MINUTES OF THE
FOURTEENTH MEETING OF THE
U.S. COMMODITY FUTURES TRADING COMMISSION'S
GLOBAL MARKETS ADVISORY COMMITTEE
NOVEMBER 7, 2012

The Global Markets Advisory Committee (GMAC or Committee) convened for a public meeting on Wednesday, November 7, 2012, at 9:30 a.m. at the U.S. Commodity Futures Trading Commission's (CFTC or Commission) Headquarters Conference Center, located at Three Lafayette Center, 1155 21st St. NW, Washington, DC. The meeting consisted of two panels. Panel I featured U.S. and international regulators who provided updates regarding their respective jurisdiction's implementation of over-the-counter (OTC) derivatives reform and discussed their cross-border implications. Panel II featured GMAC members who discussed issues concerning the current state of OTC derivatives reform.

GMAC Members in Attendance
Ronald H. Filler, Director of the Center for Financial Services Law, New York Law School
Richard Berliand, Member, Supervisory Board, Deutsche Börse AG
George Crapple, Co-Chairman and Co-Chief Executive Officer, The Millburn Corporation
David Downey, Chief Executive Officer, OneChicago
Bryan T. Durkin, Chief Operating Officer, CME Group
Robert F. Klein, Managing Director and Associate General Counsel, Citigroup Global Markets, Inc.
Bonnie Litt, Managing Director and Associate General Counsel, Goldman, Sachs & Co.
James F. Lubin, Managing Director, CBOE Futures Exchange
Stephen O'Connor, Chairman, International Swaps and Derivatives Association
Jiro Okochi, Chief Executive Officer and Co-Founder, Reval
Dan Roth, President and Chief Executive Officer, National Futures Association
Chuck Vice, President and Chief Operating Officer, IntercontinentalExchange, Inc. (for Jeffrey Sprecher, Chairman and Chief Executive Officer, Intercontinental Exchange, Inc.)

CFTC Commissioners and Staff in Attendance
Chairman Gary Gensler
Commissioner Scott O'Malia
Commissioner Jill Sommers
Commissioner Mark Wetjen
Dan M. Berkovitz, General Counsel
Carlene Kim, Deputy General Counsel, Regulatory

U.S. and International Regulators in Attendance
Brian Bussey, Associate Director, Division of Trading and Markets, Securities and Exchange Commission
Robert Cook, Director, Division of Trading and Markets, Securities and Exchange Commission
Daphne Doo, Director of Supervision of Markets, The Securities and Futures Commission, Hong Kong

Kenneth Gay, Lead Economist, Macroeconomic Surveillance Department, Monetary Authority of Singapore
Oliver Harvey, Senior Executive Leader, Financial Market Infrastructure, Australian Securities and Investment Commission
Peter Kersten, First Counselor Economics and Finance, European Commission
Christian Lachaussée, Director, Derivatives Oversight, Quebec, Canada
Ryan Ko, Associate Director of Supervision of Markets, The Securities and Futures Commission, Hong Kong
Masamichi Kono, Vice Commissioner for International Affairs Financial Services Agency, Japan Financial Services Authority
Jun Mizuguchi, Assistant Commissioner for International Affairs Financial Services Agency, Japan Financial Services Authority
Ken Nagatsuka, Assistant Director, Capital Markets Policy Division, Monetary Authority of Singapore
Hidetaka Nishizawa, Deputy Director for International Financial Markets, International Affairs Financial Services Agency, Japan Financial Services Authority
Emil Paulis, Director of Financial Markets, European Commission
Patrick Pearson, Head of Unit, Financial Market Infrastructure, European Commission
Nathalie Piscione, Senior Officer, Post-trading, European Securities and Markets Authority
Fabrizio Planta, Senior Officer, Post-trading, European Securities and Markets AuthorityDerek West, Senior Director, Derivatives Oversight, Canadian Securities Administrators

I. Opening Remarks

Commissioner Jill Sommers called the fourteenth GMAC meeting to order at 9:30 a.m. She welcomed attendees and introduced Ronald H. Filler of New York Law School as the newly appointed GMAC Committee Chair. Commissioner Sommers noted that the Commission has been working diligently with domestic and international regulators to coordinate regulation of the global swaps market. She also noted that the Commission had issued a proposed Interpretive Guidance (IG) for the cross-border enforcement of the Dodd-Frank swaps provisions, as well as a proposed Exemptive Order (EO), and that the Commission had received numerous comments regarding these. Commissioner Sommers further noted that global coordination is the key to regulating the OTC derivatives market.

Chairman Gensler made his opening remarks next. He first thanked Commissioner Sommers for her leadership on international issues and of the Committee, and noted the progress that the CFTC and other international regulators have made in bringing reform to the swaps and OTC derivatives marketplace since the 2009 Pittsburgh meeting which set a December 2012 reform deadline. Chairman Gensler also noted that the Commission was working to complete an exemptive relief order so that certain rules would not take effect until the Commission sorted through the substituted compliance issues. He further noted that the Commission was working to finalize key parts of the IG, particularly the definition of a "U.S. person" and definitions involving what might be entity level versus transaction level requirements.

Commissioner O'Malia then made his opening remarks. He thanked Commissioner Sommers for calling the meeting and the participants for attending. He noted the importance of

international agreement on the OTC derivatives regulations and also stated that the CFTC cannot dictate rules to the world and expect that they be adopted in whole cloth. He then voiced concerns regarding competitive imbalances that may be caused by the Commission's rules.

Commissioner Wetjen also offered opening remarks. He thanked the Commissioners for calling the meeting and noted the importance of continued coordination between international and domestic regulators. He also stated that he looked forward to hearing from the speakers and noted that the information from the meeting will be useful to the Commission.

Finally, Mr. Filler made opening remarks. He first thanked the Commission, especially Commissioner Sommers, for his appointment and then thanked the Commission and its staff for their work in implementing the Dodd-Frank rules. He next welcomed the international regulators and noted that he hoped that the meeting would clearly reflect the varying policy differences that exist globally. Following Mr. Filler's remarks, Commissioner Sommers asked the international regulators to briefly introduce themselves.

II. CFTC and SEC Presentations on Cross-Border Rulemakings and Guidance

A. Presentation by Ms. Kim, CFTC

Commissioner Sommers next turned to Ms. Carlene Kim for her presentation. Ms. Kim began the panel discussion with a broad overview of the IG and the EO proposals. She explained that Section 2(i) of the Commodity Exchange Act (CEA) provides that the Dodd-Frank swap provisions shall not apply to activities outside the U.S. unless those activities have a direct and significant connection with or effect on U.S. commerce. She also explained that the proposed IG and policy statement describe the Commission's interpretation of Section 2(i) as it applies to the Dodd-Frank provisions in the cross-border context.

Ms. Kim then noted that the proposed IG addresses when a non-US entity would be required to register as a swap dealer (SD) or Major Swap Participant (MSP) and the extent to which Dodd-Frank swap provisions would apply to such registrants. She also noted that the proposed IG provides a general framework for a substituted compliance regime under which the Commission would permit non-US registrants to comply with the requirements in their home jurisdiction, instead of Dodd-Frank. Furthermore, she noted that the proposed IG addresses the extent to which Dodd-Frank swap provisions would apply to swap transactions between counter parties, neither of which are registrants.

Following the overview, Ms. Kim briefly discussed the legal and policy rationale behind the proposed IG and also discussed its key elements: the definition of a "U.S. person" and the Commission's tiered approach to the Dodd-Frank swap provisions. Regarding the "U.S. person" definition, she explained that it was intended to include entities or persons organized abroad with activities that have a direct and significant nexus to U.S. commerce. She also noted that the Commission had received comments concerned about the breadth of the definition and that her staff is working to address those concerns. As for the Commission's tiered approach, she explained that there is an entity-level requirement which would apply firm-wide and there is a transaction level requirement which would apply depending on the nature of the counterparties.

Ms. Kim then reported on the aspects of the proposed guidance that would apply to a non-U.S. entity. She described when a non-U.S. entity would be required to count swaps transaction in determining whether a *de minimis* threshold is met. Regarding entity-level requirements, she noted that non-U.S. registrants would be permitted to exercise substituted compliance; however, substituted compliance for swap data repository (SDR) reporting would only be permitted if the Commission has direct access to the data. As for transaction level requirements, she stated that a non-U.S. entity need not comply with these requirements when dealing with other non-U.S. entities unless those counterparties are guaranteed by a U.S. person or is an affiliate conduit of a U.S. person. However, even in those instances, Ms. Kim noted that the Commission has proposed to recognize substituted compliance.

Following these discussions, Ms. Kim added a few remarks about affiliate conduits and the Commission's concerns regarding them. She also noted that foreign branches of U.S. swap dealers and MSPs generally would be subject to the same requirements of its head U.S. office, but would not need to comply with external business conduct rules when facing non-U.S. counterparties and may use substituted compliance.

Ms. Kim next reported on substituted compliance. She noted that the Commission's proposed guidance broadly described a process for and the factors it would consider in making comparability determinations. Specifically, the Commission is not looking for identical regulations abroad, but will consider all relevant factors including the scope and objectives of the relevant regulatory requirements and the comprehensiveness of the foreign regulators supervisory compliance program. In addition, the Commission will be approaching comparability assessments on a category by category basis, not a rule by rule analysis. Furthermore, non-registrants must generally comply with certain transaction level requirements, including reporting, record-keeping, clearing and execution when at least one counterparty is a U.S. person.

Ms. Kim then briefly discussed the proposed temporary relief which would permit non-U.S. registrants to delay compliance with entity level requirements until July of next year. Additionally, she noted that non-U.S. counterparties would be permitted to delay compliance with transaction level requirements until that time. Finally, Ms. Kim noted that the Commission is reviewing both the proposed EO and IG, which reflect careful consideration by the staff of over 200 comments received on the IG and the nearly 30 comment letters on the proposed EO.

B. Presentations by Mr. Bussey and Mr. Cook, SEC

Following Ms. Kim's presentation, Commissioner Sommers turned to Mr. Bussey and Mr. Cook from the U.S. Securities and Exchange Commission (SEC) for their presentations. Mr. Cook first noted that he would be providing information on where the SEC is in the overall process of implementing the securities-based swamp provisions of Title VII and also on how the SEC expects to address the cross-border issues. Mr. Cook also noted that the views he would be expressing at the meeting are his own and do not necessarily reflect the views of the SEC, the Commissioners, or staff as the SEC, as a matter of policy, disclaims responsibility for statements by SEC employees.

Mr. Cook then reported that the SEC has now proposed all of the major rules required by Title VII for securities-based swaps and has adopted some final rules, including those related to clearing as well as joint definitional rules related to swap dealers and MSPs with the CFTC. He also reported that the SEC had issued a policy statement in June requesting comments on the sequencing of compliance dates for when the Title VII rules would take effect. Mr. Cook explained that in the process of proposing these rules, the SEC has generally not addressed their cross-border implications, and this is because the SEC intends to address the international applications of Title VII in a single proposing release, rather than in a piecemeal fashion.

Mr. Cook next informed the Committee that the cross-border release will be published in the next few months, before the substantive rules take effect, so that the SEC can consider comments received on cross-border. He also noted that the preparation of the cross-border release has been difficult and substantial for a number of reasons: 1) the SEC is doing this as a rulemaking proposal rather than an interpretive guidance, 2) the scope of the rulemaking proposal is very broad, and 3) there are challenges associated with imposing a new regulatory regime on a preexisting market.

Mr. Cook then noted the global nature of the securities-based swaps market and stated that in addition to thinking about reducing system risk and protecting investors, regulators need to consider foreign regulatory frameworks and international comity. In addition, they need to avoid cross-border regulatory arbitrage or competitive imbalances, as well as the duplication of rules or creation of conflicting requirements. He further explained that the SEC has been considering these factors by working with foreign regulators and CFTC staff and by preparing and sharing detailed charts on Title VII.

III. Panel I: Regulatory Updates from International Regulators Regarding Cross-Border Implications of Each Respective Jurisdiction's OTC Derivatives Reform

A. Presentation by Mr. Kono, Japan Financial Services Authority

Following Mr. Cook's presentation, the international regulators presented on the cross-border implications of their OTC derivatives reforms. Mr. Kono presented first noting that his comments should only be attributed to him, and not necessarily to the Japan Financial Services Authority (JFSA) or the International Organization of Securities Commission (IOSCO) Board, on which he serves as the chair. He then noted the collective commitment that the G20 countries made in Pittsburgh relating to the OTC derivatives markets and commended the CFTC for its efforts to comply with the end of 2012 deadline.

Mr. Kono next reported that Japan is also working to meet the G20 commitments. In May 2010, Japan enacted a law that requires clearing with Central Counterparty Clearing Houses (CCPs) and reporting to trade repositories (TR), and in September 2010, Japan enacted legislation that will require the use of electronic trading platforms.

Mr. Kono then turned to a discussion of the Commission's proposed reforms. He noted that Japanese market participants would like more clarity regarding CFTC's registration requirements for Japanese firms when they eventually register as swap dealers. With respect to

substituted compliance, he noted that he would also like to see more clarity and some assurances that Japanese regulations would qualify as being equivalent on OTC derivatives transactions. Mr. Kono also voiced concerns about duplicative requirements for central clearing and data reporting in cross-border transactions and stated that Japan will refrain from applying its rules to cross-border transactions until international agreements are in place. Mr. Kono then noted he would like to see Japan's CCP be licensed by the CFTC, and would also like to see common rules applied by both the CFTC and SEC

Mr. Kono next reported that the JFSA and Bank of Japan submitted joint comments in August 2012 which raised concerns regarding overlapping and conflicting regulations and the need for international coordination in cross-border regulation. In addition, he stated that the joint comments requested clarification on substituted compliance, procedures, and timing, and also requested a deferral of the application of CFTC's regulations with regard to non-U.S. persons. He further noted that the comments requested exclusion of certain transactions from the calculation of swaps transaction with regard to the *de minimis* threshold for non-U.S. person.

Mr. Kono then stated that he would like to see more clarity regarding the Commission's rules before they come into force, and that the challenges non-U.S. persons are facing in terms of preparations, potential conflicts and inconsistencies, could result in major reductions in market liquidity and/or shifts in transaction venues. He also noted the necessity of having a CCP licensed in both Japan and the U.S. so that market participants can complete swaps without being in conflict with both U.S. and Japanese regulations. Mr. Kono then noted that international cooperation is necessary to avoid duplicative and conflicting regulation at both entity and transaction-levels.

B. **Presentation by Mr. Planta, European Securities and Markets Authority**

Mr. Planta began with an update on the European Union's (EU) regulatory reforms. He reported that the legislation implementing the G20 mandate went into force on September 16, 2012. He also reported that the European Securities and Markets Authority (ESMA) delivered technical standards necessary for the regulations to take effect to the European Commission (EC) in late September, and that the EC is expected to endorse the technical standards by the end of the year. Mr. Planta also noted that of the more than forty technical standards, the ESMA did not deliver two to the EC and chose to postpone these instead.

Mr. Planta then turned to a discussion about the European approach to third countries. He reported that the EC had mandated that the ESMA issue technical advice for assessing the equivalence of different jurisdictions in three areas: OTC derivatives, risk mitigation techniques, and trade repository requirements. He also emphasized the benefits of an equivalence approach compared to a registration and substituted compliance approach and expressed his concerns about the U.S. approach, noting high compliance costs and the difficulty in concluding certain transactions because of rule conflicts. Mr. Planta concluded his presentation by stating that international regulators have the responsibility to find mutually acceptable, workable issues to resolve these concerns.

C. **Presentation by Mr. Paulis, European Commission**

Mr. Paulis presented next and reported that the EU has a comprehensive regulatory framework in place and is on track to fully implement the G20 commitments. He also noted that in many instances, EU rules are quite often stricter than U.S. rules. Mr. Paulis then reported that the derivatives market is a hugely important global market and that it is important for the EU to deliver in the areas of banking and derivatives. He also stressed that no one foreign regulator can succeed in controlling the market by itself and that the EU's goal is not about extending its laws beyond its borders but about closing loopholes through cooperation among regulators.

Mr. Paulis then explained that the EU has within its statute a full system of substituted compliance in place. He reported that the mandatory clearing imposed by the G20 is a novelty and that it is important that regulators refrain from adding obligations which are not absolutely necessary. This means that regulators should try to avoid the application of multiple rules where possible. He also echoed Mr. Planta's remarks of the importance of having one set of applicable rules, and he noted that the issue with multiple rules is that they can create an undue burden which is not necessarily required to ensure financial stability in the markets.

Following this, Mr. Paulis expressed his concerns about the reach of U.S. and international laws. Specifically, he stated that regulators should try to reduce this reach to a minimum and he provided the registration requirement as an example. Mr. Paulis also voiced his concern about substituted compliance, noting that it should only be available if comparable standards are vigorously enforced. He explained that substituted compliance is not a blank check and that it must go hand-in-hand with cooperation between regulators. Further, he noted that in the case of substituted compliance, equivalence, or recognition to a third country regime, there needs to be a claw back power. Finally, Mr. Paulis stated that substituted compliance should not be equivalent to soft enforcement and that if there is no substituted compliance in the area of mandatory clearing, then the system is simply not workable.

D. **Presentation by Mr. Pearson, European Commission**

Mr. Pearson delivered his presentation next. He first noted that the EU has assessed CFTC's and the EU's derivatives regulations and has concluded that these rules will result in global inconsistencies, conflicts, and gaps. He also voiced concern that many of the G20 expectations and requirements will not be met. Mr. Pearson then provided examples detailing how the proposed approaches are problematic. For example, he noted that conflicting clearing requirements will prevent some trades from being executed in either jurisdiction, which will have adverse effects on the economy. Mr. Pearson also highlighted potential conflicts between EU and U.S. swap data reporting requirements. Finally, Mr. Pearson noted that the CFTC's registration requirements, definition of "U.S. persons", and the scope of substituted compliance are problematic, but that these and other issues can be resolved through cooperation.

E. **Joint Presentation by Mr. Harvey, Australian Securities and Investment Commission; Mr. Ko, The Securities and Futures Commission, Hong Kong; and Mr. Nagatsuka, Monetary Authority of Singapore**

1. **Presentation by Mr. Harvey, Australian Securities and Investment Commission**

Mr. Harvey presented next and noted that the Australians have a framework in place for regulating what the CFTC would consider as swap dealers at the entity level. At the transactional level, he reported that there is legislation moving through the Australian Parliament that will provide the government and regulators the power to mandate trade reporting, clearing, and trading on the platform. He also reported that Australian Securities and Investment Commission (ASIC) has licensing agreements in place for clearing facilities and for trading platforms, and that the ASIC recently published a market oversight assessment report on the Australian OTC market that included recommendations in expectation of the legislation moving through Parliament.

2. **Presentation by Mr. Ko, The Securities and Futures Commission, Hong Kong**

Mr. Ko then delivered his presentation. He first informed the Commission that the Securities and Futures Commission (SFC) is finalizing a consultation paper it issued in October 2010 to the public regarding the Hong Kong OTC derivatives markets. Mr. Ko then explained that the SFC needs to amend its securities and futures ordinances to implement reform of the Hong Kong OTC derivatives market and that the amendments which will consist of two stages will be completed by the third quarter of 2013.

Mr. Ko next discussed the cross-border application of the OTC derivatives rules. He noted that there may be circumstances in which Hong Kong regulations will apply to transactions outside of their jurisdiction, such as a transaction involving a foreign subsidiary of a Hong Kong bank. He also explained that third country trading venues and CCPs may offer services in Hong Kong if approved by the SFC. As to mandatory reporting, Mr. Ko explained that trades must be reported to ATR.

3. **Presentation by Mr. Nagatsuka, Monetary Authority of Singapore**

Mr. Nagatsuka delivered his presentation next. He first noted that Singapore is committed to implementing the G20 reforms and also explained that over the course of two years it conducted policy consultations on OTC derivatives, trade repositories, and mandatory clearing and reporting obligations. Mr. Nagatsuka then reported that these consultations have resulted in a set of draft laws which will be implemented in two phases. The first phase consists of passing legislation implementing mandatory clearing and reporting requirements, as well as the supplementary regulatory framework for OTC derivatives clearing facilities and trade repositories by the end of 2012. As for the regulation of OTC derivative market platforms and market intermediaries, Mr. Nagatsuka explained that these OTC reforms are being considered and that the Monetary Authority of Singapore (MAS) will consult on them later in 2013.

Mr. Nagatsuka then reported on cross-border concerns. He explained that generally the mandatory clearing and reporting obligations will be applicable as long as there is a Singapore counterparty to the transaction. Mr. Nagatsuka also reported that foreign clearing facilities and

trade repositories can seek licensing from MAS if it determines that the entities are subject to regulations comparable to those in Singapore and there are adequate arrangements for cooperation between MAS and the foreign regulator. In closing, he noted that Singapore has put a foundation in place for smoothing the edges where Singapore's laws and foreign laws overlap and that there still may be other cross-border implementation issues.

4. **Presentation by Mr. Gray, Monetary Authority of Singapore**

Mr. Gray then delivered his presentation. He explained that the cross-border concerns are twofold and are similar to those raised by Europe and Japan. The first concern is that entities outside the U.S. may be subject to the requirements of multiple jurisdictions which creates the potential for overlapping and conflicting requirements. The second concern is that there is uncertainty over the meanings of key terms in the proposed cross-border guidance.

Mr. Gray then explained that six issues with CFTC's proposed cross-border guidance have been identified. Regarding the first two issues, he reported that there is uncertainty regarding the scope of the "U.S. person" definition and that the regulators in the joint presentation support an outcomes-based approach to substituted compliance assessments. Mr. Gray then informed the Committee that Ms. Doo from the SFC would report on the next two issues.

5. **Presentation by Daphne Doo, The Securities and Futures Commission, Hong Kong**

Ms. Doo noted that the third issue with the proposed IG is client confidentiality. She explained that there is a potential problem when the counterparty whose information is being reported is located outside the jurisdiction that requires the reporting and that compliance with U.S. reporting requirements may be hampered by conflicts in local privacy or bank secrecy laws. Ms. Doo then noted that the fourth issue with the proposed IG is U.S. affiliation. Under the proposed guidance, non-U.S. swap dealers and major swap participants can delay compliance on certain entity level and transaction level requirements through temporary exemptive relief provided that the entities are not affiliated with or subsidiaries of U.S. swap dealers. Regarding this condition, Ms. Doo explained that there are circumstances under which a U.S. person and non-U.S. person actually operate independent of each other and that these entities are affiliated purely because of a common parent located outside the U.S. Therefore, Ms. Doo suggested that the Commission remove or modify the definition of affiliation.

6. **Presentation by Mr. Harvey, Australian Securities and Investment Commission**

Mr. Harvey presented again on the final two issues. He briefly noted that timing of the implementation of the proposed cross-border guidance is an issue and that there is strong support for any available flexibility. As for the final issue, he urged that the mechanics regarding the registration of a domestic CCP happen swiftly, if the need arises.

F. **Presentation by Mr. West, Derivatives Oversight Quebec, Canada**

Mr. West delivered his presentation next. He first noted that FSB had issued a statement yesterday urging regulators to pursue further discussions before the close of 2012. He then explained that the majority of the Canadian derivatives contracts between its financial institutions are with foreign counterparties, particularly the U.S. and that the Canadian Securities Administrators (CSA), the umbrella group for Canada's provisional securities commissions, and that the CSA has been working diligently to meet the G20 objectives. He further explained that the rules regarding the derivatives markets are not harmonized, but that model rules that can be adapted in the provinces are being drafted. CSA hopes to publish trade repository rules by January 2013 and clearing rules afterwards.

Mr. West then raised concerns about the timelines for the implementation of the rules in other jurisdictions. For example, he explained that until the trade repository reporting rules are in place, there is no privacy protection for those individuals who are reporting. Mr. West also spoke briefly on a few other issues and concerns. He noted that substituted compliance should be done on a holistic basis, rather than a rule-by-rule or line-by-line basis, and that regulators should take international initiatives, such as the Basel Committee on Banking Supervision (BCBS) and IOSCO working group on margin requirements, into consideration. Mr. West also informed the Committee that the development of a trading mandate for electronic trading is not currently being contemplated until there is more to review the TR data.

In closing, Mr. West stated that progress has been made with regard to implementing the G20 objectives and that the CSA looks forward to ongoing cooperation with the international regulators.

G. **Questions and Answers**

Following the presentations by the international regulators, Commissioner Sommers noted that she was encouraged by each jurisdiction's progress towards meeting the G20 commitments and that while there are a number of challenges and concerns expressed by the international regulators, they are committed to resolving any existing conflicts. Commissioner Sommers then asked the international regulators to comment on next steps so as to ensure coordinated efforts and protection of the markets.

Mr. Paulis commented among other things that the parties should identify the conflicts and inconsistencies in the regulations and then cooperate to reach agreement on those issues. He also stated that substituted compliance and equivalence can resolve conflicts, inconsistencies, and overlaps in the regulations, and that work on substituted compliance and the definition of a person whether U.S., E.U., Hong Kong, etc., can resolve regulatory gaps. Mr. Kono agreed with Mr. Paulis and also emphasized the importance of resolving particularly conflicting parts of the rules or the most contentious issues in the near term.

Commissioner Sommers next asked the Commissioners in attendance for any comments. Chairman Gensler noted that the Commission is working on the urgent matters discussed by Mr. Paulis and Mr. Kono and that the Commission will consider the comments it has received

regarding the definition of a "U.S. person." He next commented that there will be gaps as a result of the regulations as each of the regulators have different political systems and cultures, as well as histories that animate the inclusion of specific language in a particular regulator's statute, and that for the U.S. the registration regime for swap dealers in Dodd-Frank is one such example. Chairman Gensler also commented that the registration regime is partly the result of the global nature and structure of modern financial institutions and the risks associated with these institutions should one of these fail overseas, nothing as examples AIG, Long-Term Capital Management, and Citicorp among others.

Chairman Gensler then addressed some of the other comments raised by the international regulators by noting that the Commission would tighten the "U.S. Person" definition and the aggregation rules. He also noted that the Commission is considering substituted compliance and that the Commission is fine with clearinghouses. Finally, Chairman Gensler noted that all the regulators were grappling together to enhance transparency and oversight as a result of the financial system failure that affected people across the globe.

Commissioner O'Malia commented that he would like additional information on the "direct and significant test." Specifically, what it is and whether the EU had any thoughts on solving the transaction-level requirements in light of the test. Mr. Pearson commented that risks flow from the Atlantic to both the EU and the UK. He next noted that the EU has recognized that they do not have the resources or ability to regulate the thousands of EU financial institution affiliates in other jurisdictions around the world. Mr. Pearson then further noted that the only solution is substituted compliance, and that EU cannot decipher the scope of a direct and significant impact on the EU until it sees how other jurisdictions apply the scope.

Following this, Chairman Gensler briefly commented that in his view, the Commission is going to rely on substituted compliance. He further noted among other things that the Commission too is a small agency and that the Commission and other regulatory bodies are in-line with key requirements, such as clearing and margin.

In response to Commissioner O'Malia's question, Mr. Paulis noted that the EU has not yet implemented the "direct and significant test", but that where there is equivalence, there won't be a need to apply the test. Mr. Paulis then provided his view of substituted compliance in the context of Dodd-Frank and EU law, and the registration of swap dealers. Ms. Kim then commented that the transaction-level reporting requirements are designed in part to add transparency to the market and noted that in many foreign transactions where the home jurisdictions supervisory interests are superseding, substituted compliance will be available.

Commissioner Wetjen then asked the panel: 1) the reason for the heightened concern regarding the registration requirement and 2) the difference between registration under the substituted compliance regime and the historic "recognition" system. In response, Mr. Pearson and Mr. Kono commented among other things that the definition of a "U.S. Person" is too broad and the consequences of registration are uncertain at this point. Commissioner Wetjen next asked whether more meetings like the GMAC one would be helpful to the foreign regulators. In response, Mr. Paulis noted that additional meetings to further discuss a common interpretation of

a foreign person, a broadening of the application of substituted compliance, and timing of requirements would be beneficial.

Commissioner Sommers next turned to Committee Chairman Ron Filler for questions. Mr. Filler asked the panelists which of the following was the higher priority : 1) reducing systemic risk with regard to swaps clearing or 2) having a substituted compliance type regime in place. Mr. Pearson stated that the international regulators present have voiced their commitment to international clearing, but it must be done on an international basis. Mr. Pearson also stressed the need to act quickly because the year is almost over.

Commissioner O'Malia then asked the panel if there are privacy concerns implicated by data reporting and sharing. In response, Ms. Doo commented that the International Swaps and Derivatives Association (ISDA) had surveyed twenty-three jurisdictions and identified seven with privacy concerns that need to be resolved.

Commissioner Sommers then asked the GMAC members whether they had any questions. Mr. O'Connor commented that ISDA strongly agrees with the G20 goals and that the regulators must work to avoid overlaps in regulations, inconsistencies, timing differences, and inefficiencies among other things. He also added from a market perspective the importance of having a level playing field for market participants, of reducing the implementation burden, and deferring the application of CFTC rules to non-U.S. persons. Mr. O'Conner then asked whether it would be helpful to create a group under IOSCO to resolve cross-border issues. Mr. Kono commented that IOSCO had already decided to create a new work stream to deal with cross border issues, but that work at IOSCO may not be quick enough to deal with the issues that will be arising by the end of the year. However, Mr. Kono further noted that he would raise these issues with IOSCO again.

Commissioner Sommers next informed the Committee members that GMAC would be breaking for lunch. She also thanked the panelists, Committee members, and staff for attending the meeting and discussing the cross-border issues

IV. Panel II: GMAC Members' Panel

The second portion of the GMAC meeting continued with Committee Chair Filler leading the discussions.

A. Definition of a "U.S. Person"

Mr. Filler noted that the first topic for discussion would be the definition of a "U.S. person." He asked the panelists whether 1) the "U.S. Person" definition in an October 12 No-Action letter issued by the CFTC should be the final definition and (2) whether the definition should be consistent across CFTC regulations. Ms. Litt noted that there currently isn't a "U.S. Person" definition in the futures markets and expressed her concerns regarding the use of this definition under the CEA.

Mr. Berliand then addressed three main issues emerging in the European markets: 1) end users are facing uncertainty regarding the rules and registration requirements; 2) market participants are feeling constrained by the timing requirements, even in cases where deferrals have been issued; and (3) regulations will affect the markets, including a temporary drop in liquidity and the potential for many transactions to become futurized in order to avoid Dodd-Frank. Mr. Filler then asked whether Mr. Berliand had spoken to clients about moving to swap-futures. In response, Mr. Berliand indicated that while some market participants would accept a transition to futures, others would not because futures do not address their specific risk-management requirements. Mr. Durkin echoed Mr. Berliand's sentiments. Mr. Durkin also added that market participants are facing confusion regarding whether or not they qualify as a "U.S. Person," and that the October 12th definition offered by the CFTC added some clarity.

Commissioner Wetjen next asked whether there are specific issues relating to the October 12th "U.S. Person" definition. Mr. Durkin commented that there is a general confusion among market participants as to whether they must register with the CFTC and whether they will be able to engage in substituted compliance. Mr. Klein stated that the No-Action definition issued on October 12th did address some customer concerns, but that there is still confusion amongst market participants.

Commissioner Wetjen then asked whether the confusion Mr. Klein identified stems from the meaning of the exact words in the October 12 No-Action relief. In response, Mr. Klein stated that the confusion has to do with what the rule will shape up to look like. Ms. Litt agreed that market participants will face uncertainty until a definition of "U.S. Person" is finalized. Mr. O'Connor then noted that the final definition of a "U.S. Person" should be very precise in order to prevent uncertainty and expressed his support for phasing in the regulatory regime once the rule is finalized. Mr. Vice next stated that market participants in the energy market would prefer that swaps transactions be transitioned to futures contracts and that a broader "U.S. person" definition may be appropriate. He also added that the futures market relies on doctrines of equivalence and that may be the best approach for swaps as well. Mr. Berliand noted that if foreign firms are required to register with the CFTC, they will likely have to be monitored by the National Futures Association (NFA) and it remains unclear what rules they will have to comply with.

Mr. Filler then asked the Committee whether they believe registration or substituted compliance is the more important issue. Mr. Berliand noted that there is a perception of fear regarding registration for market participants as they do not know what things may follow after registration. Mr. Roth then commented on the vetting aspect of registration and noted that he did not see what additional benefit registration serves if a comparable foreign regulatory regime has some form of vetting as well.

Mr. Okochi, returning to the "U.S. person" definition, noted among other things that the definition is causing a drop in cross-border liquidity. He also asked whether Legal Entity Identifiers (LEI) could be used to track who qualifies as a "U.S. Person." In response, Ms. Litt indicated that the LEI can only be used once and some entities may change their status as a "U.S. Person" over time.

Mr. Downey commented that new derivatives regulatory regimes will spur product innovation in the futures market to meet customer concerns. He also highlighted customer challenges presented by moving the OTC derivatives markets onto exchanges and noted that it would be useful for all domestic financial regulators to settle on a common "U.S. Person" definition.

Following this, the panelists discussed what type of non-U.S. commodity fund should or should not fall with the definition of a "U.S. person." Mr. Crapple first noted among other things that the eventual futurization of swap transactions will solve many issues, including taxation concerns. Ms. Litt commented that, in her opinion, the U.S. person definition is motivated by legitimate CFTC concerns of Dodd-Frank evasion, but that CFTC has many anti-evasion policies which bring in many entities that should not be within Dodd-Frank. Mr. Klein added that it will be difficult for market participants to evaluate and track counterparties in order to determine whether they are "U.S. Persons."

Mr. Filler next asked whether a Part-30 type regime (of the CEA) should apply to swaps. Among the various comments, Mr. Klein noted that this could be a workable regime under a holistic and a not a rule-by-rule, requirement-by-requirement approach. Mr. Filler then asked whether a "consent to jurisdiction" approach with no registration is an acceptable standard. Mr. Downey stated among other things that "consent to jurisdiction" is an obligation, not a right. Ms. Litt then commented on a Part-30 type approach and discussed substituted compliance in terms of a rule-by-rule analysis.

Commissioner Wetjen then asked Ms. Litt if there was any legal reason that a Part 30-like approach couldn't be applied to Title VII of Dodd-Frank. In response, Mr. Klein and Ms. Litt contrasted Part 30 and the proposed IG. Mr. Klein added that the Commission is capable of reaching a similar result through No-Action letters and exemptive relief.

Mr. Lubin, on the "U.S. person" definition, noted that he envisions product innovation by futures exchanges to meet new customer demand. Mr. O'Connor added that an exemption for foreign banks that would not require them to count on-shore transactions with U.S. banks would cure the currently fractured nature of the interbank market.

Next, Mr. Filler asked whether 1) a non-U.S. person that is guaranteed by a U.S. company or under a common control falls under the definition of a "U.S. person", and 2) assuming mandatory clearing, should these cleared swaps count toward the *de minimis* test. Regarding the first issue, Ms. Litt commented that this type of U.S. person should not be included in the definition. Mr. Berliand and Mr. O'Connor expressed concerns about the tight deadlines. As for the *de minimis* test, Mr. Durkin commented from the perspective of energy markets. Mr. Crapple noted that foreign exchange swaps should be exempted from the *de minimis* threshold because they are already traded on a fully-margined basis. Mr. Klein commented that an entity that only engages in cleared swaps should not be required to register because the clearing mechanism will provide disclosure and reduce systemic risk.

B. Substituted Compliance

Following the discussion of the definition of a "U.S. person", Mr. Filler turned to the topic of substituted compliance and invited comments. Mr. Okochi noted the difficulty of establishing a comparable regulatory structure, particularly in light of privacy laws and gaps between the different rules. Mr. Roth commented among other things that governments already share information about futures transactions and queried why privacy laws are an impediment with regard to swaps transactions. He also noted the importance of being precise in using the term "substituted compliance" as it impacts the monitoring of compliance with substituted compliance rules. Mr. Berliand expressed concern about time constraints and commented that if the U.S. and Europe could come to an agreement on principles, perhaps through IOSCO, then the rest of the world would coalesce around those principles.

Commissioner Sommers then asked Mr. Berliand what role IOSCO could play in drafting principles for substituted compliance. In response, Mr. Berliand commented that if the regulators had another three years, then IOSCO could play a role. However, because of the impending deadline, the starting point should be the general principles that many jurisdictions have already been forming with focus on the areas that these jurisdictions are most concerned with. He then again suggested that U.S. and Europe agree bilaterally on these principles. Mr. Durkin agreed with Mr. Berliand and noted that he was encouraged by the openness expressed by foreign regulators in working together and with the Commission on the issue of substituted compliance.

Commissioner Sommers next asked whether there were any other issues that should be discussed this afternoon. Mr. O'Connor asked for clarification on the driving force for the time constraint. Mr. Berkovitz commented that the deadline is being driven by a Financial Stability Board (FSB) request to identify gaps and inconsistencies and also see if there are areas which the regulators can agree to; the deadline is not for a solution to all the issues. Mr. Klein then expressed his concern that issues discussed today will not be resolved by the registration deadline and asked whether the Commission will allow more time for compliance with the various rules. Mr. Berkovitz noted that the Commission is internally discussing how to deal with the transitional issues and is committed to ensuring a smooth transition. In the past, the Commission, where appropriate and needed, has issued No-Action letters and exemptive orders when there has been a deadline. Mr. Klein then commented on the importance of giving market participants sufficient time to comply with the new rules to avoid market disruptions.

Mr. Filler then invited comments on the "conduit theory" in which one entity negotiates and agrees to the swap transaction and another entity books the transaction. Mr. Klein noted the global nature of the derivatives market and commented that it is not necessary to regulate every party in a transaction, but that it is necessary to regulate appropriately to achieve the goals for the regulation. Ms. Litt commented that the conduit approach is focused on preventing evasion, but that Dodd-Frank already has significant anti-evasion authority. Ms. Litt also noted that financial institutions use conduits for legitimate reasons, not just evasion.

Commissioner Wetjen asked for additional information on the impact of registration on market participants. Mr. Roth responded that provisional registration would not be a problem.

Mr. Klein commented that actual registration does not present a problem, but the issue is which rules market participants actually have to comply with. He then noted that the Commission should defer its rules until data is gleaned from the swap data repositories.

Mr. Filler then asked the panelists which rule of the IG proposal that they would like to see changed. Ms. Litt commented that she is concerned with all the topics on the agenda – the "U.S. persons" definition, substituted compliance, and the conduit approach. Mr. Lubin noted that the importance of finding consensus among the leading regulators on the issues and working to resolve them. Mr. O'Connor expressed his concern over substituted compliance. Mr. Okochi suggested that the timing issue be resolved. Mr. Roth requested that any exemptive relief that may be granted be issued at an earlier time. Mr. Vice noted the importance of international cooperation in drafting rules for clearinghouses and exchanges. Mr. Klein noted that his institution had already filed comment letters and pointed to those as his response. Mr. Durkin asked for clarity on mutual recognition. Mr. Downey noted the importance of increased cooperation between the U.S. and EU. Mr. Crapple commented that exchange traded or margined swaps should not be counted toward the *de minimis* threshold. Mr. Berliand asked for a more iterative process.

Following these comments, Commissioners Sommers, O'Malia, and Wetjen thanked the GMAC members for their participation. Commissioner O'Malia added that the main takeaways from the meeting were the committee's and international regulators' concerns regarding the "U.S. Person" definition and substituted compliance. Mr. Filler also thanked the participants and adjourned the meeting at 3:53 p.m. on November 7, 2012.

I hereby certify that the foregoing minutes are accurate:

Ted Serafini
Acting GMAC Chairman

4-15-14
Date