The Pulse of Finance

Newedge

BY OVERNIGHT MAIL AND E-MAIL

February 24, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: Further Definition of "Swap Dealer," Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and Eligible Contract Participant:" File Number S7-39-10 ("Swap Dealer Release").

Dear Mr. Stawick and Ms. Murphy:

Newedge USA, LLC ("Newedge USA") is pleased to submit this comment letter on behalf of itself and its parent company, Newedge Group SA ("Newedge Group"), in connection with the above-referenced rule proposal of the Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC") (collectively the "Commissions") relating to the definitions of swap dealer, security-based swap dealer, major swap participant, major security-based swap participant and eligible contract participant. As you may know, Newedge USA has been an active participant in the comment process relating to rules proposed by the Commissions in connection with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and other important regulatory concerns.

In summary, Newedge USA believes that US-registered futures commission merchants ("FCM") and broker-dealers ("BD") – as well as foreign financial firms subject to

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comparable regulations – that engage principally in customer swaps facilitation activities should be exempt from the definitions of swap dealer, security-based swap dealer, major swaps participant and major security-based swaps participant. Among other things, such firms are already subject to stringent rules relating to capital, risk, margin and other requirements by virtue of their registrant status, and thus, any new regulations placed upon them would be redundant and may be inconsistent. In addition, we believe that separate registration under Dodd-Frank is also unnecessary given that a significant portion of the swaps executed and cleared after implementation of Dodd-Frank will, in our view, be done centrally, and thus, subject to closer supervision at the self-regulatory organization ("SRO") level. However, to the extent the Commissions deem that not all such firms should be exempt, at a minimum, we believe that registrants such as those that execute swaps solely in response to customer orders and that hedge each such transaction individually (as opposed to hedging through offsetting customer buys and sells or hedging exposure on a net basis for example) should be exempt since, among other things, their trading poses little or no risk to themselves, their customers or the markets generally, and thus, are not the types of firms Congress had in mind when it enacted the registration categories in question.[1]

In addition, we believe that, in general, foreign financial firms engaging in swaps activities with US persons should not be required to register as swaps dealers or major swaps participants in the US to the extent they are not physically located in the US and are subject to a comparable regulatory regime. Rather, we believe such firms should be required to conduct their US swaps activities through the existing regulatory framework of CFTC Part 30 and SEC Rule 15a-6.

BACKGROUND

"Newedge" refers to Newedge Group, a 50%-50% joint venture between Societe Generale and Credit Agricole CIB, headquartered in Paris, France, and all of its worldwide branches, subsidiaries and other units. Newedge, which is one of the world's largest brokerage organizations, offers its customers clearing and execution facilities across multiple asset classes including futures, securities (fixed income and equities), options, FX and various OTC instruments. Newedge maintains offices in over 15 countries, and is a member of over 85 exchanges worldwide. As of December 31, 2010, Newedge had an estimated global market share in listed derivatives of 11.6% (clearing) and 12.6% (execution), and over $60 billion of client assets on deposit.

Newedge USA is one of the leading FCMs and BDs in the US. Indeed, as of month-end January 2011, Newedge USA, according to CFTC statistics, held the largest pool of customer segregated and secured customer funds of any US-registered FCM. Like other Newedge Group entities, Newedge USA acts primarily as a broker; that is, it executes and clears products across a variety of asset classes (including stocks, bonds, futures, FX and OTC derivatives) on an agency or riskless principal basis. Newedge USA, which has primarily institutional customers, is a member of the Depository Trust Corporation, the

[1] Swaps and security-based swaps are hereafter referred to collectively as "swaps."

Options Clearing Corporation and most major US futures and securities exchanges. Newedge USA rarely conducts proprietary trading, and then generally only to facilitate customer orders or offset market risk created by facilitating customer orders. Newedge USA does not conduct securities underwriting, specialist or market making activities, issue fundamental securities research, engage in banking or advisory work or act as a dealer.

DISCUSSION

A. US-Registered FCMs, BDs and Foreign Firms Subject to Comparable Regulations That Engage in Customer Swaps Facilitation But Do Not Make Markets in Swaps or Engage in Dealer-Type Activities Should be Exempt from the Definitions of Swap Dealer and Major Swap Participant.

US-registered FCMs and BDs – as well as foreign financial firms subject to comparable regulations – that engage in customer swaps facilitation but do not engage in the other activities of swap dealers described in the Swaps Dealer Release should be exempt from the definitions of swap dealer and major swap participant. First, such entities are already subject to extensive rules and requirements relating to margin, credit, risk, capital, compliance and other matters. In addition, they are already subject to routine and special examinations and inspections by a variety of regulators relating to their business activities. Further, to the extent such an FCM or BD (or comparable foreign firm) currently engages in swaps activity, such activities are also already examined in the normal course by the Commissions, SROs and/or foreign financial regulators, and subject to a whole host of different rule requirements. Thus, requiring such firms to register as swaps dealers or major swaps participant will merely subject them to unnecessary and potentially inconsistent regulations.

Second, imposing additional regulatory (and unnecessary) obligations on certain FCMs and BDs – in this highly competitive and low interest rate environment in which many US brokers are making little to no profits -- could potentially put some of them out of business, thereby (a) reducing the number of brokers customers have to choose from, (b) concentrating counterparty risk among fewer market participants (which will increase systemic risk), and (c) having a general anticompetitive effect on the industry. Obviously, none of these results is consistent with the objectives of Dodd-Frank). We also note in this regard that the Commissions, in connection with all of their rule proposals, must consider the potential anti-competitive effects of such rules.

Third, after the implementation of Dodd-Frank, we believe that most swaps activities will be executed on organized exchanges and cleared centrally, and thus, (a) will pose less systemic risk than traditional bi-lateral swaps activity, and (b) can be examined and controlled more easily by SROs. Thus, there is less need in our view for requiring FCMs or BDs who engage in swaps activity principally to facilitate customer orders to register separately as swaps dealers or major swaps participants. Additionally, we expect that globally more swaps activities will be executed and cleared centrally (as a result of the enactment of global legislation comparable to Dodd-Frank), and thus, we do not believe

that foreign financial firms subject to such regulations should have to register separately as swap dealers or major swap participants for the same reason.

Finally, FCMs or BDs that engage in customer swaps facilitation play an important role by adding liquidity, transparency and cost-efficiency to the swaps market. Requiring them to take on duplicative and unnecessary registration and other regulatory requirements could result in some of them (even the larger ones) cutting back on their swaps activities (so as not to fall into such categories), which would impact market transparency, liquidity and efficiency and further concentrate swaps activity in the hands of a small number of players adding to systemic risk which, again, is inconsistent with the objectives of Dodd-Frank.

1. Swaps Dealer

Dodd-Frank defines a swap dealer as:

> Any person who (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps."

See Dodd-Frank Sections 721 and 761.[2]

In general, the current proposed Dodd-Frank definition of swaps dealer and related interpretative guidance provided by the Commissions appears to support our view that firms engaging solely in customer facilitation back-to-back swap activities do not fall within the definition of swap dealer.[3] Unfortunately, the current proposed definition of swaps dealer also includes an entity that "regularly enters into swaps with counterparties as an ordinary course of business for its own account" (see Sections 721 and 761 of Dodd-Frank) and related guidance issued by the Commissions establishes that trading for

[2] In the Swaps Dealer Release, the Commissions also provide some interpretive guidance as to which firms would likely qualify as a swaps dealer. For example, the Commissions note that a swaps dealer could be a firm that: provides bid/ask or two-way prices for swaps on a regular basis; participates in both sides of the swaps market on a regular basis; tends to accommodate demand for swaps from other parties on a regular basis; tends not to request that other parties propose the terms of swaps; tends to enter into swaps on their own standard terms; creates new types of swaps and then markets them with their customers and counterparties; contacts customers and counterparties to solicit interest in swaps; belongs to a dealer category of a swaps association; generally expresses a willingness to offer or provide a range of products including swaps; provides swaps liquidity regardless of the direction of the swap; provides swaps liquidity across a broad range of asset classes; trades swaps on a proprietary basis, and; intermediates swaps. See Swap Dealer Release, 75 Federal Register at 80176-80179 (December 21, 2010).

[3] For example, firms that engage solely in such activities with respect to their swap businesses do not generally "hold themselves out as a dealer" in swaps, "make a market in swaps" or engage in activities causing them "to be commonly known in the trade as a dealer or market maker in swaps." See Swap Dealer Release at 75 Federal Register 80176-80179. Further, such entities do not trade swaps on a proprietary basis or regularly create new types of swaps and then market them to their customers or counterparties.

one's "own account" means "acting as principal" on a swap.[4] Consequently, the current definition could, conceivably, include brokers that engage solely in customer facilitation back-to-back swap transactions. For the reasons set forth below, we believe that it should not.[5]

First, as noted above, such firms are already subject to extensive rules and regulations by virtue of their registrant status. Requiring them to register as swaps dealers will only add an unnecessary and potentially inconsistent layer of regulation upon them.

Second, firms that engage solely in customer facilitation back-to-back swaps trading activities are engaging in "brokerage" rather than "dealer" type activities that pose little or no risk to themselves, their customers or the markets generally. Indeed, most market participants (and many US regulators) view back-to-back principal trading -- i.e., where a broker sells to (or buys from) a customer while contemporaneously buying from (or selling to) another customer, counterparty or the market leaving it "flat" or with a fully hedged position -- as brokerage activity, even though the broker buys and sells from a principal account. This is because the broker is not trading "for its own account" so much as it is facilitating a customer order; that is, it is acting as "agent."[6] Not surprisingly, the SEC itself has noted that such "'transactions are in many respects equivalent to transactions effected on an agency basis." SEC Release No. 34-46745 (Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934) at n. 29.[7] Indeed, the SEC's definitions of "dealer" in Section 3(a)(5) of the Exchange Act (a person engaged in the business of trading securities for its "own account") and "broker" in Section 3(a)(4) of the Exchange Act (a person engaged in the business of trading securities in the accounts of "customers") clearly reflect that a

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[4] See Swap Dealer Release, 75 Federal Register at 80177 n. 19.

[5] We believe that adding exempting such activity specifically is well within the Commissions' authority under Section 712(d) of Dodd-Frank to further define the term swaps dealer, and would also serve to provide more adequate notice -- which we believe is currently lacking -- to market participants engaging in such activities as to whether they could be subject to enforcement action based on their failure to register as a swaps dealer. As the Commissions are aware, due process requires that individuals and firms receive adequate notice as to what actions the law requires them to take and to refrain from taking.

[6] Customers often prefer that brokers execute orders on a back-to-back principal basis, as opposed to a pure agency basis, in order to preserve their anonymity, obtain an average price or reduce their execution costs.

[7] See also Section 28(e) of the Securities Exchange Act of 1934 and related SEC interpretive guidance (soft dollar safe harbor available to brokers executing trades on a riskless principal basis since, among other things, such activity is akin to agency activity); cf. Investment Company Institute Letter to SEC, January 4, 2002. In discussing riskless principal transactions under the Investment Company Act, the ICI stated:

> when a fund purchases a security from an affiliated broker-dealer in a riskless principal transaction, that broker-dealer is simultaneously acquiring that security from another party. It is not selling the security out of its inventory. Thus, the broker-dealer is acting like an agent for all intents and purposes, even though the transaction is structured so that title momentarily passes through the broker-dealer.

broker's primary function is to act on its customers' behalf while a dealer's primary function is to trade its own account.[8]

In short, back-to-back swaps activity -- though it involves buying or selling regularly from a firm's principal account -- is more akin to brokerage than dealer activity, and consequently, should not fall within the definition of swaps dealer. As the Swaps and Derivatives Market Association ("SDMA") wrote in response to the Swaps Dealer Release:

> in certain instances FCMs and broker-dealers who do not hold themselves out as swap dealers may also enter into swap transactions as counterparties on behalf of their customers and promptly thereafter give up their positions to the customers or other market participants [or hedge such positions "by taking the opposite side in corresponding futures or securities positions"]. Although the FCMs and broker-dealers are initially entering into these swap transactions 'for their own account' in such situations, they are doing so to facilitate their customers' investment activities. ..... [consequently, they] should not be considered swap dealers).

See Comment Letter of the SDMA (September 20, 2011).

Further, because back-to-back swaps activity creates virtually no risk for the broker, customer or markets involved, it does not represent an area of concern under Title VII of Dodd-Frank, which was enacted to mitigate and control those types of swaps activities that do cause systemic market risk.[9]

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[8] Banking regulators in particular have "interpret[ed] 'riskless' principal activity as equivalent to agency activity under the banking laws." SEC Release 34-46745 at n. 30. For example, the Office of the Comptroller of the Currency has stated that back-to-back principal activities "are the legal and economic equivalent of permissible brokerage activities," while the Federal Deposit Insurance Corporation ("FDIC") has stated that:

> A broker which engages in riskless principal transactions assumes a passive role; i.e., does not seek to generate the demand for the transaction in question. It is initiated by the customer who decides whether to purchase or sell a security, the timing of the sale or purchase and which security to buy or sell..... it is clear that a broker which engages in riskless principal transactions has no intention of taking securities into its own account either for the purposes of investment or to hold in its inventory for later resale hopefully when the market goes up. The broker does not incur market risk with respect to the securities inasmuch as the broker has received offsetting buy and sell orders before it makes any purchase. Furthermore, as the offsetting orders are placed before the broker makes any purchases, the acquisition of title is merely incidental to the underlying transaction and the broker is acting more in the way of an agent than in the way of a principal.

FDIC Advisory Opinion, FDIC-88-31 (March 28, 1988). As a result, US banks and bank holding companies have for years been exempt from having to register as a dealer under the federal securities laws when buying and selling securities on a back-to-back principal basis.

[9] We also believe that brokers that engage solely in customer facilitation back-to-back principal swaps activities do not typically engage in any of the other activities noted by the Commissions as indicating swaps dealer status. Among other things, such brokers generally do not: provide bid/ask or two-way prices for swaps on a regular basis; request other parties to propose the terms of swaps; enter into swaps on their

2. Major Swap Participants

Dodd-Frank defines a major swap participant as any person:

> (i) That is not a swap dealer; and
>
> (ii)(A) That maintains a substantial position in swaps for any of the major swap categories, excluding both positions held for hedging or mitigating commercial risk, and positions maintained by any employee benefit plan .....;
>
> (B) Whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets or
>
> (C) That is a financial entity that:
>
> (1) Is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency (as defined in Section 1a(2) of the Commodity Exchange Act); and
>
> (2) Maintains a substantial position in outstanding swaps in any major swap category.

See Swaps Dealer Release, 75 Federal Register at 80213-80217. As we demonstrate below, US-registered FCMs, BDs and foreign financial firms subject to comparable regulatory regimes should not fall within the definition of major swap participant.

With respect to proposed Section (ii)(A), the Commissions propose that a "substantial position" in swaps means a swap position that exceeds certain daily average aggregate uncollateralized outward exposure plus daily average aggregate potential outward exposure in any of the four major swap categories (rate, credit, equity and commodity). Aggregate uncollateralized outward exposure means the sum of the current exposure of a person's swap positions with negative value less the value of the collateral the person has posted in connection with those positions. Aggregate potential outward exposure in any major swap category means the sum of (a) the aggregate potential outward exposure for a person's swap position in a major swap category that is not subject to daily mark-to-market margining and is not cleared by a registered clearing agency or derivatives clearing organization, and (b) the aggregate potential outward exposure for a person's

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own standard terms; create new types of swaps; contact potential counterparties to solicit interest in swaps; belong to a dealer category of a swaps association; express a willingness to offer or provide a wide range of products including swaps; provide swaps liquidity regardless of the direction of the swap; provide swaps liquidity across a broad range of asset classes; trade swaps on a proprietary basis or intermediate swaps. See Swaps Dealer Release at 75 Federal Register at 80176-80179.

swap position in a major swap category that is subject to daily mark-to-market margining and is cleared by a registered clearing agency or derivatives clearing organization,

US-registered FCMs and BDs, and foreign firms subject to comparable regulatory rules and requirements, are not likely to maintain "substantial positions" in major swap categories. First, given the capital requirements to which such firms are subject, they would rarely carry uncollateralized swaps positions on their books or not mark such positions to market daily. Second, we anticipate that, after implementation of Dodd-Frank (and comparable global regulations), a significant number of the swaps cleared by such entities will be cleared through registered clearing agencies. Since the aggregate value of centrally cleared swaps and swaps marked-to-market daily, as well as the value of collateral posted in connection with swaps, are each deducted from the substantial position thresholds for the major swap categories, it is unlikely that any brokers effecting swaps solely on a customer facilitation back-to-back basis will ever come close to exceeding such thresholds. And, in the rare instances that they do, they: (a) are, as noted, already subject to substantial regulations and requirements that would require they monitor and control such positions adequately, and (b) hedge the economic risk of such positions in regulated markets on a one-to-one basis.[10]

With respect to proposed Section (ii)(B), it is clear that brokers that engage solely in customer facilitation back-to-back principal or agency swaps activities will not "create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets" since, as noted: (a) such swaps are typically collateralized given the egregious charges to capital such firms are required to take in the event they do not collect margin on them; (b) such swaps are always hedged individually, and; (c) once Dodd-Frank is implemented, a significant number of the swaps entered into by such firms will, we believe, be centrally cleared (which will serve to mitigate their potential systemic risk).

Finally, with respect to proposed Section (ii)(C), we believe such firms should be exempt from this definition as well. First, while such firms would appear to fall within the general definition of "financial firms," they are not likely to engage in substantial proprietary trading (including in swaps) since they act, in essence, as brokers rather than dealers. Thus, it is unlikely they would ever be "highly leveraged relative to the amount of capital [they] hold." Second, such firms, while not subject to banking capital rules, are subject to strict capital requirements set forth by the Commissions and comparable foreign regulators. Third, for the reasons set forth above, firms of this nature are not likely to hold a substantial position in any major swap category. And finally, given the nature of the swaps trading conducted by such entities – which present little to no risk to themselves, their customers or the markets generally – they clearly are not the type of

[10] We also note that swaps entered into for "hedging or mitigating a commercial risk" are also excluded from the definition of "substantial position." To the extent this exemption is determined to include not only end-users using swaps to hedge their commercial risk but also the brokers that facilitate such transactions, firms that engage solely in back-to-back swaps activities are even more likely not to maintain "substantial positions" in swaps since at least some (and possibly many) of the swaps they execute are likely to fall within this exemption.

entities about which Congress was concerned when it enacted the major swap participant category of registration.

In short, we believe that such firms should be exempted from the definition of major swap participant as they (a) are highly unlikely ever to reach the thresholds identified by Dodd-Frank and the Commissions for the reasons set forth above, (b) are already subject to extensive regulation to the extent they would in a rare circumstance reach such thresholds which would ensure that they monitor and maintain such positions adequately and appropriately, and (c) are clearly not the types of firms Congress had in mind when it enacted the major swaps participant category of registration considering that their swaps trading activities pose little or no risk to themselves, their customers or the markets generally.

The Commissions' Request for Comment on Aggregation.

Without prejudice to any of our previous arguments, we would also like to address the Commissions' request for comment regarding the aggregation of swap positions among affiliates for purposes of determining major swap participant status. Among other things, the Commissions note that "[a]bsent that type of aggregation an entity could seek to evade major participant status by allocating swap ..... positions among a number of affiliated entities." Consequently, the Commissions note that in situations in which a parent is the majority owner of a subsidiary entity, they "preliminarily believe that the major participant tests may appropriately aggregate the subsidiary's swaps ..... at the parent for purposes of the substantial position analyses." The Commissions note that attributing those positions to a parent appears consistent with the concepts of substantial position and substantial counter-party exposure "given that the parent would effectively be the beneficiary of the transaction."

In our view, the swap positions of subsidiaries, even 100%-owned subsidiaries, should not be aggregated at the parent level absent some showing of intent to evade the substantial position thresholds. First, many (if not most) subsidiaries operate primarily independently from their parent organizations, complete with separate cost, P&L, revenue, capital and tax structures, as well as separate day-to-day decision-making in terms of investments and other commercial activities (although many such entities are subject to general credit, risk and other prudential requirements of their parent organizations). We believe this is particularly true in the case of "stand-alone" FCMs and BDs, since such entities are subject separately to a whole host of rules governing their day-to-day activities. Given these facts, we believe the Commissions' assumption that parent organizations will seek to use their subsidiaries -- and particularly those that are subject to routine regulatory examinations such as FCMs and BDs – as a means of evading the substantial position thresholds is incorrect, and thus, aggregation, as noted, should not be required absent a showing of concerted action between affiliates.[11] Second,

[11] Such treatment would be consistent with, for example, large options position reporting ("LOPR") in the securities industry. Under LOPR rules, affiliated entities are not required to aggregate their positions in equity options to determine whether they have exceeded reportable thresholds absent a showing that they are "acting in concert" with one another.

we believe that since many financial services organizations are global in nature, the Commissions would be faced with the prospect of aggregating swap positions across jurisdictional boundaries, which could lead to inconsistent application of the rule depending on the cooperation the Commissions received from the various regulatory authorities governing the jurisdictions in which the subsidiaries or parents were domiciled. In addition, in most global financial services organizations, both the parent and the subsidiaries are highly regulated, and thus, their respective swaps activities -- even if not aggregated -- are examined closely and subject to extensive credit, margin and other requirements. Finally, to the extent the Commissions determine that such aggregation, as a general rule, is required, firms should have the ability of obtaining "disaggregation" relief upon an adequate showing of the primarily autonomous nature of their commercial activities.

B. Causing Foreign Financial Firms Not Physically Located in the US and Subject to Comparable Swaps Regulations to Register Under Dodd-Frank is Unnecessary and Violates Principles of International Comity.

In our view, it is unnecessary -- and would violate principles of international comity -- to require foreign financial firms to register as swaps dealers or major swaps participants under Dodd-Frank to the extent they are (a) not physically located in the US, and (b) subject to a regulatory regime addressing swaps activities that is comparable to that in the US (such firms are referred to hereafter as "Foreign Firms"). For the reasons discussed below, we believe this should be the case even where a Foreign Firm transacts swaps directly with US persons.[12]

As an initial matter, it should be noted that the extraterritorial reach of Title VII of Dodd-Frank is limited. For the CFTC, Section 722 provides that the provisions of the Commodity Exchange Act ("CEA") relating to swaps that were enacted by VII of Dodd-Frank "shall not apply to activities outside the United States unless those activities .... have a direct and significant connection with activities in, or effect on, commerce of the United States [or] contravene [CFTC anti-evasion] rules." For the SEC, Section 772 provides that "[no] provision of the Securities Exchange Act of 1934 added by VII of Dodd-Frank "shall 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 [SEC anti-evasion rules]." These provisions are essentially consistent with existing interpretations and statutory provisions setting forth each of the Commission's jurisdictions.[13]

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[12] However, to the extent a foreign financial firm opens a physical office in the US and engages activities (with US or non-US persons), we believe it should be required to register as a swaps dealer or major swap participant (and/or a BD/FCM) depending on its activities.

[13] See, e.g., Statement of Policy Regarding Exercise of [CFTC] Jurisdiction Over Reparation Claims that Involve Extraterritorial Activities of Respondents, 49 Federal Register 14721 (April 13, 1984) (whether a person is required to be registered under the CEA may be determined by reference to whether the person is based in the US, the person engages in the prescribed activities with customers in the US, or the prescribed activities take place or originate in the US); and Section 30(b) of the Securities Exchange Act (providing that the Exchange Act "shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States").

In addition, any interpretation of Title VII should be viewed in light of generally applicable principles of statutory construction. In particular, as reaffirmed recently by the Supreme Court in Morrison v. National Australian Bank, 130 S. Ct. 2869 (2010), is a "long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 130 S. Ct. at 2877. Moreover, even where Congress has established its extraterritorial intent, considerations of international comity should always play an important role in determining the appropriate scope of US agency oversight. Such principles are provided for in Section 752 of Title VII (international harmonization provisions), which require the Commissions to take into account the (a) nature and structuring of the interactions between swap counterparties located within and outside the United States, (b) extent to which other regulatory regimes substantially parallel US law, and (c) extent to which non-US regulators are better positioned to effectively supervise the activities conducted, and the institutions domiciled, in their jurisdictions.[14] In short, Title VII of Dodd-Frank adheres to existing limitations on the extraterritorial reach of the Commissions, is consistent with existing principles of statutory construction, and requires the Commissions -- in applying its provisions to cross-border swaps activity -- to give deference to comparable regulatory regimes in regulating swap participants physically located in such jurisdictions.

As a practical matter, we also believe that requiring Foreign Firms to register as swaps dealers or major swaps participants in the US (a) would subject them, unnecessarily, to duplicative and potentially inconsistent regulations considering that the provisions of Dodd-Frank may not be entirely consistent with, for example, the swaps provisions of the European Market Infrastructure Reform Act ("EMIR") and the Markets in Financial Instruments Directive ("MiFID") in Europe, and (b) could result in foreign regulators taking retaliatory action against US firms engaging in swaps activities with non-US persons domiciled within their physical borders. In addition, to the extent the Commissions required Foreign Firms to register in the US as swaps dealers or major swaps participants and sought to impose their regulatory authority over them (i.e., inspections, examinations, enforcement actions), (a) such attempts could potentially be blocked by the foreign government in which the entity is domiciled, and (b) at a minimum, would significantly overextend the already limited Commissions' investigative and enforcement resources.[15] Finally, regulators all over the world are in the process of

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[14] We also note in this regard that some foreign regulators drafting new OTC derivatives legislation, such as the European Commission, have already included provisions that would allow them to negotiate mutual recognition frameworks with non-EU countries that would result in "exemptive relief for investment firms and market operators based in jurisdictions with equivalent regulatory regimes applicable to markets in financial instruments." European Commission Public Consultation: Review of the Markets in Financial Instruments Directive (December 8, 2010) at Section 8.3.

[15] See, e.g., Comment Letter of the European Securities and Markets Authority ("ESMA") (January 17, 2011). In commenting on the Commissions' potential exercise of extraterritorial jurisdiction over non-US resident swaps data repositories, ESMA notes:

> if the foreign supervision were not taken into account, your rulemakings would seem to force a non-resident SDR to be subject to multiple regimes and to the jurisdiction of several authorities. This would in practice be very challenging for regulated entities and would significantly raise the

drafting and implementing new legislation and rules relating to the OTC derivatives market which, in our view, will be comparable in most respects to that issued under Dodd-Frank and which should give the Commissions some sense of comfort that the interests of US persons trading in such jurisdictions will be protected.[16]

In short, we believe the Commissions should establish a framework for cross-border swap activities that preserves and leverages the strengths of existing market practices and home country supervision and regulation. Specifically, we recommend that the activities of Foreign Firms engaging in swaps activities with US persons be subject to the existing regulatory framework put in place by the Commissions that govern dealings between non-US brokers and US persons; namely, CFTC Part 30 and SEC Rule 15a-6. We believe utilizing this existing regulatory framework will (a) protect US investors with respect to swaps activities just as they have protected US investors with respect to futures and securities, (b) not offend principles of international comity (since they have been in place and generally accepted for some time), and (c) allow the Commissions to focus their efforts at this important juncture on implementing the core requirements of Dodd-Frank.[17] Certainly, some minor modifications to Part 30 and Rule 15a-6 may be required to ensure that the rules properly govern swaps activity; however, we do not such modifications will need to be substantial since the two rules -- with respect to substantive regulations -- essentially rely on existing US or foreign law.

* * *

Thus, for the foregoing reasons, we believe that (a) US-registered FCMs, BDs and foreign firms subject to comparable swaps regulation that effect swaps primarily on a customer facilitation back-to-back basis should be exempt from the definitions of swaps dealer and major swaps participant, and (b) Foreign Firms should not be required to register as swaps dealers or major swaps participants under Dodd-Frank, even to the extent they deal with US investors, but rather, such activities be dealt with via the existing regulatory framework of Part 30 and Rule 15a-6.

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costs for both the industry and supervisors. Moreover, this system would raise concerns about the possibility for the [Commissions] to carry-out on-site inspections on entities based in Europe that are supervised by European authorities.

[16] For example, in Europe, the European Commission, European Parliament and European Union Member States are in the process of implementing EMIR, while in May 2010, Japan amended its Financial Instruments and Exchange Act to provide for mandatory clearing and enhanced public and regulatory transparency of OTC derivatives.

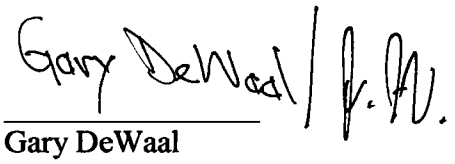
[17] Indeed, futures-based swaps activities with US persons are already subject to Part 30 requirements, while the purchase or sale of securities to or from a US person effected in connection with a securities-based swap are already subject to the requirements of Rule 15a-6.

Thank you for allowing us to submit our comments on this proposed rule. If you have any questions regarding our comment letter, please do not hesitate to contact the undersigned at (646) 557- 8458, or John Nicholas, US Securities Compliance Director, at (646) 557-8516.

Sincerely,

Newedge USA, LLC

By



Gary DeWaal
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