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VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre, 1151 21st Street, N.W.
Washington, D.C. 20581

Re: 17 CFR Part 1 – Release No. 33–9204; 34–64372; File No. S7–16–11

Dear Ms. Murphy and Mr. Stawick:

Thank you for extending the opportunity to comment on the Commodity Futures Trading Commission and Securities Exchange Commission's joint proposed rules and proposed interpretations (the "Proposal"). Our firm enjoys an extensive and diverse practice in the international insurance and reinsurance industries, serving clients with insurance regulatory needs throughout the United States and around the world. Given our broad insurance background and the broad spectrum of work that we do, we present these comments based upon the collective views of a number of our clients. Given our background, we feel that we are well positioned to comment and provide guidance on these issues.

We agree that Congress did not intend that the definition of "swap" under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") include traditional insurance products. Thus, we appreciate that the Commissions are accepting comments in order to clarify what products are insurance and therefore would not be considered swaps under Dodd-Frank.

We provide these comments in the format set forth in your Request for Comment. Although we represent clients in all areas of the insurance industry, these comments address only those questions related to property and casualty insurance. We do not address other questions.

1. The Commissions request comment on all aspects of proposed rule 1.3(xxx)(4) under the CEA and proposed rule 3a69–1 under the Exchange Act and the interpretive guidance in this section.

As discussed in greater detail below, we suggest removing the entity qualification in paragraph 1.3(xxx)(4)(ii) of the Proposal in its entirety. As drafted, the entity qualification would essentially require an insurance contract to be provided by an insurer domiciled in the United States. In reality, a very substantial portion of this country's insurance and reinsurance needs are met by international insurers and reinsurers. This is particularly true of large, complex commercial risks requiring very high limits and risks that pose unique, esoteric or particularly challenging underwriting considerations. Developing a definition of "insurance entity" that would not preclude any of these participants in the international insurance market from continuing to provide insurance support to U.S. citizens would be difficult to say the least. We respectfully submit that the key consideration should be whether the agreement itself is an "insurance contract" as that term is commonly understood for U.S. insurance regulatory purposes. The product itself should be a sufficient basis for determining whether the product qualifies as an insurance contract or should be regulated as a swap.

The Proposal, as currently drafted, would not exempt from the regulation of swaps traditional insurance products offered by any number of insurers domiciled outside of the U.S. or, potentially, products offered by any entity regulated as an insurer in its home jurisdiction that is not "organized as an insurance company." If the Commissions regulate these products as swaps as contemplated by the Proposal as currently written, this would have a damaging effect on the insurance available in the United States. This would potentially include the following categories of non-U.S. insurers writing U.S. business, all of which are licensed and regulated in their country of domicile:

1. **Insurers writing on a direct "nonadmitted" basis.** This includes insurers writing business pursuant to the state-specific "industrial insured" or other direct placement exemptions in place in many U.S. states, as well as insurers listed by the National Association of Insurance Commissioner's International Insurers Department (the "IID"). Effective July 21, 2011, non-U.S. insurers listed by the IID are eligible to write surplus lines insurance in all U.S. jurisdictions pursuant to the Nonadmitted and Reinsurance Reform Act (the "NRRA") section of Dodd-Frank in Part I of Subtitle B of Title V.

    - Requiring the provider of an insurance product to be regulated in the U.S. would exclude insurance policies issued by non-U.S. insurers on a nonadmitted basis, which is inconsistent with the NRRA. The NRRA is intended to streamline the access of U.S. large commercial insureds to nonadmitted insurance products, including those offered by non-U.S. insurers that are listed by the IID.

- This international market of insurers has covered much of the losses in the U.S. resulting from catastrophic events, such as hurricanes and tornadoes, including recent natural catastrophes. The entities responsible for the largest insurance payments stemming from the 2001 World Trade Center attack and Hurricane Katrina were UK, German, Swiss and Bermuda insurers. Further, many major insurers in the U.S. are affiliated with non-US insurers.

- These insurers provide substantial capacity to the U.S. insurance market. Non-U.S. insurers have played a critical role in America's recovery from natural disasters and are contributing substantially to the significant insured losses from global catastrophes in the first half of 2011. Bermuda is the most important foreign supplier of insurance and reinsurance to the United States, averaging $15 billion annually in payments or as much as $25 billion annually in recovered losses.[1] Twenty three Bermuda insurers supply 40% of the catastrophic event property and casualty coverage for the entire U.S. market.[2]

2. **Captive insurers.**

- The use of captive insurance companies is a well-established risk management tool for all types of businesses in the United States. Captives provide insurance coverage to their owners, but many captives do a portion of their business with third parties. A captive can be formed for any number of business reasons, and in any number of jurisdictions. Many jurisdictions have laws facilitating the formation of captives. Prominent captive domiciles include Bermuda, The Cayman Islands and Isle of Man, which license and regulate captives. Captive insurance companies have a positive impact on the U.S. economy by improving risk management and reducing costs to businesses.

- Bermuda's captive commercial liability and reinsurance sector in particular fills an important capacity shortage for U.S. companies. Approximately 75% of the 500 leading companies in the U.S. have captive insurance subsidiaries in Bermuda, which help provide workers' compensation and other lines of liability coverage.[3]

- There are several types of insurance captives, ranging from individual parent captives – which are insurance or reinsurance companies formed primarily to insure the risks of their non-insurance parents or affiliates – to group or

[1] U.S. - Bermuda Economic Relations: Economic Impact Study - 2010. Albright Stonebridge Group; May 2010; p. 9.
[2] *Id.*, p. 4.
[3] *Id.*, p. 5.

association captives – which are owned by trade, industry or service groups for the benefit of their members. Association captives allow smaller companies to pool their risks together and get the benefits of wider insurance coverage on their exposures.

3. **Marine Protection & Indemnity Clubs ("P&I Clubs").**

- P&I Clubs insure over 90% of the world's ocean-going tonnage against a wide variety of third party liability risks. They are organized as mutual insurers that provide cover for their members/owners, *i.e.* ship-owner and charterer members, against hazards relating to the use and operation of ships. Members/owners are located around the world, including many in the U.S., and range in size from the largest integrated oil companies, with large fleets of tankers, to smaller, specialist vessel owners. As noted, P&I Clubs cover a wide range of liabilities, including personal injury to crew, passengers and others on board, cargo loss and damage, oil pollution, wreck removal and dock damage. The majority of P&I Clubs are members of the International Group of P&I Associations and are domiciled in the UK, Japan, Luxembourg, Bermuda, Sweden, Norway and one in the U.S. Each P&I Club is subject to full prudential and solvency regulation by its respective home jurisdiction, and non-U.S. P&I Clubs have insured Americans for decades pursuant to the "ocean marine" exemption from the state licensing and oversight requirements for insurers. However, because non-U.S. P&I Clubs are not regulated by a U.S. state, they would not be included in the exemption for insurance.

4. **Insurers that are not "organized as an insurance company."**

- Not all insurers are structured as "insurance companies." Perhaps the most prominent example is Lloyd's of London, which is an insurance marketplace comprised of more than eighty underwriting groups, or "syndicates." The Lloyd's market is among the world's leading reinsurers and is a prominent provider of surplus lines insurance coverage to U.S. policyholders.

Overall, we urge the Commissions to delete the entity qualification aspect of the Proposal. This test is not necessary for the Proposal to fulfill its purpose, and imposing the entity qualification as written will do severe damage to many aspects of the insurance market in the United States by potentially subjecting traditional insurance products to Federal regulation as swaps. Given the many regulations under Dodd-Frank that will affect providers of swaps, we believe that subjecting insurance products to classification as such could result in the elimination of those products from the U.S. market. As the above demonstrates, cutting U.S. policyholders

off from international insurers will create huge holes in this country's insurance net and will severely damage this country's economy at the very moment we can ill afford such damage.

If some form of entity qualification needs to be retained, the current draft is far too narrow in scope. It should not be limited to "insurance companies" but should extend to all insurers no matter how structured. More vitally, it must be revised to accommodate the international market that is so essential to so many aspects of our insurance market place. If the insurer or reinsurer is primarily regulated as an insurance business in its home jurisdiction – even if that jurisdiction is outside the United States – it should be recognized as satisfying the entity qualification for purposes of the Proposal

2. **Do the proposed criteria for identifying an agreement, contract, or transaction that would not fall within the swap or security-based swap definitions appropriately encompass insurance and reinsurance products? If not, what types of insurance or reinsurance products are not encompassed, and why?**

No. An appropriate definition of "insurance contract" would be an agreement or transaction whereby one party is obligated to confer benefit of pecuniary value upon another party, dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event. *See, e.g.*, N.Y. Ins. Law § 1101(a)(1). The material elements to an insurance contract include the existence of an insurable interest, the transfer of risk and indemnification of covered loss. The Proposal should also expressly exempt from the definition of a swap or security-based swap the traditional insurance products enumerated in the interpretive guidance to the Proposal: surety bonds, life insurance, health insurance, long-term care insurance, title insurance, property and casualty insurance and annuity products. Reinsurance of any insurance contract or specified traditional insurance product (as defined above) should also be expressly exempt from the definition of swap or security-based swap.

9. **Does the interpretive guidance proposed in this section appropriately identify certain enumerated insurance products as traditional insurance products that would not fall within the swap or security-based swap definition if the provider of the product satisfies the requirements of the proposed rules? Why or why not? Is the interpretive guidance proposed in this section sufficient? Why or why not? Are there additional types of traditional insurance that should be similarly enumerated? If so, which ones and why?**

As discussed above, transactions involving the enumerated types of products should not have to additionally satisfy the requirements that the entity offering the insurance product be a U.S. domiciled insurer and that the product be regulated in the U.S. as insurance. The interpretive guidance also should be expanded to include reinsurance of any of the

enumerated types of products as traditional insurance products that would not fall within the swap or security-based swap definition. In addition, the insurance market continues to introduce new products to meet the needs of consumers. Any exemption of traditional insurance products should allow for continued innovation without concerns that newer products will be classified as swaps.

10. The CFTC also requests comment on whether the products specified in section 302(c)(2) of the GLBA, which names certain insurance products, should be considered traditional property and casualty insurance. Why or why not?

We agree that the products specified in section 302(c)(2) of the GLBA should be considered traditional property and casualty insurance.

12. Is the proposed requirement that the agreement, contract, or transaction be provided by a company that is organized as an insurance company whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies and that is subject to supervision by the insurance commissioner (or similar official or agency) of any state, as defined in section 3(a)(16) of the Exchange Act, or by the United States or an agency or instrumentality thereof, and that the agreement, contract, or transaction be regulated as insurance under the laws of such state or of the United States, an effective criterion in determining whether an agreement, contract, or transaction falls within the swap or security-based swap definition? Does it sufficiently preclude the use of the proposed rules by unregulated entities? Why or why not? Does it sufficiently prevent evasion of the requirements of Title VII with respect to agreements, contracts, or transactions that are swaps or security-based swaps? Why or why not?

No, this is not an effective criterion. As noted in Comment 1 above, the requirement that the provider be subject to supervision by the insurance commissioner (or similar official or agency) of any state, as defined in section 3(a)(16) of the Exchange Act, or by the U.S. or an agency or instrumentality thereof would not exempt from the regulation of swaps traditional insurance products offered by any number of insurers domiciled outside the U.S., including those insuring U.S. risks pursuant to the "ocean marine" exemption or, potentially, products offered by any entity regulated as an insurer in its home jurisdiction that is not "organized as an insurance company."

Insurance products offered by non-U.S. insurers, captive insurers and marine protection & indemnity clubs are legitimate insurance products, which account for a significant amount of insurance covering U.S. risks, including some of the most difficult risks for which to secure insurance, such as the risks of natural and man-made catastrophes.

We suggest that the entity qualification be eliminated in its entirety. If some form of entity qualification needs to be retained, the current definition is far too narrow. If adopted as written, it will effectively preclude a substantial portion of the U.S. insurance marketplace from accessing international insurers and reinsurers to which access must be preserved if our insurance market is to fulfill its function. The potential damage to U.S. policyholders and this country's economy is difficult to overestimate. At a minimum, the rule must be expanded to include all insurers and reinsurers that are primarily regulated as insurance businesses in their home jurisdictions, even if the home jurisdiction is outside of the U.S. Again, however, for the reasons explained in Comment 1 above, we see no need for the entity qualification if the definition of insurance products is appropriate in scope and, indeed, we believe imposing the entity qualification is substantially likely to create compliance issues and confusion because of the inherent difficulty of drafting such an additional requirement.

16. Are there additional criteria for identifying contracts, agreements, or transactions that are insurance and not swaps or security-based swaps that the Commissions should consider? Please provide detailed information and empirical data, to the extent possible, supporting any suggested criteria.

As discussed in Comment 2 above, an appropriate definition of "insurance contract" would be an agreement or transaction whereby one party is obligated to confer benefit of pecuniary value upon another party, dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event. *See, e.g.*, N.Y. Ins. Law § 1101(a)(1). A fortuitous event would include any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party. *See, e.g., Id.* § 1101(a)(2). So long as this definition is met, along with a transfer of risk (*i.e.*, the obligated party assumes a risk of loss that would otherwise be borne by the other party), then the transaction would constitute insurance and not a swap or security-based swap.

17. Should the proposed rules relating to insurance include a provision related to whether a product is recognized at fair value on an ongoing basis with changes in fair value reflected in earnings under U.S. generally accepted accounting principles?

No, as discussed in Comments 2 and 16, the determinants should be the existence of an insurable interest, transfer of risk and indemnification of covered loss.

20. Should the proposed rules include a provision similar to section 302(c)(1) of the GLBA 54 that would provide that any product regulated as insurance before July 21, 2010 (the date the Dodd-Frank Act was signed into law) and provided in accordance with paragraph (ii) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (b) of proposed rule 3a69–1 would be considered insurance and not fall within the swap

definition? Why or why not? Should different criteria apply to products regulated as insurance before July 21, 2010? Why or why not? If so, please provide a detailed description of what different criteria should apply.

Prior regulation of insurance products before July 21, 2010 could be a consideration, but it should not be an absolute determinant. As discussed above, any insurance contract that includes the existence of an insurable interest, the transfer of risk and covered loss indemnification should not be considered a swap.

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Thank you for your consideration. We stand ready to assist the Commissions in the development of the Proposal, and towards that end we are prepared to answer any questions you have or provide whatever additional information you may require. We would also be pleased to travel to Washington, D.C. to meet with you and/or your colleagues.

Very truly yours,

John P. Mulhern/PH

John P. Mulhern