Occupy the SEC

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April 30, 2013

Hon. Jeb Hensarling, Chairman
Hon. Maxine Waters, Ranking Member
House Financial Services Committee
2129 Rayburn House Office Building
Washington, DC 20515

RE: Proposed Bills Under Consideration by the Committee: H.R. 634, H.R. 677, H.R. 742, H.R. 992, H.R. 1003, H.R. 1038, H.R. 1062, and H.R. 1256.

Dear Members of the House Financial Services Committee,

Only a few weeks have passed since the Senate released a scathing report criticizing JP Morgan for misleading regulators and investors about the nature of risky swap trading activities that resulted in multi-billion dollar losses at the bank's "London Whale" CIO office. With little sense of irony, the House Financial Services Committee is currently considering a number of bills that – if passed into law – will roll back key regulatory measures targeting similarly risky swap activities.

These bills seek to revise various provisions of the Dodd-Frank Act relating to swap oversight, despite the fact that the regulatory agencies are still months or years away from fully implementing all of the various components of that Act. Occupy the SEC urges the Committee to be circumspect in its consideration of revisions to the Dodd-Frank Act, as such revisions may be entirely premature. We are also concerned that certain provisions in these bills will render the swaps market less transparent and even riskier. The discussion below highlights our recommendations on each of the above-captioned bills.

I. H.R. 992 – Increasing the Possibility of Government Bailouts Due to Swaps

A. The Sweeping Impact that H.R. 992 Would Have on Section 716 of Dodd-Frank

H.R. 992 proposes to roll back a key provision of the Dodd-Frank Act: the Lincoln Amendment, or Section 716. In its current form, Section 716 prohibits federal assistance to "swap entities."[1] Shortly after Section 716 was passed, certain members of the Senate, including that section's primary author Senator Blanche Lincoln, conceded that there were certain mistakes made in the amendment. She stated the following:

> It is my understanding that a number of [] U.S. branches and agencies of foreign banks will be swap entities under section 716 and title VII of Dodd- Frank. Due to the fact that the section 716 safe harbor [exempting interest rate, foreign currency and certain other swaps] only applies to ''insured depository institutions,'' it means that U.S. branches and agencies of foreign banks will be forced to push out all their swaps activities. This result was not intended. U.S. branches and agencies of foreign banks should be subject to the same swap desk push out requirements as insured depository institutions under section 716.[2]

We would like to point out that H.R. 992 actually goes beyond fixing the supposed oversight that Senator Lincoln identified in the drafting of Section 716. According to Sen. Lincoln, that section's intent was to make "U.S. branches and agencies of foreign banks [] subject to the same swap desk push out requirements [and exemptions] as insured depository institutions." H.R. 992, however, greatly expands the scope of permissible swaps dealings in which government backstopped institutions (domestic and foreign) can participate. The following table summarizes what swaps would be required to be pushed out from the public safety net under Section 716, before and after amendment by H.R. 992.

Swaps NOT Required to be Pushed Out Under § 716	Swaps Required to be Pushed Out Under § 716
● All interest rate swaps ● All foreign exchange (FX) swaps and forwards ● Gold and silver swaps ● Swaps on US government securities ● Swaps on investment grade	● Commodity and agricultural swaps ● Equity swaps ● Energy swaps ● Metal swaps (excluding gold and silver) ● Agricultural swaps ● Non-cleared, non-investment-

[1] Under Section 716 a swap entity is defined as a swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant that is registered under the Commodity Exchange Act or the Securities Exchange Act of 1934. 15 U.S.C. § 8305 (2012).

[2] 156 Cong. Rec. S5903-04 (daily ed. July 15, 2010) (statement of Sen. Lincoln).

corporate debt securities ● Swaps on general state obligations ● Cleared CDS	grade CDS and CDS on asset-backed securities (ABS)
Swaps NOT Required to be Pushed Out Under H.R. 992	**Swaps Required to be Pushed Out Under H.R. 992**
● All interest rate swaps ● All foreign exchange (FX) swaps and forwards ● Gold and silver swaps ● Swaps on US government securities ● Swaps on investment grade corporate debt securities ● Swaps on general state obligations ● Cleared CDS ● Commodity and agricultural swaps ● Energy swaps ● Metal swaps (excluding gold and silver)	● Non-cleared, non-investment-grade swaps based on asset-backed securities (ABS); *subject to jointly adopted rules relating to credit quality of assets*

The net result of H.R. 992 would be to allow almost all swaps activities to be conducted within government backstopped institutions, and to potentially subsidize such activities with public funds.

In a letter to the House Agriculture Committee, the American Bankers Association ("ABA") made the outrageous claim that H.R. 992's vast expansion of the scope of permissible swaps activities was necessary. The ABA claimed that, without that expansion, bank "customers would lose the ability to do 'one-stop shopping' with a bank for loans and swaps to offset their credit risk, even if they prefer to do 'one-stop shopping' with a bank and may prefer to have a bank as a counterparty because of credit risk."[3]

[3] Comment Letter of American Bankers Association re: ABA's Views on H.R. 634, the Business Risk Mitigation and Price Stabilization Act of 2013; HR. 677, the Inter-Affiliate Swap Clarification Act; H.R. 992, the Swaps Regulatory Improvement Act; H.R. 1003, to improve consideration by the Commodity Futures Trading Commission of the costs and benefits of its regulations and orders; and H.R. ___, discussion draft of the Swap Jurisdiction Certainty Act (Mar. 19, 2013), *available at* http://www.aba.com/Issues/LetterstoCongress/Documents/House%20Ag%20Memo%20re%20DFA%20Title%20VII%20031913.pdf.

This claim is outrageous for two reasons. First, in a classic tale of the tail wagging the dog, this reasoning assumes that a bank should take on a customer's counterparty risk simply because that company *prefers* that the bank do so. In reality, a customer's *preference* should not play a determinative role in defining how risk is controlled at banks. Rather, limitations on bank exposure should be defined by taking into account broader considerations like systemic risk and bank solvency. Secondly, the fact that the ABA prioritizes the ability of customers to do "one-stop shopping" with banks is troublesome because that reasoning exhibits the same myopic view of customer risk that contributed to the 2008 financial crisis. The ABA's view is hauntingly analogous to the reasoning employed by proponents of sub-prime lending before 2008: that major banks should be unhampered in their ability to buy subprime debt because that would allow customers with poor credit to have easier, "one-stop shopping" access to liquidity.

This "one-stop shopping" line of reasoning is a commonly used, and thoroughly debunked, argument for maintaining the Too Big to Fail ("TBTF") status quo.

B. The Cost of Section 716 is Mischaracterized by Proponents of H.R. 992

Proponents of the H.R. 992 rollback argue that this bill is needed because Section 716 will make derivatives trading activity too costly for hedging purposes, and hence will disrupt the financial markets. That is, without the benefit of H.R. 992, Section 716 will make "derivatives so expensive that businesses will be forced to stop using them to hedge against risks."[4] Admittedly, the push-out rule under Section 716 will result in increased cost to derivatives dealers, but that is the very purpose of that section's restriction. Section 716 was written with the objectives of the broader public benefit in mind, and not just the interests of derivatives dealers and users.

At its core, H.R. 992 is short-sighted because it rewards banks with public subsidies for engaging in risky derivatives trading. Publicly subsidizing banks to engage in such activity, under the guise that failing to do so is "too costly for businesses," is analogous to giving someone who has been in repeated automobile accidents a reduced premium on auto insurance so that she can afford to buy a faster car.

Moreover, the rhetoric of "cost" that is employed by proponents of H.R. 992 is self-serving and highly conjectural, as it fails to account for the holistic costs of derivatives activity. In our view, the cost analysis needs to adequately incorporate the broader costs that derivatives activity imposes on society, in the form of expensive government guarantees. The proposed bills fails to

[4] Frank D. Lucas, Opening Statement Before Committee on Agriculture Public Hearing Examining Legislative Improvements to Title VII of the Dodd-Frank Act (Mar. 14, 2013), *at* http://agriculture.house.gov/statements/opening-statement-chairman-frank-d-lucas-committee-agriculture-public-hearing-examining.

take these larger, more significant costs into account, focusing instead on the fat wallets of derivative dealers.

Proponents of H.R. 992 further argue that maintaining swaps activities within banks is key to controlling systemic risk because banks are subject to prudential regulations.[5] However, this is but a thinly veiled argument for maintaining the TBTF status quo. One lesson learned from the financial collapse of 2008 is that effective financial regulation is undermined by the centralization and concentration of risk in entities that are subject to prudential oversight. Regulators frequently fail to catch malignant activity before it becomes a problem because balance sheets in TBTF entities have become bloated and opaque. The pushout rule would bring much needed clarity as to the true risk profiles of entities subject to prudential regulations (and their affiliates).

The proponents' argument boils down to the following tautology: markets will fall apart if banks cannot continue using the same derivatives that previously caused the markets to fall apart.

II. H.R. 1038: Hindering Transparency in Utility Markets

We are concerned that H.R. 1038 would exempt most companies that engage in swaps with natural gas and power utilities from having to register with the CFTC. The bill exempts a party from registering with the CFTC as a swaps dealer so long as the gross notional value of the swap dealings by that party does not exceed the *de minimis* amount permitted in the past 12 months, which is $3B with a phase in period starting at $8B. While this *de minimis* provision might appear to limit the degree to which the exemption would make swaps markets less transparent, the actual adequacy of this limitation remains sketchy. What complicates this exemption is the fact that the Commission has exempted a series of swaps-related activities that would fall outside the *de minimis* calculation, which could significantly increase the dollar amount of contracts not under supervision. The end result of these exemptions is alarming because it would greatly reduce transparency in energy and gas swaps markets. Moreover, this decreased transparency could result in the packaging of derivatives contracts that are unfavorable to utilities,[6] which in turn could (1) impact the price discovery mechanism in energy and gas markets and (2) increase volatility in energy prices.

III. H.R. 634: Frustrating the Stated Goal of "Risk Mitigation"

H.R. 634 would eliminate margin-requirements for certain businesses that use swaps to hedge their risks. This produces a contradiction. Margin requirements are intended to mitigate loss. Therefore, eliminating margin-requirements only increases the risk profile of companies. Risk is

[5] Daniel Wilson, *Reps. Look To Soften Dodd-Frank Swaps 'Pushout' Rule*, Law360, Mar. 7, 2013.
[6] Wallace C. Turbeville, Remarks at the House Committee on Agriculture (Mar. 14, 2013), *available at* http://www.demos.org/publication/examining-legislative-improvements-title-vii-dodd-frank-act.

a function of two variables: likelihood of losses multiplied by the impact of losses in the event of losses, or the total conditional expected losses. If this bill passes and margin requirements are eliminated for certain businesses, then the upper limit on their conditional expected losses increases. This increase in conditional expected losses goes in the opposite direction of any benefit that a business may achieve by hedging its exposures through swaps. Thus, H.R. 634 could actually render hedging activity by affected businesses *more* risky.

IV. Interaction Between Bills and Implementation of the Volcker Rule

A. H.R. 992 and the Volcker Rule

While the Volcker Rule[7] is meant to limit proprietary trading at government-backstopped banks, its mandate is significantly diluted by numerous exemptions, including one permitting market-making activities. One key aspect of Section 716 is that it "pushes out" market-making in certain swaps at insured depository institutions. Thus, Section 716 has the potential to make up for a controversial shortcoming in the Volcker Rule (the market-making exemption).

In practice, it is often difficult to tell the difference between market making and proprietary trading. Section 716 reduces the risks associated with such ambiguities by completely pushing out swaps activities that present significant risks or deviate from "traditional bank activities." Thus, Section 716 plugs a significant hole in the Volcker Rule framework. If H.R. 992 were to pass, then the scope of swaps activities that would be permitted at banks would be greatly expanded, and Congress would forfeit a valuable opportunity to circumvent complications relating to the scope of the market-making exemption in the Volcker Rule.

B. H.R. 634 and the Volcker Rule

As we argue above, H.R. 634's elimination of margin-requirements for end-users creates the potential for excessive risk taking and the possibility of localized business failures. To the extent that such end-users are truly isolated from the larger economic system, the global impact of their failures can be mitigated and global contagion can be avoided.

Unfortunately, certain exemptions in the Volcker Rule make such isolation less likely, and consequently, make global contagion from isolated end-user losses more likely. The Volcker Rule permits banks to engage in market making and certain types of hedging, particularly on behalf of customers. Thus, risk from end-users of swaps can easily be transferred to interconnected banks even under the Volcker Rule. If the Volcker Rule had not carved out exemptions for market-making and hedging, then it might have been possible to avoid the system-wide distribution of risks accruing from end-user engagement in swaps. Unfortunately, it

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[7] 12 U.S.C. § 1851 (2012).

is difficult to isolate the failure of end-users when such users are imbricated in and dependent upon a banking system that is permitted to make markets in swaps. Thus, H.R. 634 is especially dangerous because its elimination of margin requirements for bank customers could result in even greater concentration of risk at banks by virtue of the Volcker Rule's allowances for customer dealings.

Moreover, as we explained in our comment letter regarding the implementation of the Volcker Rule,[8] the proposed version of the Rule is riddled with loopholes and exemptions that make it difficult for banks and regulators to distinguish legitimate market making and hedging activities from prohibited proprietary trading activities. Indeed, the Volcker regulations actually enable banks to actively conceal proprietary trading activity under the guise of customer-facing hedging or market making. Eliminating margin requirements for swap end-users would compound these complications, as it would allow banks to imperil their balance sheets by purchasing highly toxic swap holdings from their customers.

With this consideration in mind, we encourage Congress to wait until the Volcker Rule is finalized and fully implemented before passing any legislation easing margin requirements on swap end-users. Otherwise, the hasty passage of H.R. 634 could ensconce into the law structural failures that themselves would need legislative fixes in the future.

V. H.R. 677: Eliminating Oversight of a Key Source of Systemic Risk

H.R. 677 complements the end-user exemptions embodied in H.R. 634 (and those already in force in Section 2(h)(7) of the Commodities Exchange Act) with a separate set of exemptions from swap clearing for transactions among affiliate companies. This is dangerous terrain given the fact that major global corporations can have thousands of affiliates spanning dozens of reporting jurisdictions around the world. Swap transactions between these affiliates can effectively create massive potential networks for the transmission (and at times magnification) of risk in the event of a default by any single node. The clearing requirements in Dodd-Frank were designed precisely to reduce this sort of risk, by moving swap transactions onto regulated exchanges requiring the posting of margin as a barrier to cascading defaults, clear documentation, reporting and other measures intended to reduce the scope of potential risk.

The CFTC has made clear that it supports the creation of some form of inter-affiliate exemption from these requirements, and in August 2011 released a proposed rule specifying the terms under which affiliates could claim such an exemption.[9] The CFTC also took the industry's feedback

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[8] Comment Letter, Occupy the SEC, Prohibitions and Restrictions on Proprietary Trading and Certain Interests in and Relationships With, Hedge Funds and Private Equity Funds (Feb. 13, 2012), *at* http://www.occupythesec.org/letter/OSEC%20-%20OCC-2011-14%20-%20Comment%20Letter.pdf.

[9] Clearing Exemption for Swaps Between Certain Affiliated Entities, 77 Fed. Reg. 50425 (proposed Aug. 21, 2012).

and objections to key segments of its proposed rule into account in formulating the final rule, and thus the final version of April 2013 reflects many of the industry's preferences.[10]

Despite the significant concessions already made by the CFTC, the lawmakers sponsoring H.R. 677 have gone far beyond the CFTC to propose a *carte blanche* clearing exemption for affiliates meeting minimal threshold conditions. A comparison of the core features of each regime is illustrative:

	CFTC Rule: Proposed	**CFTC Rule: 17 CFR Part 50**	**H.R. 677**
Definition of Affiliate	Conditions: - Majority ownership, **and** - Consolidated accounting	Conditions: - Majority ownership, **and** - Consolidated accounting	Condition: - Consolidated accounting
Cross-border Issues	An affiliate also engaging in third-party swaps can only be exempt from inter-affiliate clearing if it: - Clears all 3rd party swaps in accordance with US law; or - Operates in a country with similar clearing requirements; or - Does not engage in 3rd party swaps	An affiliate also engaging in third-party swaps can only be exempt from inter-affiliate clearing if it: - Clears all 3rd party swaps in accordance with US law; or - Operates in a country with similar clearing requirements; or - Does not engage in 3rd party swaps	No requirement
Margin	Posting of variation margin if affiliates are financial entities	No requirement	No requirement
Documentation	Contracts must document a set list of	Contracts must be documented in some	No requirement

[10] Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 Fed. Reg. 21750 (Apr. 11, 2013) (to be codified at 17 C.F.R. pt. 50).

	core features	form	
Risk management	Parent organization must have a centralized risk management function for all swaps	Parent organization must have a centralized risk management function for all swaps	No requirement
Reporting	Trades must be reported to either a swap data repository (SDR) or the regulator	Trades must be reported to either a swap data repository (SDR) or the regulator	Trades must be reported to either a swap data repository (SDR) or the regulator

The terms of H.R. 677 represent an unwelcome watering down of the already weak provisions of the CFTC rule. Moreover, the bill reflects many of the financial industry's specious arguments, such as the supposed role that corporate "reputation" can play as a mitigating factor against potential risks from uncleared inter-affiliate swaps. It is worth noting that neither the CFTC's final rule nor H.R. 677 includes the requirement for variation margin that appeared in the proposed version of the CFTC rule. This deletion, which was favored not only by industry but also by two Commissioners, removes a powerful tool to force the internalization of risk by global financial institutions engaging in swaps. If Congress is going to intervene in the rulemaking process, it should be to demand the enactment of prudent requirements like variation margin.

Instead, certain representatives are pushing Congress to go in the opposite direction, and have crafted a rule that reflects the wish list of the financial industry. For example, a common argument offered during the CFTC's comment period was that any additional documentation or risk management for contracts between affiliates is unnecessary since affiliates share both the counterparty risk of their affiliates as well as the credit umbrella of their parent company. In keeping with this view, H.R. 677 includes neither of these features from the CFTC's rule. This argument conveniently ignores the fact that barriers between organizational units are often designed specifically to isolate liabilities so that other affiliates and the parent entity are not damaged in the event of failure. These inter-affiliate barriers to liability are particularly important in the case of swaps, which are typically not legally enforceable against parent companies in the event of the failure of a subsidiary counterparty.[11]

The impact of intra-organizational risk makes the definition of an affiliate eligible for exemption particularly important. Not surprisingly, the industry objected strongly to the CFTC's proposed

[11] *See* Brad B. Erens, Scott J. Friedman & Kelly M. Mayerfeld, *Bankrupt Subsidiaries: The Challenges to the Parent of Legal Separation*, 25 Emory Bankr. Dev. J. 65 (2008); Héctor José Miguens, *Liability of a Parent Corporation for the Obligations of an Insolvent Subsidiary Under American Case Law and Argentine Law*, 10 Am. Bankr. Inst. L. Rev. 217 (2002).

hurdles of both majority ownership (either by one affiliate of another, or of both by the same parent entity) and consolidated accounting, and argued that the latter alone was sufficient. To move forward with this lower hurdle as per H.R. 677 would be a mistake. The subtle but significant differences between GAAP and IFRS in the consolidation of subsidiaries, special-purpose entities and other affiliates offer potential for cross-border regulatory arbitrage.[12] H.R. 677 would offer large conglomerates, many of which have thousands of subsidiaries around the world, an open invitation to use transactions to concentrate risk into potentially unconsolidated units.

H.R. 677 is also silent on the issue of outward-facing swaps, an aspect of the CFTC's rule about which the industry was particularly negative. In essence, the CFTC's rule requires that affiliates that engage in swaps with third parties must do so in countries with similar clearing requirements to those of the U.S. in order to be exempt from clearing swaps with their internal affiliates. The CFTC's concern was appropriate given that the complex linkages created by back-to-back swaps are an obvious pathway for the transmission of risk globally, whether into a single firm from third parties or vice versa. While it is true that third-party transactions taking place in jurisdictions governed by rules (such as Europe's EMIR) that require clearing of swaps would already meet this standard, it is not a given that the transactions will take place in such jurisdictions. In fact, removing the CFTC's outward-facing provision provides a strong incentive for affiliates to transact in lightly regulated markets, in the process potentially removing entire networks of uncollateralized transactions from regulatory oversight.

By attempting to overwrite the already-mild safeguards built into the CFTC rule, the deregulatory approach put forward in H.R. 677 would subvert both the intent of Dodd-Frank and the established rulemaking process. The CFTC's rule was far from sufficient in our view, but should be left standing rather than being superseded by still-weaker legislation.

VI. H.R. 1003 and H.R. 1062: Impediments to Regulatory Operations

H.R.1062 calls for the SEC to perform cost benefit analysis before promulgating rules and to choose the one that "imposes the least burden on society."[13] On its face, this seems to be a reasonable requirement, but it is clear to us that H.R. 1062 was actually designed to impede the Commission's ability to institute rules that the financial industry opposes.

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[12] While GAAP rules for consolidated accounting emphasize control over the subsidiary in question, they also make space for cases of minority ownership. AICPA, *IFRS Resources: IFRS for SMEs — U.S. GAAP Comparison Wiki*, http://wiki.ifrs.com/Consolidated-and-Separate-Financial-Statements (last visited Apr. 29, 2013); *see also* Price Waterhouse Coopers, *IFRS and US GAAP: Similarities and Differences*, October 2012, *available at* http://www.pwc.com/im/en/publications/assets/ifrs_and_us_gaap_similarities_and_differences.pdf.

[13] The House Agriculture Committee recently passed a similar bill, H.R. 1003, that targets the CFTC.

We would note that the SEC is already required to perform cost-benefit analyses on proposed regulations, which leads us to wonder why this bill is necessary or even desirable. The bill's cost-benefit provisions are a superfluous bureaucratic requirement that will only hamper the rule-making process. Proposed Section 23(e)(2)(A) of the Securities Exchange Act of 1934 requires the Commission to evaluate whether the regulation is "tailored to impose the least burden on society." While the proposal requires consideration of both costs and benefits, its wording is oriented towards heightened recognition of the costs of regulation and largely overlooks the prospect of societal benefits from proposed regulations. Thus, the bill sends a signal to the Commission that the agency should regulate as little as possible.

Moreover, the requirement that the Commission only adopt the "least" burdensome regulation possible will subject the agency to a flood of industry lawsuits challenging inconvenient regulations on purely technical grounds: was the adopted regulation "the least" burdensome among the universe of possible regulations? The Commission would waste millions of dollars in litigating the existential question of whether a proposed rule placed the "least burden on society." Thus, practically speaking, H.R. 677 would create an insurmountable obstacle to the promulgation of meaningful rules by the Commission.

Further evidence of the de-regulatory intent of the bill can be found in proposed Section 23(e)(3), which requires the SEC to explain itself if it has the temerity to reject proposals put forth by industry or consumer groups. No mention is made of comments by individuals, non-consumer/public advocacy organizations or investor groups. In any case, even if this language were more balanced in its listing of pre-endorsed commenters, the bill would still make the SEC beholden to industry. As an active participant in the rulemaking process, Occupy the SEC is all too aware that the preponderance of comment letters on financial regulation are indeed from industry sources. Thus, requiring the SEC to craft regulation tailored to the whims of commenters would all but ensure that final rules of any significance would invariably kow-tow to the interests of the regulated.

In addition, industry groups are likely the only groups with sufficient resources to bring litigation over cost-benefit analyses. We have already seen cost-benefit analysis used as a pretext to block the SEC's and the CFTC's efforts to regulate in favor of investors' voices and the broader public interest.[14] This bill would be an open invitation for additional litigation and judicial interference in the rule-making process. H.R. 1062 would have a profoundly negative effect on SEC rule-making. We note that the House Agriculture Committee passed H.R. 1003, which targets the CFTC similarly. Both of these bills impose very substantial burdens on crucial regulatory

[14] *See, e.g.*, *Business Roundtable, et al. v. SEC*, No. 10-1305 slip op. (D.C. Cir., July 22, 2011) *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/$file/10-1305-1320103.pdf; *see also* Barbara Roper, *Will Cost-Benefit Analysis Seal the SEC's Fate as an Industry Lap Dog?*, Huffington Post, Sep. 17, 2012, http://http://www.huffingtonpost.com/barbara-roper/sec-cost-benefit_b_1878949.html.

agencies. Congress should apply a "cost-benefit analysis" to its own actions and reject both of these bills as severely harmful to society.

VII. H.R. 1256: A Superfluous Delegation of Authority Over Swap Jurisdiction

The stated purpose of H.R. 1256 is to create certainty in the extraterritorial application of Title VII of the Dodd-Frank Act. While this is certainly a laudable objective, the need for Congress to pass this bill is questionable. At best, H.R. 1256 adds little benefit to the process by which the CFTC and SEC delineate the extraterritorial parameters of Title VII. At worst, the bill impedes their ability to do so.

Section 722(d) of the Dodd-Frank Act states that the swap-related provisions of the Dodd-Frank Act shall only apply to overseas activities that have "a direct and significant connection with activities in, or effect on, commerce of the United States." The SEC and the CFTC have envisioned an implementation of this regulatory mandate that allows for overseas regulation to prevail in certain instances. The Commissions presently intend to allow for "substituted compliance" whereby overseas swaps participants that are subject to "comparable" swaps regulatory schemes can avoid duplicative compliance concerns under U.S. law. Both Commissions are also actively involved in further defining the specific contours of Title VII's extraterritoriality provisions. Thus, H.R. 1256 is superfluous to the extent that it compels the initiation of a regulatory process that has already begun.

In fact, H.R. 1256 may actually impede the Commissions' ability to define the global scope of Title VII's applicability. The bill states that a non-U.S. person in compliance with the swaps regulatory requirements of a G20 member nation will be exempt from U.S. swaps requirements if that member nation's swaps regulatory regime is "broadly equivalent" to Title VII. The addition of this new bureaucratic benchmark ("broadly equivalent," in place of the Commission's current preference for the term "comparable") provides little practical clarity, and only muddies the semantic waters of Title VII.

Moreover, it appears that the true purpose behind H.R. 1256 is to browbeat the Commissions into allowing Title VII to be supplanted by foreign regulations as much as possible. This is clear from the bill's imposition of a cumbersome requirement that would force the Commissions to report to Congress before determining that any particular foreign jurisdiction's swaps regime is not "broadly equivalent" to Title VII.

We recommend that, instead of allowing H.R. 1256 to add an unnecessary layer of complexity to the Dodd-Frank regulatory regime, Congress should increase the budgets of the Commissions to enable them to carry out the significant (and much-needed) rulemaking burdens that have already been placed on them.

VIII. H.R. 742: A Technical Amendment

We concede that one of the proposed bills relating to Title VII of Dodd-Frank, H.R. 742, provides a technical fix for difficulties in international data-sharing and regulatory cooperation that are collateral -- and perhaps unintended -- consequences of the original reform. Provisions of Dodd-Frank require confidentiality and indemnification agreements whenever a covered swap data repository provides information to certain domestic or foreign regulators and whenever the CFTC provides information to certain foreign regulators. There is scant legislative history to explain the purpose and history of these provisions. As Americans for Financial Reform and the Depository Trust and Clearing Corporation have testified before the House Agriculture Committee, current law may impede sharing of data across borders and therefore could threaten international regulatory cooperation and cause data fragmentation that would limit effective review of systematic risk. The law now requires indemnification (a concept arising in the common law tradition without parallel in several countries) from overseas agencies incapable of granting it.

The CFTC has issued interpretive guidance to exempt foreign regulatory entities from the indemnification and classification requirements where a Swap Data Repository ("SDR") has operations in the regulator's country. But agencies and commentators alike recognize the need for further reform. H.R. 742 retains data confidentiality requirements in line with the recent efforts of international organizations such as the OTC Derivatives Regulatory Forum, while eliminating other barriers to data sharing. Occupy the SEC does not have specific objections to this bill, which alone furthers the Dodd-Frank Act's purposes of increasing international cooperation and reducing systemic risk.

Thank you for your attention to this important matter of public concern.

Sincerely,
/s/
Occupy the SEC

Eric Taylor
Joshua Reynolds
Josh Snodgrass
Akshat Tewary
et al