



3 April 2013

Honorable Gary Gensler
Chairman
U.S. Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street NW
Washington DC 20581

Re: Dodd Frank extraterritorial effects

Dear Chairman Gensler:

The European Financial Markets Lawyers Group (www.efmlg.org) is a body established in 1998 and composed of senior lawyers from the major banking institutions of the European Union. The EFMLG is active in wholesale and investment markets, whose purpose is to discuss legal matters, both regulatory and contractual, of common interest with the aim of contributing to the furtherance of integration of financial markets in Europe.

First and foremost, the EFMLG fully supports the work initiated by financial market authorities in the field of OTC derivatives, as expressed in the Joint Statement published on December 4, 2012, particularly that Statement's affirmation of (i) the need for coordination among jurisdictions regarding the regulation of cross-border activities; (ii) the need to prevent the application of conflicting rules; and (iii) the need to minimize the application of inconsistent or duplicative rules. (See Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-Border OTC Derivatives Market, included in CFTC Press Release 6439-12, Dec. 4, 2012.)

To that end, the EFMLG has been monitoring the work of the Commodity Futures Trading Commission (CFTC) in implementing the CFTC cross-border rules for swaps, and appreciates the Commission's modifications to its Proposed Guidance Regarding Compliance with Certain Swap Regulations (77 Fed. Reg. 41,214 July 12, 2012) reflected in the Further Proposed Guidance (78 Fed. Reg. 858 Jan. 7, 2013). As the EFMLG understands that the CFTC is continuing, in consultation with foreign regulators, to develop the final rules, we would like to draw your attention to European banks' continuing concerns regarding certain consequences of the extraterritorial effects of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA), which we believe could lead to significant operational difficulties and regulatory risks.

Specifically, we appreciate that the Further Proposed Guidance narrowed the definition of "US persons" and provided temporary relief from certain requirements for foreign branches of US persons. As described below, we urge that the final rules reflect that a person that is resident or established in the EU – for example, foreign branches of US firms located in Europe – be subject only to the EU's regulatory scheme. We believe that this is appropriate because when the CFTC undertakes its "substituted compliance" assessment, it will find that the European Union compliance regime is "comparable and comprehensive" to the US framework.

The EFMLG believes that in the following areas, EU regulation is, or shortly will be, comparable and comprehensive to relevant DFA requirements:

- **Clearing:** As you may know, as far as clearing is concerned, the harmonisation process, or at the very least the convergence, is being finalised and should, in the near future, reduce counterparty risks and more globally systemic risks; the European Market Infrastructure Regulation (EMIR) came into force in 2012 and technical standards provided by European Securities and Markets Authority (ESMA) have recently been finalised.
- **Trading:** Concerning the obligation to trade swaps on platforms, rather than OTC, and the increase of market transparency, European authorities are adopting these measures under the process of the revision of the EU Markets in Financial Instruments Directive (MiFID) which is still a work-in-progress, the first draft of this text having been recently adopted by the European Parliament.
- **Market Abuse:** Regarding the prevention of fraudulent behaviour and market misconduct, European rules on market abuse (*i.e.*, rules on insider trading, market manipulation and the spreading of false information) already apply to derivative instruments, since these financial instruments or the underlying assets of these financial instruments are listed on a regulated market. The Market Abuse Directive is also currently being modified to extend its scope to all derivatives (whatever their nature or the listed nature of their underlying assets).
- **Conduct of Business Rules:** Concerning conduct of business rules, European Investment Providers acting in the swap business have been obliged, since 2007, to meet most of the rules which were recently adopted in US (for swap markets), in particular:
 - ✓ the obligation to provide the client with clear, fair, non-misleading and balanced information;
 - ✓ the obligation to prevent and to manage conflicts of interests, in particular those implied by the payment or the perception of third parties' fees and commissions (inducements);
 - ✓ the best execution rule, which consists of obtaining the best possible result when executing a client order, in terms of price, costs, rapidity, liquidity, security, etc.;
 - ✓ the obligation to assess the retail clients' knowledge and experience (the concept of retail clients including most local municipalities);
 - ✓ the obligation to check the suitability of client transactions, when financial advice has been provided to any kind of counterparties (retail, professional, etc.).

The EFMLG is concerned that if the definition of "US persons" includes, for example, branches of US companies located in Europe, certain entities could theoretically be subject to both the DFA and MiFID. This clearly does not make sense and could create operational and compliance risks for all participants.

Thus, in order to achieve legal certainty, which is necessary to the smooth functioning of markets and protection of all participants, in particular investors, we are of the view that the US authorities should consider exempting from the definition of "US person" a person or entity that is resident or established in a jurisdiction that has rules in force which are comparable and comprehensive to the rules under the DFA. We believe that this approach is consistent with the position set forth by the European Commission on this issue. See, e.g., European Commission Comment on Proposed Interpretative Guidance and Policy Statement on Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, Aug. 24, 2012; Hearing on Dodd-Frank Derivatives Reform: Challenges Facing U.S. and International Markets, 112th Cong. (Dec. 13, 2012) (Testimony of Patrick Pearson, Head, Financial Market Infrastructures Unit, Internal Market and Services Directorate General, European Commission).

The EFMLG commends the ongoing dialogue between the CFTC and other regulators, particularly the European Commission, to resolve these issues in a way that provides clear guidance to market participants.

Yours sincerely,



Antonio Sáinz de Vicuña
Chairman of the EFMLG

Cc: Mr. Patrick Pearson
European Commission