August 27, 2012

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

Re: Proposed Guidance on Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, RIN Number 3038–AD57

Dear Mr. Stawick:

This letter is submitted in response to the Commodity Futures Trading Commission's ("CFTC's") request for comment on the agency's proposed guidance on the Cross-Border Application of Certain Swaps Provisions[1] ("Proposed Guidance") that sets forth guidelines for how the protections established by the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] ("Dodd-Frank") should apply on an extraterritorial basis.

Congress enacted Dodd-Frank "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system" and "to protect the American taxpayer by *ending bailouts*" and the "abusive financial services practices"[3] that led to the 2008 financial crisis.

To this end, section 722 applies Dodd-Frank protections to swap activities that "have a direct and significant connection with activities in, or effect on, commerce of the United States"[4] or that contravene regulations that prevent the evasion of Dodd-Frank provisions.[5]

Thus, Title VII of the statute subjects most swaps to transparency, capitalization, and collateralization requirements[6] and, subsequently, promises to both restore integrity to the $300 trillion notional value over-the-counter (OTC) derivatives market[7]subject to CFTC oversight and prevent American taxpayers from having to yet again bailout Too Big To Fail financial institutions.

Dodd-Frank protects U.S. taxpayers from having to make the Hobson's choice of having to once again spend trillions of dollars to bail out huge financial institutions to prevent a Second Great Depression or to suffer the effects of the worst financial crisis since the early 1930's.

The CFTC acknowledges the "critical importan[ce]"[8] of cross-border regulation to creating a robust regulatory framework that, per Congress's intent, would protect American

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[1] Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214 at 41237, 41218 (proposed July 12, 2012) [hereinafter "Proposed Guidance"].
[2] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter "Dodd-Frank Act"].
[3] *Id.* at Preamble.
[4] *Id.* at § 722(d)(i)(1).
[5] *Id*. at § 722(d)(i)(2).
[6] *See* Proposed Guidance, *supra* note 1, at 41224-27.
[7] CFTC Strategic Plan 2011-2015, *available at* http://www.cftc.gov/reports/strategicplan/2015/2015strategicplan04.html.
[8] Proposed Guidance, *supra* note 1, 41216.

taxpayers from having to repeatedly bailout U.S. financial institutions that engage in risky swap activity in overseas markets or face a Second Great Depression. Despite this acknowledgement, the CFTC insists that "it should exercise its regulatory authority over cross-border activities in a manner consistent with the principles of statutory construction and international *comity*."[9] It therefore twists the intent of Congress to construe its extraterritorial authority to avoid interfering with the "interests" of foreign countries even when the U.S. taxpayer and the U.S. economy are threatened.[10] In this respect, the CFTC prioritizes comity and other countries' sovereign interests—interests that the CFTC can only anticipate[11]—over Congress's clear intent that when the U.S. taxpayer and the U.S. economy are at risk and personal jurisdiction is within the CFTC's reach, Dodd-Frank must apply. In writing section 722, Congress did not authorize the CFTC to place the interests of foreign countries over the interests of the U.S. taxpayer and U.S. economy when the swap transaction in question affects U.S. interest and if that transaction and others like it present issues of systemic risk.

Congress did not pass Dodd-Frank to establish a malleable regulatory regime that would allow financial institutions with clear ties to the U.S. to easily circumvent U.S. financial regulations. Rather, Congress passed Dodd-Frank to stop financial institutions from engaging in risky swap activity—activity that wrought havoc on the U.S. and global economies in the fall of 2008—and, by extension, *did not* establish a regulatory system that encourages these institutions to outsource their swap business to jurisdictions that have less rigorous or developed regulatory oversight than the comprehensive regulatory oversight established by Dodd-Frank.

As we asserted in our comment letter dated August 13, 2012, if another financial crisis ensues because the CFTC failed to assert its full statutory authority to protect American taxpayers from the risks posed by the swap market, which has clear ties to the U.S., the American taxpayer will never forgive the CFTC if it bows to the shrine of "comity" and "the sovereign interests of other nations"[12] over protecting the U.S. taxpayer when transactions with clear U.S. ties wash back on American shores.[13]

Throughout this letter, we use the phrase "foreign subsidiaries of U.S. parent institutions" to include foreign subsidiaries, affiliates, divisions, affiliates, end users, and branches of U.S. parents.

This letter is organized into four parts. First it establishes that the CFTC should define foreign subsidiaries of U.S. parent institutions as U.S. persons independent of the language in section 722. Second, it shows that comity does not limit the vast extraterritorial reach of Dodd-

[9] *Id.* at 41223 (relying on comity to determine the scope of the CFTC's "regulatory authority over cross-border activities").

[10] Proposed Guidance, *supra* note 1, at 41223 (relying on comity to determine the scope of the CFTC's "regulatory authority over cross-border activities"); *see also* 41226-29 (claiming that any determination of the extraterritorial reach of Dodd-Frank most abide by principles of comity).

[11] *See infra* p. 15 (explaining that foreign regulators do not know how the extraterritorial application of Dodd-Frank will impact financial regulation in other jurisdictions).

[12] Proposed Guidance, *supra* note 1, at 41223.

[13] Gary Gensler, CFTC Chairman, Keynote Address on the Cross-Border Application of Dodd-Frank Swaps Market Reforms Before the 2012 FINRA Annual Conference (May 21, 2012) [hereinafter "Gensler Keynote Address"] *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-113.

Frank by establishing that comity does not apply where Congress affirmatively intends to regulate across jurisdictions. Third, it demonstrates that even if comity does affect the application of Dodd-Frank rules to foreign subsidiaries of U.S. parent institutions this application satisfies comity because the application is reasonable. Fourth, and finally, the letter demonstrates that comity only authorizes the reasonable use of substitutive compliance and argues that the CFTC should only use substitutive compliance sparingly.

I. Title VII of Dodd-Frank Requires the CFTC to Classify Foreign Subsidiaries of U.S. Financial Institutions as U.S. Persons.

The Proposed Guidance defines U.S. person[14] to include U.S. subsidiaries of foreign parent institutions[15] and foreign branches or agencies of a U.S. person,[16] *but not* foreign subsidiaries of U.S. parent institutions[17] that are not guaranteed by a U.S. person. The CFTC explains that it "has a strong supervisory interest in ensuring that the protections of the Dodd-Frank Act are extended to the U.S. guarantor" in cases involving "transactions [that] are guaranteed by a U.S. person."[18] We agree with the CFTC that U.S. subsidiaries of foreign parent institutions[19] and foreign branches or agencies of U.S. parent institutions are U.S. persons; however, we maintain that non-guaranteed subsidiaries of U.S. parent institutions are also U.S. persons[20] and should be subject to direct compliance with Dodd-Frank.

a. The CFTC's Failure to Define "U.S. Person" to Include Foreign Subsidiaries of U.S Parent Institutions Fails to Protect American Taxpayers From the Demonstrated Risks Associated with Overseas Swaps.

The CFTC reads comity—the principle that sovereign nations should "avoid unreasonable interference with the sovereign authority of other nations"[21]—into Dodd-Frank to propose a narrow definition of "U.S. person"[22] that allows Wall Street and its foreign allies to

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[14] *See* Proposed Guidance, *supra* note 1, at 41218.
[15] *Id.* at 41218.
[16] *Id.* at 41218.
[17] *Id.* at 41218 (commenting that "a foreign affiliate or subsidiary of a U.S. person would be considered a non-U.S. person even where such an affiliate or subsidiary has certain or all of its swap-related obligations guaranteed by the U.S. person"); *see infra* p. 5 (showing that the CFTC's registration requirements will allow most foreign subsidiaries of U.S. banks to avoid registering as a swap dealer and/or major swap participant).
[18] Proposed Guidance, *supra* note 1, at 41230.
[19] *Id.* at 41218.
[20] *Id.* at 41218 (designating as a U.S. person "any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in . . . case[s] . . . in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person").
[21] *Id.* at 41223 (quoting *F. Hoffman-La Rouche, Ltd.*, 542 U.S. 155, 164 (2004)).
[22] *Id.* at 41218 (commenting that "the term 'U.S. person' can be helpful in determining the level of U.S. interest for purposes of analyzing and applying principles of international comity").

easily circumvent the statute. Put another way, the Proposed Guidance is a roadmap for Too Big To Fail U.S. bank holding companies to, for example, avoid the transparency, capitalization, and collateralization requirements of Title VII. Under the CFTC's proposed guidance, a U.S. parent could avoid compliance with Dodd-Frank by establishing and trading through a foreign subsidiary created at its own choosing and/or trading with foreign subsidiaries of other foreign U.S. parent institutions. For example, JPMorgan and Goldman Sachs could orchestrate multi-billion dollar swaps trade through their subsidiaries in London without having to satisfy capital or margin requirements, or Dodd-Frank's major transparency requirements. This proposed guidance may be the first instance of a U.S. regulatory agency encouraging outsourcing while holding the U.S. taxpayer accountable either for a foreign subsidiary's collapse or the direct adverse economic suffering that will occur if, as politics now makes almost certain, no U.S. taxpayer bailout is forthcoming.

The loophole created by the CFTC's narrow definition of "U.S. person" in the Proposed Guidance threatens to undermine the entire Dodd-Frank regulatory framework. U.S. companies control numerous foreign subsidiaries across the globe (and can create further foreign subsidiaries)[23] and so could move their swap activity overseas with minimal effort or cost. The ease with which U.S. parents could channel their swap activities through their foreign subsidiaries, combined with the obvious advantage of avoiding U.S. financial regulation, incentivizes U.S. companies to outsource their swap activities *en masse*—an incentive Congress clearly did not intend when it passed Dodd-Frank with the goal of ending taxpayer bailouts of Too Big To Fail financial institutions.

Additionally, the aggregation requirements outlined in the Proposed Guidance would not restrict the swap activity that a foreign subsidiary of a U.S. parent institution could engage in with other non-U.S. persons. The Proposed Guidance applies entity-level requirements[24] and transaction-level requirements[25] to non-U.S. persons based on whether the non-U.S. financial entity exceeds the *de mininis* threshold for swap activity and, subsequently, is required to register as a swap dealer ("SD") and/or major swap participant ("MSP"). A non-U.S. person exceeds this threshold if it transacts over $8 billion aggregate notional amount[26] in swaps in a twelve-month period[27] as part of its regular business.[28] With respect to SD registration, the CFTC would aggregate all swaps by a non-U.S. person that are: transacted with a U.S. person (but not the

[23] Richard J. Herring, *Wind-Down Plans as an Alternative to Bailouts: The Cross-Border Challenges*, *in* ENDING GOVERNMENT BAILOUTS AS WE KNOW THEM 125, 144-45 (Kenneth E. Scott et al. eds., 2010) (commenting that Lehman Brothers consisted of almost 3000 legal entities that operated in fifty countries) [hereinafter "Herring"]; Gensler Keynote Address, *supra* note 13 (noting that Lehman operated "a complex web of affiliates").

[24] Proposed Guidance, *supra* note 1, at 41224-25 (identifying 6 entity-level requirements: capital adequacy, chief compliance officer, risk management, swap data recordkeeping, reporting to an SDR, and physical commodity swaps reporting).

[25] *Id.* at 41225-27 (identifying 6 entity-level requirements: capital adequacy, chief compliance officer, risk management, swap data recordkeeping, reporting to an SDR, and physical commodity swaps reporting).

[26] *Id.* at 41240.

[27] *Id.* at 41219.

[28] *Id.* at 41220 ("A person that is not engaged in swap dealing as part of "a regular business" is not required to apply the de minimis test and is not a swap dealer under the CEA.").

foreign branch of a U.S. person); transacted with a U.S. person and an affiliate of the non-U.S. person that is controlled by the U.S. person; and guaranteed by a U.S. person regardless of counterparty.[29] The CFTC adopts a similar approach to determine if a non-U.S. person should register as an MSP.[30] Most importantly, under the Proposed Guidance, the CFTC would *not* aggregate trades between a non-U.S. person and another non-U.S. person that are not guaranteed by a U.S. person (the U.S. person would count these swaps toward its *de minimis* threshold).[31] Thus, foreign subsidiaries of U.S. parent institutions could transact billions of dollars worth of swaps with non-U.S. persons without exceeding the *de minimis* requirement and therefore having to comply with Dodd-Frank. In this respect, trading between foreign subsidiaries of U.S. parent institutions would further weaken what we view as already lax requirements to regulate SDs/MSPs.

b. Defining U.S. Person to Include Foreign Subsidiaries of U.S. Parents Would Protect American Taxpayers Against the Demonstrated Risks Associated With Overseas Swap Activity.

In contrast to the narrow definition found in the Proposed Guidance, a comprehensive definition of “U.S. Person” that includes foreign subsidiaries of U.S. parent institutions and would halt mounting efforts by Wall Street and its foreign allies to evade Dodd-Frank. Banks in Hong Kong, Singapore, and Japan—banks that represent a growing percentage of the global swap market[32]—are collaborating with Wall Street banks to try to avoid Dodd-Frank regulation.[33] As a manager at an Asian bank recently observed: “If I have a choice, I just don’t want to deal with a ‘U.S. person’.” Rather than terminating their relationship with U.S. banks—“[D]o we just bring up the drawbridge to U.S. institutions?”[34]—Asian banks are working with their U.S. counterparties to determine how these counterparties can restructure their swap businesses to allow the likes of an Asian bank to trade with a U.S. bank through a non-U.S. person that is controlled by the U.S. bank.[35] This global effort to avoid Dodd-Frank threatens to undermine the effectiveness of Dodd-Frank protections. But most important, this global effort threatens to have U.S. taxpayers rescue U.S. parents as they were required to do to after the 2008 financial crisis to the tune of trillions of dollars or face a global Depression. Section 722 is designed to protect U.S. taxpayers when they are put on the hook for failures at Too Big To Fail financial institutions; it is not designed to let the U.S. taxpayer be held at the mercy of “comity” or the policy concerns of foreign nations.

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[29] *Id.* at 41219-20.
[30] *Id.* at 41220-21.
[31] *Id.* at 41219-2.
[32] Rachel Armstrong, *As Dodd-Frank looms, Asian banks look to cut U.S. trading ties*, REUTERS, Aug. 19, 2012, [hereinafter “Armstrong”] *available at* http://www.reuters.com/article/2012/08/19/us-asia-regualtion-derivatives-idUSBRE87I0A720120819.
[33] *Id.* (“[Dodd-Frank] has prompted a knee-jerk reaction from some Asian institutions to consider cutting all their derivative trading relationships with U.S. counterparties, anxious to avoid higher trading costs and the spotlight of American regulators”).
[34] *Id.*
[35] *Id.*

The comprehensive definition of "U.S. person" proposed herein would alleviate the potential for massive regulatory arbitrage by recognizing that U.S. parents and their foreign subsidiaries essentially operate (for purposes of systemic risk) as a single financial entity and that the actions of a "foreign" subsidiary can easily imperil the U.S. parent. Major financial entities manage their cash on a global basis so that no clear operational separation exists between a U.S. parent and its foreign subsidiaries. Lehman Brothers, for example, consisted of almost 3000 legal entities that operated in fifty countries.[36] At the time of Lehman's insolvency, the bank's affiliates had over three hundred outstanding creditor and debtor balances that totaled over $21 billion[37] and several of the bank's subsidiaries had difficulty identifying their specific assets and liabilities.[38] Thus, a foreign subsidiary of a U.S. parent company constitutes an integral and indistinguishable part of the parent institution and therefore should be classified as a U.S. person under Dodd-Frank as the plain language of that statute dictates and as the purpose of that statute—protecting American taxpayers and the U.S. economy—clearly demands.

A comprehensive definition of "U.S. person" would also alleviate the potential for regulatory arbitrage by standardizing regulation for foreign subsidiaries and foreign branches of U.S. parents. As the International Monetary Fund (IMF) recently reported: "Despite a clear *legal* distinction between branches and subsidiaries . . . they may in practice . . . be operated and managed *in a similar fashion*."[39] The IMF recognized that a financial institution's decision to establish a foreign branch or foreign subsidiary is, *inter alia*, "affected by . . . differences in tax and regulatory regimes across jurisdictions."[40] The fact that banking groups "run operations through a hybrid structure that includes both branches and subsidiaries"[41] to take advantage of variations (and weaknesses) in regulation suggests that the legal differences between these two types of financial entity have little practical implication for financial entities and that banking groups could easily operate extensively through foreign subsidiaries if their overseas subsidiaries are designated as non-U.S. persons. In this respect, a comprehensive definition of U.S. person that includes foreign branches, agencies, affiliates, and guaranteed and non-guaranteed subsidiaries of U.S. financial institutions both reflects market realities and practices and protects U.S. taxpayer from having to subsidize the global swap activities of Too Big To Fail U.S. and international banks.

Similarly, classifying foreign subsidiaries of U.S. parents as U.S. persons will obviate the arbitrary distinction created by the Proposed Guidance between guaranteed and non-guaranteed foreign subsidiaries as this distinction severely limits Dodd-Frank's extraterritorial reach. As is true of the distinction the CFTC draws between foreign branches and subsidiaries, the distinction between guaranteed and non-guaranteed subsidiaries ignores the practical reality that a U.S. parent is equally unlikely to allow either type of subsidiary to fail. As the IMF has observed, "reputational risks may limit the ability to restrain contagion independent of the legal corporate

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[36] Herring, *supra* note 23.
[37] *Id*.
[38] *Id*.
[39] Jonathan Fiechter et al., *IMF STAFF DISCUSSION NOTE: Subsidiaries or Branches: Does One Size Fit All?*, International Monetary Fund, March 7, 2011 [hereinafter "IMF Note"] at 7. (emphasis added).
[40] *Id.* at 20.
[41] *Id.* at 5.

structure"[42] or legal agreements of a financial institution. For example, in 2007 Bear Stearns bailed out two of its failing hedge fund affiliates located in the Cayman Islands in order "to preserve its reputation, as well as its ability to continue funding itself."[43] Although the hedge funds were not formally guaranteed by Bear Stearns, the bank agreed to save the funds from collapse in order to preserve investor confidence in the parent institution and to preserve its access to credit.[44] In this respect, guarantees do not effectively measure risk and so do not form a reasonable basis from which to determine whether a foreign subsidiary of a U.S. parent is classified as a U.S. person.

As CFTC Chairman Gary Gensler noted, the "result was the same" for Bear Stearns as it was for the likes of AIG and Lehman Brothers (U.S. parents that incurred losses when their guaranteed foreign subsidiaries made swaps that went bad):[45] the parent company "took on the risk of its failing affiliates."[46] Categorizing all foreign subsidiaries of U.S. parents as U.S. persons would eliminate the arbitrary distinction between guaranteed and non-guaranteed foreign subsidiaries and thereby eliminate the incentive for banks to channel their swap business through so-called non-guaranteed foreign subsidiaries.

Further, categorizing foreign subsidiaries of U.S. parent institutions and as U.S. persons requires U.S. banks and financial institutions to comply directly with Dodd-Frank requirements.[47] As the CFTC readily acknowledges and as we discuss in greater detail in section IV of this letter,[48] substitutive compliance is not allowed for swap trades conducted with U.S. persons. Classifying foreign subsidiaries of U.S. parent institutions as "U.S. persons" would require these subsidiaries to comply directly with U.S. clearing, exchange trading, capital, and collateralization requirements. In other words, the comprehensive definition of "U.S. person" proposed herein denies foreign subsidiaries of U.S. parent institutions recourse to alternative regulatory regimes whose requirements and enforcement mechanisms are less rigorous than those established under U.S. law. In other words, this definition avoids any reliance on regimes that imperil the U.S. taxpayer and the U.S. economy by creating situations where U.S. parents either have to be bailed out by U.S. taxpayers or, in the likely absence of another bailout, or collapse and cause a Second Great Depression.

In sum, an expansive definition of U.S. person prioritizes the needs of U.S. taxpayers over other countries' interests to realize Congress's intent to implement a rigorous regulatory regime that will protect U.S. taxpayers from the demonstrated risks associated with overseas swap activity that is controlled by U.S. institutions.

In the sections that follow, we argue in the alternative that the plain language of section 722 supports classifying foreign subsidiaries of U.S. persons and foreign subsidiaries of foreign persons that are not guaranteed by a U.S. person as U.S. persons (see section III below). As we

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[42] *Id.* at 20.
[43] Gensler Keynote Address, *supra* note 13.
[44] *Id.*
[45] Proposed Guidance, *supra* note 1, at 41215.
[46] Gensler Keynote Address, *supra* note 13.
[47] Sullivan and Cromwell, *CFTC Guidance on Extraterritoriality*, July 12, 2012, 5 [hereinafter "Sullivan and Cromwell"], *available at* http://www.sullcrom.com/files/Publication/c0c33ecf-cfed-4b8a-a84e-0bd693512f02/Presentation/PublicationAttachment/0f14ac92-c20d-4575-a7f2-0d78aff000b1/S%26C_Publication_CFTC_Guidance_on_Extraterritoriality.pdf.
[48] *Infra* pp. 19.

allude to in this section, we also argue that both types of non-guaranteed subsidiary should comply directly with Dodd-Frank (*i.e.*, there should be no substitutive compliance).

Before we make these arguments we clarify, immediately below in section II, the relationship between comity—or, more precisely, prescriptive comity—and that comity supports the extraterritorial application of Dodd-Frank to include foreign subsidiaries of U.S. parent institutions.

II. International Comity Does Not Require the CFTC to Exempt Foreign Subsidiaries of U.S. Parents From Direct Compliance With U.S. Financial Regulation.

The Supreme Court defines comity as a "rule of construction [that] reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."[49] As Justice Scalia clarified in his dissenting opinion in *Hartford Fire*, "prescriptive comity" refers to "the respect sovereign nations afford each other by limiting the reach of their laws" and is "exercised when they come to interpreting the scope of laws their legislatures have enacted."[50] In this sense, prescriptive comity requires courts to read general[51] or otherwise "*ambiguous* statut[ory]" language "to avoid unreasonable interference with other nations' sovereign authority,"[52] where "unreasonable interference" involves a direct conflict of laws. In sum, prescriptive comity is a rule of statutory construction that is applied in the face of statutory ambiguity and not a limit on Congressional power when Congress has spoken clearly; it applies

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[49] *F. Hoffmann-La Roche Ltd.*, *supra* note 21, at 164.

[50] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817, 113 S. Ct. 2891, 2920, 125 L. Ed. 2d 612 (1993).

[51] *Lauritzen v. Larsen*, 345 U.S. 571, 576-77, 73 S. Ct. 921, 925, 97 L. Ed. 1254 (1953) (explaining that the language in the Jones Act is so general that to read it literally would interpret Congress to have "conferred an American right of action which requires nothing more than that plaintiff be 'any seaman who shall suffer personal injury in the course of his employment'. [The statute] makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation-a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945)(emphasis added) (explaining that courts "are not to read *general* words . . . without regard to the limitations customarily observed by nations upon the exercise of their powers"); *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 554-55, 107 S. Ct. 2542, 2561, 96 L. Ed. 2d 461 (1987) (j. Blackmun concurring) (observing that "[t]he Court frequently has relied upon a comity analysis when it has adopted general rules to cover recurring situations in areas such as choice of forum, maritime law, and sovereign immunity").

[52] *F. Hoffmann-La Roche Ltd.*, *supra* note 21, at 156.

only when a statute fails to establish Congress's intent to legislate on an extraterritorial basis and when a statute may be read to directly conflict with a foreign country's laws.[53]

a. Comity Does Not Constrain Congress's Express Intent to Legislate On an Extraterritorial Basis Or U.S. Regulators' Ability to Assert Personal Jurisdiction Over Foreign Financial Institutions That Harm U.S. Commerce.

The Supreme Court's ruling in *Morrison v. National Australia Bank Ltd.* affirms Congress's authority to legislate on an extraterritorial basis and directs courts to uphold the extraterritorial reach of a given statute so long as the language of the statute "clearly express[es]" Congress's "affirmative intention"[54] to apply U.S. laws to foreign activity. The Court in *Morrison* denied the plaintiffs relief based on the fact that the Securities Exchange Act, as it existed prior to the passage of Dodd-Frank, did not establish such an affirmative intent.[55] Despite the outcome of *Morrison*, the Court emphasized that the presumption against the extraterritorial application of statues is "a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate."[56] The *Morrison* Court's recognition that Congress *can* legislate on an extraterritorial basis,[57] so long as Congress *clearly manifests* its intent to do so, aligns with the principles of interpretive deference to international comity, which apply only when the language of a federal statute is unclear.

Additionally, the extraterritorial reach of the Dodd-Frank Act comports with the Due Process requirements of the Fifth and Fourteenth Amendments to the U.S. Constitution,[58] which authorize the CFTC to establish personal jurisdiction over financial entities that operate outside of the United States, but whose actions affect U.S. commerce. In *International Shoe Co. v. Washington*, the Supreme Court explained that "due process requires only that in order to subject a defendant to a judgment in personam, if he not be present within the territory of the forum, he have certain minimum contacts with" the forum.[59] In *Asahi Metal Industry Co. v. Superior Court*

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[53] *Societe Nationale*, *supra* note 51, at 555 (j. Blackmun concurring) (observing that comity only applies where there "is in fact a true conflict between domestic and foreign" laws rather than where U.S. law merely duplicates foreign law).
[54] *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 245 (1991)).
[55] *Id*. at 2881.
[56] *Id*. at 2877.
[57] *See Hartford Fire*, *supra* note 50, at 796 (observing that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); *see also Hartford Fire*, *supra* note 50, at 813-14 (Scalia dissenting) (observing that "this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected"); *see also Hartford Fire*, *supra* note 50, at 815 ("Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.").
[58] U.S. Const. amends. V, XIV.
[59] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

of California,[60] the Supreme Court relied on the minimal contacts test established to hold that U.S. courts have jurisdiction over foreign-owned and operated corporations. Asahi is a Japanese manufacturer that, prior to the lawsuit, had supplied valve assemblies to a Taiwanese company that manufactured tubes for use in the wheels of Honda vehicles; the California plaintiff was injured when one of these tubes burst.[61] A divided Supreme Court ruled that personal jurisdiction exists if either the "defendant purposefully directed [the action] toward the forum State"[62] or the defendant regularly engaged in an action that it knew could impact the forum State.[63] The extraterritorial application of Dodd-Frank to foreign persons who trade with U.S. counterparties and/or to activities that have a "direct and significant connection with . . . or effect on commerce of the United States"[64] clearly satisfies the Supreme Court's due process analysis.

Also, U.S. regulators have filed successful enforcement actions against foreign financial entities in order to protect vested U.S. interests. For example, in May 1998 the CFTC instigated proceedings and imposed sanctions against Sumitomo Corporation of Japan for manipulating the U.S. copper prices[65] *through transactions that took place wholly outside the United States*.[66] A rogue trader at Sumitomo's principal place of business in Tokyo, Japan, maintained large and dominating futures positions in copper metal on the London Metals Exchange (LME) that significantly impacted U.S. copper prices.[67] Similarly, in 2003 the SEC brought a successful lawsuit against the Italian food and diary giant Parmalat in connection with one of the largest frauds in history—a fraud that involved up to $12 billion in vanished assets and had a significant impact on investors in the United States.[68] The SEC sued Parmalat for misleading U.S. investors in a "brazen fraud" in which Parmalat executives forged a letter that indicated that Parmalat had deposited substantial sums of money in a Bank of America account in the Cayman Islands.[69] The CFTC's and SEC's successful lawsuits against foreign companies establish that the extraterritorial reach of the Dodd-Frank Act merely codifies U.S. regulators' existing authority to

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[60] *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987).
[61] *Id. at* 105-06.
[62] *Id*. at 112.
[63] *Id*. at 121, Justice Brennan concurring (ruling that "Asahi's regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California" satisfied the minimum contacts test established under the Due Process Clause).
[64] Dodd-Frank, *supra note* 2, at § 722(d).
[65] *See In the Matter of Sumitomo Corp.*, CFTC Docket No. 98-14 (May, 11, 1998), *available at* http://www.cftc.gov/ogc/oporders98/ogcfsumitomo.htm (finding that Sumitomo's manipulation of copper prices on the LME "caused prices on the Comex [and United States cash market] to become similarly distorted and artificial").
[66] *See id.*
[67] *Id*.
[68] Gail Edmondson and Laura Cohn, *How Parmalat Went Sour*, BLOOMBERGBUSINESSWEEK, *available at* http://www.businessweek.com/stories/2004-01-11/how-parmalat-went-sour; *The Parmalat scandal*, WORLD FINANCE [hereinafter "Parmalat Scandal"] *available at* http://www.worldfinance.com/home/special-reports-home/the-parmalat-scandal.
[69] Parmalat Scandal, *supra* note 68; *SEC v. Parmalat Finanziaria*, First Am. Compl., 03 CV 10266, 15-16 (S.D.N.Y. 2004), *available at* http://www.sec.gov/litigation/complaints/comp18803.pdf.

instigate proceedings against non-U.S. companies whose actions directly harm U.S. persons and/or negatively impact the U.S. economy and which are subject to personal jurisdiction in the United States.

b. The Plain Language and Purpose of Section 722 Establishes Congress's Intent to Apply Dodd-Frank Protections Across Borders When U.S. Interests Are At Risk In Order to Protect U.S. Taxpayers From Systemic Risk Without Creating a Conflict of Laws.

The Supreme Court employs rules of statutory construction to clarify a statute's meaning only when Congress fails to clearly manifest its intent in the language or purpose of the statute. As Justice Thurgood Marshall explained in *United States v. Locke*, "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used."[70] Similarly, in *United States v. Rice* the Court observed that "[s]tatutory language and objective . . . appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure.'"[71] Thus, as a rule of construction, prescriptive comity applies only when the statutory language is ambiguous or so general that a literal interpretation of the statute would lead to a conflict of laws or otherwise absurd result.[72]

The cases cited in the Proposed Guidance do not warrant the CFTC's use of comity to override the clear intent of section 722 to require foreign subsidiaries of U.S. parent institutions and to directly comply with Dodd-Frank. Specifically, the cases cited by the CFTC involve ambiguous statutory language that could be read to create a conflict of international laws as well as economic activity that had little connection to U.S. commerce. In marked contrast to the cited cases, the language of 722 is clear (i.e., the CFTC must require foreign subsidiaries of U.S. parent institutions to directly comply with Dodd-Frank) and the economic activity (i.e., risky swap activity conducted by foreign subsidiaries of U.S. parent institutions that are interconnected with the U.S. economy) poses a serious threat to U.S. economic stability and prosperity.

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[70] *United States v. Locke*, 471 U.S. 84 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962)); *see United States v. Locke*, 471 U.S. 84, 95-96 (1985); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977)) (suggesting that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances"); *Watt v. Alaska*, 451 US 259 (1981) (stating that "[t]he starting point in every case involving construction of a statute is the language itself); *Muscarello v. United States*, 524 US 125 (1998) ("We begin with the statute's language."); BRESSMAN, RUBIN, STACK, THE REGULATORY STATE, 189 (2010) [hereinafter "THE REGULATORY STATE"] ("The 'plain meaning rule' directs courts to give effect to the text if it has a plain meaning—that is, the text is not only a starting point but the stopping point.") *Miller v. French*, 530 U.S. 327, 336 (2000) ("Congress has made its intent" in the statute "clear, 'we must give effect to that intent.'") (quoting *Sinclair Refining Co. v. Atkinson*, 370 US 195, 215).

[71] *United States v. Rice*, 327 U.S. 742, 752-53 (1946).

[72] THE REGULATORY STATE, at 281.

The CFTC relies on *Murray v. Schooner Charming Betsy* for the principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[73] Writing for the court, Chief Justice Marshall clarified, however, that a statute must be interpreted expansively when Congress's intent to legislate on an extraterritorial basis is "manifested by express words or a very plain and necessary implication."[74] The Court found that the ban on "all commercial intercourse" with France enacted by the non-intercourse law of 1800,[75] was too general[76] to establish Congress's intent to authorize the U.S. Navy's capture of a merchant vessel that was flying the Danish flag,[77] but was operated by French pirates[78] and owned by a U.S.-born merchant[79] who had "acquire[d] . . . the commercial privileges attached to his domicile"[80] on the Danish island of St. Thomas.[81] Thus, the Court applied comity to clarify the vague language of the statute and read the statute narrowly so as to avoid subjecting activity that was far removed from U.S. commerce to U.S. laws.

The CFTC also relies on the Supreme Court's ruling in *Hoffmann La Roche* in which the Court applied the principles of comity to determine if the Sherman Act, as modified by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA),[82] remedied foreign harms caused by a foreign price-fixing scheme that effected U.S. and non-U.S. consumers independently.[83] The Sherman Act, as modified, prohibits anticompetitive "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations" if the conduct "has a direct, substantial, and reasonably foreseeable effect" on domestic commerce, imports to the United States, and export activities based in the United States.[84] Writing for the Court, Justice Breyer found that the statutory language[85] and purpose[86] did not clearly establish that Congress intended the Act to remedy harms caused by transactions that are "entirely outside U.S. commerce."[87] He explained that the "principles of prescriptive comity counsel against" construing ambiguous statutory language to "interfere with a foreign nation's ability independently to regulate its own

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[73] *Murray v. Schooner Charming Betsy, The*, 6 U.S. 64, 118 (1804); *Lauritzen*, *supra* note 51, at 578 ("This doctrine of construction is in accord with the long-heeded admonition of Mr. Chief Justice Marshall that 'an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'").
[74] *Schooner Charming Betsy*, *supra* note 73, at 118.
[75] *Id.* at 77.
[76] *Id.* at 120. ("[A]n American citizen may acquire in a foreign country the commercial privileges attached to his domicile and be exempted from the operation of an act of Congress expressed in general terms.").
[77] *Id.* at 116-25.
[78] *Id.* at 117.
[79] *Id.* at 116.
[80] *Id.* at 65.
[81] *Id.* at 116.
[82] *F. Hoffmann-La Roche Ltd.*, *supra* note 21, at 158.
[83] *Id.*
[84] *Id.* at 161.
[85] *Id.* at 162.
[86] *Id.* at 162-63.
[87] *Id.* at 159-60.

commercial affairs."[88] Similar to the Court's holding in *Charming Betsy,* the Court in *Hoffman La Roche* held that, absent a clear expression of congressional intent to apply the Sherman Act in cases "where the adverse foreign effect [of the prescribed conduct] is independent of any adverse domestic effect,"[89] [90] [91] comity requires courts to construe ambiguous statutes narrowly so as not to apply U.S. law to economic activity that has no direct connection with U.S. commerce as such an application might unreasonably interfere with other nations' laws.[92]

Further, the CFTC cites to the Supreme Court's ruling in *Hartford Fire Insurance* to support its position that comity limits the extraterritorial reach of Dodd-Frank. The *Hartford* Court considered whether the "principle of international comity"[93] prevented U.S. courts from exercising jurisdiction over Sherman Act claims brought against London-based defendants who allegedly "engaged in unlawful conspiracies to affect the market for insurance in the United Sates."[94] Although the Court found that comity did not apply to the case because the case did not involve conflicting foreign laws, the Court engaged in the comity analysis to try to determine "to what extent, Congress *has* exercised . . . [its] undoubted [extraterritorial] legislative jurisdiction in enacting the Sherman Act."[95][96] Thus, the Court, yet again, only applied comity to clarify Congress's intent to legislate on an extraterritorial basis when this intent was unclear.

In marked contrast to *Charming Betsy* and *Hoffmann La Roche* where the Supreme Court considered if ambiguous statutory language applied to economic activity that was remotely, if at all, connected with U.S. commerce, the plain language of Title VII establishes Congress's *affirmative and express* intent to require foreign subsidiaries of U.S. parent institutions to comply directly with Dodd-Frank requirements. As previously mentioned, Congress passed Dodd-Frank "to protect the American taxpayer by ending bailouts"[97] of Too Big To Fail financial institutions. Further, the plain language of section 722—language that applies Dodd-Frank to swap activities that "have a direct and significant connection with activities in, or effect on, commerce of the United States"[98]—aligns with congressional intent by protecting American taxpayers from the risk of having to regularly bail out financial institutions like AIG, which received $183 billion from American taxpayers to cover losses incurred by its "foreign" subsidiary, AIG Financial

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[88] *Id.* at 165, 169.
[89] *Id.* at 158 (ruling that the Sherman Act did not remedy harms suffered by vitamin distributors located in Ukraine, Australia, Ecuador, and Panama - and that distributed vitamins outside of the United States - due to an "anticompetitive price-fixing activity that is in significant part foreign").
[90] *Id.* at 164.
[91] *Id.* at 159-60.
[92] *Id.* at 166. ("Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* We can find no good answer to the question.").
[93] *Hartford Fire, supra* note 50, at 769.
[94] *Id.* at 796.
[95] *Id.* at 814.
[96] *Id.* at 798 ("Congress expressed no view of the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity.").
[97] Dodd-Frank Act, *supra* note 2, at Preamble.
[98] *Id.* at § 722(d)(i)(1).

Products, based in London.[99] To construe section 722 to suggest that foreign subsidiaries of U.S. parent institutions that are not guaranteed by a U.S. person are not U.S. persons would undermine one of the central tenants of Dodd-Frank and therefore force the American taxpayer to continue to choose between bailing out a financial institution or facing a global depression.

The legislative history of Dodd-Frank fully supports the plain meaning of the "direct and significant" language found in section 722. Members of Congress heard testimony regarding the risks that non-guaranteed foreign subsidiaries pose to their U.S parents and they highlighted these risks in their statements in support of Dodd-Frank. In October 2008, Martin Sullivan, the former President and Chief Executive Officer of AIG, testified before the House Committee on Oversight and Government Reform regarding "the credit default swap portfolio of AIG-Financial Products" in London and the "billions of dollars of unrealized losses" AIG Financial incurred due to its risky swap positions.[100] In December 2008, Senator Byron Dorgan even suggested that AIG's collapse due to trades made by AIG-Financial Products was synonymous with the risks presented by credit default swaps: "There is something called credit default swaps out there, something over $50 trillion of credit default swaps. If someone wants to know what they are, look at the AIG story. You will understand what brought them down. It was run by a little operation over in London with several hundred people."[101] Also, prior to the passage of Dodd-Frank on July 16, 2010,[102] Senators Chris Dodd and Jeff Merkley commented on the risks associated with the global swap market[103] and how bank subsidiaries can easily "imperil" a bank and its holding company, respectively.[104] Thus, Congress clearly knew that foreign subsidiaries of U.S. banks posed a serious threat to the U.S. economy and intended Dodd-Frank to regulate these subsidiaries so that U.S. taxpayers were no longer a risk of having to bailout Too Big To Fail financial institutions.

Finally, the Proposed Guidance does not identify a specific conflict of law that would result from the extraterritorial application of Dodd-Frank and that the CFTC's use of comity would resolve. As Justice Blackmun observed in *Societe Nationale Industrielle Aerospatiale*, "the threshold question in a comity analysis is whether there is in fact a true conflict between

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[99] *Id*. at 156.

[100] Martin Sullivan, former President and CEO of American International Group, *Testimony of Martin Sullivan Before the H. Comm. on Oversight and Government Reform*, 112th Cong. (2012) *available at* http://oversight-archive.waxman.house.gov/documents/20081007101236.pdf.

[101] 154 Cong. Rec. 185, S10848-50 (Dec. 10, 2008), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2008-12-10/html/CREC-2008-12-10-pt1-PgS10848.htm.

[102] Dodd-Frank Act, *supra* note 2.

[103] 156 Cong. Rec. 104, S5828-53 (July 14, 2010), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2010-07-14/html/CREC-2010-07-14-pt1-PgS5828.htm (explaining that Dodd-Frank contains "the tools to see to it that our regulatory agencies and others will have the capacity and the ability to identify, to spot early on problems that emerge both here at home and around the world").

[104] 156 Cong. Rec. 105, S5870-902 (July 15, 2010), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2010-07-15/html/CREC-2010-07-15-pt1-PgS5870-2.htm (Representative Jeff Merkley observing that the activities of bank "subsidiaries and affiliates . . . [can] imperil the bank").

domestic and foreign law."[105] In a recent letter to the CFTC, Swiss financial regulators commented that "[t]he potential extraterritorial reach of . . . [Dodd-Frank] requirements still remains unclear . . . we are not in a position to fully assess the consequences of a registration with the CFTC and whether these [requirements] can be reconciled with Swiss regulatory standards."[106] In fact, the Proposed Guidance only refers to "potentially conflicting regulations"[107] and suggests that international regulation will largely mimic and not conflict with U.S. financial regulation.[108] As was true in *Hartford Fire Insurance*, the fact that the extraterritorial application of Dodd-Frank does present a direct conflict—as opposed to a duplication—of laws confirms that the CFTC cannot rely on comity to exclude non-guaranteed foreign subsidiaries of U.S. parent institutions from the definition of U.S. person.

c. Sections 752 and 719 Do Not Support Using Comity To Restrict the Vast Extraterritorial Scope of Dodd-Frank When U.S. Interests Are at Stake In Violation of Congress's Affirmative Intent to Protect American Taxpayers From the Risks Associated With Overseas Swap Activity of U.S.-Related Institutions.

Sections 752 (a) and 719 do not undercut the express mandate of Section 722. Section 752(a) instructs the CFTC and SEC to "promote effective and consistent global regulation of swaps and security-based swaps" by "consult[ing] and coordinat[ing] with foreign regulatory authorities on the establishment of consistent international standards with respect to . . . [swaps] regulation."[109] Similarly, section 719(c) requires both agencies to study swap and clearinghouse regulations in foreign jurisdictions and to identify areas where these regulations might align with

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105 *Societe Nationale*, *supra* note 51, at 555 (j. Blackmun concurring); *See also Hartford Fire*, *supra* note 50, at 799 (finding that comity did not apply because, despite the absence of clear congressional intent, the Sherman Act did "no[t] conflict with British law"); *Lauritzen*, *supra* note 51, at 582 (1953) (explaining that comity "does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own . . . [interests] and territory;" rather, it "aims at stability and order" in cases where "competing laws are involved").
106 Letter from Patrick Raaflaub and Mark Branson, Swiss Financial Market Supervisory Authority, to Gary Gensler, Chairman, Commodities Futures Trading Commission (July 5, 2012) [hereinafter "Raaflaub and Branson Letter"].
107 Proposed Guidance, *supra* note 1, at 41229.
108 *Id.* at 41216 (acknowledging that the Group of 20 has agreed that OTC derivatives contracts should be subject to reporting, clearing, and exchange-trading requirements that are similar to Dodd-Frank requirements); *see also* Letter from Timothy Geithner, Secretary of the Treasury, to Congressman Spencer Bachus, at 1 (Sept. 14, 2011) [hereinafter "Geithner Letter"] **(**commenting that Dodd-Frank is "set[ting] the global standard for oversight and transparency in the derivates market"); *see also Financial Regulatory Reform: The International Context: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 1, 1 (2011) [hereinafter "Brainard Testimony"], *available at* http://financialservices.house.gov/UploadedFiles/061611brainard.pdf **(**testimony of Lael Brainard, Under Secretary for International Affairs, Dep't of Treasury), at 1.
109 Dodd-Frank Act, *supra* note 2, at § 752(a).

U.S. regulations.[110] Section 719 also requires the CFTC and SEC to "identif[y] areas of regulation that are similar in the United States, Asia and Europe" and to locate "other areas of regulation that could be harmonized."[111] There is no reference within these sections to suggest they qualify the express mandate of Section 722.

Moreover, the requirement that the CFTC consult and coordinate with foreign regulators should be read consistently with section 722—and not used to read Section 722 out of Dodd-Frank—and, subsequently, to pertain to swap activity not governed by the section. Activity outside the ambit of Section 722 includes a swap between two non-U.S. persons that is executed outside the United States. Sections 752(a) and 719 seek a "level playing field" that ensures all swap transactions are treated similarly whoever and wherever they are traded. Even with Dodd-Franks' extraterritorial reach and considering the interconnectedness of all swaps transactions, the U.S. taxpayers would greatly benefit if even truly foreign swaps are traded in a manner that is consistent with the goals of Title VII of Dodd-Frank. That said, sections 752 (a) and 719 do not allow the CFTC to expose U.S. taxpayers to economic peril when a swap transaction has the kind of close ties to the U.S. described in section 722. Congress did not simultaneously instruct the CFTC to: protect the U.S. economy from regulatory arbitrage by applying Dodd-Frank to swap activity that has a "direct and significant" effect on U.S. commerce; and amend Dodd-Frank protections as they pertain to U.S related entities (e.g., foreign subsidiaries of U.S. bank holding companies) to harmonize U.S. and foreign financial regulation at the expense of the U.S. taxpayer and the U.S. economy.

III. Defining Foreign Subsidiaries of U.S. Parent Institutions as U.S. Citizens Constitutes a Reasonable Extraterritorial Application of Dodd-Frank.

Even if the CFTC relies on international comity to construe section 722 of Dodd-Frank—an unprecedented decision given that Congress clearly intended to legislate extraterritorially and that no specific conflict exists between U.S. and foreign laws—comity supports defining non-guaranteed foreign subsidiaries of U.S. parent institutions as U.S. persons because such a classification is inherently reasonable.[112]

a. Comity Supports Defining Foreign Subsidiaries of U.S. Parent Institutions as U.S. Persons.

The extraterritorial scope of Title VII of Dodd-Frank accommodates the interconnectedness of the global derivatives market and provides U.S. regulators with the global reach they need to protect U.S. taxpayers from regulatory arbitrage and ensuing market

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[110] *Id.* at § 719(c)(1).
[111] *Id.*
Societe Nationale, *supra* note 51, at 555 (j. Blackmun concurring) ("When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws."); *Lauritzen*, *supra* note 51, at 582 (observing that courts maintain order by "weighing of the significance of . . . [the action being regulated] and the national interest served by the assertion of authority"); *see* Restatement (Third) of Foreign Relations Law of the United States §§ 403(1), 403(2) (1986) [hereinafter Restatement] (listing several _ factors that courts use to determine if construing an ambiguous statute to have extraterritorial effect is reasonable).

volatility.[113] As Jamie Dimon, chief executive officer of JPMorgan Chase, has commented, banks such as JPMorgan "move trillions of dollars a day around the world, usually for global clients."[114] Thus, in marked contrast to the distinct commercial activities that the Supreme Court addressed in *Charming Betsy* and *Hoffmann LaRoche*, which were entirely removed from U.S. commerce, swaps trading by foreign subsidiaries of U.S. persons entails considerable financial risk to the U.S. taxpayer and the U.S. economy. Requiring such U.S.-related subsidiaries to comply directly with Dodd-Frank radically reduces the risks inherent in the swaps market—risks that have a direct and significant impact on American taxpayers—and therefore is both reasonable and necessary.

As we allude to in section two,[115] the integrated accounting practices used by major U.S. financial institutions and their foreign subsidiaries[116] allow a foreign subsidiary's unmargined trades (backed by no capital reserves) to undermine the stability of the U.S. parent.[117] For example, JPMorgan's recent $9 billion dollar loss resulted from bad trades in complex synthetic credit derivatives made by a single trading desk in the bank's London offices;[118] the desk consistently assume such large positions in the swap market that it was known colloquially as the

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[113] COMMODITY FUTURES TRADING COMM'N & SEC. & EXCH. COMM'N, PUBLIC ROUNDTABLE TO DISCUSS INTERNATIONAL ISSUES RELATING TO THE IMPLEMENTATION OF TITLE VII OF THE DODD-FRANK ACT, at 43 (2011) [hereinafter ROUNDTABLE TO DISCUSS INTERNATIONAL ISSUES], *available at* http://www.sec.gov/news/press/2011/2011-151-transcript.pdf (testimony of Wally Turbeville) ("Derivatives are ephemeral, they defy the notion of territoriality, they defy a lot of things—they defy understanding."); Brainard Testimony, *supra* note 108 (commenting that today's financial markets are global and highly interconnected).

[114] *Dimon on Price Wars, Volcker Rule, Stock Prices* (Fox Business broadcast Feb. 13, 2012), *available at* http://video.foxbusiness.com/v/1450367194001/dimon-on-price-wars-volcker-rule-stock-prices/.

[115] *See supra* 4.

[116] Gensler Keynote Address, *supra* note 13 (observing that "[l]arge, international financial institutions are managed as an integrated web of legal entities" that share treasury, custodial, brokerage and depository functions).

[117] *See id.* ("When one affiliate of a large, international financial group has problems, it's accepted in the markets that this will infect the rest of the group. If a financial run starts on one part of a group, almost regardless of where it is around the globe, it invariably means a funding and liquidity crisis rapidly spreads to the entire consolidated entity."); *id*. (observing that "[l]arge, international financial institutions are managed as an integrated web of legal entities" that share treasury, custodial, brokerage and depository functions). ROUNDTABLE TO DISCUSS INTERNATIONAL ISSUES, *supra* note 113, at 68 (testimony of Robert Cook) (arguing that "broad rules perhaps are best" because "activities in physical [commodities] and not in our country have a huge effect back into [the U.S.] market"); *see also* Gensler Keynote Address, *supra* note 13 (observing that swaps have "concentrated and heightened risk in international financial institutions . . . [and] can contribute to quickly spreading risk across borders").

[118] Ambereen Choudhury and Dawn Kopecki, *JPMorgan Slips on Report Trading Loss Widened to $9 Billion*, BLOOMBERG (June 28, 2012), http://www.bloomberg.com/news/2012-06-28/jpmorgan-slips-on-report-of-trading-loss-widening-to-9-billion.html.

"London Whale."[119] AIG's near collapse during the financial crisis further proves that the financial stability of even major U.S. financial institutions can be undercut by the irresponsible trading practices of a foreign subsidiary. As CFTC Chairman Gary Gensler has observed, AIG's "fast collapse . . . was sobering evidence of the markets' international connectedness. Sobering evidence, as well, of how transactions booked in London or anywhere around the globe can wreak havoc on the American public."[120] Thus, foreign subsidiaries of U.S. financial institutions have a "substantial, direct, and foreseeable effect upon"[121] U.S. Commerce and so can reasonably be required to comply with Dodd-Frank regulation. As Chairman Gary Gensler has observed, overseas swap trades by foreign subsidiaries of U.S. parents "*send risk straight back to our shores*."[122]

Although other states may have a policy "interest" in regulating swaps activity that occurs within their immediate jurisdictions,[123] requiring foreign affiliates and subsidiaries of U.S. persons to comply with Dodd-Frank is clearly justified given the considerable risks that these affiliates pose to the U.S. economy. Although subsidiaries, as a technical legal matter, are separate entities, the fact that foreign subsidiaries and their U.S. parents typically integrate their accounts[124] establishes an obvious connection between the foreign subsidiary, the United States as "the regulating state," and the U.S. taxpayer whom Dodd-Frank aims to protect.[125] In this sense, the fact that Dodd-Frank's rigorous capitalization and collateralization requirements promise to mitigate the direct impact that foreign affiliates and subsidiaries of U.S. parents have on the U.S. economy overrides other countries' general interest in regulating swap activity that occurs within their territory, especially since foreign taxpayers are quite unlikely—especially considering the present austerity of, for example, the European Union countries—to bailout foreign subsidiaries of U.S. financial institutions if these subsidiaries near collapse.[126]

b. Comity Cannot Substitute For Congress's Intent to Protect the American Taxpayer From Future Bailouts.

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[119] *JPMorgan May Lose $5 Billion On Derivatives, WSJ Reports*, BLOOMBERG (May 18, 2012), http://www.bloomberg.com/news/2012-05-18/jpmorgan-may-lose-5-billion-on-derivatives-wsj-reports.html; *see also* Jessica Silver-Greenberg & Nelson D. Schwartz, *JPMorgan Loss Is Said to Rise at Least 50%*, N.Y. TIMES, May 17, 2012, at A1—see if we can just use an Id. here instead of citing two more articles—up to you.

[120] *See* Gary Gensler, CFTC Chairman, *Testimony Before the US Senate Committee on Banking, Housing, and Urban Affairs* (May 22, 2012), U.S. COMMODITY FUTURES TRADING COMMISSION, http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-114.

[121] Restatement (considering "the extent to which the activity . . . has substantial, direct, and foreseeable effect upon or in the territory" and the economic "connections . . . between the regulating state and [either] the person principally responsible for the activity to be regulated, or . . . those whom the regulation is designed to protect").

[122] Proposed Guidance, *supra* note 1, at 41238 (emphasis added).

[123] Restatement, at §§ 402(1)(b); Raaflaub and Branson Letter, *supra* note 106.

[124] *See supra* p. 17.

[125] Restatement, at §§ 403(2).

[126] IMF Iceland reference

If the CFTC adopts the regulatory framework outlined in the Proposed Guidance—in violation of Congress's mandate in Dodd-Frank and despite relevant Supreme Court precedent[127]—the agency cannot, though its use of comity, consider other countries' interests to the total derogation of Congress's intent to protect U.S. taxpayers. The CFTC must balance foreign countries' interests in regulating swap activity that occurs within their immediate jurisdiction with the risks that swap trading that is closely tied to the U.S. economy poses to the U.S. economy and to American taxpayers.

As we have previously established, formal guarantees are not effective measures of risk.[128] That said, if the CFTC continues to rely on "guarantees" to determine if foreign affiliates and subsidiaries of U.S. persons and should be designated "U.S. persons," the agency must define "guarantee" to include implicit as well as explicit guarantees. Such a definition of "guarantee" recognizes that a U.S. guarantor will typically assume a foreign subsidiary's financial obligations even if the guarantor has not formally contracted to assume the risk (e.g. Bear Stearns bailing out two of its hedge funds in the Cayman Islands purely for reputational reason).[129]

Also, we maintain that the CFTC should require a foreign affiliate or subsidiary of a U.S. parent institution to inform its counterparties when the affiliate or subsidiary is *not* guaranteed by the parent.[130] In other words, non-guaranteed foreign affiliates and subsidiaries of U.S. parent institutions should have an affirmative duty to inform their counterparties that their financial obligations are not guaranteed by the U.S. parent. Such an affirmative obligation comports with standard market protocol (i.e. counterparties commonly assume that a swap with a foreign subsidiary of a U.S. parent institution is guaranteed by the parent) and ensures that counterparties that are dealing with a non-guaranteed subsidiary are fully informed of this fact.

IV. Comity Neither Requires the CFTC to Implement Substitutive Compliance Nor Condones Using Substitutive Compliance in All But the Rarest of Circumstances.

The Proposed Guidance allows substitutive compliance for the vast majority of Dodd-Frank entity-level and transaction-level requirements. For example, the guidance subjects guaranteed foreign affiliates and subsidiaries of U.S. parent institutions to capital adequacy, chief compliance officer, risk management, and swap data recordkeeping requirements; however, it allows these affiliates and subsidiaries to satisfy these entity-level requirements through substitute compliance.[131] Similarly, the Proposed Guidance requires foreign branches and agencies of U.S. persons to comply with most transaction-level requirements for swaps with non-U.S. counterparties, but allows such persons to satisfy these requirements through substitutive compliance.[132] In this respect, the Proposed Guidance employs substantive compliance as the default means of regulation and enforcement rather than an alternative means of regulation that should be implemented in rare circumstances.

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[127] Supra p. 1-2, 8-13.
[128] Infra p.
[129] Supra p.6-7.
[130] See letter by Americans for Financial Reform.
[131] Proposed Guidance, *supra* note 1, at 41227.
[132] *Id.* at 41237.

a. Substitutive Compliance Risks Exposing American Taxpayers to Regulatory Arbitrage and The Threat of Future Bailouts.

The congressional and regulatory record is replete with dissatisfaction with foreign oversight of U.S. markets and U.S. entities—entities that pose a direct and significant risk to the U.S. economy and American taxpayers. For example, in 2008 and 2009 U.S. regulators and members of Congress expressed frustration with the U.K.'s Financial Services Authority ("FSA") for its lax regulation of oil futures trading on the Intercontinental Exchange in Atlanta.[133] The CFTC demanded more comprehensive data from the FSA to better "facilitate rigorous oversight of trading in related contracts on U.S. and U.K. derivatives exchanges"[134] and CFTC Commissioner Bart Chilton openly expressed doubt as to the FSA's overall effectiveness. In an "unusually sharp rebuke," Commissioner Chilton stated that the FSA lacked transparency and that the U.K. regulator needed to apply "greater oversight and enforcement."[135] Also, on June 19, 2008, Representative Christopher Shays, a Republican Congressman, introduced a bi-partisan resolution "[u]rging the President to direct the Commodity Futures Trading Commission to work with the United Kingdom Financial Services Authority to establish position limits on oil futures traded by traders on the Intercontinental Exchange that are similar to those established by the Commodity Futures Trading Commission for traders on the New York Mercantile Exchange."[136] Thus, regulators as well as Congressional Representatives from both political parties have expressed deep skepticism regarding substitutive compliance and the ability of foreign regulators to protect U.S. taxpayers and consumers from abusive market activity.

Several Senators also expressed grave skepticism that the FSA could effectively regulate U.S. derivatives markets. Senator Levin complained that "the British regulators do not have any limits on speculation as we do here in the United States, and the British do not make public the same type of trading data we do. That means traders can avoid the limits on speculation in crude oil imposed on the New York exchanges by trading on the London exchange."[137] Senator Cantwell commented that "[i]t's time to melt away the idea that ICE is a foreign board of trade and instead shine some bright light into this dark market and make sure all exchanges trading U.S. commodities be registered."[138] Further, Senator Feinstein was particularly vehement in her

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[133] *See* IPE, CFTC No-Action Letter, 1999 CFTC Ltr. LEXIS 152, 53 (Nov. 12, 1999).
[134] Press Release, U.S. Commodity Futures Trading Commission, CFTC Announces Multiple Energy Market Initiatives, *available at* http://www.cftc.gov/PressRoom/PressReleases/pr5503-08
[135] Jeremy Grant, *Companies & Markets: US regulator takes FSA to task for poor derivatives oversight*, FIN. TIMES (April 22, 2008) *available at:* http://search.ft.com/ftArticle?queryText=%22US+regulator+takes+FSA+to+task+over+poor+derivatives+oversight&y=12&aje=true&x=9&id=080422000166&ct=0
[136] H. Res. 1289, 110th Cong. (2008), *available at* http://www.govtrack.us/congress/bills/110/hres1289/text.
[137] 154 Cong. Rec. 77, S3997-4004 (July 14, 2010), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2008-05-12/html/CREC-2008-05-12-pt1-PgS3997-2.htm.
[138] Press Release, Mary Cantwell, Senators Cantwell and Snowe Demand Intercontinental Exchange Reveal Names Behind Record Oil Prices

criticism: “A 2008 CFTC report found that traders using this London exchange to trade U.S. crude oil futures held positions far larger than would be allowed by American regulators. In fact, from 2006 to 2008 at least one trader position exceeded U.S. speculation limits every single week on the London exchange, and British regulators had done nothing about it . . . Bottom Line: We need to make sure the CFTC can oversee trading of American commodities, whether it happens through a computer server located on Wall Street or in Shanghai.”[139] Thus, the legislative record reflects a deep mistrust of foreign regulators and a skepticism that “comparable” regulation can protect U.S. consumers and taxpayers from having to continue to subsidize Too Big To Fail financial institutions that persist in engaging in risky swap trades in overseas markets.

Despite its highly publicized failure to curb excessive speculation on ICE terminals in Atlanta, the FSA continues to assume a relatively laissez-faire approach to financial regulation.[140] In fact, several scandals shook London’s markets in 2011 alone: UBS allegedly orchestrated a $2.3 billion fraud from its London offices,[141] 12 banks with significant presences in the U.K. were accused of collaborating to manipulate the London InterBank Offer Rate (“Libor”),[142] and the London Whale was permitted to assume immensely risky swap positions that resulted in a multi-billion dollar loss for JPMorgan.[143] British regulators have been particularly heavily criticized for their failure to detect the “blatant” manipulation of Libor, with one former trader calling for British regulators to “be fired for gross incompetence.”[144] The

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CFTC Announces Multiple Energy Market Initiatives (June 12, 2008), *available at* http://www.cantwell.senate.gov/public/index.cfm/press-releases?ID=c8f7e829-80f6-4c85-baa4-b0ed45107303

[139] Dianne Feinstein, Restoring American Financial Stability Act of 2010 – Continued (May 13, 2010), *available at* http://votesmart.org/public-statement/508287/restoring-american-finacial-stability-act-of-2010-continued.

[140] Awrey, Dan, *The FSA, Integrated Regulation, and the Curious Case of OTC Derivatives*, University of Pennsylvania Journal of Business Law Volume 13:1 (January 5, 2011), page 39-43, *available at* https://www.law.upenn.edu/journals/jbl/articles/volume13/issue1/Awrey13U.Pa.J.Bus.L.1%282010%29.pdf (observing that the “*FSA adopted a non-interventionist regulatory regime governing OTC derivatives markets*”).

[141] Choudhury, Ambereen and Crowley, Kevin, *Made-in-London Scandals Risk City Reputation as Money Center*, Bloomberg (July 6, 2012), *available at* http://www.bloomberg.com/news/2012-07-05/made-in-london-scandals-risk-city-s-reputation-as-finance-center.html.

[142] Ahuja, Vivek, *At a Glance: The TSC’s Liborgate Report*, Financial News (August 20, 2012), *available at* http://www.efinancialnews.com/story/2012-08-20/treasury-committee-libor-report?mod=sectionheadlines-home-IB. (criticizing the FSA for failing to detect bank manipulation of LIBOR rates, especially as the FSA had extensive oversight over Barclays and frequently met with representatives from the bank).

[143] Jill Schlesinger, *JPMorgan Chase earnings: 'London whale' cost $5.8 billion*, CBS Money Watch (July 13, 2012), *available at* http://www.cbsnews.com/8301-505123_162-57471697/jpmorgan-chase-earnings-london-whale-cost-$5.8-billion/.

[144]*Libor review: Wheatley says system must change*, BBC News (Aug. 10, 2012), *available at* http://www.bbc.co.uk/news/business-19203103.

failure of the FSA and Bank of England to act on information provided to them by the New York Federal Reserve, which flagged potential problems with the Libor rate,[145] confirms Congress's belief that U.S. regulators are more vigilant and more willing to enforce financial regulation than their foreign counterparties and therefore best suited to ensure that American taxpayers are not forced to continually bailout large financial institutions or face a depression.

a. Comity Does Not Authorize the CFTC To Outsource the Oversight of Foreign Subsidiaries of U.S. Parent Institutions to Foreign Regulatory Regimes That Have Less Rigorous Financial Rules Or That Promise Comparable Regulation That Will Not Be Immediately In Place.

Should the CFTC adopt substitutive compliance, despite deep skepticism in Congress and on the Commission that substitutive compliance will protect American taxpayers from bailouts, it should frame substitutive compliance as an exception rather than the rule and implement clear procedures to evaluate "comparable" regulation. To this end we support the CFTC's decision not to allow substitutive compliance for transactions involving U.S. counterparties[146] since the risk associated with these transactions flows directly back to the United States. For similar reasons to do with risk, the CFTC should not to allow substitutive compliance for swaps that are guaranteed by a U.S. person[147] or for swaps executed between a foreign branch of a U.S. person and a non-U.S. person.[148] We also support the CFTC's decision to only allow substitutive compliance for SDR Reporting "provided the Commission has direct access to the swap data . . . that is stored at the foreign trade repository"[149] and maintain that the CFTC must ensure that foreign jurisdictions provide the agency with all pertinent information about trades etc. in a prompt manner.

We recognize, along with the CFTC, that "comparable does not necessarily mean identical";[150] however, we encourage that the CFTC to adopt a rigorous, empirical approach to judging the comparability of other countries' regulatory regimes that focuses on practical considerations rather than principles. To its credit, the CFTC recognizes the importance of adopting rigorous standards to evaluative "comparable" regimes that accommodates the "heightened requirements and expectations under the Dodd-Frank Act"[151] and includes several factors in the Proposed Guidance that will help ensure that substitutive compliance only extends to foreign regulations that closely align with Dodd-Frank regulation. The CFTC should make a particular effort to ensure that foreign regimes have comparable clearing, business conduct, anti-fraud, anti-manipulation, exchange regulations, and transparency requirements.

We support the CFTC's proposal to review a "foreign jurisdiction's laws and regulations"[152] as well as the "comprehensiveness of the foreign regulator's supervisory

[145] Pedro Nicolaci da Costa, Bernanke, *Geithner response to Libor scandal rings hollow*, Reuters (July 28, 2012), *available at* http://www.reuters.com/article/2012/07/28/us-usa-fed-libor-idUSBRE86R00Q20120728.
[146] *See* Proposed Guidance, *supra* note 1, at 41230.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at 41233.
[151] *Id.* at 41232.
[152] *Id.*

compliance program . . . [and] the authority to support and enforce its oversight of the non-U.S. swap dealer or non-U.S. MSP applicant."[153] We also support the CFTC's suggestion that it "make comparability determinations on an individual basis"[154] as this approach best ensures that substitutive compliance only extends to foreign regulations that are truly comparable with Dodd-Frank. Additionally, in the absence of outlawing substitutive compliance, we encourage the CFTC to establish "a robust and ongoing process of cooperation and coordination" with foreign regulators so long as this process ensures that the CFTC authorizes substitutive compliance only when a foreign regulatory regime "meet[s] the same regulatory objectives [and practical requirements] of the Dodd-Frank Act."[155]

Finally, substitutive compliance cannot involve the mere promise of substitutive compliance. Although many jurisdictions are using the Dodd-Frank statutory framework for a regulatory template,[156] non-U.S. jurisdictions have not gotten heavily into the arduous process of translating statutory principles into operational regulations. For example, the United Kingdom has indicated that it may not implement the general reforms stipulated by the Independent Commission on Banking until 2019, when the new rules established by the Basel III international agreement on capital held by banks comes into effect.[157] The European Union is in a similar

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[153] *Id.*

[154] *Id.* at 41229.

[155] *Id.* at 41232.

[156] Geithner Letter, *supra* note 108, at 1 **(**commenting that Dodd-Frank is "set[ting] the global standard for oversight and transparency in the derivates market"); *see also* Brainard Testimony, *supra* note 108, at 1; COMMODITY FUTURES TRADING COMM'N STAFF, DERIVATIVES REFORM: COMPARISON OF TITLE VII OF THE DODD-FRANK ACT TO INTERNATIONAL LEGISLATION (2010), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/speechandtestimony/gmac_100510-cftc2.pdf (noting that the European Commission's laws governing over-the-counter derivatives align with principles established by Dodd-Frank and that Europe is preparing to implement Dodd-Frank's two-tiered registration scheme); FIN. SERVS. AGENCY, GOV'T OF JAPAN, NEW REGULATION OF OTC DERIVATIVES IN JAPAN (2010), *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/gmac_100510_fsag.pdf (stating that in May of last year Japan amended its Financial Instruments and Exchange Act to adopt similar reporting and clearing requirements to the United States); George Mathew, *Optimistic About Parliament Passing FCRA Amendment Bill in Next Session*, INDIAN EXPRESS, June 27, 2011, http://www.indianexpress.com/news/optimistic-about-parliament-passing-fcra-amendment-bill-in-next-session/809040/2 (reporting that the Indian parliament was debating legislation that, like Dodd-Frank, would restore transparency to OTC markets).

[157] Robert Peston, *Banks Face Biggest Shake-Up for Decades*, BBC NEWS (Sept. 12, 2011), http://www.bbc.co.uk/news/business-14877861; *see also* Mark Hoban, Fin. Sec'y to the Treasury, *Britain Still Leads Critical Financial Reform Talks*, TELEGRAPH, Feb. 19, 2012, http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9091829/Britain-still-leads-critical-financial-reform-talks.

position: it has enacted financial reform legislation, but has only recently begun the rule-making process.[158] The CFTC cannot initiate substitutive compliance in anticipation that these jurisdictions will eventually establish so-called "comparable" regulatory regimes.

If, after the one year delay in the extraterritorial application of the Dodd-Frank expires—a delay that we opposed in our August 13 letter on the grounds that Dodd-Frank does not authorize substitutive compliance[159]—foreign jurisdictions have not implemented comprehensive financial reforms, the CFTC should delay substitutive compliance until these jurisdictions have implemented their financial regulations and are able to bring enforcement actions. Such a delay best ensures that the CFTC can accurately determine whether foreign regulation is compatible with Dodd-Frank. Also, it will prevent foreign subsidiaries of U.S. parent institutions from outsourcing their swap activity to nascent regulatory regimes that have yet to finalize regulations and/or develop enforcement capabilities that will ensure that swap trades are properly capitalized and collateralized. In this respect, delaying substitutive compliance until "comparable" regulatory regimes are fully operational will, per Congress's intent, protect American taxpayers from having to bailout out a Too Big To Fail financial institutions.

V. Conclusion

The CFTC should fully implement the vast extraterritorial scope of Dodd-Frank to protect U.S. taxpayers from the threat of having to bail out Too Big To Fail institutions. Failure to regulate foreign subsidiaries of U.S. parent institutions would create a loophole in Dodd-Frank's otherwise robust regulatory framework that would both allow and encourage U.S. banks to circumvent regulations that Congress intended to restore stability to derivatives markets and protect the U.S. economy from a financial crisis like we witnessed in 2008.

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html ("While we support what has been agreed to date, there remains much work to do.").

[158] *See* ATLANTIC COUNCIL & THOMSON REUTERS, THE DANGER OF DIVERGENCE: TRANSATLANTIC COOPERATION ON FINANCIAL REFORM I (2010), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2010/1007_atlantic_council_elliott/1007_atlantic_council_elliott.pdf (commenting that while Europe is still considering major financial-reform legislation, the U.S. "has already set a framework to address the root causes" of the 2008 financial crisis); *Laws For All: Lots of Rules, But Not All Good Ones*, ECONOMIST, Feb. 18, 2012, http://www.economist.com/node/21547835 (reporting that the European Commission has issued over twenty proposed rules that are at different stages in the legislative process—forthcoming, under negotiation, and adopted—but that overall E.U. regulations are fragmented and trail U.S. efforts to regulate derivatives trading under Dodd-Frank); John O'Donnell, *EU Considers New Controls for Shadow Banking*, REUTERS, Mar. 19, 2012, *available at* http://www.reuters.com/article/2012/03/19/us-eu-shadowbanking-idUSBRE82I0KM20120319 (reporting that the E.U. has been criticized for being "slow to tackle the causes of a financial crisis that struck Europe roughly five years ago").

[159] Comment Letter from Michael Greenberger, University of Maryland Center For Health and Homeland Security, to the Commodities Futures Trading Commission (August 13, 2012).

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