

I. *The SEC Rule on Derivatives Trading by Foreign Branches of U.S. Banks*

A. Introduction

In the wake of the 2008 financial crisis, the highly complex and largely unregulated cross-border derivatives market became a key area of regulatory concern.¹ In response, Title VII of the 2010 Dodd-Frank Act outlined regulatory initiatives for the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”) to undertake to mitigate the economic risks inherent in this multi-trillion dollar market.² In June 2014, the SEC consummated its first significant step in this effort by issuing its final rules regarding the cross-border security-based swaps market.³

This Article proceeds as follows. Part B provides general background on the foreign derivatives market. Part C briefly examines the derivatives market’s contribution to the 2008 financial crisis. Part D addresses governmental attempts at regulating the derivatives market following the financial crisis of 2008, including Dodd-Frank Title VII requirements, CFTC guidance, and the SEC’s June 2014 final rule. Part E discusses the SEC’s final rule’s implications, including reactions from institutional authorities, and concerns and possible motivations for the rule’s narrow scope. Part F looks to the future of derivatives regulation.

¹ See, e.g., Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the “Business of Banking,”* 63 U. MIAMI L. REV. 1041, 1042–43 (2009).

² Dodd-Frank Wall Street Reform and Consumer Protection Act § 715, 15 U.S.C. § 8304 (2012); Lucy McKinsty, *Regulating a Global Market: The Extraterritorial Challenge of Dodd-Frank’s Margin Requirements for Uncleared OTC Derivatives & a Mutual Recognition Solution*, 51 COLUM. J. TRANSNAT’L L. 776, 789 (2013) (finding that the total notional value of cross-border derivatives transactions was \$21.6 trillion for the first half of 2012 alone).

³ Press Release, Sec. & Exch. Comm’n, SEC Adopts Cross-Border Security-Based Swap Rules (June 25, 2014), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542163722#.VE6oP4vF-zA>, archived at <http://perma.cc/CT5T-FBMA>.

B. Background on the Foreign Derivatives Market

A derivative is a financial risk-transferring instrument “whose price is dependent upon or derived from one or more underlying assets.”⁴ A common variety of derivative, known as a “swap,” involves a contractual exchange of cash flows between parties for a set time period.⁵ These contracts are largely executed through “over-the-counter” (“OTC”) trades within dealer networks, rather than through formally regulated stock exchanges.⁶ The use of “credit default swaps” (“CDSs”), which are a subcategory of swaps, spiked in popularity in the years leading up to the financial crisis.⁷ In a CDS, a protection buyer pays a protection seller for insurance against default on the underlying asset.⁸ In the event of default, the buyer may then cash in the CDS for payment pursuant to the contract.⁹

As of December 2013, the Bank of International Settlements estimated that the derivatives market exceeded \$710 trillion worldwide.¹⁰ This marketplace is truly global in scope: between January 2008 and December 2012, approximately forty-eight percent of price-forming North American corporate CDS transactions occurred between a U.S.-domiciled counterparty and a foreign-domiciled counterparty, while only thirteen percent occurred between two U.S.-domiciled counterparties.¹¹ Though the sheer breadth of the

⁴ *Derivative*, INVESTOPEDIA, <http://www.investopedia.com/terms/d/derivative.asp> (last visited Oct. 27, 2014), archived at <http://perma.cc/9AZS-NVMK>.

⁵ Michael McCaffrey, *An Introduction to Swaps*, INVESTOPEDIA, <http://www.investopedia.com/articles/optioninvestor/07/swaps.asp> (last visited Oct. 27, 2014), archived at <http://perma.cc/87QL-3FCR>.

⁶ *Id.*

⁷ Frank Partnoy & David A. Skeel, Jr., *The Promise and Perils of Credit Derivatives*, 75 U. CIN. L. REV. 1019, 1021 (2007) (“[T]he market for credit derivatives has grown from virtually nothing a decade ago to the range of \$20 trillion of notional value in 2006.”)

⁸ See Mary Williams Walsh, *Risky Trading Wasn’t Just on the Fringe at A.I.G.*, N.Y. TIMES, Feb. 1, 2010, at B1.

⁹ See Partnoy & Skeel, *supra* note 7, at 1021–22, for a simple example of how CDSs function.

¹⁰ Mayra Rodriguez Valladares, *Derivatives Markets Growing Again, With Few New Protections*, N.Y. TIMES DEALBOOK (May 13, 2014, 4:35 PM), http://dealbook.nytimes.com/2014/05/13/derivatives-markets-growing-again-with-few-new-protections/?_php=true&_type=blogs&_r=0.

¹¹ Application of “Security-Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap

international derivatives market facilitates the flow of financial commerce, it does so to the potential detriment of global economic stability, due to the interconnectivity and accompanying capacity for risk transfer associated with derivatives transactions.¹² Furthermore, competitive advantage concentrates derivatives dealing around the largest market participants, creating the potential for contagion and widespread financial disaster in the event that a single market participant—connected to hundreds or thousands of derivatives counterparties—becomes financially distressed.¹³

C. How Derivatives Contributed to the Financial Crisis of 2008

The derivatives market—and CDS transactions in particular—attracted a substantial amount of negative media attention following the 2008 crisis, primarily in connection with the collapse and subsequent bailout of insurance giant, AIG.¹⁴ AIG's Financial Products unit in London issued more than \$440 billion in CDSs, a substantial portion of which covered large financial institutions' pools of subprime mortgages.¹⁵ When the housing bubble burst and these mortgages went into simultaneous default, AIG suddenly found itself too undercapitalized to deliver on its CDS contracts.¹⁶ Though AIG's derivatives business primarily originated in London, many of the large U.S. banks that transacted with AIG sustained major losses when AIG could not pay their CDS counterparties, creating a domino effect of loan defaults with global implications.¹⁷ In effect, AIG's failure had grossly amplified the economic costs of bad mortgages.¹⁸ The collapse of such an established institution signaled a significant need for regulatory reform in derivatives markets.¹⁹

Activities, 79 Fed. Reg. 47,278, 47,298 (Aug. 12, 2014) [hereinafter SEC Final Rule].

¹² *Id.* at 47,283.

¹³ *Id.* at 47,283–84.

¹⁴ See, e.g., Adam Davidson, *How AIG Fell Apart*, REUTERS (Sept. 18, 2008, 1:55 PM), <http://www.reuters.com/article/2008/09/18/us-how-aig-fell-apart-idUSMAR85972720080918>, archived at <http://perma.cc/4NRA-RFV3>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Lynn A. Stout, *Why We Need Derivatives Regulation*, N.Y. TIMES DEALBOOK (Oct. 7, 2009, 4:30 PM), <http://dealbook.nytimes.com/>

D. Attempting to Regulate the Foreign Derivatives Market

The 2010 Dodd-Frank Act served as a congressional vehicle for establishing a framework for regulating cross-border swaps.²⁰ The Act allows the SEC to regulate “security-based swaps,”²¹ with the CFTC overseeing the remainder of the swaps market.²²

1. Required Rulemaking Under Title VII of the Dodd-Frank Act

Title VII of the Dodd-Frank Act lays out several regulatory requirements that advance two primary objectives: reducing risk and increasing transparency.²³ First, Title VII directed the CFTC and SEC to define key terms like “security-based swap” and “security-based swap dealer” in order to circumscribe the reach of the regulations and the entities that fall within them.²⁴ Title VII also directed the agencies to establish extensive recordkeeping and reporting requirements regarding derivatives transactions.²⁵ Title VII further instructs the CFTC and SEC to require swap dealers to abide by mandatory swap clearing guidelines and to execute swaps on a regulated exchange.²⁶ Other key provisions include the creation of capital and margin

2009/10/07/dealbook-dialogue-lynn-stout/, archived at <http://perma.cc/A3YS-5T6H>.

²⁰ *Dodd-Frank Act Rulemaking: Derivatives*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/spotlight/dodd-frank/derivatives.shtml> (last visited Oct. 31, 2014), archived at <http://perma.cc/JW4N-YMZU>.

²¹ *Id.* (defining “security-based swaps” as “swaps based on a single security or loan or a narrow-based group or index of securities . . . or events relating to a single issuer or issuers of securities in a narrow-based security index”).

²² *Id.*

²³ See *Dodd-Frank’s Title VII – OTC Derivatives Reform*, ERNST & YOUNG 1 (2013),

[http://www.ey.com/Publication/vwLUAssets/Key_questions_board_members_should_ask_about_Title_VII/\\$FILE/Americas_FAAS_Dodd_Frank_derivative_s_reform.pdf](http://www.ey.com/Publication/vwLUAssets/Key_questions_board_members_should_ask_about_Title_VII/$FILE/Americas_FAAS_Dodd_Frank_derivative_s_reform.pdf), archived at <http://perma.cc/58E6-RE4A>.

²⁴ *Dodd-Frank Act Rulemaking: Derivatives*, *supra* note 20.

²⁵ See *Dodd-Frank Act: Regulation of Over-the-Counter Derivatives*, KPMG LLP 1 (Aug. 10, 2010), <https://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/regulatory-practice-letters/Documents/rpl-1013-otc-derivatives.pdf>, archived at <http://perma.cc/D9G6-J8PB>.

²⁶ *Id.*

requirements for dealers, and mandatory public access to OTC swap data.²⁷

2. Prelude to the SEC Rule: CFTC Guidance

In November 2013, the CFTC issued both an advisory letter and a guidance letter regarding cross-border swap activities.²⁸ The guidance conceptualized CFTC jurisdiction in a very broad manner, extending its oversight to swap activities that have a direct impact on the U.S. economy via a U.S. person's involvement, regardless of whether the transactions physically occur in the U.S.²⁹ The CFTC's definition of "U.S. person" includes: (1) "natural person[s]" residing in the U.S., (2) any "legal entity" that is "organized or incorporated" under U.S. law or has its "principal place of business" in the U.S., (3) the pension plans of the employees of such legal entities, (4) any trust governed by U.S. law, and (5) any "commodity pool" or "investment fund" that is majority-owned by a U.S. person.³⁰ All "[n]on-U.S. branches of U.S. swap dealers" must also attain compliance with stated transaction-level requirements regarding clearing, margin, reporting, and swap execution facility trading.³¹ If a non-U.S. branch of a U.S. swap dealer is transacting with a non-U.S. person, "substituted compliance," or compliance with a foreign jurisdiction's regulations, may be an available option.³² Non-U.S. swap dealers must also comply with the "transaction-level requirements with respect to transactions

²⁷ *See id.*

²⁸ *CFTC Staff Action Addresses CFTC Cross-Border Jurisdiction, Echoes SEC's Proposed Territorial Approach*, SIDLEY AUSTIN LLP 1 (Dec. 6, 2013), <http://www.sidley.com/CFTC-Staff-Action-Addresses-CFTC-Cross-Border-Jurisdiction-Echoes-SECs-Proposed-Territorial-Approach-12-06-2013/>, archived at <http://perma.cc/KZ39-SHPD>.

²⁹ *See id.* at 2.

³⁰ *SEC Adopts Key Cross-Border Security-Based Swap Rules, Anticipates Further Rulemaking*, SIDLEY AUSTIN LLP 4 (July 21, 2014), <http://www.sidley.com/files/News/da02b229-05b3-4ac4-a18a-c10a48282dc6/Presentation/NewsAttachment/72cdcdb8-60e9-4e42-af41-188b8cdce6db/7.21.14%20Derivatives%20Update.pdf>, archived at <http://perma.cc/XZH4-U6EY>.

³¹ *CFTC Adopts Final Cross Border Swaps Guidance*, ROPES & GRAY 1 (July 12, 2013), <http://www.ropesgray.com/news-and-insights/Insights/2013/07/CFTC-Adopts-Final-Cross-Border-Swaps-Guidance.aspx>, archived at <http://perma.cc/GQY6-KGDC>.

³² *See id.*

with U.S. persons and with non-U.S. affiliates guaranteed by a U.S. person.”³³

3. The SEC’s Final Rule Regarding Cross-Border Security-Based Swap Activities

Rather than mirroring the CFTC’s interpretive guidance model, the SEC elected to promulgate regulations with a more binding effect by engaging in formal rulemaking.³⁴ The SEC further diverged from the CFTC’s approach by adopting a comparatively narrow conception of its jurisdictional reach.³⁵ The SEC embraced a territorial approach to the applicability of the regulations, which looks to whether any defined swap dealing activities appear to occur within the United States, in determining whether they count towards reporting requirements for derivatives activity.³⁶ In contrast to the CFTC’s definition of “U.S. person,” the SEC adopted a narrower definition which does not include collective investment vehicles that are majority-owned by U.S. persons.³⁷ The SEC final rule does extend to swaps transactions that originate with a non U.S.-domiciled counterparty whose activity is protected by a recourse guarantee from a U.S. person.³⁸ The SEC perceives a recourse guarantee from a U.S. person as a manifestation of a direct channel of risk flow back to the U.S. economy, thus warranting regulatory oversight.³⁹

The SEC final rule also outlines an important security-based swap dealer registration framework, which establishes a threshold for when a market participant is considered a security-based swap dealer and accordingly is required to register with the SEC.⁴⁰ The regulations

³³ *Id.*

³⁴ See Micah Green et al., *Five Key Facts About the SEC’s and CFTC’s Cross-Border Regulatory Approaches*, 6 Alternative Inv. & L. Rep. (BNA) No. 50, at 1560 (Dec. 25, 2013).

³⁵ See, e.g., Kara M. Stein, Commissioner, Sec. & Exch. Comm’n, Cross-Border Security-Based Swap Rules and Guidance (June 25, 2014), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370542172069>, archived at <http://perma.cc/5HQ2-EWRC>.

³⁶ SEC Final Rule, 79 Fed. Reg. 47,278, 47,288 (Aug. 12, 2014).

³⁷ SEC Adopts Key Cross-Border Security-Based Swap Rules, *Anticipates Further Rulemaking*, *supra* note 30, at 2.

³⁸ SEC Final Rule, 79 Fed. Reg. at 47,289.

³⁹ See *id.*

⁴⁰ Press Release, Sec. & Exch. Comm’n, *supra* note 3.

exempt entities that fall below a *de minimis* swap dealing threshold.⁴¹ The rule requires U.S. persons to account for all security-based swap transactions when calculating the *de minimis* threshold, which includes swaps that originate in their non-US branches.⁴² Non-U.S. persons are required to count the following swaps transactions against their thresholds: (i) “[d]ealing transactions with counterparties that are U.S. persons, including foreign branches of U.S. banks,” (ii) “[d]ealing transactions with any counterparty that has rights of recourse against a U.S. affiliate of the non-U.S. person,” and (iii) “[a]ll dealing activity if a non-U.S. person acts as a ‘conduit affiliate.’”⁴³ A “conduit affiliate” is defined as “a non-U.S. affiliate of a U.S. person that enters into security-based swaps with non-U.S. persons or with certain foreign branches U.S. banks on behalf of its U.S. affiliates.”⁴⁴

The SEC final rule also incorporates a provision defining the scope of the SEC’s antifraud jurisdiction in the cross-border context, providing enforcement authority “wherever sufficient conduct in furtherance of fraud occurs” or where the “effects of the fraud are felt.”⁴⁵

E. Implications of the SEC’s Final Rule

Despite taking an important step forward towards regulating cross-border swaps, the SEC’s adoption of the final rule has not been without criticism.⁴⁶ Consumer advocates chastised the SEC for its delay in issuing the new regulations.⁴⁷ Perhaps most significantly, the regulations contain a critical loophole that has already induced large U.S. banks to begin restructuring their foreign operations to avoid regulation under the new rule.⁴⁸

⁴¹ SEC Final Rule, 79 Fed. Reg. at 47,301.

⁴² Press Release, Sec. & Exch. Comm’n, *supra* note 3.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See, e.g., Jon Watkins, *SEC’s Cross-Border Rules Expose Loopholes*, TRADE (July 8, 2014), http://www.thetradenews.com/news/Asset_Classes/Derivatives/SEC_s_cross-border_rules_expose_loopholes.aspx, archived at <http://perma.cc/T7GT-VXPZ>.

⁴⁷ William Alden, *S.E.C. Limits Derivatives Trading by Foreign Branches of U.S. Banks*, N.Y. TIMES, June 26, 2014, at B3.

⁴⁸ See Andrew Ackerman, *SEC Signs Off on Foreign-Bank Swaps Rules*, WALL ST. J. (June 25, 2014), <http://online.wsj.com/articles/sec-signs-off-on-foreign-bank-swaps-rules-1403715071>.

1. Reactions to the Final Rule

The SEC opted for a more methodical approach to its rulemaking than the CFTC, which sparked criticism of the resulting delay in much-needed regulatory reform.⁴⁹ However, industry experts fear that the deliberation in drafting failed to translate into regulatory thoroughness, as there are significant loopholes that may still leave the U.S. economy vulnerable to substantial risk.⁵⁰ The concerns predominantly surround the SEC's narrow vision of its jurisdictional scope, which establishes regulatory authority over only the foreign entities who engage in swap trading with an *explicit* recourse guarantee from a U.S. affiliate.⁵¹ As SEC Commissioner Kara Stein noted in a speech accompanying the rule's release, "this rule ignores [the] reality of corporate finance by assuming that the U.S. parent is linked to the foreign affiliate only when an explicit recourse guarantee is provided to a third party."⁵² The desire to maintain a reputation of financial stability may induce U.S. parents to rescue their foreign affiliates in times of trouble, whether or not they have explicitly guaranteed the affiliate.⁵³

Large U.S. financial institutions have already begun to reorganize their derivatives activities to exploit this gap in the rule by retracting their explicit guarantees in favor of implicit understandings, or "keepwell" arrangements.⁵⁴ They are increasingly transferring derivatives activity to their overseas units, which are subject to less regulatory scrutiny, and removing their legal status as explicit guarantor.⁵⁵ This recent trend has caused regulators to express concern for the stability of the U.S. financial system, because U.S. parent companies are still bearing the risk of sustaining losses on their foreign

⁴⁹ Watkins, *supra* note 46 ("It has been almost a year since the CFTC outlined its stance on cross-border applications, while the SEC has dragged its heels in defining who will fall under its rules.").

⁵⁰ See, e.g., Stein, *supra* note 35.

⁵¹ SEC Final Rule, 79 Fed. Reg. 47,278, 47,289 (Aug. 12, 2014).

⁵² Stein, *supra* note 35.

⁵³ Katy Burne, *Big U.S. Banks Make Swaps a Foreign Affair*, WALL ST. J. (Apr. 27, 2014, 4:52 PM) (citation omitted), <http://online.wsj.com/news/articles/SB10001424052702304788404579520302570888332>.

⁵⁴ See Stein, *supra* note 35; Ackerman, *supra* note 48 ("Both Ms. Stein and Luis Aguilar . . . expressed concern the rules ignore the reality of parent companies 'implicitly' guaranteeing overseas affiliates that get into trouble even if they are under no legal requirement to do so.").

⁵⁵ See Burne, *supra* note 53.

subsidiaries' abundant swaps activity.⁵⁶ Referred to as the "de-guaranteeing movement,"⁵⁷ this regulatory evasion contravenes the Dodd-Frank Act's core objectives of transparency and risk-minimization by obscuring the nature of institutional relationships across borders and failing to minimize the U.S. economy's risk exposure arising from foreign derivatives trading.⁵⁸

Though the SEC has endured some backlash following the rule's release, industry members do recognize some value in the rule.⁵⁹ SEC Chairwoman Mary Jo White noted, "the final rules and guidance have been substantially strengthened from our 2013 proposal to better protect the U.S. financial system from the risks that can be posed by security-based swap activity."⁶⁰ Such improvements include the requirement that banks register their guaranteed subsidiaries that only engage in swaps activity outside U.S. borders, and clarification that the definition of a "guarantee" extends to any "legally enforceable" right of recourse.⁶¹ The Securities Industry and Financial Markets Association ("SIFMA") applauded the SEC in a public statement for "moving forward through the appropriate rulemaking process to adopt cross-border rules" and providing "clarity on jurisdictional lines."⁶²

⁵⁶ Silla Brush, *Wall Street Defends Overseas Swap Trading From U.S. Regulation*, BLOOMBERG (July 1, 2014, 5:00 AM), <http://www.bloomberg.com/news/2014-07-01/wall-street-defends-overseas-swap-trading-from-u-s-regulation.html>, archived at <http://perma.cc/SET9-YV2M>.

⁵⁷ Stein, *supra* note 35.

⁵⁸ See Watkins, *supra* note 46.

⁵⁹ See, e.g., Press Release, Kenneth E. Bentsen, Jr., President, Sec. Indus. & Fin. Mkts. Ass'n, SIFMA Statement on SEC Approval of Cross-Border Swaps Rules (June 25, 2014) available at http://sifma.org/newsroom/2014/sifma_statement_on_sec_approval_of_cross-border_swaps_rules/, archived at <http://perma.cc/3K7U-M4T5>.

⁶⁰ Mary Jo White, Chairwoman, Sec. & Exch. Comm'n, Chair's Opening Statement on the Adoption of Cross-Border Securities-Based Swap Rules under Title VII of the Dodd-Frank Act (June 25, 2014), available at <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370542555708#.VF7FN4oug>, archived at <http://perma.cc/FBA7-77ZN>.

⁶¹ See *id.*

⁶² Press Release, Kenneth E. Bentsen, Jr., *supra* note 59.

2. Possible Motivations for the Rule's Narrow Scope

There are a few potential motives for the SEC's conservative position on its jurisdictional authority over cross-border derivatives. The SEC's general counsel, Anne Small, noted that the SEC had carefully considered the authority question and ultimately concluded that the agency did not have the legal authority to regulate non-guaranteed foreign affiliates.⁶³ It is likely that the threat of litigation from concerned Wall Street-affiliated entities was a chief motivator in the SEC's narrower approach.⁶⁴ The CFTC's comparatively broad rule has resulted in a lawsuit initiated by a few key industry groups—including SIFMA—seeking to limit the regulations' extraterritorial application.⁶⁵ Though a district court recently dismissed the case for failure to state a claim, the suit is reflective of the potential hostility to an overbroad rule.⁶⁶ Furthermore, the House of Representatives voted in June to pass a bill that would curtail the CFTC's regulatory authority in the cross-border swaps market, indicating another potential source of resistance to overreaching regulation.⁶⁷ These are just a few of the competing considerations and interested parties that the SEC must consider in conjunction with the aims of the Dodd-Frank Act.

F. Conclusion and Future of SEC Security-Based Swaps Regulation

As noted by SEC Commissioner Kara Stein, though the new “rule regarding cross-border definitions is a small, but significant, step towards implementing [the Dodd-Frank Act],” there still remains “a huge portion of the cross-border rules outstanding.”⁶⁸ This rule is only an initial step into the realm of Dodd-Frank mandated derivatives

⁶³ Alden, *supra* note 47.

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *Court Dismisses Challenge to CFTC Cross-Border Guidance*, SULLIVAN & CROMWELL LLP 1 (Sept. 18, 2014), http://www.sullcrom.com/siteFiles/Publications/SC_Publication_Court_Dismisses_Challenge_to_CFTC_Cross_Border_Guidance.pdf, archived at <http://perma.cc/Q8HK-6XJT>.

⁶⁷ Andrew Ackerman & Michael R. Crittenden, *House Passes Bill to Limit CFTC on Swaps Rules*, WALL ST. J. (June 24, 2014, 3:06 PM), <http://online.wsj.com/articles/house-passes-bill-to-limit-cftc-on-swaps-rules-1403636804>.

⁶⁸ Stein, *supra* note 35.

regulation, and there is still plenty of work to be done.⁶⁹ The SEC still has yet to address: (1) the conduct that falls within the SEC's regulatory jurisdiction by defining "transaction conducted within the United States," (2) the rules that apply to regulated dealers, and (3) whether and to what extent firms may comply with U.S. rules through substituted compliance.⁷⁰ This rule merely lays a preliminary foundation for "defining who is—and who is not—covered by [the SEC's] regulatory regime."⁷¹ Though Commissioners Stein and Aguilar expressed apprehension regarding the potentially wide loophole in the rule, both were confident that the SEC has the ability to bring greater transparency and safety to the foreign derivatives market as it progresses in its Dodd-Frank rulemaking.⁷²

Alexandria Martin⁷³

⁶⁹ *See id.*

⁷⁰ *Id.*

⁷¹ White, *supra* note 60.

⁷² Stein, *supra* note 35 ("Without question, this approach will, regardless of our future rules, leave the U.S. vulnerable to the risks arising from unregulated swaps trading. But, it is a step forward. . . . I also think we need to get this one done and move on to the next rule."); Luis A. Aguilar, Commissioner, Sec. & Exch. Comm'n, Beginning to Shine a Light on the Opaque Derivatives Market: Defining Dealers and Major Participants in the Cross-Border Context (June 25, 2014), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370542163686#.VFr-clN4oug>, *archived at* <http://perma.cc/E4TE-PG4L> ("When all is said and done, I believe that the definitions to be adopted today are a significant step forward. While not perfect, the final rules will close many of the loopholes in our regulatory framework, and they are an initial step forward in accomplishing the goals of the Dodd-Frank Act.").

⁷³ Student, Boston University School of Law (J.D. 2016).