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November 24, 2014

Mr. Robert deV. Frierson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue NW
Washington, D.C. 20551

Mr. Barry F. Mardock
Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Mr. Alfred M. Pollard
General Counsel
Attention: Comments/RIN 2590-AA45
Federal Housing Financing Agency
Constitution Center (OGC Eighth Floor)
400 7th Street, SW
Washington, D.C. 20024

Legislative and Regulatory Activities Division
Office of Comptroller of the Currency
400 7th Street SW
Suite 3E-218
Mail Stop 9W-11
Washington, DC 20219

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

Re: *Margin and Capital Requirements for Covered Swap Entities, Proposed Rule; Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, Proposed Rule*

Ladies and Gentlemen:

ICI Global[1] appreciates the opportunity to provide comments on the margin proposals recently reissued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal

[1] The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US$18.7 trillion. ICI Global seeks to

Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency (together, the "Prudential Regulators") and the Commodity Futures Trading Commission ("CFTC") with respect to margin requirements for uncleared swaps and security-based swaps.[2] The Prudential Regulators Proposal addresses margin requirements with respect to uncleared swaps and security-based swaps entered into by swap dealers ("SDs"), security-based swap dealers ("SBSDs"), major swap participants ("MSPs"), and major security-based swap participants ("MSBSPs") regulated by a Prudential Regulator.[3] The CFTC Proposal addresses uncleared swaps entered into by CSEs for which there is no Prudential Regulator. Although the CFTC and the Prudential Regulators (together the "Agencies") have proposed substantially similar margin rules for uncleared swaps, the Prudential Regulators have proposed one approach and the CFTC has proposed three alternative approaches as to how their respective margin rules would apply to cross-border transactions. We have significant concerns that, if the Agencies do not further coordinate their approaches, a cross-border transaction would be treated differently depending on whether a CSE involved in the transaction was regulated by a Prudential Regulator or the CFTC. We do not believe that this result would be sound policy and urge the Agencies to develop approaches that at least would produce the same or similar outcomes.

Our members – US funds that are regulated under the Investment Company Act of 1940 ("ICA") and similar non-US regulated funds publicly offered to investors, such as UCITS (collectively, "Regulated Funds") – use swaps and other derivatives in a variety of ways. Derivatives are a particularly useful portfolio management tool in that they offer Regulated Funds considerable flexibility in structuring their investment portfolios. Uses of swaps and other derivatives include, for example, hedging positions, equitizing cash that a Regulated Fund cannot immediately invest in direct equity holdings, managing a Regulated Fund's cash positions more generally, adjusting the duration of a Regulated Fund's portfolio, or managing a Regulated Fund's portfolio in accordance with the investment objectives stated in a Regulated Fund's prospectus. To employ uncleared swaps in the best interests of fund investors, our members strongly support ensuring that the derivatives markets are efficient, highly competitive, and transparent.

ICI Global members, as market participants representing millions of investors, generally support the goal of providing greater oversight of the derivatives markets. Given that many derivative

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advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

[2] *See Margin and Capital Requirements for Covered Swap Entities; Proposed Rule*, 79 Fed. Reg. 57348 (Sept. 24, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-09-24/pdf/2014-22001.pdf ("Prudential Regulators Proposal"); *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 79 Fed. Reg. 59898 (Oct. 2, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-10-03/pdf/2014-22962.pdf ("CFTC Proposal").

[3] For ease of reference, SDs, SBSDs, MSPs, and MSBSPs will be referred to in this letter as "covered swap entities" or "CSEs" although the CFTC Proposal would apply only to SDs and MSPs.

transactions are conducted across multiple jurisdictions, we support efforts for real and meaningful coordination among regulators on how these regulations will be applied to market participants that engage in derivatives transactions on a cross-border basis. In this letter, ICI Global focuses on the cross-border application of the proposed rules issued by the Agencies. We discuss below our concerns if the Prudential Regulators and the CFTC take approaches that would produce different results for similar cross-border transactions and offer our recommendations for modifications to the Agencies' proposed approaches. For comments on the substance of the Prudential Regulators Proposal and the CFTC Proposal, please refer to the letter submitted by the Investment Company Institute.[4]

Greater Coordination among International Regulators is Critical to Workable Application of Margin Rules to Cross-Border Transactions

We support the work of the Basel Committee on Banking Supervision ("BCBS") and International Organization of Securities Commissions ("IOSCO") in developing international margin standards for non-centrally cleared derivatives.[5] This effort to harmonize margin standards will greatly alleviate burdens on market participants and eliminate inefficiencies in the derivatives markets, which are global in nature. Although market participants may more easily comply with margin rules in different jurisdictions when margin rules are harmonized internationally, there may nevertheless be some differences among the jurisdictions (as can be seen already with the proposals by the European Union[6] ("EU") and the Agencies). Therefore, it is imperative that international regulators coordinate if more than one jurisdiction's requirements could apply to a cross-border transactions to avoid duplicative and/or potentially conflicting regulations.

During the BCBS/IOSCO consultations, we had cautioned that regulatory coordination will be complex and that the proposed framework did not adequately address numerous questions on how the margin requirements would apply to cross-border transactions.[7] We recommended that the BCBS and

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[4] *See* letter from David W. Blass, General Counsel, ICI, to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, Barry F. Mardock, Deputy Director, Office of Regulatory Policy, Farm Credit Administration, Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, Alfred M. Pollard, General Counsel, Federal Housing Financing Agency, Legislative and Regulatory Activities Division, Office of Comptroller of the Currency, and Christopher Kirkpatrick, Secretary, Commodity Futures Trading Commission, dated November 24, 2014.

[5] *See Margin Requirements for Non-Centrally Cleared Derivatives*, Basel Committee on Banking Supervision and Board of the Intentional Organization of Securities Commissions, September 2013, *available at* http://www.bis.org/publ/bcbs261.pdf ("2013 International Framework").

[6] Consultation Paper – Draft regulatory technical standards on risk-mitigation techniques for OTC-derivatives contracts not cleared by a CCP under Article 11(15) of Regulation (EU) No 648/2012, April 14, 2014, *available at* http://www.eba.europa.eu/documents/10180/655149/JC+CP+2014+03+%28CP+on+risk+mitigation+for+OTC+derivatives%29.pdf ("EU Margin Consultation Paper").

[7] Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to Wayne Byres, Secretary General, Basel Committee on Banking Supervision, Bank for International Settlements, and David Wright, Secretary General, International Organization of Securities Commissions, dated March 14, 2013, *available at* http://www.ici.org/pdf/27111.pdf; Letter from Karrie McMillan, General Counsel, ICI, and Dan Waters, Managing

IOSCO develop a more detailed framework for how margin requirements will apply to transactions conducted across borders. Regrettably, the 2013 International Framework ultimately did not contain sufficient detail regarding the circumstances that trigger the application of the laws of a particular jurisdiction and which law would apply (and to which aspects of the transaction) when the laws of more than one jurisdiction could apply to a transaction. As a result, the Agencies are now proposing different approaches regarding how they would apply their margin rules to cross-border transactions. Given the global market for derivatives, we request that the Agencies work with the Securities and Exchange Commission and regulators abroad, particularly EU regulators, to achieve greater coordination in developing a global approach for cross-border derivatives transactions.

In the remainder of this letter, we focus on how the Prudential Regulators and the CFTC should address the cross-border application of their margin rules to avoid duplicative and/or potentially conflicting regulations and the opportunity for regulatory arbitrage.

Agencies Must Harmonize Cross-Border Approaches to Produce Similar Outcomes

With respect to the cross-border application of the margin requirements, the Prudential Regulators proposed one approach ("Prudential Regulators Approach")[8] and the CFTC proposed three alternative approaches – Prudential Regulators Approach, Guidance Approach,[9] and Entity Approach.[10] There are significant differences in the three cross-border approaches that have been

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Director, ICI Global, to Wayne Byres, Secretary General, Basel Committee on Banking Supervision, Bank for International Settlements, and David Wright, Secretary General, International Organization of Securities Commissions, dated September 27, 2012, *available at* http://www.ici.org/pdf/26529.pdf.

[8] Under the Prudential Regulators Approach, a "foreign non-cleared swap" or a "foreign non-cleared security-based swap" of a "foreign covered swap entity" would not be subject to the Prudential Regulators' margin requirements. In addition, CSEs whose obligations under their uncleared swaps or security-based swaps are not guaranteed by an entity organized under the laws of the United States or any State and that is (1) a foreign covered swap entity, (2) a foreign bank or US branch or agency of a foreign bank or (3) a foreign subsidiary of a depository institution, Edge corporation, or agreement corporation may be eligible for substituted compliance.

[9] Under the Guidance Approach, the CFTC's margin requirements would not apply to an uncleared swap between a non-US CSE and a non-US person that is not guaranteed by, or an affiliate conduit of, a US person. Where the counterparty to such CSE is (a) a foreign branch of a US bank that is an SD/MSP or (b) a non-US person that is guaranteed by, or an affiliate conduit of, a US person, the CFTC Proposal would apply but substituted compliance would be available. Substituted compliance also would be available where the CSE is a foreign branch of a US bank and the counterparty is (a) also a foreign branch of a US bank that is an SD/MSP or (b) a non-US person. Finally, and notwithstanding the foregoing, the margin requirements would apply with no substituted compliance available if (a) the counterparty to the CSE is a US person (other than a foreign branch of a US bank that is an SD/MSP) or (b) the CSE is a US CSE. It is not entirely clear whether the margin requirements would apply or whether substituted compliance would be available if the CSE is a non-US CSE that is acting out of a US branch. *See infra* note 18.

[10] Under the Entity Approach, the margin requirements would apply to all of the uncleared swaps of a CSE on a firm-wide level, with substituted compliance available in certain instances. Whether substituted compliance is available and how it would apply to the margin requirements (*e.g.,* for posting of initial margin, collection of initial margin, and/or posting

proposed by the Agencies that relate not only to how and when the margin requirements would apply (including under what circumstances substituted compliance may be available and how it should apply) but also with respect to the persons that would be subject to the relevant requirements. For example, the CFTC uses the concept of a "US person" to determine whether the CFTC Proposal would apply to a particular transaction, but the definition of a US person is not relevant to the application of the Prudential Regulators Proposal. Instead, the determination of whether to apply the Prudential Regulators' margin rules would depend on whether the transaction is a "foreign non-cleared swap" or "foreign non-cleared security-based swap" and whether a covered swap entity is a "foreign covered swap entity."

Although it may be the easiest for market participants if the Agencies use the same category of market participants or persons to whom the margin rules would apply, we recognize that it may be difficult for the CFTC and the Prudential Regulators to agree to adopt a single rule text for the cross-border application of the margin rules.[11] At a minimum, we believe, however, that it is essential that the approaches ultimately adopted by the Agencies impose the margin rules consistently to each category of market participants to avoid regulatory arbitrage. The Agencies could achieve similar outcomes by making substituted compliance available in more instances. We believe substituted compliance is particularly workable in the margin rules area where international standards already have greatly harmonized the requirements. We illustrate below how substituted compliance can greatly alleviate the potential concern for duplicative and/or potentially conflicting margin rules.

Agencies Must Consider Effects of Margin Rules on Global Regulated Funds

We are concerned that, because the margin rules technically apply to CSEs regulated by the Agencies and only indirectly to their counterparties (including financial end users, such as Regulated Funds), there has not been sufficient attention given to the cross-border effect of the proposed rules on Regulated Funds. As the Agencies are fully aware, a majority of derivatives transactions are conducted on a cross-border basis. If the Agencies do not find a solution to address the potential for duplicative and/or potentially conflicting margin rules on cross-border transactions, there will be significant negative effects on Regulated Funds.

To assist the Agencies to understand fully the scope of the concerns of Regulated Funds, we describe below the typical cross-border transactions of Regulated Funds, analyze how the Agencies' margin rules would apply, and consider whether the European Market Infrastructure Regulation ("EMIR") would apply to such transactions to illustrate the potential for overlapping and/or conflicting regulations when more than one jurisdiction's laws could apply to a transaction. We then provide some recommendations on how the Agencies' approaches should be modified to avoid

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and collection of variation margin) would, *inter alia*, depend on whether the CSE and/or the counterparty is a US person and whether the CSE and/or the counterparty is guaranteed by a US person.

[11] Because the Prudential Regulators have proposed rules for their cross-border approach and the CFTC has issued an advanced notice of proposed rulemaking, it may be even more difficult for the Agencies to adopt a common text.

duplicative (and/or potentially conflicting) margin requirements. In general, we urge the Agencies to make substituted compliance available in a greater number of situations.

Scenario 1: Swap transaction between a CSE that is organized in the European Union ("EU Dealer")[12] and a UCITS[13]

- The Prudential Regulators Proposal would not apply US margin rules to this transaction.
- Under the Guidance Approach, a UCITS would generally not be considered a US person[14] and US margin rules would not apply to this transaction. Under certain limited situations, a UCITS, however, may be considered a US person[15] and the Guidance Approach would apply US margin rules to this transaction and substituted compliance would not be available.
- The Entity Approach would apply US margin rules to this transaction, but substituted compliance would be available.
- EMIR margin requirements would apply because both entities are established in the European Union.

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[12] The EU Dealer is organized in the European Union but is registered or required to be registered with the relevant US regulator as an SD or SBSD. The EU Dealer also is not controlled by a US entity.

[13] UCITS, or "undertakings for collective investment in transferrable securities," are collective investment schemes established and authorized under a harmonized EU legal framework, currently EU Directive 2009/65/EC, as amended ("UCITS IV"), under which a UCITS established and authorized in one EU Member State ("Member State") can be sold cross border into other Member States without a requirement for an additional full registration. Detailed requirements applicable to UCITS include those related to disclosure and custody as well as investment restrictions and limitations. *See* UCITS IV (requirements regarding simplified disclosure (key investor information document) (Art. 78), annual and semi-annual reports (Art. 68), appointing a depositary bank as a custodian and its responsibilities (Art. 22), redemption (Art. 76), diversification and issuer concentration (Art. 52 and Art. 56), permitted assets, including limitations relating to derivatives and leverage (Art. 50 and Art. 52)).

[14] The CFTC provides that "a collective investment vehicle that is publicly offered only to non-US persons and not offered to US persons generally would not fall within any of the prongs of the interpretation of the term 'US person.'" *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 FR 45292, 45314 (emphasis added) (July 26, 2013) *available at* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf ("Guidance").

[15] Under the Guidance, non-US Regulated Funds that are publicly offered to only non-US persons but offered privately to US persons under Section 3(c)(1) or Section 3(c)(7) of the ICA and non-US Regulated Funds authorized to make a public offering but that elect only to offer privately to non-US institutional investors are not carved out of the definition of US person. These funds must analyze whether they are US persons under the CFTC's definition of US person.

In the scenario described above, because the definition of US person can treat certain entities that are established in a foreign jurisdiction (such as some UCITS) as US persons, applying the margin requirements without making substituted compliance available will result in imposing duplicative and/or potentially conflicting requirements on the transaction. We recognize that the CFTC may be limiting the use of substituted compliance to non-US persons under the Guidance Approach to ensure that the full panoply of US derivatives regulations apply (and their protections are provided) to US persons. We believe, however, that the CFTC may not have fully considered situations in which regulations of another jurisdiction apply to those "US persons."

We therefore strongly urge the CFTC to extend substituted compliance to situations in which the CSE is transacting with an entity that may be considered a US person but also is established in a foreign jurisdiction and subject to that jurisdiction's margin regime. Providing for substituted compliance in these circumstances may greatly alleviate the problem of duplicative and/or potentially overlapping margin requirements for cross-border swap transactions. Moreover, as noted above, with respect to the margin rules, the CFTC could achieve its regulatory objectives with substituted compliance because international regulators, including the CFTC, have already agreed, pursuant to the 2013 International Framework, to minimum standards and have greatly harmonized the specific requirements.

<u>Scenario 2: Swap transaction between an EU branch of a US CSE and a UCITS</u>

- The Prudential Regulators Approach would apply US margin rules to this transaction, but substituted compliance would be available with respect to the CSE's obligation to post initial margin.[16]

- Under the Guidance Approach, if the UCITS is not a US person, the US margin rules would apply to this transaction but substituted compliance would be available. If the UCITS was considered a US person, the Guidance Approach would apply US margin rules to this transaction and substituted compliance would not be available.

- The Entity Approach would apply US margin rules to a transaction with a UCITS that is not considered a US person, but substituted compliance would be available with respect to the CSE's obligation to post initial margin.[17] The Entity Approach would apply US margin

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[16] US margin rules would apply to variation margin and collection of initial margin by the CSE. According to the Prudential Regulators, if a US bank that is a CSE enters into a swap with a foreign fund that is subject to a foreign regulatory framework for which the Prudential Regulators have made a comparability determination, the US bank must collect the same amount of margin as required under the US rule but need post only the amount of margin that the foreign fund is required to collect under the foreign regulatory framework. The Prudential Regulators do not explain the rationale for not permitting substituted compliance for variation margin.

[17] US margin rules would apply to variation margin and collection of initial margin by the CSE. The CFTC does not provide an explanation for why it would not permit substituted compliance for variation margin.

rules to a transaction with a UCITS that is considered a US person and substituted compliance would not be available.

- EMIR margin requirements would apply to the UCITS because it is established in the European Union.

To avoid imposing duplicative and/or potentially conflicting requirements on this transaction, for reasons similar to those described in our discussion of Scenario 1, the Agencies should provide for substituted compliance (including with respect to variation margin) where a foreign branch of a US CSE transacts with a counterparty that is subject to the margin requirements of a foreign jurisdiction. In addition, as described above, the CFTC's US person definition does not appear to contemplate that the US person also may be subject to the requirements of another jurisdiction. Because such an entity may be subject to more than one jurisdiction's margin requirements, the CFTC should adopt an approach that provides for substituted compliance in situations in which the CSE is transacting with a counterparty that may be considered a US person but also is established in a foreign jurisdiction and subject to that jurisdiction's margin rules.

Scenario 3: Swap transaction between a US branch of an EU Dealer and a UCITS

- The Prudential Regulators Approach would apply US margin rules to this transaction, but substituted compliance would be available.

- Under the Guidance Approach, the margin rules would apply if a US branch of an EU Dealer transacts with a UCITS regardless of whether it is considered a US person and substituted compliance would not be available.[18]

- The Entity Approach would apply US margin rules to this transaction, but substituted compliance would be available.

- EMIR margin requirements would apply because both entities are established in the European Union.

To avoid duplicative and/or potentially conflicting requirements on this transaction, the CFTC should provide for substituted compliance regardless of whether the UCITS is considered a US person for the reasons described above for Scenarios 1 and 2.

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[18] *See* Guidance, *supra* note 14, at n.513 ("a U.S. branch of a non-US swap dealer or MSP would be subject to Transaction-Level requirements, without substituted compliance available"). *But see* CFTC Proposal, *supra* note 2, at 59916 (Under the Guidance Approach, the margin rules would not apply if an EU Dealer transacts with a non-US person but would apply if an EU Dealer transacts with a US person and substituted compliance would not be available).

Scenario 4: Swap Transaction between an EU Dealer and a US Registered Investment Company ("RIC")

- The Prudential Regulators Approach would apply US margin rules to this transaction, but substituted compliance would be available.

- The Guidance Approach would apply US margin rules to this transaction with no substituted compliance available.

- The Entity Approach would apply US margin rules to this transaction, but substituted compliance would be available.

- EMIR margin requirements would apply in this scenario.[19]

We are concerned that in the scenario described above a transaction will be subject to both US and EU margin rules. We appreciate that the US and the EU may each have an interest in applying their respective rules to this transaction. US and EU regulators, however, must coordinate and determine which rules should apply to avoid duplicative and/or potentially conflicting margin requirements. We understand that the CFTC may have greater interest in ensuring the application of its margin rules when a CSE transacts with a US person, such as a RIC, than with a non-US person, such as a UCITS, but the CFTC should recognize the practical concerns of (and attempt to avoid) having more than one set of margin rules apply to the same transaction.

One way to avoid duplicative and/or potentially conflicting margin requirements would be for the EU Commission to make an equivalence determination with respect to US margin rules, and then both counterparties would follow the US margin rules. Given the procedural difficulties in making an equivalence determination, the CFTC could choose to provide itself with the tool of substituted compliance to avoid this consequence if the EU does not make an equivalence determination. Alternatively, the CFTC could permit the parties to a transaction for which the margin requirements of multiple jurisdictions would apply to elect or agree between themselves the regime with which they will comply. As noted previously, because the 2013 International Framework has greatly harmonized the margin rules, there should be no concern regarding regulatory arbitrage.

Scenario 5: Swap Transaction between a US branch of an EU Dealer and a RIC

- The Prudential Regulators Approach would apply US margin rules to this transaction, but substituted compliance would be available.

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[19] The EU Dealer would be required to collect margin from the US RIC. *See* EU Margin Consultation Paper, *supra* note 6.

- The Guidance Approach would apply US margin rules to this transaction with no substituted compliance available.

- The Entity Approach would apply US margin rules to this transaction, but substituted compliance would be available.

- EMIR margin requirements would apply in this scenario.[20]

As in the previous scenario, we understand that the CFTC has a stronger interest in applying the US margin rules to this type of transaction because of the involvement of a US person (*i.e.,* the US RIC) and the EU regulators have an interest in applying their margin rules to an entity established in the European Union (*i.e.,* the EU Dealer). US and EU regulators, however, must coordinate and determine which rules should apply to avoid duplicative and/or potentially conflicting margin requirements. We recommend the alternatives discussed for Scenario 4 as possible options to address the overlapping and/or potentially conflicting obligations.

Impact of Guarantees on Margin Rules on Global Regulated Funds Must be Fully Considered

We note that cross-border guarantees present significant challenges with respect to the application of a given regime's margin requirements and whether substituted compliance should be available. Under the Prudential Regulators Approach, the US margin requirements would apply and no substituted compliance would be available if the CSE is guaranteed by an entity organized under the laws of the United States or any State regardless of the counterparty's domicile.[21] This treatment of guarantees may cause issues where, for example, the CSE is organized in the European Union and subject to the EMIR margin requirements. Where a non-US Regulated Fund, such as a UCITS, transacts with an EU entity guaranteed by an entity organized under the laws of the United States, both US and EU margin regulations would apply without the availability of substituted compliance. Therefore, we recommend that the Agencies consider broadening the availability of substituted compliance where the CSE has a US guarantor under the Prudential Regulators Approach.[22]

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[20] The EU Dealer would be required to collect margin from the US RIC. *See* EU Margin Consultation Paper, *supra* note 6.

[21] Prudential Regulators Proposal at §_.9(b) and §_.9(d)(3).

[22] We understand that the OTC Derivatives Regulatory Group ("ODRG") is working on developing approaches to address issues related to the treatment of guaranteed affiliates. *See* Report of the OTC Derivatives Regulators Group (ODRG) to G20 Leaders on Cross-Border Implementation Issues (November 2014), *available at* http://www.cftc.gov/ucm/groups/public/@internationalaffairs/documents/file/oia_odrgreportg20_1114.pdf. As illustrated in this letter, a practical approach must be developed to avoid duplicative or potentially conflicting margin requirements on cross-border transactions. We urge the CFTC, which is a part of the ODRG, to discuss the work of the ODRG with the Prudential Regulators, which are not ODRG members.

Finally, the Prudential Regulators seek comment on whether the margin rules should clarify and define the concept of a "guarantee" to better ensure that those swaps that pose risks to US insured depository institutions would be included within the scope of the rule. According to the Prudential Regulators, many swaps agreements contain cross-default provisions that give swaps counterparties legal rights against certain "specified entities." The Prudential Regulators state that, in these arrangements, a swap counterparty of a foreign subsidiary of a US CSE may have contractual rights to close out and settle its swap positions with the US entity if the foreign subsidiary of the US entity defaults on its own positions with the counterparty. The Prudential Regulators believe that, although not technically a guarantee of the foreign subsidiary's swaps, these provisions may be viewed as reassuring counterparties to foreign subsidiaries that the US bank stands behind its foreign subsidiaries' swaps.

We believe the Prudential Regulators' description and analysis of these cross-default provisions do not accurately reflect commercial reality. As a technical matter, a cross-default provision involving a "specified entity" would not generally give a swap counterparty any direct right against the specified entity. The cross-default provision would give the swap counterparty the right to terminate its swaps with its direct counterparty if certain events involving the specified entity (such as the US CSE in the Prudential Regulators' example) are triggered. These provisions are intended to alert counterparties to situations in which credit deterioration of an affiliate of a direct counterparty may indicate a credit issue within the corporate group that may ultimately adversely affect the performance of the direct counterparty (foreign subsidiary of the US CSE) to the swap counterparty.

Absent other factors, the swap counterparty would not be able to close out its swap positions with the specified entity (*i.e.*, the US CSE) if the foreign subsidiary defaults on its own positions with the counterparty. Moreover, in a cross-default situation involving a "specified entity," there are no contractual provisions that would provide an implicit or explicit guarantee by the US CSE of the foreign subsidiary's obligations. In fact, in the scenario described by the Prudential Regulators, if the foreign subsidiary defaults on its obligations with the counterparty, it would appear that the US CSE is not guaranteeing the foreign subsidiary's contract or providing assistance to the foreign subsidiary.

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We appreciate the opportunity to respond to the margin proposals of the Agencies. If you have any questions on our comment letter, please feel free to contact the undersigned, Susan Olson at +1-202-326-5813, Sarah Bessin at +1-202-326-5835, or Jennifer Choi at +1-202-326-5876.

Sincerely,

/s/ Dan Waters

Dan Waters
Managing Director
ICI Global
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cc: The Honorable Timothy G. Massad
The Honorable Mark Wetjen
The Honorable Sharon Bowen
The Honorable J. Christopher Giancarlo

The Honorable Mary Jo White
The Honorable Luis A. Aguilar
The Honorable Daniel M. Gallagher
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar