



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

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CFTC Letter No. 12-22
No-Action
October 12, 2012
Division of Swap Dealer and Intermediary Oversight

Re: Time-Limited No-Action Relief: Swaps Only With Certain Persons to be Included in Calculation of Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception and Calculation of Whether a Person is a Major Swap Participant

Ladies and Gentlemen:

This letter responds to requests from multiple parties received by the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) requesting relief with respect to the swaps that are to be included in the calculation of the aggregate gross notional amount of swaps connected with swap dealing activity for purposes of determining when and if a person is no longer entitled to rely on the de minimis exception from swap dealer registration set forth in Commission Regulation 1.3(ggg)(4)¹ and must register with the Commission as a swap dealer, or in the calculation of whether a person is a major swap participant for purposes of Commission Regulation 1.3(hhh).

In the Commission’s Proposed Cross-Border Interpretive Guidance,² the Commission proposed a definition of the term “U.S. person” that would encompass both persons (or classes of persons) located within the United States as well as those that may be domiciled or operating outside the United States. This definition was proposed in order to identify those persons whose swap activities would meet the jurisdictional nexus under Section 2(i) of the Commodity Exchange Act (“CEA”) for the application of the swaps provisions of the CEA to such activities. The Commission stated that, for example, “this interpretation would help determine whether non-U.S. persons engaging in swap dealing transactions with ‘U.S. persons’ in excess of the de minimis level would be required to register and regulated as a swap dealer.”³

¹ 17 CFR 1.3(ggg)(4), 77 FR 30596, 30744 (May 23, 2012).

² Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214 (July 12, 2012).

³ *Id.* at 41218.

Specifically, in the Proposed Cross-Border Interpretive Guidance, the Commission proposed to define the term “U.S. person” as follows:

“U.S. person” would include, but not be limited to:

- (i) Any natural person who is a resident of the United States;
- (ii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States (“legal entity”), or (B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person;
- (iii) any individual account (discretionary or not) where the beneficial owner is a U.S. person;
- (iv) any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person(s);
- (v) any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA;
- (vi) a pension plan for the employees, officers, or principals of a legal entity with its principal place of business inside the United States; and
- (vii) an estate or trust, the income of which is subject to United States income tax regardless of source.⁴

In the Proposed Cross-Border Interpretive Guidance, the Commission also proposed to apply this same definition of “U.S. person” to the determination of whether a person is a major swap participant.⁵

⁴ *Id.* In its proposed Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 FR 41110 (July 12, 2012) (“Proposed Cross-Border Exemptive Order”), the Commission proposed this definition of “U.S. person” solely for purposes of a proposed temporary exemptive order that would permit non-U.S. swap dealers and non-U.S. major swap participants to delay compliance with certain entity-level requirements of the CEA (and Commission regulations promulgated thereunder) subject to specified conditions, and that would permit non-U.S. swap dealers and non-U.S. major swap participants, as well as foreign branches of U.S. swap dealers and U.S. major swap participants (for swaps with non-U.S. counterparties) to comply with certain transaction-level requirements of the home jurisdiction of non-U.S. swap dealers or non-U.S. major swap participants, or the foreign location of the branches of U.S. swap dealers and U.S. major swap participants. *See* 77 FR at 41114.

The Commission published the foregoing definition of “U.S. person” for public comment on July 12, 2012, and has been diligently reviewing the many comments received in anticipation of finalizing the Proposed Cross-Border Interpretive Guidance and the Proposed Cross-Border Exemptive Order. Nonetheless, the Division anticipates that neither the interpretive guidance nor the exemptive order will be finalized prior to October 12, 2012.⁶

However, it has come to the attention of the Division, based on information provided by multiple parties, that prior to the Commission’s issuance of final guidance or a final exemptive order setting forth a definition of “U.S. person,” foreign entities may adopt either potentially over-inclusive or potentially under-inclusive categorizations of their counterparties for purposes of determining whether their swap dealing activities exceed the de minimis threshold under the swap dealer definition and registration requirements, or whether certain thresholds have been exceeded for determining whether a person must register as a major swap participant. Either result would not be consistent with the Commission’s intent, in issuing the Proposed Cross-Border Interpretive Guidance for public comment, to establish a uniform and consistent standard, through a definition of “U.S. person,” for determining “whether non-U.S. persons engaging in swap dealing transactions with ‘U.S. persons’ in excess of the de minimis level would be required to register and regulated as a swap dealer,”⁷ or whether non-U.S. persons are a major swap participant for purposes of Commission Regulation 1.3(hhh).

Thus, prior to a further determination by the Commission with respect to the definition of “U.S. person,” the Division believes that time limited no-action relief is warranted in order to enable swap market participants to apply a uniform and readily ascertainable standard regarding which swaps, as of October 12, 2012, must be included in their calculation of the aggregate gross notional amount of swaps connected with swap dealing activity for purposes of determining when, and if, they are no longer entitled to rely on the de minimis exception from swap dealer registration and must register with the Commission as a swap dealer. For similar reasons, the Division also believes that time limited no-action relief is warranted to apply that same uniform and readily ascertainable standard to the calculation of whether a person must register with the Commission as a major swap participant.

Additionally, in the Proposed Cross-Border Interpretive Guidance, the Commission proposed to exclude “the notional value of dealing transactions with foreign branches of registered U.S. swap dealers” from the calculation of the aggregate gross notional amount of swaps connected with swap dealing activity for purposes of determining when, and if, a foreign

⁵ See 77 FR at 41220 (“In determining whether it is [a major swap participant], a non-U.S. person would ‘count’ all of its swap positions where its counterparty is a U.S. person, but would not ‘count’ any swap position where its counterparty is a non-U.S. person.”).

⁶ As of October 12, 2012, persons must comply with the Commission’s swap dealer registration regulations with respect to their swap activities, and entities that engage in more than the de minimis level of swap dealing activity (measured by aggregate gross notional amount) after October 12, 2012, must register as swap dealers by no later than two months after the end of the month in which they exceed the de minimis level. Thus, an entity engaged in swap dealing activity must determine whether or not a swap entered into after October 12, 2012, should be included in the calculation of its aggregate gross notional amount of swap dealing activity.

⁷ 77 FR at 41218.

entity is no longer entitled to rely on the *de minimis* exception from swap dealer registration.⁸

Some industry participants have expressed concern that the Proposed Cross-Border Interpretive Guidance would provide an exclusion only when a foreign entity's dealing transactions are with the foreign branches of *registered* U.S. swap dealers. Because the proposed exclusion would be limited to *registered* U.S. swap dealers and many of the persons who expect to register as U.S. swap dealers may not do so until December 31, 2012, or later, these industry participants have expressed concern that a foreign entity will be required after October 12, 2012, to begin counting toward the *de minimis* threshold any swap dealing transactions with a foreign branch of any person that may meet the definition of "U.S. person" in the Proposed Cross-Border Interpretive Guidance and that is not yet registered as a U.S. swap dealer. If a foreign entity must count its dealing transactions with such foreign branches from October 12, 2012, until persons begin registering as swap dealers, those dealing transactions could result in such foreign entity exceeding the *de minimis* threshold in Commission Regulation 1.3(ggg)(4)(i) and consequently being required to register as a swap dealer with the Commission. This outcome would occur notwithstanding that many persons in the United States with foreign branches intend to register as swap dealers later in 2012. The Division believes that this potential outcome would not be consistent with the scope of relief intended to be provided in the Proposed Cross-Border Interpretive Guidance.

Similarly, if a foreign entity must include swaps with such foreign branches in its calculation of whether it is within the definition of major swap participant in Commission Regulation 1.3(hhh), it could be required to register with the Commission in that capacity. Although the Commission's Proposed Cross-Border Interpretive Guidance did not provide for a similar exclusion with respect to the consideration of a foreign entity's swaps with foreign branches of U.S. swap dealers with respect to determining whether such foreign entity must register as a major swap participant, a number of commenters requested that the Commission provide a similar exclusion. The Division believes that it would be appropriate to provide limited transitional relief prior to the Commission's full consideration of these comments and final determination.

In light of the foregoing, the Division will not recommend that the Commission take enforcement action against any person not described in (i) through (v) below for failure to include a swap executed prior to the earlier of December 31, 2012, or the effective date of a definition of "U.S. person" in a final Exemptive Order Regarding Compliance with Certain Swap Regulations, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission Regulation 1.3(ggg)(4), so long as the counterparty to such swap is not:

- (i) A natural person who is a resident of the United States;
- (ii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of

⁸ 77 FR at 41219.

the foregoing, in each case that is organized or incorporated under the laws of the United States;

- (iii) A pension plan for the employees, officers or principals of a legal entity described in (ii) above, unless the pension plan is exclusively for foreign employees of such entity;
- (iv) An estate or trust, the income of which is subject to U.S. income tax regardless of source; or
- (v) An individual account (discretionary or not) where the beneficial owner is a person described in (i) through (iv) above.

For purposes of this no-action relief, a person may reasonably rely on the representations of its counterparty as to whether such counterparty is not a person described in (i) through (v) above.

Consistent with the Proposed Cross-Border Interpretive Guidance definition of “U.S. person,” the position taken herein shall apply where the counterparty to such swap is not a person described in (i) through (v) above whether or not that counterparty’s obligations under the swap are guaranteed by a person that is described in (i) through (v) above.⁹

For similar reasons, the Division takes the same position with respect to the determination of whether a person is a major swap participant. That is, the Division will not recommend that the Commission take enforcement action against any person not described in (i) through (v) above for failure to include a swap executed prior to the earlier of December 31, 2012, or the effective date of a definition of “U.S. person” in a final Exemptive Order Regarding Compliance with Certain Swap Regulations, in its calculation of whether a person is a major swap participant for purposes of Commission Regulation 1.3(hhh), so long as the counterparty to such swap is not a person described in (i) through (v) above.

Further, the Division also will not recommend that the Commission take enforcement action against any person not described in (i) through (v) above for failure to include a swap executed prior to the earlier of December 31, 2012, or the effective date of a final Exemptive Order Regarding Compliance with Certain Swap Regulations, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission Regulation 1.3(ggg)(4) or in its calculation of whether it is a major swap participant for purposes of Commission Regulation 1.3(hhh), so long as the counterparty to such swap is a

⁹ The Division notes that nothing contained in this staff no-action letter is intended to, nor should be construed as, an indication of, or a limitation on, the definition of the term “U.S. person” that the Commission will or may adopt in final guidance or a final exemptive order. In particular, with respect to swaps with counterparties that are in those categories of persons that were included in the Commission’s proposed definition of “U.S. person” but that are not described in (i) through (v) above, the Commission is reviewing the comments received and may require that any or all such swaps entered following the effective date of any definition of “U.S. person” in a final guidance or final exemptive order must be included in a person’s calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission Regulation 1.3(ggg)(4) or in its calculation of whether a person is a major swap participant for purposes of Commission Regulation 1.3(hhh).

foreign branch of a person described in (i) through (v) above that meets the definition of a swap dealer under Section 1a(49) of the CEA and Commission Regulation 1.3, and such person represents that it intends to register with the Commission as a swap dealer by March 31, 2013.¹⁰

This letter, and the positions taken herein, represent the view of the Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. As with all no-action letters, the relief issued by this letter does not excuse the affected persons from compliance with any other applicable requirements contained in the CEA or in the Commission's regulations issued thereunder, nor would it apply in a case of willful evasion. Further, this letter, and the relief contained herein, is based upon the information made available to the Division. Any different or changed material facts or circumstances might render this letter void.

Should you have any questions, please do not hesitate to contact Frank Fisanich, Chief Counsel, at 202-418-5949, or Ward Griffin, Associate Chief Counsel, at 202-418-5425.

Very truly yours,

Gary Barnett

cc: Regina Thoele, Compliance
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¹⁰ The Division notes that the representation of the intention to register with the Commission as a swap dealer need not be obtained prior to execution of a swap in order to rely on this staff no-action letter when excluding such swap from calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission Regulation 1.3(ggg)(4) or in its calculation of whether it is a major swap participant for purposes of Commission Regulation 1.3(hhh).