the United States as "U.S. Persons" Would Impose Unnecessary Burdens on Funds and Their Investors and Disadvantage U.S. Asset Managers*

Absent a substituted compliance determination, a non-U.S. CSE's uncleared swap transactions with a non-U.S. regulated fund that is considered a U.S. person would have to comply with the Proposed Margin Rules, which may overlap or conflict with the margin regulations of the CSE's and the fund's home country. In these situations, the potentially duplicative and overlapping regulations under the Proposed Margin Rules and the foreign margin rules could harm rather than benefit the fund's investors. A non-U.S. regulated fund would be faced with considerable legal and operational challenges if it would be required to negotiate and enter into collateral arrangements with its counterparties that are compliant with the margin rules of two different jurisdictions.

For example, if a UCITS is classified as a "U.S. person," then the fund's swap transactions with a CSE would be subject to the Proposed Margin Rules and to the margin rules under the European Market Infrastructure Regulation ("EMIR") because the UCITS is established in a European Union ("EU") Member State. Application of both the Proposed Margin Rules and EMIR could result in potentially overlapping and conflicting regulatory obligations. Specifically, we note the following concerns:

- The EMIR margin rules include an 8% charge or haircut for currency mismatch and concentration limits. These requirements are not replicated in the Proposed Margin Rules.
- Under proposed CFTC Regulation 23.156(b), a UCITS would be required to post variation margin to a non-U.S. CSE whose obligations are guaranteed by a U.S. person (or absent a substituted compliance determination, any non-U.S. CSE) in U.S. dollars (or the currency in which payment obligations of the underlying transaction are settled), even under arrangements with dealers organized in the European Union. This situation could create operational issues for UCITS that currently transfer margin in euros (and it seems reasonable that two entities organized in the European Union should be able to use euros for their margin).
- The maximum "minimum transfer amount" and "threshold" for initial margin are referenced by different currencies under the proposed EU rules and the Proposed Margin Rules. The amounts are expressed in euros (EUR 500,000 and EUR 50 million, respectively) under the proposed EU rules and in dollars (\$650,000 and \$65 million, respectively) under the Proposed Margin Rules. Counterparties whose transactions are subject to both sets of rules would have to amend their "minimum transfer amounts" and

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<sup>16</sup> See July 2013 ICI/ICI Global Letter, *supra* note 10.

“thresholds” for initial margin on a periodic basis as the U.S. dollar/EUR exchange rates change to ensure that their arrangements comply with both sets of rules.

Moreover, without an exclusion for non-U.S. regulated funds, U.S. asset managers to non-U.S. regulated funds would find themselves at a significant disadvantage to their non-U.S. counterparts, resulting in harm to U.S. business and potentially driving asset management business overseas. A non-U.S. regulated fund with a U.S. asset manager could be considered a U.S. person under the Proposal and be subject to significant and potentially overlapping margin regulations. To avoid unnecessary costs and burdens of complying with two sets of margin rules (which would be a disadvantage vis-à-vis other non-U.S. regulated funds that do not have a U.S. asset manager), these non-U.S. regulated funds may terminate the U.S. asset manager and/or avoid hiring a U.S. asset manager. These disincentives could dissuade a non-U.S. regulated fund from selecting a U.S. asset manager, even if the U.S. asset manager has the expertise to manage the fund. In addition, non-U.S. dealers may seek to avoid engaging in transactions with non-U.S. regulated funds that could be U.S. persons to avoid having to comply with the Proposed Margin Rules. These results would be harmful to the fund, its investors, and the U.S. asset management industry.

*Commission Should Adopt an Exclusion from the Definition for Certain Non-U.S. Regulated Funds Similar to the Cross-Border Guidance*

For the reasons discussed above, we urge the Commission to adopt a definition of “U.S. person” for funds specifying that a pool, fund or other collective investment vehicle will not be deemed a U.S. person if it is publicly offered only to non-U.S. persons and not offered to U.S. persons. Thus, non-U.S. regulated funds that are not publicly offered to U.S. persons would not be defined as U.S. persons. This exclusion would be consistent with the approach in the Cross-Border Guidance.

As we have described in more detail in prior comment letters,<sup>17</sup> focusing on the “offer to U.S. persons” for purposes of the U.S. person definition has two key advantages. First, if the “U.S. person” determination is made by how a fund conducts its offerings, the definition will be workable and systems are already in place to comply with the standard.<sup>18</sup> This approach would provide certainty to counterparties at the outset of a swap transaction regarding which margin rules will govern. Second, focusing on the “offering to U.S. persons” would look to whether the fund is attempting to target the U.S. market or U.S. investors and should be appropriately subject to U.S. laws. Our definition would exclude non-U.S. regulated funds that have little U.S. nexus and do not target the U.S. market or U.S. investors and therefore present little risk to the U.S. markets or U.S. investors.

Finally, we urge the Commission to have consistent definitions of “U.S. person” for each rule under the Dodd-Frank Act. Otherwise, market participants will be required to keep track of multiple definitions and determine which entities would be considered U.S. persons for purposes of

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<sup>17</sup> See *supra* note 7.

<sup>18</sup> For example, global fund managers have long structured their activities to reflect the requirements of Regulation S under the Securities Act of 1933 to remain offshore and have policies and procedures in place to avoid making offers to U.S. persons.

each rule. Market participants have already sought representations from their counterparties (and asset managers have already sought representations from their clients) as to whether they are “U.S. persons” under the definition in the Cross-Border Guidance. Adopting different definitions of “U.S. person” for the purposes of different rules would require market participants to obtain representations from their counterparties (and asset managers to obtain representations from their clients) under each separate definition and then track the status of each counterparty with respect to each formulation of the definition, which could impose significant operational burdens. We recommend the Commission use one definition of “U.S. person” that could be applied consistently to determine whether the CFTC’s swap rules would apply to cross-border transactions.<sup>19</sup>

#### Commission Should Permit Full Substituted Compliance for Any Comparable Foreign Regulatory Framework

The Commission proposes to permit CSEs under certain circumstances to comply with the margin requirements of a foreign jurisdiction – instead of the Proposed Margin Rules – if the Commission finds that such requirements are comparable to the requirements under the Proposed Margin Rules and other conditions are satisfied. In our comment letter to the Proposed Margin Rules, we supported making substituted compliance available in more instances because the mechanism could greatly alleviate the potential concern for duplicative and/or potentially conflicting margin rules. We continue to believe substituted compliance is appropriate in the context of cross-border transactions, particularly with respect to margin rules because international standards already have greatly harmonized the requirements across jurisdictions. Substituted compliance should be available whenever both the Margin Rules and a non-U.S. derivatives regulatory regime’s margin rules apply. For transactions for which the U.S. regime and another comparable regulatory regime apply, the parties should be able to agree on the set of rules with which they would comply.

We therefore support the provisions of the Proposal that permit substituted compliance in more circumstances than under the Cross-Border Guidance. For example, under the Proposal, a U.S. regulated fund engaging in a swap transaction with a non-U.S. CSE (including a FCS or a U.S. branch of a non-U.S. CSE) whose obligations under the relevant swap are not guaranteed by a U.S. person would be able to rely on substituted compliance to comply with margin requirements of an applicable foreign jurisdiction. Allowing for substituted compliance in such a case would mitigate a disincentive for the non-U.S. CSE to trade with the U.S. mutual fund. An expanded use of substituted compliance also would solve the practical problem of having to comply with the margin rules of more than one jurisdiction.

We are concerned, however, that the Proposal does not permit complete substituted compliance in certain circumstances. For example, a non-U.S. CSE (including a FCS or a U.S. branch of a non-U.S. CSE) whose obligations are guaranteed by a U.S. person would not be able to rely on substituted compliance when entering into swap transactions with a U.S. fund. Also, under the Proposal, a non-U.S. CSE whose obligations are guaranteed by a U.S. person can rely on

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<sup>19</sup> See Cross-Border Guidance, *supra* note 11, at 45314 (stating that “a collective investment vehicle that is publicly offered to non-U.S. persons, but not offered to U.S. persons, would generally not be included within the interpretation of the term U.S. person”).

substituted compliance only with respect to the initial margin received by the non-U.S. CSE from a non-U.S. person but must comply with the Proposed Margin Rules with respect to variation margin and the initial margin it receives from its non-U.S. person counterparty. Therefore, a UCITS transacting with a non-U.S. CSE that is a FCS that is guaranteed by a U.S. person could rely on substituted compliance for the initial margin the UCITS collects from the non-U.S. CSE but would be required to comply with the Proposed Margin Rules with respect to variation and initial margin the UCITS posts to the non-U.S. CSE. For these types of transactions, EMIR margin rules would apply, and if substituted compliance is not fully available, the transaction would be subject to duplicative and perhaps inconsistent requirements. As described above, a fund will be faced with considerable legal and operational challenges if it is required to negotiate and enter into collateral arrangements with its counterparties that are compliant with the margin rules of two different jurisdictions.

The proposal not to have substituted compliance available in certain circumstances involving U.S. persons and for a “partial” substituted compliance framework in certain other circumstances appears to be based on the concern that a foreign regulatory framework would never be sufficient (even though the Commission has found comparability) in situations in which the Commission has strong enough regulatory interest, such as the interest in protecting U.S. person guarantors of non-U.S. CSEs and FCS. By not permitting substituted compliance, or by permitting only “partial” substituted compliance, the Commission is in effect stating that a foreign regulatory regime that has been determined to be comparable is not “good enough” in certain circumstances. We disagree with this approach.

Substituted compliance should be permitted if and when the Commission finds a foreign regulatory framework to be comparable to the CFTC’s rules. The Commission should determine whether the margin rules of a foreign regulatory regime are comparable to the Margin Rules and if they are so found, substituted compliance should be available without qualification as long as the foreign rules remain comparable and other applicable conditions are satisfied.

#### Comparability Determinations Should be Made for a Set of Foreign Margin Rules in Its Entirety

The Commission notes that its approach to comparability determinations will be “outcome-based with a focus on whether the margin requirements in the foreign jurisdiction achieve the same regulatory requirements as the [CEA’s] margin requirements.”<sup>20</sup> The Commission states, however, that it will make comparability determinations not based on whether a foreign regulator’s margin rules as a whole are comparable, but instead on an element-by-element basis, considering eleven different elements. The Commission notes that, because it “will make comparability determinations on an element-by-element basis, it is possible that a foreign jurisdiction’s margin requirements would be comparable with respect to some, but not all, elements of the [Proposed Margin Rules].”<sup>21</sup>

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<sup>20</sup> Proposal, *supra* note 3, at 41389.

<sup>21</sup> *Id.*

We encourage the Commission to adopt a method for comparability determinations that considers the margin rules of a jurisdiction in their entirety, rather than making separate determinations for each element of the margin rules. The proposed approach is unnecessarily complicated and, in effect, will focus on whether each particular aspect of the non-U.S. margin regime is comparable to the Margin Rules, rather than on whether the foreign regulator's margin rules achieve the same outcome.

We appreciate the considerable revisions the Commission has incorporated into the Proposal and the Proposed Margin Rules to reflect the adoption of BCBS and IOSCO of the International Margin Framework. The BCBS/IOSCO coordination was designed to create a framework that would be implemented in each jurisdiction and to ensure consistency across different regulatory regimes. An approach that could result in substituted compliance being available for only certain elements of a margin regime, even though that regime is consistent with the International Margin Framework and achieves its outcomes, significantly undercuts (and minimizes) the benefits of substituted compliance.

Commission Should Exclude Transactions between a Non-U.S. Person and U.S. Branches or FCSs of a Non-U.S. CSE Whose Obligations Are Not Guaranteed by a U.S. Person

We support the Commission's exclusion of transactions between a non-U.S. CSE (that is not a FCS or a U.S. branch of a non-U.S. CSE and is not guaranteed by a U.S. person) and a non-U.S. person (that is not guaranteed by a U.S. person) from the Proposed Margin Rules. This exclusion will mean that transactions between non-U.S. regulated funds (that are not U.S. persons) and non-U.S. CSEs (as described in the previous sentence) would comply with margin requirements of jurisdictions that have a stronger regulatory interest in such transactions. The proposed exclusion recognizes that these transactions do not have a direct and significant connection with activities in, or effect on, commerce of the United States and limits appropriately the extraterritorial application of the Proposed Margin Rules.

We believe, however, the exclusion should be expanded to include transactions between a non-U.S. person, such as a UCITS (whose obligations are not guaranteed by a U.S. person), and a U.S. branch of a non-U.S. CSE whose obligations are not guaranteed by a U.S. person. Treating transactions between a non-U.S. person and a *U.S. branch* of a non-U.S. CSE that is not guaranteed by a U.S. person differently from transactions between the non-U.S. person and *non-U.S. branches* of the non-U.S. CSE that are not guaranteed by a U.S. person could create significant operational issues and credit risks.

Typically, the ISDA Master Agreement or other derivatives documentation between a non-U.S. person and a non-U.S. CSE governs all of the over-the-counter derivatives between the non-U.S. person and any branch of the non-U.S. CSE (in other words, the transactions with the U.S. branch of the non-U.S. CSE would be governed by the same master agreement as the transactions with the non-U.S. branches). Under the Proposal, unless the CFTC grants substituted compliance with respect to every element of the Proposed Margin Rules to every other derivatives regulatory regime that applies to the underlying transactions, transactions with a U.S. branch would have to comply with the Proposed Margin Rules with respect to any element for which substituted compliance had not been granted. This situation may result in parties documenting transactions

with the U.S. branch under a separate master agreement, which would create operational difficulties because there would need to be separate margin determinations and transfers with respect to the U.S. branch. Moreover, disparate treatment of the branches could lead to additional credit risk between the non-U.S. person and the non-U.S. CSE because the parties might lose the netting benefits under the U.S. Bankruptcy Code and other insolvency regimes that apply to transactions under a single master agreement. We do not think that conducting a transaction between two non-U.S. person counterparties through a U.S. branch is sufficient to create a direct and significant connection with U.S. commerce as required by the Dodd-Frank Act.

For similar reasons, we believe the exclusion should be expanded to include transactions between a FCS that is not guaranteed by a U.S. person and a non-U.S. person, such as a UCITS. We do not believe that simply because the financial results of a non-U.S. subsidiary are consolidated with the financial results of a U.S. parent necessarily means that an insolvency or default of the FCS (without a guarantee by the U.S. parent) would lead to an insolvency or default of the U.S. parent or create systemic risks to U.S. markets. These transactions therefore do not have a sufficient nexus to the U.S. to be subject to the Proposed Margin Rules.

Greater Coordination with U.S. Prudential Regulators and Foreign Regulators Continues to Be Necessary

We commend the Commission's efforts to coordinate with other U.S. and foreign regulators to develop the Proposed Margin Rules. We recognize that the Proposal is more consistent with the cross-border approach proposed by the U.S. prudential regulators<sup>22</sup> than the approach taken under the Cross-Border Guidance. The Commission's and prudential regulators' margin rules are designed to serve the same goals and should be consistent; however, we are concerned about some remaining differences.

Differences of approaches by the CFTC and the Prudential Regulators can create operational issues for U.S. regulated funds as well as non-U.S. regulated funds that have to determine which margin requirements are going to apply to transactions they enter into with each CSE. We urge the Commission to continue working with its fellow regulators – both in the United States and abroad – to develop an approach that is as consistent as possible.

We also urge the Commission to coordinate with other regulators on establishing the compliance dates for the Margin Rules and the margin rules that will be adopted by those regulators. The Commission should coordinate with other U.S. and non-U.S. regulators to establish a coordinated compliance date that is measured from the publication of the final margin rules by both U.S. and non-U.S. regulators. Because existing collateral documentation between counterparties will have to be amended to reflect the new margin requirements, there will be an extraordinary number of agreements that will need to be renegotiated and executed before the relevant compliance dates. Those efforts cannot begin until all of the rules are final because it is not

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<sup>22</sup> See Margin and Capital Requirements for Covered Swap Entities, 79 FR 57347 (Sept. 24, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-09-24/pdf/2014-22001.pdf>. The five prudential regulators are the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency.

yet clear what provisions will be included in those agreements. Also, because many derivatives transactions are likely to be subject to more than one jurisdiction's margin rules, market participants would waste significant effort if they amended their documentation to comply with one jurisdiction's applicable rules before rules of other jurisdictions are final.

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We appreciate the opportunity to provide our comments to the Commission. We strongly urge the Commission to continue to work with other domestic and international regulators to develop workable solutions before adopting the final rules. If you have any questions on our comment letter, please feel free to contact the undersigned, Susan Olson at (202) 326-5813, Jennifer Choi at (202) 326-5876, or Kenneth Fang at (202) 371-5430.

Sincerely,

/s/ Dan Waters

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cc: The Honorable Timothy G. Massad  
The Honorable Sharon Y. Bowen  
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The Honorable Mary Jo White  
The Honorable Luis A. Aguilar  
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The Honorable Kara M. Stein  
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