



**ICSA**

INTERNATIONAL COUNCIL of SECURITIES ASSOCIATIONS

August 27, 2012

Mr. David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

**Re: Comment Letter on the Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57)**

Dear Mr. Stawick:

The International Council of Securities Associations (**ICSA**), the global forum for trade associations and self-regulatory organizations that represent and/or regulate firms active in the securities industry, welcomes the opportunity to provide the Commodity Futures Trading Commission (the **Commission**) with comments regarding the Proposed Interpretive Guidance on the Cross-Border Application of Certain Swap Provisions of the Commodity Exchange Act (henceforth referred to as the **Release**).<sup>1</sup> Individual ICSA members have specific comments on various aspects of the Release but those comments will be made separately through comment letters from the individual associations. The focus of this letter will be our comments on the process set forth in the Release for determining the extent to which there can be "substituted compliance" between U.S. regulations and home country regulations for swap dealers organized outside of the U.S.

ICSA welcomes the publication of the Release and particularly its reliance on "substituted compliance", which would in principle allow non-U.S. swaps dealers and major swaps participants (**MSPs**) to meet certain U.S. regulatory requirements by complying with comparable and comprehensive regulatory requirements in their home jurisdictions. The Release is significant precisely because, by allowing for "substituted compliance", it potentially represents a concrete step toward addressing the regulatory challenges posed by the global swaps market.

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<sup>1</sup> ICSA is composed of trade associations and self-regulatory organizations that collectively represent and/or regulate the vast majority of the world's financial services firms on both a national and international basis. ICSA's objectives are: (1) to encourage the sound growth of the international securities markets by promoting harmonization in the procedures and regulation of those markets; and (2) to promote mutual understanding and the exchange of information among ICSA members. More information about ICSA is available at: [www.icsa.bz](http://www.icsa.bz)

This is an extremely important issue for ICSA members, who strongly support efforts to develop globally consistent regulatory reforms and see substituted compliance as an important tool toward achieving that end.

At the same time, however, we are concerned about how substituted compliance as described in the Release would be implemented in practice, since the Release appears to suggest that various methods or approaches could be used. We are particularly concerned about the possibility that the Commission intends for substituted compliance to be granted only in those cases where it finds rule-by-rule equivalence in the regulations of non-U.S. jurisdictions. Such an approach would significantly raise compliance costs for non-U.S. swaps dealers and MSPs, which in turn would increase costs for the U.S. and non-U.S. firms that are reliant upon the global swaps market without any commensurate reduction in systemic risk. Therefore, while we strongly support the concept of substituted compliance, we suggest that the Commission take a much broader, principles-based approach toward substituted compliance than is proposed in the Release.

### 1.1 Differing approaches to substituted compliance suggested in the Release

The Release appears to suggest that different methods for substituted compliance determinations could be used, depending on circumstances. For example, the Release stipulates that substituted compliance for regulations in jurisdictions outside of the U.S. will be permitted, "...if the Commission finds that such requirements are comparable to cognate requirements under the [Commodity Exchange Act (CEA)] and Commission regulations."<sup>2</sup> The Release specifically provides that the Commission could make a positive substituted compliance determination even if the non-U.S. regulations were not identical to the relevant U.S. regulations. In addition, the Release notes that such determinations could include a consideration of the objectives of the non-U.S. regulatory regime, all of which suggests that the Commission would take a principles-based approach to substituted compliance determinations.<sup>3,4</sup>

At the same time, the Release also suggests that the Commission could follow a different approach in cases where a positive substituted compliance determination could not be made following a principles-based review. Specifically, when the non-U.S. regulatory regime does not meet the objectives of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the **Dodd-Frank Act**), the Release appears to suggest that substituted compliance would only be recognized in areas that were strictly comparable with the Commodities Exchange Act and with Commission regulations. Even more worrisome, the Release also suggests that substituted compliance determinations would be made on an "individual requirements basis," which could mean that the Commission would require rule-by-rule equivalence for substituted compliance determinations. In effect, non-U.S. swap dealers or MSPs (or a representative entity on their behalf) will have to demonstrate that substituted compliance is appropriate for each swap regulation to which it is subject. The Commission would then have to make a determination as

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<sup>2</sup> Release at 41,229.

<sup>3</sup> The Release also spells out that "comparable does not necessarily mean identical." *Id.* at 41,233.

<sup>4</sup> The description in the Release of the Commission's intended scope of review of the foreign regulatory regime also appears to be consistent with a principles-based approach.

to comparability for each such requirement. In short, the Release suggests that there could be various methods used for achieving substituted compliance determinations, some of which would clearly be more onerous for non-U.S. swaps dealers and MSPs and non-U.S. regulatory authorities than others.

## **1.2 Modifications suggested for substituted compliance determinations**

ICSA members are in general very supportive of the Commission's proposal to rely on a system of substituted compliance since it would provide a more flexible and less onerous compliance process for non-U.S. swap dealers and MSPs. Moreover, reliance on substituted compliance could alleviate some of the practical concerns regarding cross-border swaps regulation since, rather than relying exclusively on its own resources, the Commission would be able to rely on the resources and experience of regulators in other jurisdictions.

However, we believe that the system of substituted compliance proposed by the Commission in the Release should be modified. In particular, we suggest that the Commission's proposal to make comparability determinations on an individual requirements basis rather than for the foreign regime as a whole should be eliminated. This type of arrangement would be extremely burdensome for non-U.S. swap dealers and MSPs as it would significantly increase their compliance costs without a commensurate reduction in global systemic risk.

Instead, we suggest that the Commission take a much broader, principles-based approach to substituted compliance. Rather than focusing on whether each swaps requirement has a directly comparable provision in a non-U.S. jurisdiction, we propose that the Commission focus on whether the regulatory objectives, intended outcomes and supervisory resources and practices in individual jurisdictions are substantially similar to those in the U.S. In effect, rather than looking for strict comparability, we suggest the Commission concentrate its resources on developing substituted compliance agreements with regulatory authorities in foreign jurisdictions that share similar regulatory approaches and are oriented toward the same outcomes.<sup>5</sup> We also suggest that U.S. and non-U.S. regulators should take the lead in understanding each other's regulatory regimes and explaining why substituted compliance would be appropriate, rather than placing that burden on non-U.S. swaps dealers and MSPs.

ICSA members are hopeful that a system of substituted compliance in the global swaps market, with the features described above, could become a precedent for substituted compliance agreements in other areas of financial regulation, including broker-dealer, investment adviser, future commission merchant and commodity trading advisor registration and compliance. Given the highly interconnected nature of the global financial system, it is imperative that regulators develop a method for coordinating their regulatory regimes more closely with one another. We suggest that substituted compliance arrangements based on regulatory recognition could achieve this objective.

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<sup>5</sup> For fuller discussions of principles-based approaches to regulatory recognition, please see Global Financial Markets Association and The Futures and Options Association Ltd. letters to the Commission dated August 13, 2012.

## Conclusion

In closing, we would like to reiterate that ICSA members welcome the publication of the Release and particularly its reliance on "substituted compliance". However, we are concerned about the type of substituted compliance proposed in the Release, which would apparently require rule-by-rule equivalence between U.S. regulations and regulations in other jurisdictions. Basing substituted compliance determinations on a strict equivalence standard is likely to be problematic due to the significant differences that exist between the relevant regulations in the U.S. and other jurisdictions and could raise concerns about the extraterritoriality of U.S. swaps regulation, an issue which has already been noted in numerous comment letters to the Commission. We suggest that such an approach would significantly raise compliance costs for non-U.S. swaps dealers and MSPs, which in turn would raise costs for the U.S. and non-U.S. firms that are reliant upon the global swaps market, without any commensurate reduction in systemic risk. Therefore, we urge the Commission to reconsider its proposal and adopt a principles-based approach to substituted compliance under which the focus for substituted compliance determinations would be the extent to which the regulatory objectives, intended outcomes and supervisory resources and practices in individual jurisdictions were substantially similar to those in the U.S.

Sincerely,



Jong Soo Park, Chairman  
International Council of  
Securities Associations (ICSA)



Ian Russell, Chairman  
ICSA Standing Committee on  
Regulatory Affairs

cc: Chairman Gary Gensler  
Commissioner Bart Chilton  
Commissioner Scott O'Malia  
Commissioner Jill Sommers  
Commissioner Mark Wetjen