SPEECHES & TESTIMONY

Statement of Dissent by Commissioner Rostin Behnam Regarding Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants; Proposed Rule

December 18, 2019

Introduction

I respectfully dissent from the Commodity Futures Trading Commission's (the "Commission" or "CFTC") notice of proposed rulemaking addressing the cross-border application of the registration thresholds and certain requirements applicable to swap dealers ("SDs") and major swap participants ("MSPs") (the "Proposal"). I support the Commission's effort to make good on its commitment to periodically review its approach to evaluating the circumstances under which the swaps provisions of Title VII of the Dodd-Frank Act[1] ought to apply to swap dealing and related activities outside the United States.[2] Indeed, the Guidance currently in place and Section 2(i) of the Commodity Exchange Act (the "Act" or "CEA") itself provide the Commission the flexibility to evaluate its approach on a case-by-case basis, affording interested and affected parties the opportunity to present facts and circumstances that would inform the Commission's application of the relevant substantive Title VII provisions in each circumstance.[3] Today, the Commission, without adequate explanation of its action, consideration of alternatives, or deference to the wisdom of the United States District Court for the District of Columbia on the matter, is proposing to discard both the existing Guidance and the use of agency guidance and non-binding policy statements altogether in addressing the cross-border reach of its authority in favor of hard and fast rules. I simply do not believe the Commission has made a strong enough case for wholesale abandonment of guidance at this point in the evolution of our global swaps markets, and in light of current events that are already impacting market participants and their view of the future global swaps landscape. As well, I have serious questions and concerns as to what the Commission may give up should the Proposal be codified in its current form.

Whereas the Commission understands the scope of our jurisdictional reach with respect to Title VII, a federal district court has affirmed that understanding, and we have operated within such boundaries—aware of the risks and successfully responding in kind, the Commission is now making a decision based on the most current thinking that we should retreat under a banner of comity and focus only on that which can fit on the head of a pin. Oddly enough, that pin will hold only the giants of the swaps market. Indeed, where our jurisdiction stands on its own, the ability to exercise our authority through adjudication[4] and enforcement has allowed the Commission to articulate policy fluidly, refining our approach as circumstances change without the risk of running afoul of our mandate. Today's Proposal suggests that we can resolve all complexities in one fell swoop if we alter our lens, abandon our longstanding and literal interpretation of CEA section 2(i), and limit ourselves to a purely *risk-based approach*. I cannot support an approach that would limit our jurisdiction and consequently oversight directly in conflict with Congressional intent, and potentially expose the U.S. to systemic risk.

Throughout the preamble, the Proposal evinces a clear understanding that the complexity of swaps markets, transactions, corporate structures and market participants create channels through which swaps-related risks warrant our attention by meeting the jurisdictional nexus described in CEA Section 2(i).[5] However, in many instances, we manage to simply acknowledge the obvious risk and step aside in favor of the easier solution of doing nothing, assuming that the U.S. prudential regulators will act on our behalf, or waving the comity banner. The Proposal provides shorthand rationales for each of its decision points without the support of data or direct experience as if doing so would reveal the vision's vulnerabilities. Perhaps most concerning are the Proposal's contracted definitions of "U.S. person" and "guarantee," its introduction of "substantial risk subsidiaries," and its determination that "ANE" means something akin to "absolutely nothing to explain" regarding our jurisdictional interest—even when activities are occurring within the territorial United States. These represent some notable examples where the Proposal undermines the core protections sought to be addressed by section 2(i), as the Commission has, until now, understood them to be.

My concerns aside for a moment, I am grateful that within the four corners of the document, the requests for comment seek to build consensus and operatively provide the public an option to maintain the status quo with regard to most aspects of the Guidance—albeit without sticking with guidance. While this leads me to more questions as to whether and how the Proposal could go final absent additional intervening process, I am pleased that there is recognition that the public and market participants may have lost their appetite for this brand of rulemaking or perhaps have come to agree with the D.C. District Court that the Commission's decision to issue the Guidance benefits market participants.[6] Further, as the Commission currently engages with our foreign counterparts regarding impending regulatory matters related to Brexit, I hope we are measured in timing and substance on the Proposal.

Before I highlight certain aspects of the Proposal, I want to take a brief moment to acknowledge why—as a general matter—we are here, and why this particular proposal is so important. Without rehashing market realties that led to the economic devastation of 2008, it should never be lost on our collective consciousness that a significant driving force that exacerbated the financial crisis and great recession, at least within the context of the over-the-counter derivatives market, was housed overseas. Although much of the risk completed its journey within the continental U.S., it was conjured up in foreign jurisdictions.[7] But, as we all also know too well, more than 10 years later, despite the products often being constructed, sold, and traded overseas, the highly complex web of relationships between holding companies, subsidiaries, affiliates, and the like, created a perfect storm that brought our financial markets to a near halt, and the global economy to a shudder. Those experiences should always serve as the foundation from which we craft cross-border derivatives policy. Always.

Cutting to the Chase on Codification

Since 2013, when the Commission announced its first cross-border approach in flexible guidance as a non-binding policy statement,[8] the Commission has understood that addressing the complex and dynamic nature of the global swaps market cannot be described in black and white, and that even describing it in shades of gray quickly overwhelms our regulatory sensibilities. Cutting through the haze with bright line rules for identity, ownership, control, and attribution to find comfort in comity seems to be our approach in addressing the nature of risk in the global swaps market. However, Congress has granted the Commission authority without any attendant instruction to engage in rulemaking.[9] Under such circumstances, the Commission must critically evaluate whether a rule-driven application of policy amid a global market that is only growing in size and in its complexity may prove inadequate as we carry out our mandate and protect our domestic interests. It seems in this instance that the Commission is barreling toward hard and fast comprehensive rules without acknowledging the benefits of what we have today.

To be clear, while I support the Commission's efforts to address problems resulting from its current approach to regulating swaps activities in the cross-border context, it is not clear to me at this moment that we have reached a point where codification would provide immediate benefits to either the Commission or the public. While the Guidance is complex, it is difficult to say it is any more complex than the Proposal. The complexity is and will be inherent to whatever action we take as it, "merely reflects the complexity of swaps markets, swaps transactions, and the corporate structures of the market participants that the CFTC regulates."[10] It is this type of complexity that supported the Commission's initial determination to issue the Guidance, and to my knowledge, such determination has not hindered the Commission's ability to pursue enforcement actions that apply Title VII extraterritorially[11] or to participate in discourse with and decision-making among our fellow international financial regulators.

CEA Section 2(i) Preservation

As recognized by the D.C. District Court, the Title VII statutory and regulatory requirements apply extraterritorially through the independent operation of CEA section 2(i), which the CFTC is charged with enforcing.[12] Congress did not direct—and has not since directed—the Commission to issue rules or even guidance regarding its intended enforcement policies pursuant to CEA section 2(i). To the extent the CFTC interpreted Section 2(i) in the Guidance, an interpretation carried forward in the Proposal, such interpretation is drawn linguistically from the statute; its interpretation has not substantively changed the regulatory reach.[13] Putting aside the anti-evasion prong in CEA section 2(i)(2), it remains that the Commission construes CEA section 2(i) to apply the swaps provisions of the CEA to activities, viewed in the class or aggregate, outside the United States that, meet either of two jurisdictional nexus: (1) a direct and significant effect on U.S. commerce; or (2) a direct and significant connection with activities in U.S. commerce, and through such connection, present the type of risks to the U.S. financial system and markets that Title VII directed the Commission to address.[14] Accordingly, to any extent the Commission is moving away from guidance towards substantive rulemaking, it must preserve that interpretation.

As I read the Proposal—which purports to reflect the Commission's current views[15]—I cannot help but notice that our "risk-based approach" seems to focus on individual entities that present a particular category of significant risk--the giants among global swap market participants-- and ignores smaller pockets of risk that, in the aggregate, may ultimately raise systemic risk concerns.[16] What is lacking is any discussion of how our laser focus on individual corporate families and their ability to singularly impact systemic risk to the U.S. financial system adequately ensures that we are not disregarding the potential for similar swap dealing activities of groups of market participants, regardless of individual size, and in the aggregate, present a similar risk profile, or at the least a risk profile worth monitoring. Perhaps more troubling, the Proposal is focused largely on the threshold matter of swap dealer registration requirements. However, as the Commission has acknowledged, "Neither the statutory definition of 'swap dealer' nor the Commission's further definition of that term turns solely on risk to the U.S. financial system."[17] And to that end, "[T]he Commission does not believe that the location of counterparty credit risk associated with a dealing swap—which…is easily and often frequently moved across the globe—should be determinative of whether a person's dealing activity falls within the scope of the Dodd-Frank Act."[18]

I also cannot help but notice the Proposal seems to frequently reference "comity" without providing supporting rationales for deferring to our fellow domestic regulators and foreign counterparts or for providing per se exemptions. I support working closely with foreign regulators to address potential conflicts with respect to each of our respective regulatory regimes, and I believe that our cross-border approach must absolutely align with principles of international comity. But, I do not understand how we can reach regulatory absolutes and conclusions based on comity, absent a finding that the exercise of our authority under CEA section 2(i) would be patently unreasonable under international principles. I believe that substituted compliance is generally the most workable and respectful solution, and I believe we must engage with our fellow global regulators to address matters of risk that may impact each of our jurisdictions regardless of size and nature.

Contraction Justifies Inaction—"U.S. Persons" and "Guarantees"

The bulk of the Proposal is dedicated to codifying 23 definitions "key" to determining whether certain swaps or swap positions would need to be counted towards a person's SD or MSP threshold and in addressing the cross-border application of the Title VII requirements. While most of the defined terms are familiar from the Guidance, there are some differences that stand out as more than a simple exercise in conformity. For example, the preamble of the Proposal describes the proposed definition of "U.S. person" as "largely consistent with" and the definition of "guarantee" as "consistent with" the Commission's Cross-Border Margin Rule.[19] However, both represent a narrowing in scope from the current Guidance, and in turn, may potentially retract our authority under CEA Section 2(i) with respect to swap dealing activities relevant to swap dealer registration and oversight.

With regard to "U.S. persons," the definition harmonizes with the definition adopted by the Securities and Exchange Commission ("SEC") in the context of its regulations regarding cross-border security-based swap activities, which largely encompasses the same universe of persons as the Commission's Cross-Border Margin Rule. However, among other things, the proposed "U.S. person" definition, unlike the Cross Border Margin Rule, would not include certain legal entities that are owned by one or more U.S. person(s) and for which such person(s) bear unlimited responsibility for the obligations and liabilities of the legal entity ("unlimited U.S. responsibility prong").[20] In support of its decision, the Commission puts forth what almost reads as an incomplete syllogism that fatally fails to address how such relationships may satisfy the jurisdictional nexus laid out in CEA section 2(i). After noting (1) that the SEC does not include an unlimited U.S. responsibility prong because it considers this type of arrangement as a guarantee, and (2) that when considering the issue in the context of the Cross-Border Margin rule, the Commission does not view the unlimited U.S. responsibility prong as equivalent to a U.S. guarantee, the Proposal states that (3) the Commission is not revisiting its interpretation of "guarantee" and is not including an unlimited U.S. responsibility prong in the "U.S. person" definition because it "is of the view that the corporate structure that this prong is designed to capture is not one that is commonly used in the marketplace."[21]

To be clear, the Guidance includes an unlimited U.S. responsibility prong in its interpretation of "U.S. persons" for purposes of applying CEA section 2(i) that is intended to cover entities that are directly or indirectly owned by U.S. person(s) such that the U.S. owner(s) are ultimately liable for the entity's obligations and liabilities.[22] Among other things, where this relationship exists, the Commission's stated view is that, "[W]here the structure of an entity is such that the U.S. owners are ultimately liable for the entity's obligations and liabilities, the connection to activities in, or effect on, U.S. Commerce would generally satisfy section 2(i)..."[23]

While I am not arguing that the Commission cannot change its views regarding the necessity for including a U.S. responsibility prong in a proposed "U.S. person" definition, I do believe that if we do so, we must articulate a rationale relevant to the particular context at issue and explain why our past reasoning with regard to the jurisdictional nexus is no longer valid.

More concerning, the proposed “guarantee” definition is narrower in scope than the one used in the Guidance in that it would not include several different financial arrangements and structures that transfer risk directly back to the United States such as keepwells and liquidity puts, certain types of indemnity agreements, master trust agreements, liability or loss transfer or sharing agreements, etc.[24] While in this instance, the Proposal explains the Commission’s rationale for the broader interpretation of “guarantee” for purposes of CEA section 2(i) in the Guidance, and admits that the rationale is still valid, it nevertheless chooses to ignore the truth of the matter and focus on what is more “workable” for non-U.S. persons.[25] Further concerning, as I will explain shortly, the Proposal puts forth that while the proposed “guarantee” definition could lead to entities counting fewer swaps towards their *de minimis* threshold calculation relevant to SD registration as compared to the Guidance, related concerns could be mitigated to the extent such non-U.S. person meets the definition of a “significant risk subsidiary.”[26] In this instance, the Commission is simply ignoring its responsibilities under CEA section 2(i) to save non-U.S. persons a little extra work, or as the Proposal might say, “overly burdensome due diligence.”[27]

SOS on SRS

The introduction of the “significant risk subsidiary” or “SRS” is perhaps the most elaborate departure from the Commission’s interpretation of CEA section 2(i) and almost seems to be an attempt to ensure that no non-U.S. subsidiary of a U.S. parent entity will ever have to consider its swap dealing activities for purposes of the relevant SD or MSP registration threshold calculations. Save for a single footnote reference to a request for comment and passing references to SRSs likely being classified as conduits in the explanation of Cost-Benefit Considerations, the Proposal does not mention anything regarding the Guidance’s concept of a conduit affiliate—despite the fact that the SEC includes the concept of conduit affiliate in its definitions relevant to cross-border security-based swap dealing activity.[28] Rather, instead of elaborating on whether and how the concept of conduit affiliates described in the Guidance failed to achieve its purpose, is no longer relevant, resulted in loss of liquidity, fragmentation, proved unworkable, etc., or should be deleted from all frame of reference in favor of harmonizing with the SEC, the Proposal simply introduces the SRS as a new category of person and walks through an elaborate analysis that really begins where it ends—an exclusion. It is a policy decision of the worst ilk because it masquerades as a solution by diminishing the problem.

SRSs represent a tiny subset of the consolidated non-U.S. subsidiaries of U.S. parent entities that the Commission believes are of supervisory interest in light of their clear potential to permit U.S. persons to accrue risk that, in the aggregate, may have a significant effect on the U.S. financial system or may otherwise be used for evasion.[29] The Proposal’s stated rationale for targeting only a subset of non-U.S. subsidiary relationship focuses on comity and the application of a risk-based approach acts like a sieve on CEA section 2(i) such that only the largest entities that themselves as individual entities may pose risk to the financial system. An approach that outright acknowledges the potential for widespread swap activities within the scope of CEA section 2(i), which could ultimately result in significant risk being transferred back to U.S. parent entities, only to be met with a bright line induced shrug by the Commission – is simply untenable.

Rather than rehashing the elements of the SRS definition, I will focus on two aspects that I find most troubling. First is the requirement that the U.S. parent entity meet a $50 billion consolidated asset threshold. This threshold is intended to limit the SRS definition to only those entities whose U.S. parent entity may pose a systemic risk to the U.S. financial system. Foremost, given CEA section 2(i)'s focus on activities in the aggregate, a bright line threshold at the entity level is irrelevant. Not to mention that if Congress had wanted the Commission to focus its cross-border authority on systemically significant entities, it would have used language that was not so embedded in common law[30] or would have articulated that directive clearly in the Dodd-Frank Act.[31]

Second, even if a non-U.S. person met one of three tests for being a significant subsidiary of a U.S. parent with over $50 billion in consolidated assets, it would not be an SRS if it is either subject to prudential regulation as a subsidiary of a U.S. bank holding company or subject to comparable capital and margin standards and oversight by its home country supervisor. While I believe these exclusions are appropriate in the context of the policy the Proposal is putting forward in its vision of the SRS, I am concerned that we are substituting our oversight with that of the Federal Reserve Board, in one instance, on the grounds that being subject to consolidated supervision and regulation by the Federal Reserve Board with respect to capital and risk management requirements provides appropriate regulatory coverage. While I do not disagree with respect to risk management that the Federal Reserve Board provides comparable oversight, finding that comparability satisfies our regulatory oversight concerns in this instance may lead us down a slippery slope in which we find ourselves fighting to maintain our own Congressionally delegated jurisdiction with respect to swaps activities. This fact is only further validated— considering the breadth of the exclusions—by the high likelihood that a non-U.S. subsidiary of a U.S. parent entity with over $50 billion in consolidated assets is a financial entity subject to some form or prudential regulation in its home jurisdiction. Indeed, the Proposal suggests that of the current population of 59 SDs, "few, if any, would be classified as SRSs."[32]

While the concept of an SRS is interesting to me, the Proposal's attempt to draw multiple bright lines in a web of interconnectedness almost ensures that risk will find an alternate route back to the U.S. with potentially disastrous results. Without a better understanding of how the SRS proposal would work in practice and whether it is truly better than the conduit affiliate concept currently outlined in the Guidance and presumably similar to the SEC's own approach, it is difficult to get behind a policy that could most certainly bring risk into the U.S. of the very type CEA Section 2(i) seeks to address.

ANE—Anyone? Anyone?

The issue of how to address the application of certain transaction-level requirements with respect to swap transactions arranged, negotiated, or executed by personnel or agents located in the United States of non-U.S. SDs (whether affiliates or not of a U.S person) with non-U.S. counterparties ("ANE Transactions") is one aspect of the Commission's cross-border approach that has continually raised concerns and demands greater certainty. First articulated in a 2013 Staff Advisory,[33] the issue boils down to whether transactional requirements apply to ANE swaps, and if so, whether substituted compliance may be available. A 2014 Commission Request for Comment[34] sought to address the complex legal and policy issues raised by the 2013 Staff Advisory. It was followed by the Commission's 2016 Proposal, which among other things, addressed ANE transactions, including the types of activities that would constitute arranging, negotiating, and executing within the context of the 2016 Proposal, and the extent to which the SD registration threshold and external business conduct standards apply with respect to ANE Transactions.[35] Today's Proposal withdraws the 2016 Proposal on grounds that the Commission's views have changed and evolved as a result of market and regulatory developments and "in the interest of international comity."[36]

The proposal sets forth an approach largely based on comments to the 2014 Request for Comment[37] and seemingly in response to a recommendation made in an October 2017 report of the U.S. Treasury Department that both the CFTC and SEC "reconsider the implications of applying their Title VII rules to transactions between non-U.S. firms or between a non-U.S. firm and a foreign branch or affiliate of a U.S. firm merely on the basis that U.S. located personnel arrange, negotiate, or execute the swap, especially for entities in comparably regulated jurisdictions."[38] The proposed approach is simply to ignore ANE Transactions within the scope of the Proposal as irrelevant "because the transactions involve two non-U.S. counterparties, and the financial risk of the transactions lies outside the United States…"[39] That may be the case in some circumstances; however, casting an overly broad net on a category of activities may run the risk of slippage, and I am concerned we have not given this important element of our cross-border jurisdiction enough thought to warrant such an expeditious solution.

Conclusion

Despite my concerns regarding this Proposal, I look forward to hearing constructive input from market participants and the public. I am encouraged by the balanced nature of the requests for comment, and would like to modestly request that in responding to the Proposal, commenters indicate whether they believe it is appropriate and prudent for the Commission to proceed with a rulemaking at this time, or whether the preference is to adhere to the current Guidance, or some hybrid of the two.

As with all rulemakings, input the Commission receives through public comment drives the conversation, and sets us on a course that balances diverse interests; seeks transparency, resiliency, and efficiency; and above all else, focuses on protecting U.S. markets, its participants and most importantly the customers that rely on this truly global marketplace. One might assume that making targeted, surgical changes to an existing regulatory framework is easier than creating a framework. But, in some circumstances, it is exactly the opposite. Global swaps markets have grown and evolved around rule sets that were completed and implemented in the very recent past. As regulators I believe we should caution against any wholesale rewrite when we find well regulated, transparent, and generally well running financial markets. But, if we do find vulnerabilities or inefficiencies in our rules (certainly both old and new), the process to reconsider should be deliberate, balanced, and inclusive to ensure the Commission, as a collective body, understands the gravity of its decisions.

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[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 § 712(d), 124 Stat. 1376, 1644 (2010) (the "Dodd-Frank Act").

[2] *See* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swaps Regulations, 78 FR 45292, 45297 (Jul. 26, 2013) (the "Guidance").

[3] *Id.*

[4] *See* 5 U.S.C. 554.

[5] *See, e.g.,* Proposal at I.B., I.C., II.B, II.C., V, and VII.

[6] *See SIFMA v. CFTC*, 67 F.Supp.3d 373, 426-427, 429 (D.D.C. 2014) (finding the CFTC's choice to address extraterritorial application of the Title VII Rules incrementally and through the Guidance reasonable, "particularly, where, as here, 'the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule' and 'the problem may be so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule.'" (quoting *SEC v. Chenery Corp*., 332 U.S. 194, 202-203, 67 S.Ct. 1760, 90 L.Ed 1995(1947))).

[7] *See* Guidance, 78 FR at 45293-5; *SIFMA v. CFTC*, 67 F.Supp.3d at 387-88 (describing the "several poster children for the 2008 financial crisis" that demonstrate the impact that overseas over-the-counter derivatives swaps trading can have on a U.S. parent corporation).

[8] *See* Guidance, 78 FR at 45292.

[9] *SIFMA v. CFTC*, 67 F.Supp.3d at 423-25, 427 (finding that Section 2(i) operates independently and provides the CFTC with the authority—without implementing regulations—to enforce the Title VII Rules extraterritorially); *See also, Id. at* 427 ("Although many provisions in the Dodd-Frank Act explicitly require implementing regulations, Section 2(i) does not.").

[10] *Id.* at 419-20 ("Indeed, the complexity of a regulatory issue is one reason an agency might choose to issue a non-binding policy statement rather than a rigid 'hard and fast rule.'" (citing *SEC v. Chenery Corp*., 332 U.S. 194, 202-203, 67 S.Ct. 1760, 90 L.Ed 1995(1947))).

[11] *See, e.g., SIFMA v. CFTC*, 67 F.Supp.3d at 421, ("Indeed, even after promulgating the Cross-Border Action, the CFTC has relied *solely* on its statutory authority in Section 2(i) when bringing enforcement actions that apply to Title VII Rules extraterritorially.").

[12] *SIFMA v. CFTC, supra* note 9.

[13] *SIFMA v. CFTC*, 67 F.Supp.3d at 424.

[14] *See* Proposal at C.1.; Guidance, 78 FR at 45292, 45300; see also *SIFMA v. CFTC*, 67 F.Supp.3d at 424-5.

[15] Proposal at I.A.

[16] The Commission proposes to limit its supervisory oversight outside the United States, "*only* as necessary to address risk to the resiliency and integrity of the U.S. financial system." Proposal at I.D. (emphasis supplied).

[17] Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 FR 71946, 71952 (Oct. 18, 2016) ("2016 Proposal").

[18] *Id.*

[19] Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016).

[20] Proposal at II.A

[21] Proposal at II. A.

[22] See Proposal at II. A.; Guidance, 78 FR at 45312-13.

[23] Guidance, 78 FR at 45312.

[24] Proposal at II. B; *See* Guidance 78 FR at 45320, n. 267.

[25] *Id.*

[26] *Id.*

[27] Proposal at II.

[28] *See* 17 CFR 240.3a71-3(a)(1).

[29] Proposal at II.C.1.

[30] *See, e.g.* Proposal at I.C.1.; Guidance 81 FR at 45298-300; *See SIFMA v. CFTC,* 67 F.Supp.3d at 427 ("Congress modeled Section 2(i) on other statutes with extraterritorial reach that operate without implementing regulations." (citations omitted); *See* Larry M. Eig, Cong. Research Serv., 97-589, Statutory Interpretation: General Principles and Recent Trends 20 (2014) (Congress is presumed to legislate with knowledge of existing common law.").

[31] *Id.* at 16-17 ("where Congress includes particular language in one section of a statute but omits it in another…, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1933))).

[32] Proposal at VII. C.2.i.

[33] *See* CFTC Staff Advisory No. 13-69, Applicability of Transaction-Level Requirements to Activity in the United States (Nov. 14, 2013), http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-69.pdf.

[34] *See* Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers located in the United States, 79 FR 1347 (Jan. 8, 2014) ("2014 Request for Comment").

[35] *See* Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 FR 71946 (Oct. 18, 2016).

[36] Proposal at I.A.

[37] Indeed, the discussion of the seventeen comments to the 2014 Request for Comment in the 2016 Proposal is nearly identical to that of the Proposal. *See*, 2016 Proposal, 81 FR at 71946, 71952-3; Proposal at V.

[38] *See* U.S. Dep't of the Treasury, A Financial System that Creates Economic Opportunities: Capital Markets 135-136 (Oct. 2017), https://home.treasury.gov/system/files/136/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

[39] Proposal at V.