

SPEECHES & TESTIMONY

Remarks of Chairman J. Christopher Giancarlo to the City Guildhall, London, United Kingdom

September 4, 2018

Introduction

Thank you.

I am grateful to the City of London Corporation and especially Catherine McGuinness for this opportunity to speak to you this evening.

Nearby, in the streets and alleys, since the time of the Romans, this part of London has been a center of commerce. It drew the world's products with a powerful force of gravity and inspired global exploration, banking, and trade. Here was a crossroads of commodities, where goods flowed from the land and sea, slowly, yet steadily, then rapidly becoming a torrent from places like the tin mines of Cornwall and the farms of Scotland, and farther, from the teas of India and the lamb of New Zealand. London became a powerhouse of trade and finance, and since the 12th Century, Guildhall has been the central meeting place for the city.

I am pleased it is the location for my remarks tonight.

I am here in Guildhall to do three things. First, I want to discuss the current state of swaps reform and highlight the tremendous progress that has been made by regulators across the globe in their regulatory reform efforts. Second, I want to provide both a mea culpa and an apologia for what has been, at times, an overreach on the part of the Commodity Futures Trading Commission (**CFTC** or **Commission**) in applying its swaps rules outside the United States.[i]

Third, and most importantly, I want to propose an updated and improved vision for cross-border swaps regulation by outlining for you the content of a White Paper I will publish in the near future. This White Paper will assess the CFTC's application of its swaps rules to cross-border activities and make concrete recommendations for improvements. In a number of areas, the White Paper will recognize deficiencies in the CFTC's current approach to regulating cross-border activities and seek to recalibrate the CFTC's cross-border approach based on a set of guiding principles. I will lay out these principles to you tonight.

I hope that the White Paper begins a dialogue with my fellow Commissioners at the agency and interested parties outside of it and leads to a more thoughtful approach to the cross-border application of U.S. swaps rules based on effective systemic risk mitigation and deference to comparable overseas regulation.

In preparing these remarks here at Guildhall, I was reminded of another London landmark, the original Globe Theatre, and the following words of Antonio in Shakespeare's last play, *The Tempest*, which was performed there, came to mind:

"Whereof what's past is prologue; what to come,

In yours and my discharge."[ii]

The words "What is past is prologue" are also inscribed on the statue called *Future* located on the northeast corner of the National Archives Building in Washington, D.C., fairly close to where the CFTC is located. Consistent with these words, I believe we should see the swaps regulatory reform efforts that have taken place up to this point as the stage for what is to come, the next act. The shape of that next act is ultimately in our discharge.

The Current State of Swaps Market Reform

Let me take you back in time. September 2008 marks the tenth anniversary of the bankruptcy of Lehman Brothers, the fourth-largest U.S. investment bank at the time of its collapse, which many see as the spark that set off the financial crisis of 2008.

We also are nearing the ninth anniversary of the Pittsburgh G20 Summit, where the G20 leaders committed to a sweeping and coordinated set of policy actions that were designed to reform financial regulation and supervision to support economic recovery and avoid a return to the risky practices that led to financial crisis of 2008.[iii] In 2009, the G20 leaders agreed upon the following reforms for the over-the-counter (**OTC**) derivatives markets:

1. Standardized OTC derivatives should be traded on regulated trading platforms, where appropriate;
2. Standardized OTC derivatives should be cleared through central counterparties;
3. OTC derivatives contracts should be reported to trade repositories; and
4. Non-centrally cleared derivatives contracts should be subject to higher capital requirements.[iv]

To achieve these common goals, the G20 leaders pledged to work together to "implement global standards" in financial markets, while rejecting "protectionism." [v]

The following year, in 2010 the U.S. Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (**Dodd-Frank Act**).^[vi] Consistent with the Pittsburgh G20 reforms, Title VII of the Dodd-Frank Act established a comprehensive framework for the regulation of the OTC swaps markets in the United States.^[vii]

Among the world's regulators, the CFTC was the earliest to implement the reforms set forth by the G20 and later endorsed in the Dodd-Frank Act.^[viii] Still, other regulators have remained engaged in their own implementation efforts.^[ix]

Much has changed in the decade since Lehman Brothers went bankrupt. The regulatory landscape is very different than it was then. Even in 2013 when the CFTC published the CFTC Cross-Border Guidance, very few non-U.S. jurisdictions had made much progress in finalizing the global swaps reforms that were agreed to at the Pittsburgh G20 Summit. Today, however, as a result of cumulative implementation efforts by regulators throughout the world, significant and substantial progress has been made in the world's primary swaps trading jurisdictions to implement the G20 commitments.

The following is a sample of some of these significant achievements as of June 2017:

- **Trade Reporting** – Nineteen out of 24 Financial Stability Board (FSB) jurisdictions have comprehensive trade reporting requirements in force, which gives regulators greater insight into the global trading activities of multi-national financial institutions than they have ever had before.
- **Central Clearing** – Seventeen FSB jurisdictions have in force comprehensive standards for determining when standardized OTC derivatives should be centrally cleared, up from 14 at end-June 2016.
- **Margin Requirements for Non-Centrally Cleared Derivatives** – Considerable progress has been made in the implementation of comprehensive margin requirements for non-centrally cleared derivatives; 14 jurisdictions have such requirements in force, up from 3 jurisdictions at end-August 2016.
- **Capital Requirements for Non-Centrally Cleared Derivatives** – Higher capital requirements for exposures to non-centrally cleared derivatives consistent with the bank capital framework adopted by the Basel Committee on Banking Supervision (**BCBS**)^[x] are largely in force; 23 jurisdictions have comprehensive requirements in force, up from 20 jurisdictions at end-June 2016.

Of these reforms, swaps central clearing is probably the most far-reaching and consequential. Precise data as far back as 2010 are not available, but the Bank for International Settlements (**BIS**) estimated minimum global clearing rates at that time of about 40% for interest rate swaps and 8% for credit default swaps (**CDS**).^[xi] By 2017, according to data collected by the CFTC on U.S. reporting entities, about 85% of both new interest rate swaps and new CDS were cleared.^[xii] The default risk of swaps counterparties that was once spread across Wall Street is now pooled and managed within regulated central counterparties (**CCPs**). Globally, for OTC interest rate derivatives markets, reporting dealers' positions booked against CCPs accounted for about 75% of all notional amounts outstanding. In addition, the share of outstanding CDS cleared through CCPs increased to 55% at end-December 2017.^[xiii]

This is a significant achievement. I would say we are not in Kansas anymore (for those of you who recognize the reference), but as the Chairman of the CFTC I have developed a certain fondness for Kansas, so I will simply say we are not in 2008 – or even 2013 – anymore.

A Mea Culpa and An Apologia

Now I am would like to turn to the mea culpa and apologia.

To start by putting it bluntly, the CFTC's current approach to applying its swaps rules to cross-border activities has resulted in a number of problems, including the following:

- It is expressed in Commission "guidance," rather than formal Commission regulation.
- It is over-expansive, unduly complex, and operationally impractical.^[xiv]
- It is premised on the incorrect assumption that every single swap a U.S. person enters into, no matter where and how transacted, has a direct and significant connection with activities in, and effect on, commerce of the United States that requires imposing the imposition of CFTC transaction rules.^[xv]
- It is conceptually inconsistent in utilizing a "U.S. entity" test for swaps activity abroad and a "territorial" test for swaps activity in the United States.
- It relies on a substituted compliance regime that applies a somewhat arbitrary, rule-by-rule comparison of CFTC and non-U.S. rules under which a transaction or entity may be subject to a patchwork of U.S. and non-U.S. regulation.
- It shows insufficient deference to non-U.S. regulators that have adopted comparable swaps reforms for their jurisdictions, which is inconsistent with the CFTC's traditional approach of comity to competent overseas regulation.
- It fails to distinguish between those swaps reforms that are designed to mitigate cross border systemic risk and those reforms that address particular market and trading practices that are suitable for tailoring to local trading conditions.
- It has driven global market participants away from transacting with entities subject to CFTC swaps

It has driven global market participants away from transacting with entities subject to CFTC swaps regulation and caused fragmentation of what were once global markets into a series of separate liquidity pools that are less resilient to market shocks, thereby increasing systemic risk rather than diminishing it. [xvi]

For this reason, soon after I started as a Commissioner at the CFTC in 2014, I expressed the view that the CFTC could well be seen to have started the current rift in cross-Atlantic swaps cooperation with its 2013 cross-border guidance imposing CFTC transaction rules on swaps traded by U.S. persons even in jurisdictions committed to implementing G-20 swaps reforms. That approach alienated many overseas regulatory counterparts and squandered important American leadership and influence in global reform efforts. **Mea culpa.**

In all fairness, the CFTC's over-expansive assertion of jurisdiction may have been understandable in 2013 when other G20 jurisdictions had not yet implemented swaps reforms. **Apologia.**

Yet, today the world is much different than it was then. The CFTC's 2013 approach is increasingly out of step with the world's major swaps trading regimes that have now adopted comparable swaps reforms.

I recognized that if the CFTC overreaches we should not be surprised if non-U.S. regulators do the same – “turnabout is fair play.”[xvii] For this reason, in 2014, I called for a reset in the EU and CFTC cross-border regulatory relationship in the spirit of the Pittsburgh G-20 Accord. I repeat that call here.

Cross-Border Swaps Regulatory Version 2.0

Elsewhere I have described the current CFTC framework as “Swaps Reform Version 1.0,” using the analogy of a first version of a software application.[xviii] While it contains the basic functionality of the Pittsburgh G20 swaps reforms, it has some serious bugs and flaws. The time has come to take stock of global swaps market reforms to balance better systemic risk resiliency with vibrant and durable financial markets essential for sustainable economic growth and broad-based prosperity. The goal is to pursue improvements to the CFTC's Swaps Reform Version 1.0, while staying true to the Pittsburgh G20 reforms and remaining in full accordance with the letter and spirit of Title VII of the Dodd-Frank Act.

With respect to the application of the CFTC's swaps rules to cross-border activities, we can refer to these improvements as “Cross-Border Swaps Regulatory Version 2.0.” The goal is to develop the next version of cross-border rules, which would be better calibrated to address systemic risk while fostering innovation, competition, and international cooperation. An improved framework should be engineered to better enhance market durability, increase trading liquidity, and stimulate broad-based economic growth and revival.[xix] Moreover, the CFTC should adopt proper and final cross-border rules rather than rely on less clear cut interpretive policy statements or guidance.[xx]

Accordingly, I intend to direct the CFTC staff to develop proposed rules governing the cross-border application of the swaps provision of Title VII of the Dodd-Frank Act. These rulemakings would draw upon the CFTC's experiences over the last four years and the global implementation of swaps reform, particularly with respect to measures taken to address systemic risk, such as the adoption by key jurisdictions throughout the world of requirements for central clearing and margin on uncleared swaps. The proposals also would be informed by the increased swaps trading data the CFTC receives concerning U.S.-related trading activity and the potential build-up of risk in U.S.-related entities.[xxi] The goal of these rulemakings would be to develop proposals that would address systemic risk to the U.S. financial system that would be better tailored to the market as it exists now, not as it existed in 2010 or even in 2013.

Principles to Guide the Cross-Border Application of the Swaps Rules

With this background, I want to set out a set of principles that should inform a revision of the CFTC's swaps rules for cross-border activities.[xxii]

Principle: The CFTC should recognize the distinction between swaps reforms intended to mitigate cross border systemic risk and reforms designed to address particular market and trading practices that are suitable for tailoring to jurisdictional trading conditions.

A key distinction that should inform the CFTC's cross-border approach is the difference between swaps reforms that are designed to mitigate systemic risk and swaps reforms that address market structure and trading practices. Swaps reforms that are designed to mitigate systemic risk include swaps clearing, margin for uncleared swaps, dealer capital, and recordkeeping and regulatory reporting. These reforms specifically address risk in several ways, including by mandating the use of a central counterparty (**CCP**), requiring parties to collateralize positions, requiring more capital reserves, and ensuring sufficient information is available for effective supervision and oversight. These reforms seek to mitigate the type of risk that may have a “direct and significant” connection with the United States.

By contrast, swaps reforms that are designed to address market structure and trading practices include public trade reporting and price transparency, trading platform design, trade execution methodologies and mechanics, platform personnel qualifications, and examinations and regulatory oversight. These reforms address market integrity issues and are intended to facilitate the orderly operations of the markets, such as by requiring public dissemination of trade information to promote price discovery or by mandating particular modes of trade execution. These reforms are appropriately tailored to jurisdictional market characteristics, practices, and

norms. As such, while important, these reforms do not have such a “direct and significant” connection with the United States as the swaps reforms that are specifically designed to address systemic risk.[xxiii] To provide just one example, whether or not a non-U.S. trading venue has functionality that requires a request for quote to three dealers (**RFQ-to-3**) or ten dealers has almost nothing to do with the transference of counterparty risk to the U.S. financial system.

This distinction between market structure and trading practices, on the one hand, and global systemic risk transfer, on the other, must inform how we think about cross-border issues generally. Regulation and oversight of the former must be established and overseen jurisdictionally. The latter requires closer cross-border regulatory coordination.[xxiv]

Principle: The CFTC should pursue multilateralism, not unilateralism, for swaps reforms that are designed to mitigate systemic risk.

For those swaps reforms designed to mitigate systemic risk, the CFTC should seek a reasonably strong degree of comparability with global standards and laws of G20 regulators. Systemic risk mitigation reforms should be appropriately comparable across borders to mitigate the risk of cross-border contagion. Accordingly, with respect to swaps reforms designed to mitigate systemic risk, the CFTC’s jurisdiction should continue to apply cross-border to U.S. firms on an “entity” basis, with the availability of substituted compliance for non-U.S. jurisdictions that have implemented comparable reforms for systemic risk mitigation.

The G20 leaders in Pittsburgh committed “to take action at the national and international level to raise standards together so that our national authorities implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage.”[xxv] As the CFTC’s non-U.S. regulatory counterparts continue to implement comparable swaps reforms in their markets, the CFTC should exercise regulatory deference to ensure that its rules do not unnecessarily conflict with effective overseas regulatory frameworks and fragment the global marketplace. The CFTC should operate on the basis of comity, not uniformity, with non-U.S. regulators that oversee comparable regulatory regimes. The alternative is a world in which every regulator asserts global jurisdiction over swaps trading abroad by their home domiciled institutions, leading to a completely untenable state of overlapping and duplicative regulations and highly fragmented trading markets. This is not the right approach to cross-border regulation.[xxvi] Unfortunately, it is the current approach of the CFTC.

Principle: The CFTC shall be a rule maker, not a rule taker, in overseeing U.S. markets – one marketplace, one set of trading rules

As an agency of the sovereign government of the United States with exclusive regulatory jurisdiction over the world’s largest derivatives marketplace, the CFTC shall be a “rule maker,” not a “rule taker,” with respect to the U.S. swaps market. The CFTC has exclusive statutory responsibility, as sovereign “rule maker” in the United States, to decide what is appropriate regulation for U.S. markets and market participants, just as other non-U.S. regulators should be expected to act as rule makers for their jurisdictions. The CFTC has been successfully regulating derivatives trading for decades and has extensive systems, capabilities and experience. The CFTC has every right to expect that non-U.S. regulators defer to it on oversight of U.S. derivatives trading markets, as the CFTC should defer to non-U.S. regulators for activities conducted primarily in their jurisdictions, and it should seek to reconcile its rules with rules adopted by its non-U.S. regulatory counterparts, as appropriate.[xxvii]

For this reason, those swaps reforms that address market structure and trading practices should be regulated and overseen jurisdictionally by national competent regulators. They should develop in ways that are suitable to jurisdictional practices, customs, and market characteristics. And they should be uniform within a single trading jurisdiction and not vary in any regulatory jurisdiction based on the nationality of the trading counterparty. Regulation of market structure and trading practices should not create separate domestic and foreign trading liquidity pools within the same regulatory jurisdiction.

Principle: The CFTC should act with deference towards comparable swaps reform regulation in non-U.S. markets by adopting a flexible, outcomes-based approach for substituted compliance.

Substituted compliance is where the CFTC permits a swap participant or market utility (e.g., an exchange or clearinghouse) whose status or activities might bring it within the scope of certain U.S. regulations to use compliance with regulations in its home jurisdiction as a substitute for compliance with the relevant CFTC regulations. This is, and has been since the very beginning, a key component to the CFTC’s cross-border approach.[xxviii] Indeed, the CFTC has a long history of working collaboratively with non-U.S. regulators to facilitate cross-border activity.[xxix]

Regrettably, the way in which substituted compliance of swaps reform has been implemented to date by the CFTC raises concerns.[xxx] Rather than conducting a granular, rule-by-rule comparison, the CFTC should focus on whether a non-U.S. regulator’s regime, in the aggregate, provides a sufficient level of regulation to justify a comparability assessment.[xxxi] Mutual commitment to cross-border regulatory deference means that market participants can rely on one set of rules – in their totality – without fear that another jurisdiction will seek to selectively impose an additional layer of regulatory burden. This approach, whether for margin, trading venues, clearinghouses, or other areas, is essential to ensuring a strong and stable derivatives market that supports economic growth both within and outside the United States.[xxxii] Furthermore, compliance with the terms of a substituted compliance determination should be straightforward and unconditional to prevent the “fragmentation of markets, protectionism, and regulatory arbitrage” that global regulators were charged to avoid

In short, the CFTC should move to a flexible, outcomes-based approach for cross-border substituted compliance determinations.[xxxiii] The CFTC and its global counterparts should recommit themselves to working together to implement a deference process (using, for example, the tools of equivalence and substituted compliance), particularly for swaps execution and the cross-border activities of swap dealers, based on common principles in order to increase regulatory harmonization and reduce market balkanization. The future of the global swaps marketplace depends on it.[xxxiv]

Principle: The CFTC should act to encourage adoption of comparable swaps reform regulation in non-U.S. markets that have not yet adopted swaps reform for any significant swaps trading activity.

With respect to those non-U.S. jurisdictions that do not yet have comparable requirements to the CFTC's and that generally have not implemented the swaps reforms agreed to by the G20 leaders in Pittsburgh, U.S. rules should be applied generally to U.S.-related entities rather than taking a deferential approach. To the extent that the activity does not raise systemic risk concerns, materiality thresholds may be appropriate before CFTC requirements are triggered to facilitate U.S. persons' access to non-U.S. markets. This is partly out of a desire to avoid creating non-U.S. havens that could be used to avoid U.S. regulation. However, this approach is also out of a desire to encourage adoption of comparable swaps reform regulation in overseas markets that have not adopted reform for any significant swaps trading activity.

Recommendations

My forthcoming White Paper will make a number of concrete recommendations. These will include the following:

Non-U.S. Central Counterparties

The CFTC should expand the use of its exemptive authority for non-U.S. CCPs that clear swaps and that do not pose substantial risk to the U.S. financial system if the CCPs are subject to "comparable, comprehensive supervision and regulation" in their home country. The exemption would permit such non-U.S. CCPs to provide clearing services to U.S. customers indirectly through non-U.S. clearing members, without the non-U.S. CCP or its non-U.S. clearing members having to register as a DCO or futures commission merchant (**FCM**) with the CFTC, respectively.

In this context, the CFTC has construed "comparable, comprehensive supervision and regulation" to mean that the home country's supervisory and regulatory framework should be consistent with, and achieve a comparable outcome as, the statutory and regulatory requirements applicable to registered DCOs. The CFTC has deemed a supervisory and regulatory framework that is consistent with the Principles of Financial Market Infrastructures (**PFMI**) to be comparable.[xxxv]

However, non-U.S. CCPs that clear swaps for U.S. persons and are deemed by the CFTC to pose substantial risk to the U.S. financial system would continue to be required to register with, and then be regulated by, the CFTC, with a focus on their U.S.-facing business. At the same time, non-US CCPs that clear foreign futures through CFTC's Part 30 and Part 48 regimes respectively may continue to clear for U.S. customers without registering. In such cases, the CFTC should work closely with the CCP's primary regulator in its home country to ensure that both regulators can effectively monitor the activity of the CCP.

This approach supports the CFTC's effort to strike an appropriate balance by focusing on the risk implications to the United States, while promoting global harmonization.

Non-U.S. Trading Venues

The CFTC should exempt non-U.S. trading venues subject to comparable regulation from registration as swap execution facilities (**SEFs**) with respect to all types of swaps (both swaps that are subject to the CFTC's trade execution requirement (**Required Transactions**) and swaps that are not (**Permitted Transactions**)). Because systemic risk concerns are not raised, such exempt swaps trading venues would not be required to have identical rules regarding trading methodologies and mechanics in order to be deemed comparable. Instead, comparable local (non-U.S.) trading rules would apply.

Both this recommendation and the previous recommendation on non-U.S. CCPs build upon the 2016 CFTC – European Commission (**EC**) Agreement establishing a common approach to regulating transatlantic CCPs and the 2017 CFTC-EC Agreement for derivatives trading venues. Those agreements would stay in place with the EU, but a similar approach would be taken to other jurisdictions with comparable regulatory requirements for swaps CCPs and trading venues.

Non-U.S. Swap Dealers

As you may know, the CFTC requires persons to register as swap dealers if they engage in swap dealing activity that exceeds the de minimis threshold in the swap dealer definition. I believe the CFTC should take an approach to registration for non-U.S. swap dealers that both recognizes risk-mitigating measures and shows appropriate deference to non-U.S. regulatory regimes that have comparable requirements for entities engaged in swap dealing activity. Thus, non-U.S. persons should not have to count toward their de minimis threshold swaps with other non-U.S. persons that are registered as swap dealers. Non-U.S. persons also should not have to count

toward their de minimis threshold swaps with foreign consolidated subsidiaries (**FCS**). Such an approach is consistent with the SEC's approach to the de minimis threshold in the security-based swap dealer definition. [xxxvi] This approach will avoid incentivizing non-U.S. market participants from avoiding financial firms bearing the scarlet letters of "U.S. person" in order to steer clear of the CFTC's regulations. Furthermore, this approach will help reduce the current fragmentation of global swaps markets between U.S. persons and non-U.S. persons.

Conclusion

In closing, I sincerely hope that we can fulfill the important goals that the G20 set for us in Pittsburgh to reform global trading in swaps to reduce systemic risk while avoiding "protectionism."

I propose that the CFTC exhibit global leadership in this effort by:

- Distinguishing between those swaps reforms that are designed to mitigate cross-border systemic risk and reforms that address particular market and trading practices suitable to local trading conditions;
- Pursuing multilateralism, not unilateralism, for swaps reforms that are designed to mitigate systemic risk;
- Asserting its authority as a rule maker, not a rule taker, for rules concerning U.S. market structure and market practices;
- Operating with deference towards comparable swaps reform in non-U.S. markets by adopting a flexible, outcomes-based approach for substituted compliance; and
- Encouraging adoption of comparable swaps regulation in non-U.S. markets that have not yet adopted swaps reform for significant swaps trading activity.

In short, it is time for a more thoughtful approach to the cross-border application of U.S. swaps rules based on effective systemic risk mitigation and deference to comparable overseas regulation.

Many of you follow the work of the best-selling historian Peter Ackroyd. In one of his great books, he wrote that London is more than a city; it is a vision. That vision can guide our future.

Let us have the same confidence as we move forward. I know there are some who fear an uncertain future. I think the future can be an improvement, much better. I have been told that fear ("F-E-A-R") can mean "Forget everything and run." I prefer to define it as "Face everything and rise."

The choice is ours. And what better place to make that choice than Guildhall!

Thank you very much for your time.

[i] (file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref1) The CFTC's view of the application of the swaps rules to cross-border activities is set forth in the following releases: Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 FR 45292 (July 26, 2013) (**CFTC Cross-Border Guidance**), available at: <https://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf> (<https://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf>); Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 FR 21946 (Oct. 18, 2016) (**Proposed CFTC Cross-Border Rules**), available at: <https://www.govinfo.gov/content/pkg/FR-2016-10-18/pdf/2016-24905.pdf> (<https://www.govinfo.gov/content/pkg/FR-2016-10-18/pdf/2016-24905.pdf>); and 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) (**Final CFTC Cross-Border Margin Rules**), available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-05-31/pdf/2016-12612.pdf> (<https://www.gpo.gov/fdsys/pkg/FR-2016-05-31/pdf/2016-12612.pdf>). Relevant CFTC staff no-action letters and advisories are available at: <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm> (<https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm>).

[ii] (file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref2) William Shakespeare, *The Tempest*, Act II, Scene 1.

[iii] (file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref3) G20 Leaders' Statement, "Framework for Strong, Sustainable and Balanced Growth," The Pittsburgh Summit (Sep. 24-25, 2009), available at: https://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf (https://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf).

[iv] (file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref4) In Cannes in 2011, a fifth reform to require margin for swaps not subject to central counterparty clearing was added.

[v] (file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref5) Id.

[vi]

(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref6) Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, §§ 721 – 774, 124 Stat. 1641, 1641 – 1807 (2010), available at: <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm> (<http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>).

[vii]

(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref7) Title VII of the Dodd-Frank Act established a statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating recordkeeping and real-time reporting regimes; and (4) enhancing the CFTC's rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the CFTC's oversight.

[viii]

(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref8) The CFTC continues to play a very active role in international bodies like the International Organization of Securities Commissions (IOSCO) in order to build consensus and cooperate in the regulation of the global financial markets. The CFTC currently chairs many international committees and groups and serves as a member of many other ones, including: (1) Chair, IOSCO Cyber Task Force; (2) Chair, IOSCO Committee on Derivatives; (3) Co-Chair, CPMI-IOSCO Data Harmonization Group; (4) Co-Chair, FSB Working Group on UTI and UPI Governance; (5) Chair, OTC Derivatives Regulators Group; (6) Co-Chair, Derivatives Assessment Team; and (7) Co-Chair, CPMI-IOSCO Policy Standing Group.

[ix]

(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref9) See Financial Stability Board, OTC Derivatives Market Reforms: Twelfth Progress Report on Implementation (June 29, 2017), available at: <http://www.fsb.org/wp-content/uploads/P290617-2.pdf> (<http://www.fsb.org/wp-content/uploads/P290617-2.pdf>).

[x]

(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref10) BCBS is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Institutions represented on the BCBS include the Federal Reserve Board, the European Central Bank, Deutsche Bundesbank, Bank of France, Bank of England, Bank of Japan, and Bank of Canada.

[xi]

(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref11) Bank for International Settlement, Statistical release: OTC derivatives statistics at end-December 2017 (May 3, 2018) (**2018 BIS Report**), available at: https://www.bis.org/publ/otc_hy1805.pdf (https://www.bis.org/publ/otc_hy1805.pdf)

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref12) Cited in Remarks of Chairman J. Christopher Giancarlo at the Association of German Banks, Berlin, Germany (May 7, 2018), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo45> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo45>).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref13) 2018 BIS Report at 2.

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref14) See Keynote Address of CFTC Commissioner J. Christopher Giancarlo Before SEFCON VII, "Making Market Reform Work for America" (Jan. 18, 2017), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-19> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-19>).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref15) See, e.g., Statement of Commissioner J. Christopher Giancarlo Regarding Final Response to District Court Remand Order in Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission (Aug. 4, 2016), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement080316> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement080316>). The CFTC's current approach to cross border application of its swaps trading rules has been aptly referred to as the "Intergalactic Commerce Clause." See CFTC Commissioner Jill E. Sommers, Commissioner, Statement of Concurrence: (1) Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, Proposed Interpretive Guidance and Policy Statement; (2) Notice of Proposed Exemptive Order and Request for Comment Regarding Compliance with Certain Swap Regulations (June 29, 2012), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/sommersstatement062912> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/sommersstatement062912>).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref16) See, e.g., Testimony of Commissioner J. Christopher Giancarlo before the U.S. House Committee on Agriculture, Subcommittee on Commodity Exchanges, Energy, and Credit (Apr. 14, 2015), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-5> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-5>) (arguing that the combined effect of the CFTC's cross-border approach is to dictate that non-U.S. market operators and participants must abide by the CFTC's peculiar, one-size-fits-all swaps transaction-level rules for trades involving U.S. persons or supported by U.S.-based personnel).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref17) Keynote Address of CFTC Commissioner J. Christopher Giancarlo at The Global Forum for Derivatives Markets, 35th Annual Burgenstock Conference, Geneva, Switzerland, "The Looming Cross-Atlantic Derivatives Trade War: 'A Return to Smoot-Hawley'" (Sep. 24, 2014), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-1> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-1>).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref18) See also Remarks of Chairman J. Christopher Giancarlo before the Global Forum for Derivatives Markets 38th Annual B urgenstock Conference, Lucerne, Switzerland (Sep. 12, 2017), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-27> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-27>).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref19) The Cross-Border White Paper is intended as a complement to a previous White Paper I co-authored with the CFTC's Chief Economist, Bruce Tuckman, analyzing the CFTC's current implementation of swaps reform. See CFTC Chairman J. Christopher Giancarlo and CFTC Chief Economist Bruce Tuckman, Swaps Regulation Version 2.0: An Assessment of the Current Implementation of Reform and Proposals for Next Steps (Apr. 26, 2018) (**April 2018 White Paper**), available at: https://www.cftc.gov/sites/default/files/2018-05/oce_chairman_swapregversion2whitepaper_042618.pdf (https://www.cftc.gov/sites/default/files/2018-05/oce_chairman_swapregversion2whitepaper_042618.pdf).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref20) See, e.g., Statement of Dissent by Commissioner Scott D. O'Malia, Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations and Related Exemptive Order (July 12, 2013), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b>) (disagreeing with the CFTC's decision to issue its position on the cross-border application of its swaps regulations in the form of interpretive guidance instead of promulgating a legislative rule under the U.S. Administrative Procedure Act).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref21) The CFTC currently obtains swap trading data regarding cleared positions from the CCPs that it regulates. Given the high percentage of interest rate swaps and CDS that are centrally cleared, this represents a significant portion of the U.S.-related swaps market. Furthermore, for the remaining portion of the U.S.-related swaps market, namely, the uncleared part that is reported to swap data repositories, the CFTC obtains swaps trading information from the entities that it regulates regarding their own trading activity and, in certain cases, the trading activity of their U.S. and non-U.S. guaranteed and unguaranteed affiliates. With passage of the FAST Act and a recent rulemaking by the CFTC, as discussed below, the CFTC soon should be able to obtain from foreign regulators regarding U.S.-based entities (guaranteed and unguaranteed) through information-sharing arrangements. This should give the CFTC a very comprehensive view of the U.S.-related swaps marketplace, from which it can monitor the build-up of risk in U.S.-related entities, regardless of whether they are registered as swap dealers.

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref22) The nature of the swaps markets differs from other markets in key respects. In particular, the swaps markets are sophisticated, professional markets – not retail markets. As such, many of the investor protection concerns that inform the regulation of the futures markets, where there is substantial retail participation, do not play as important of a role in the swaps markets. Historically, swaps products trading has always taken place in institutional marketplaces. Until the passage of the Dodd-Frank Act, the United States generally had not permitted retail participants to transact swaps products, and that largely remains the case today.

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref23) The CFTC is guided by Section 2(i) of the Commodity Exchange Act (CEA). 7 U.S.C. § 2(i). This provision provides, in relevant part, that the CFTC's swap authority "shall not apply" to activities outside the United States unless those activities "have a direct and significant connection with activities in, or effect on, commerce of the United States...." Section 2(i) also provides that the swap provisions apply to activities outside the United States when they contravene CFTC rules or regulations as are necessary or appropriate to prevent evasion of the swaps provisions of the CEA enacted under Title VII of the Dodd-Frank Act.

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref24) As noted below, the White Paper does not address the application of the CFTC's public dissemination requirements (as opposed to regulatory reporting) for swaps. However, consistent with the principle articulated here, public reporting requirements would be treated as a requirement that does not pose systemic risk. As such, local rules governing public reporting would apply to trades executed in a non-U.S. jurisdiction if the jurisdiction's rules governing public reporting are generally comparable to the CFTC's. See discussion of substituted compliance below.

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref25) See supra note iii.

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref26) Domestically, the CFTC also has closely consulted with the staff of the Securities and Exchange Commission (**SEC**) in an effort to increase understanding of each other's regulatory approaches and to harmonize the cross-border approaches of the two agencies to the greatest extent possible, consistent with their respective statutory mandates. See Section 712 of the Dodd-Frank Act. Recently, to help ensure continued coordination and information sharing between the two agencies, the CFTC and SEC entered into a new Memorandum of Understanding (July 11, 2018), available at: https://www.cftc.gov/sites/default/files/2018-07/CFTC_MOU_InformationSharing062818.pdf (https://www.cftc.gov/sites/default/files/2018-07/CFTC_MOU_InformationSharing062818.pdf).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref27) For example, the CFTC is working cooperatively with international efforts to harmonize data fields for swaps reporting. Despite these efforts, the CFTC could add additional fields not addressed at the international level if it deems it appropriate to do so. Of course, consistent with the previous principle, this "rule making" applies to trading within the United States. As will be discussed below, outside the United States, deference to home country regulation or "rule taking" should be encouraged, where appropriate. See CFTC, Roadmap to Achieve High Quality Swaps Data (July 10, 2017), available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf (https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref28) See CFTC Cross-Border Guidance, 78 FR at 45340 - 45346.

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref29) For example, under CFTC Regulation 30.10 (17 CFR § 30.10), adopted in 1987, if the CFTC determines that a foreign regulatory regime offers comparable protections to U.S. customers transacting in foreign futures and options, and there is an appropriate information-sharing arrangement in place, the CFTC has allowed foreign brokers to comply with their home-country regulations in lieu of CFTC regulations. By analogy, since 1996 the CFTC has permitted direct access by U.S. customers to FBOTs without requiring the FBOT to register with the CFTC as a DCM. In determining the comparability of the foreign regulatory regime the CFTC does not engage in a line-by-line examination of the foreign regulator's approach to supervising the FBOT it regulates. Rather, the CFTC conducts a principles-based review to determine whether the foreign regime supports and enforces regulatory oversight of the FBOT and its clearing organization in a substantially equivalent manner as that used by the CFTC in its oversight of DCMs and clearing organizations. See Registration of Foreign Boards of Trade, 76 FR 80674, 80680 (Dec. 23, 2011), available at: <https://www.gpo.gov/fdsys/pkg/FR-2011-12-23/pdf/2011-31637.pdf> (<https://www.gpo.gov/fdsys/pkg/FR-2011-12-23/pdf/2011-31637.pdf>).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref30) For example, with respect to its cross-border approach to uncleared margin requirements, the CFTC did not recognize and build upon the strong foundation for mutual recognition of foreign regulatory regimes created by the G20 commitments and the BCBS-IOSCO framework, as well as the CFTC's own history of using a principles-based, holistic approach to comparability determinations. See Statement of Dissent by Commissioner J. Christopher Giancarlo on the Cross-Border Application of the Margin Requirements (May 24, 2016), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement052416> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement052416>).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref31) See, e.g., IOSCO Task Force on Cross-Border Regulation, Final Report (Sept. 2015) (advocating for an outcomes-based approach as opposed to a line-by-line comparison of rules), available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD507.pdf> (<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD507.pdf>). This is also consistent with the Treasury Report on Capital Markets, which includes the following recommendations regarding substituted compliance:

- The CFTC and the SEC should adopt substituted compliance regimes that consider the rules of other jurisdictions, in an outcomes-based approach, in their entirety, rather than relying on rule-by-rule analysis. They should work toward achieving timely recognition of their regimes by non-U.S. regulatory authorities.
- The CFTC should undertake truly outcomes-based comparability determinations, using either a category-by-category comparison or a comparison of the CFTC regime to the foreign regime as a whole.

Treasury Report on Capital Markets at 135.

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref32) See Remarks of Chairman J. Christopher Giancarlo to the ABA Derivatives and Futures Section Conference, Naples, Florida (Jan. 19, 2018), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo34> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo34>).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref33) See, e.g., Report of the OTC Derivatives Regulators Group (ODRG) on Cross-Border Implementation Issues (Mar. 2014), available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-03-odrg_odrg_report_to_the_g20_march_2014.pdf (https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-03-odrg_odrg_report_to_the_g20_march_2014.pdf).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref34) See, e.g., Statement of CFTC Commissioner J. Christopher Giancarlo Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties (March 16, 2016), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement031616> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement031616>).

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref35) See CPMI-IOSCO, Principles for financial market infrastructures (Apr. 2012), available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf> (<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf>). The PFMI is comparable to the DCO Core Principles and applicable CFTC regulations in purpose and scope. Both address major elements critical to the safe and efficient operations of clearing organizations, such as risk management, adequacy of financial resources, default management, margin, settlement, and participation requirements. See Derivatives Clearing Organizations and International Standards, 78 FR at 72477 – 72480.

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(file:///Z:/Media/DRAFT%20press%20releases/2018%20Posted%20General%20Press%20Releases/opagiancarlo52-CMS.doc#_ftnref36) See Application of the “Security-based Swap Dealer” and “Major Security-based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities, 79 FR 47278 (Aug. 12, 2014), available at: <https://www.gpo.gov/fdsys/pkg/FR-2014-08-12/pdf/R1-2014-15337.pdf> (<https://www.gpo.gov/fdsys/pkg/FR-2014-08-12/pdf/R1-2014-15337.pdf>).