IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, and INSTITUTE OF INTERNATIONAL BANKERS, Plaintiffs, v. UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 13-CV-1916 (ESH)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Rachel L. Brand
Steven P. Lehotsky
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Stephen B. Kinnaird, DC Bar # 454271
Kevin L. Petrasic
Michael A. Hertzberg
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20015
(202) 551-1700
stephenkinnaird@paulhastings.com
kevinpetrasic@paulhastings.com
michaelhertzberg@paulhastings.com

Counsel for the Chamber of Commerce of the United States of America

February 3, 2014

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. The Chamber represents the perspectives not only of entities in the swaps market directly regulated by the Commodity Futures Trading Commission ("Commission" or "CFTC"), but also of swaps purchasers whose risk management will be profoundly affected by the Commission's extraterritorial regulation of the swaps market.

American companies need a robust and competitive swaps market to hedge business risk effectively. In Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA" or "Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress granted the Commission rulemaking authority over certain swaps, but subject to important constraints that promote efficient regulation in a multitrillion-dollar global market. The Commission's Cross-Border Rule will increase both the cost and complexity of managing business risk for American companies operating globally, all without the mandatory evaluation of whether the regulations' benefits justify their costs. U.S. companies often use foreign affiliates to operate and manage global risks and serve foreign customers effectively. The broad extraterritorial application of the Commission's Dodd-Frank regulations will jeopardize the participation of foreign entities in swaps transactions involving U.S. entities and certain of their non-U.S. affiliates. The Rule will competitively disadvantage U.S. companies and affiliates by restricting liquidity in various foreign markets, forcing them to find new counterparties, and ultimately increasing the costs of

transactions that they had previously executed with foreign entities. This Court should vindicate the constraints that Congress placed upon the Commission's rulemaking powers.

ARGUMENT

The Commission's cross-border "Guidance" reflects a troubling pattern of administrative agencies' labeling their regulations as "policy statements" or "guidance" to circumvent the procedural requirements of legislative rulemaking; the agency seeks an "advantage" by proceeding to "issue or amend its real rules, *i.e.*, its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures," and with the hope of evading judicial review. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (internal quotation marks omitted).

The Commodity Exchange Act ("CEA") requires the Commission to evaluate the costs and benefits of proposed regulations and orders against specified criteria before promulgation. 7 U.S.C. § 19(a) (2012). The Commission has gone to extraordinary lengths to avoid its statutory obligations by promulgating Title VII regulations without considering their extraterritorial scope, and then later promulgating the Cross-Border Rule as "Guidance" without any cost-benefit analysis. *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45,292 (2013). In issuing the Rule, the Commission seems to believe that it can impose extensive duties and standards that will determine the regulatory fate of industry participants significantly beyond U.S. borders, and then drop in the modifier "generally"—which by the Chamber's count it has done a remarkable 193 times[1]—and escape the procedural constraints that Congress has placed on the Commission's rulemaking powers.

---

[1] To give the Court a flavor of the Commission's approach, here are examples just of the Commission's explication of its definition of a "U.S. person." *See, e.g.*, 78 Fed. Reg. at 45,309 ("the Commission would *generally* consider swap activities" involving persons physically located in the U.S. "to satisfy the 'direct and significant' test under section 2(i)"); *id.* ("the

This maneuver cannot succeed. First, the CEA's requirement of cost-benefit analysis applies to all "regulations" and "orders" issued by the Commission but for three narrow and inapplicable exceptions. The Cross-Border Rule is a substantive legislative rule, not a mere statement of policy, despite the Commission's prolific use of the "generally" modifier. Second, even if the Commission were correct in characterizing the Rule as a policy statement, such a statement would still qualify as a "regulation" under the CEA. Third, even if the Cross-Border Rule is not a regulation, the Commission contemplates extraterritorial application of its Title VII regulations; it therefore had a duty to evaluate all costs and benefits (domestic and extraterritorial) of those regulations before promulgating them. Finally, the Commission has impermissibly converted a statutory *prohibition* on extraterritorial swaps regulation (with limited exceptions for certain activities) into a warrant to engage in unprecedented status-based regulation of foreign financial institutions and transactions. This Court should grant the Plaintiffs' motion for summary judgment and the relief requested therein.

I. THE COMMISSION CANNOT AVOID MANDATORY COST-BENEFIT ANALYSIS BY STYLING ITS CROSS-BORDER RULE AS POLICY GUIDANCE.

The CEA requires the Commission to undertake cost-benefit analysis of all "regulations" and "orders" (save for narrow exceptions not applicable here) prior to promulgating them. 7 U.S.C. § 19(a). The Commission has sought to rationalize its failure to conduct a cost-benefit analysis by styling of its cross-border rule as "guidance" in the form of a policy statement. That rationale fails. Regardless of the Commission's labeling its action as guidance or a policy

---

Commission would *generally* interpret the term 'U.S. person' to include also a legal entity that is not incorporated in the United States if it has its 'principal place of business' in the United States," which "would *generally* include those entities that are organized outside the United States but have the center of direction, control, and coordination of their business activities in the United States") (emphases added); *see also id.* at 45,310 & nn. 201, 202, 203; 45,311-12.

statement, the Cross-Border Rule is a substantive (legislative) rule that is a regulation within the meaning of § 19(a). Even if the Cross-Border Rule were merely a guidance document (and it is not), as a general statement of the Commission's policy regarding the extraterritorial application of Dodd-Frank regulations, it is still subject to the cost-benefit-analysis requirement in § 19(a).

A. The Cross-Border Rule Is A Legislative Rule, Not A Policy Statement, That The Commission Cannot Promulgate Without Prior Cost-Benefit Analysis.

"Substantive or legislative rules are those that grant rights, impose obligations, or produce other significant effects on private interests, or which effect a change in existing law or policy." *American Tort Reform Ass'n. v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) (citations and internal quotation marks omitted). A policy statement, by contrast, has no binding effect, and does no "more than express, without the 'force of law,' the [agency's] 'tentative intentions for the future.'" *Thomas v. New York*, 802 F.2d 1443, 1447 (D.C. Cir. 1986) (Scalia, J.) (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

The agency's characterization of the Guidance as a policy statement rather than a substantive rule does not excuse it from complying with applicable rulemaking requirements. *See Appalachian Power*, 208 F.3d at 1022-23; *Barrick Goldstrike Mines Inc. v. Browner,* 215 F.3d 45, 48 (D.C. Cir. 2000) (agency's labeling of rule as an informal guideline does not foreclose APA review). Rather, the distinction between a substantive rule and a policy statement turns on the intent and effect of the agency action: *i.e.,* whether "a document expresses a change in substantive law or policy (that is not an interpretation) which the agency *intends to make binding, or administers with binding effect* …." *General Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (internal quotation marks omitted and emphasis added). A court need not await actual implementation to determine whether the pronouncement will bind the agency or regulated parties: "If the document is couched in mandatory language, *or in terms indicating*

that it will be regularly applied, a binding intent is strongly evidenced." *Id.* at 383 (internal quotation marks omitted and emphasis added).

The Commission claims that its cross-border requirements do not constitute a "binding rule … which would state with precision when particular requirements do and do not apply to particular situations." 78 Fed. Reg. at 45,297. But there is no necessity that a rule be absolute; a binding rule of *general* applicability that affects the rights of private parties or the agency's decisions is a substantive rule and regulation. *See* 5 U.S.C. § 551(4). As the D.C. Circuit opined in *General Electric*, if the agency declares a rule "in terms indicating that it will be regularly applied, a binding intent is strongly evidenced." 290 F.3d at 383. Accordingly, the Court there declared that a guidance document for PCB risk assessment was a binding substantive rule even though the document acknowledged that circumstances may call for non-standard assessment methods; the Court held that this proviso did "not undermine the binding force of the Guidance Document in standard cases." *Id.* at 384. And in *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988), the EPA had reserved the discretion to deviate from its waste-contamination model and to decide manufacturer's petitions to delist certain hazardous wastes on other grounds. The D.C. Circuit nonetheless held that the model was a legislative rule: "Though such a provision for exceptions obviously qualifies a rule—it's not 'ironclad'—, it does not push it much in the direction of a policy statement." *Id.* at 1321; *see also Community Nutrition Inst. v. Young,* 818 F.2d 943, 947 (D.C. Cir. 1987) (agency's intent to grant exceptions confirms that a rule has binding effect).

The Commission's ubiquitous usage of the qualifier "generally" does not deprive the Cross-Border Rule of its substantive effect; to the contrary, it confirms that the Rule will be regularly applied to mandate compliance on those terms. *See* 78 Fed. Reg. at 45,297 ("this

Guidance will assist market participants in understanding how the Commission intends that the registration and certain other substantive requirements of the Dodd-Frank Act *generally would apply* to their cross-border activities") (emphasis added). Indeed, the Guidance is replete with expressions of Commission intent and expectation underscoring that the Cross-Border Rule will have binding effect in the vast run of cases.[2]

There is no doubt that the Commission's intent and expectation will be realized. The Guidance has all the indicia of a legislative rule that is binding in practical effect. Because one cannot predict the basis upon which Commission staff may depart from the status-based provisions, "affected private parties are reasonably led to believe that failure to conform will bring adverse consequences." *General Elec.*, 290 F.3d at 383 (internal quotation marks omitted). Moreover, because the Guidance does not merely explicate existing exterritorial rules, but creates an extensive extraterritorial regulatory regime where none previously existed, it manifests Commission intent that both its staff and regulated entities treat the Guidance as establishing binding norms. Finally, because the Cross-Border Rule serves to "focus the decision-maker's attention" on stated criteria, and "thus narrow his field of vision, minimizing the influence of other factors and encouraging decisive reliance upon [those] factors," the Guidance functions as a legislative rule. *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974); *McLouth*,

[2] *See, e.g.,* 78 Fed. Reg. at 45,348 ("the Commission *would expect* non-U.S. swap dealers and non-U.S. MSPs to comply with all of the Entity-Level Requirements"); *id.* at 45,349 n.507 ("non-U.S. swap dealers and non-U.S. MSPs generally *should be expected* to report all of their swaps to a registered SDR"); *id.* at 45,355 ("to the extent that the non-U.S. swap dealer or non-U.S. MSP would have recourse to the U.S. guarantor in connection with its swaps position, the Commission *would generally expect* such non-U.S. swap dealer or MSP to comply with the Category A Transaction-Level Requirements for such a guaranteed swap"); *id.* at 45,361 ("where a swap transaction is between nonregistrants, and one or more of the counterparties is a U.S. person, generally the parties to the swap *will be expected* to comply in full with the Non-Registrant Requirements") (Emphases added).

838 F.2d at 1320 (same). And, as Plaintiffs demonstrate, the Commission and staff already treat the Guidance as binding norms. *See* Pltfs. Mem. 26-28.

Just as a rose by any other name smells as sweet, a substantive rule labeled as guidance binds just the same. Because the comprehensive Cross-Border Rule is a substantive rule, and thus a "regulation" that the Commission cannot promulgate without conducting a cost-benefit analysis, this Court should vacate the Cross-Border Rule and remand for such an analysis.

B. The Commodity Exchange Act Requires Cost-Benefit Analysis for All "Regulations," Including Policy Statements.

Even if the Commission properly characterized its Cross-Border Rule as a policy statement rather than a substantive rule, that would not relieve the Commission of its duty to conduct cost-benefit analysis. The term "regulation" in the CEA, 7 U.S.C. § 19(a), is not limited to substantive rules, but includes policy statements. As the D.C. Circuit has held, "Courts and Congress treat the terms 'regulation' and 'rule' as interchangeable and synonymous," and those terms mean "what the APA defines as a 'rule,' that is, 'the whole or part of *any agency statement* of general or particular applicability and future effect *designed to* implement, interpret, or *prescribe law or policy* or describing the organization, procedure, or practice requirements of an agency ….'" *National Treasury Emps. Union v. Weise*, 100 F.3d 157, 160 (D.C. Cir. 1996) (*quoting* 5 U.S.C. § 551(4)) (emphases added); *cf. National Park Hospitality Assn. v. Department of Interior*, 538 U.S. 803, 808-10 (2003) (characterizing a "general statement of policy" as a "regulation"). Because policy statements are "rules" under the APA, *Thomas*, 802 F.2d at 1446-47 & n.*, they are also "regulations" under the CEA, and the CEA requires the Commission to consider and evaluate the policy's costs and benefits before prescribing it. Thus, even if the Guidance were deemed a policy statement, the Commission cannot adopt a major new policy initiative like the Cross-Border Rule, expanding the

Commission's reach to previously unregulated transactions and entities, without the assessment of the regulation's costs and benefits in light of statutory factors.

C. The Commission Had A Duty To Consider The Extraterritorial Costs And Benefits Before Promulgating Its Original Title VII Regulations.

Even if this Court were to hold that the Cross-Border Rule is not a "regulation" subject to cost-benefit analysis under the CEA, the specific Title VII regulations that the Commission purports to apply extraterritorially—including its registration, entity-level, and transaction-level regulations—indisputably are. Because the Commission never assessed the costs and benefits of those regulations in their extraterritorial application, it has violated the CEA. 7 U.S.C. § 19(a).

Where the Commission engages in multi-step rulemaking, it need not project and evaluate the costs and benefits of *future regulations*; parties may always challenge the adequacy of the cost-benefit analysis of those regulations once "the nature of those obligations is clear." *Investment Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013). But the Commission cannot evade a statutory mandate by the artifice of deferring questions of extraterritoriality to a policy statement. Either the Title VII regulations should be deemed not to apply extraterritorially (notwithstanding the Guidance) because the regulations themselves do not declare that intent, *see* Pltfs. Mem. 16-17, or the cost-benefit analysis the Commission originally performed is defective because it failed to address the cost and benefits of the full scope of the Title VII regulations as promulgated. The necessary premise of the Commission's decision to issue a policy statement expressing "the Commission's views on how it ordinarily expects to apply *existing law and regulations in the cross border context*," 78 Fed. Reg. at 45,297 (emphasis added), is that the Title VII regulations had extraterritorial application as promulgated. But if the originally promulgated Title VII regulations had extraterritorial scope, the Commission had a duty to account for that scope in assessing the costs and benefits of the proposed Title VII regulations

before promulgation. 7 U.S.C. § 19(a). The Commission's failure to do so violated the CEA, and the regulations must be vacated (at least as to their extraterritorial application).

II. THE COMMISSION'S STATUS-BASED EXTRATERRITORIAL REGULATION OF FOREIGN PERSONS EXCEEDS ITS STATUTORY AUTHORITY.

The Chamber will defer to the Plaintiffs' briefing of the specific substantive challenges to the Cross-Border Rule, but wishes to underscore the central defect that undermines all of its provisions: namely, the Commission's misinterpretation of section 2(i) of the CEA.

Recognizing that financial institutions and transactions are subject to extensive regulation abroad, and in accord with the traditional presumption against regulating extraterritorial conduct, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), Congress adopted a transaction-based approach to extraterritorial swaps jurisdiction. Congress granted the Commission jurisdiction to regulate swaps executed in the U.S., but its regulations "*shall not apply to activities outside the United States* unless those activities—(1) have a direct and significant connection with activities in, or effect on, commerce of the United States"; or (2) contravene Commission regulations designed to prevent evasion of Title VII. 7 U.S.C. § 2(i) (emphasis added). Indeed, because the Constitution gives Congress the power to regulate "Commerce with foreign Nations" but not wholly foreign commerce, U.S. Const. art. I § 8, cl. 3 & 18, Congress could not grant the Commission the power to regulate the latter "economic activity" unless it "substantially affects" U.S. commerce. *Cf. United States v. Lopez*, 514 U.S. 549, 560 (1995); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 166 (2004).

The general statutory prohibition against Commission regulation of swaps "activities outside the United States" applies even to foreign swaps involving U.S. counterparties. The Commission cannot regulate *any* foreign swaps activities unless they come within one of the two exceptions to the prohibition. The exceptions, like the general prohibition, are activities-based.

The Commission must show that "*activities* outside the United States" have a connection with "*activities* in … commerce of the United States"—for example, that the domestic and foreign activities in certain kinds of swaps transactions are so integrated that the Commission must regulate both—or an effect on U.S. commerce. 7 U.S.C. § 2(i). Moreover, that activity's connection or effect must be both "direct and significant." *Id.*; *cf. Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (term "direct effect in the United States" in the Foreign Sovereign Immunities Act means "an immediate consequence of the defendant's activity").

The Commission has not limited its regulations to specific kinds of foreign swaps activities based on their direct and significant connection to U.S. activities, or their effect on U.S. commerce. Instead, the Commission has by design engaged in status-based regulation. For example, if a foreign entity's business organization has some U.S. nexus (such as a guarantee), the Commission purports to regulate even the wholly foreign swaps transactions of that entity with foreign counterparties regardless of whether those foreign swaps *activities* have any direct and significant connection with U.S. swaps activities or effect on U.S. commerce. *See* 78 Fed. Reg. at 45,326. "The Entity-Level Requirements apply to registered swap dealers and MSPs across all their swaps without distinctions as to the counterparty or the location of the swap," *id.* at 45,331, and other entity-level and transaction-level requirements apply based on the counterparty. *See id.* at 45,368-70. As Commissioner O'Malia observed, the Commission has improperly "treat[ed] section 2(i) as a ready tool to expand authority rather than as a limitation," *id.* at 45,372, and has arrogated to itself a power of effective worldwide swaps regulation whenever a foreign entity (or other counterparty) has some U.S. nexus. The Commission's action exceeds its limited extraterritorial statutory jurisdiction and should be overturned.

CONCLUSION

This Court should grant Plaintiffs' Motion for Summary Judgment and requested relief.

Respectfully submitted,

/s/Stephen B. Kinnaird

Rachel L. Brand
Steven P. Lehotsky
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Stephen B. Kinnaird, DC Bar # 454271
Kevin L. Petrasic
Michael A. Hertzberg
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20015
(202) 551-1700
stephenkinnaird@paulhastings.com
kevinpetrasic@paulhastings.com
michaelhertzberg@paulhastings.com

Counsel for the Chamber of Commerce of the United States of America

February 3, 2014

CERTIFICATE OF SERVICE

I hereby certify this 3rd day of February, 2014, that the foregoing *Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment* has been served via ECF to all parties of record to this proceeding.

/s/Stephen B. Kinnaird

Stephen B. Kinnaird