



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

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Director

CFTC Letter No. 18-13
No-Action
May 16, 2018
Division of Swap Dealer and Intermediary Oversight

Re: No-Action Position: Relief for Certain Non-U.S. Persons from Including Swaps with International Financial Institutions in Determining Swap Dealer and Major Swap Participant Status

Ladies and Gentlemen:

This letter is in response to a request¹ received by the Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) of the Commodity Futures Trading Commission (“**Commission**”) from ABN AMRO Bank N.V. (the “**Requestor**”) for a position of no-action if the Requestor does not include one or more swaps entered into with certain international financial institutions (as defined below, “**IFIs**”) in determining whether it is (i) deemed to be a swap dealer (“**SD**”) pursuant to the criteria set forth in the Commission’s definition of “swap dealer;”² or (ii) a major swap participant (“**MSP**”) pursuant to the criteria set forth in the Commission’s definition of “major swap participant.”³

I. Regulatory Background

A. Swap Dealer and Major Swap Participant Definitions

In accordance with the definition of “swap dealer” in section 1a(49)(D) of the Commodity Exchange Act (“**CEA**”)⁴ the Commission has excepted from designation as an SD any entity that

¹ Letter dated January 25, 2018, from ABN AMRO Bank N.V. to Matthew B. Kulkin, Director, DSIO.

² See subparagraph (4) of the definition of “swap dealer” in 17 CFR § 1.3. See also *Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,”* 77 FR 30596, 30626-35 (May 23, 2012) (hereinafter “**Entity Definitions Rulemaking**”).

³ See the definition of “major swap participant” in 17 CFR § 1.3.

⁴ 7 USC § 1 et seq.

engages in a *de minimis* quantity of swap dealing with or on behalf of its customers.⁵ Specifically, subparagraph (4) of the definition of “swap dealer” in Commission regulation 1.3 provides that a person shall not be deemed to be an SD until its aggregate gross notional amount of swaps connected with swap dealing activity, during the preceding 12 months, exceeds the *de minimis* threshold.⁶ Such Commission regulation further requires that, in determining whether its swap dealing activity exceeds the *de minimis* threshold, a person must include the aggregate notional value of the swap positions connected with the dealing activities of its affiliates under common control.⁷

Section 1a(33) of the CEA defines “major swap participant” to include persons that are not SDs but that nevertheless pose a high degree of risk to the U.S. financial system by virtue of the “substantial” nature of their swap positions.⁸ In accordance with section 1a(33)(B) of the CEA the Commission adopted rules further defining “major swap participant” and providing that a person would not be deemed an MSP unless its swap positions exceed one of several thresholds.⁹ The thresholds were designed to take into account default related credit risk, the risk of multiple market participants failing close in time, and the risk posed by a market participant’s swap positions on an aggregate level.¹⁰ The Commission also adopted interpretive guidance that, for purposes of the MSP analysis, an entity’s swap positions would be attributable to a parent, other affiliate, or guarantor to the extent that the counterparty has recourse to the parent, other affiliate, or guarantor and the parent or guarantor is not subject to capital regulation by the Commission, SEC, or a prudential regulator.¹¹

⁵ See 7 U.S.C. 1a(49)(D) (directing the Commission to establish a *de minimis* exception from the SD definition). See also subparagraph (4) of the definition of “swap dealer” in 17 CFR § 1.3; Entities Definitions Rulemaking, 77 FR at 30626-35.

⁶ See subparagraph (4)(i)(A) of the definition of “swap dealer” in 17 CFR § 1.3. See also subparagraph (6) of the definition of “swap dealer” in 17 CFR § 1.3 (identifying swaps that are not considered in determining whether a person is a swap dealer).

⁷ See subparagraph (4)(i)(A) of the definition of “swap dealer” in 17 CFR § 1.3.

⁸ See 7 U.S.C. 1a(33)(A) (defining “major swap participant” to mean any person who is not an SD and either (i) maintains a substantial position in swaps for any of the major swap categories, subject to certain exclusions; (ii) whose outstanding swaps create substantial counterparty exposure that could have serious effects on the U.S. financial system; or (iii) is a highly leveraged financial entity that is not subject to prudential capital requirements and that maintains a substantial position in swaps for any of the major swap categories.)

⁹ See definitions of “major swap participant,” “substantial position,” “hedging or mitigating commercial risk,” “substantial counterparty exposure,” and “financial entity; highly leveraged” in 17 CFR § 1.3.

¹⁰ See Entity Definitions Rulemaking, 77 FR at 30666 (discussing the guiding principles behind the Commission’s definition of “substantial position” in 17 CFR 1.3); *id.* at 30683 (noting that the Commission’s definition of “substantial counterparty exposure” in 17 CFR 1.3 is founded on similar principles as its definition of “substantial position”).

¹¹ *Id.* at 30689.

B. Application of SD and MSP Registration Thresholds to Cross-Border Transactions

In 2013, the Commission issued a general statement of policy regarding the cross-border application of the swaps provisions of the CEA, which, among other things, addressed the general manner in which the Commission would apply the SD and MSP definitions with respect to cross-border swap activity involving Non-U.S. persons.¹² With regard to swap dealing activity, the Commission stated that it would generally expect a Non-U.S. person, together with its non-U.S. affiliates, to include swap dealing activity with U.S. person counterparties when calculating its aggregate gross notional amount of swaps connected with swap dealing activity for purposes of determining whether it may rely on the *de minimis* exception from SD registration set forth in the definition of “swap dealer.”¹³ Similarly, swap positions of a Non-U.S. person with U.S. person counterparties would be included in determining whether its positions are in excess of the applicable MSP registration thresholds.¹⁴

Under the Cross-Border Guidance, an entity whose principal place of business or jurisdiction of incorporation is within the United States would generally be considered a U.S. person, and thus swap activity of a Non-U.S. person with such entities would generally be considered for purposes of determining whether such Non-U.S. persons are required to register as SDs or MSPs.¹⁵ Conversely, swap activity between two Non-U.S. persons would generally not be considered for purposes of determining whether such Non-U.S. persons are required to register as SDs or MSPs.¹⁶ In addition, under the Cross-Border Guidance, the swap activity of a Non-U.S. person that is not a guaranteed or conduit affiliate¹⁷ of a U.S. Person with an entity that is not a U.S. person but that is guaranteed by a U.S. person, subject to certain exceptions and conditions, would generally be considered for purposes of determining whether such Non-U.S. persons are required to register as SDs or MSPs.¹⁸

¹² See *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 FR 45292 (July 26, 2013) (“**Cross-Border Guidance**”). For purposes of this letter, the term “**Non-U.S. person**” means a person that is not a U.S. person and the term “**U.S. person**” has the same meaning as in the Cross-Border Guidance. See Cross-Border Guidance, 78 FR at 45316-17.

¹³ See Cross-Border Guidance, 78 FR at 45326.

¹⁴ See *id.*

¹⁵ See Cross-Border Guidance, 78 FR at 45316-17.

¹⁶ See *id.*

¹⁷ For purposes of this letter, the terms “**guarantee**” and “**guaranteed affiliate**” have the same meaning as in the Commission’s *Exemptive Order Regarding Compliance with Certain Swap Regulations*, 78 FR 43785, 43794 (July 22, 2013). For purposes of this letter, the term “**conduit affiliate**” has the same meaning as in the Cross-Border Guidance, 78 FR at 45358-59.

¹⁸ See Cross-Border Guidance, 78 FR at 45319, 45324-25. Exceptions and conditions include circumstances where the guaranteed counterparty is an SD, is affiliated with an SD, is guaranteed by a non-financial entity, or, for purposes of MSP registration, the guaranteed counterparty is an SD and the documentation of the swap requires such SD to collect daily variation margin with no threshold. See *id.*

II. Summary of Request for No-Action Position

Based on representations by the Requestor, DSIO understands certain facts to be as follows. The Requestor is incorporated in the Netherlands and is regulated by the Netherlands Authority for the Financial Markets pursuant to the laws and regulations of the European Union and the Netherlands. The Requestor is not currently registered, and is not required to be registered, with the Commission as an SD or as an MSP. The Requestor is a Non-U.S. person. The Requestor is also neither guaranteed by a U.S. person, nor a conduit affiliate of a U.S. person. The Requestor plans to enter into swaps with certain IFIs (as defined below). To the extent an IFI is incorporated in, or has its principal place of business in, the United States, it could be considered to be a U.S. person for purposes of the Cross-Border Guidance, and therefore the Requestor may be required to include swaps with such IFI for purposes of determining whether it is required to register as an SD or MSP.¹⁹ In addition, to the extent an IFI is or becomes guaranteed by a U.S. person, the Requestor may be required to include swaps with such IFI for purposes of determining whether it is required to register as an SD or MSP.²⁰

The Requestor notes that the Commission has provided a number of specific exceptions for the IFIs from the application of certain Commission regulations, including the following:

1. The Commission issued an interpretive letter to the World Bank Group (which group includes several IFIs) in 1991,²¹ indicating that the World Bank Group should be treated as a non-U.S. person for purposes of application of the Commission's Part 30 rules, thereby allowing the World Bank to undertake foreign futures and options transactions through unregistered intermediaries.²² The Commission indicated that its interpretation was based on the unique attributes and status of the World Bank Group as a multinational member agency, and the public policy affecting its ability to enter into transactions in all member countries in conjunction with promoting global economic development. The Commission further stated that the World Bank Group should not be precluded from selecting a firm, and a firm should not be precluded from dealing with the World Bank Group in foreign futures and options transactions, regardless of whether such firm is registered as a futures commission merchant or exempt from registration as such under Commission regulations.²³

¹⁹ See *id* at 45316-17.

²⁰ See *id* at 45419, 45324-25.

²¹ See CFTC Interpretative Letter to World Bank Group, Comm. Fut. L. Rep. ¶ 25,149 (Oct. 30, 1991).

²² Part 30 of the Commission's regulations prohibits any person located in the United States from trading in foreign futures or foreign options unless such transactions are conducted through a registered futures commission merchant or a person exempt from registration as a futures commission merchant. See Commission regulation § 30.4, 17 CFR § 30.4.

²³ In 2015, a staff no-action position provided similar relief for introducing broker and commodity trading advisor registration in connection with swaps activities with certain of the IFIs. See CFTC Staff Letter 15-

2. As part of the Entities Definitions Rulemaking the Commission indicated that special considerations, including the international status of certain IFIs, warrant an exclusion for certain IFIs from registration as SDs or MSPs.²⁴
3. In recognition of the important public policy implications related to the application of the swap clearing requirement and exceptions from that requirement, the Commission determined that certain IFIs should not be subject to required clearing.²⁵
4. Based on similar policy considerations, under the Cross-Border Guidance, the Commission would generally not apply transaction-level rules to swap transactions between non-U.S. SDs and certain IFIs, effectively treating certain IFIs as Non-U.S. persons for purposes of the application of transaction-level rules.²⁶
5. Finally, for similar reasons, the Commission does not require SDs and MSPs to comply with the Commission's uncleared swap margin requirements when transacting with certain IFIs.²⁷

For the same reasons that supported the Commission determinations summarized above, the Requestor believes that its swaps activity with IFI counterparties should not be included when determining whether it is deemed to be an SD or MSP, notwithstanding the fact that the principal place of business or jurisdiction of incorporation of an IFI may be in the United States, or the fact that an IFI may be or become guaranteed by a U.S. person.

III. DSIO No-Action Position

Based on the facts presented and representations made by the Requestor, and consistent with certain regulatory exceptions provided by the Commission and Commission staff to the IFIs in similar contexts, DSIO believes that no-action relief is warranted. Accordingly, DSIO will not recommend that the Commission take an enforcement action against a Non-U.S. person that is neither a guaranteed affiliate nor conduit affiliate of a U.S. person²⁸ if it does not include one or more swaps entered with IFI counterparties in determining whether it is (i) deemed to be an SD

37, available on the Commission's website at:
<https://www.cftc.gov/idc/groups/public/%40lrlettergeneral/documents/letter/15-37.pdf>.

²⁴ See Entity Definitions Rulemaking, 77 FR at 30692-93.

²⁵ See *End-User Exception to the Clearing Requirement for Swaps*, 77 FR 42560, 42561-62 (July 19, 2012) ("**End-User Exception**").

²⁶ See Cross-Border Guidance, 78 FR at 45353 n. 531, 45360 n. 595. The Commission would also treat IFIs as Non-U.S. persons for transactions with unregistered non-U.S. entities. See *id.* at 45361 n. 605.

²⁷ Certain IFIs are excluded from the definition of "financial end user" under Commission regulation 23.151, 17 CFR § 23.151. See *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 81 FR 636, 642-43 (Jan. 6, 2016).

²⁸ Although requested by ABN AMRO Bank N.V., the no-action position provided by this letter is available to all Non-U.S. persons that are neither guaranteed affiliates nor conduit affiliates of a U.S. person.

pursuant to the criteria set forth in the Commission’s definition of “swap dealer;”²⁹ or (ii) an MSP pursuant to the criteria set forth in the Commission’s definition of “major swap participant.”³⁰

For the purposes of this letter, IFIs are those international financial institutions referenced in the Commission’s Cross-Border Guidance,³¹ with the addition of the North American Development Bank (“**NADB**”), to the extent a Non-U.S. person that is neither a guaranteed nor conduit affiliate would be required to include swaps with such IFI for purposes of determining whether it is required to register as an SD or MSP. The international financial institutions referenced in the Cross-Border Guidance, with the addition of NADB are:

- (1) The International Monetary Fund,
- (2) International Bank for Reconstruction and Development,
- (3) International Development Association,
- (4) International Finance Corporation,
- (5) Multilateral Investment Guarantee Agency,
- (6) European Bank for Reconstruction and Development,
- (7) African Development Bank,
- (8) African Development Fund,
- (9) Asian Development Bank,
- (10) Inter-American Development Bank,
- (11) Bank for Economic Cooperation and Development in the Middle East and North Africa,
- (12) Inter-American Investment Corporation,
- (13) Council of Europe Development Bank,
- (14) Nordic Investment Bank,
- (15) Caribbean Development Bank,
- (16) European Investment Bank,
- (17) European Investment Fund; and
- (18) NADB.³²

This letter, and the positions taken herein, represent the views of DSIO only, and do not necessarily represent the positions or views of the Commission or of any other office or division of the

²⁹ See subparagraph (4) of the definition of “swap dealer” in 17 CFR § 1.3. See also Entities Definitions Rulemaking, 77 FR at 30626-35 (May 23, 2012).

³⁰ See the definition of “major swap participant” in 17 CFR § 1.3.

³¹ See Cross-Border Guidance, 78 FR at 45353 n. 531 (citing the institutions listed in the Entities Definitions Rulemaking, 77 FR at 30692 n. 1180), 45360 n. 595.

³² NADB has been added to this list because it is located in the United States and Commission staff has found that it has a similar status to that of the other IFIs listed above. See CFTC Staff Letter 17-59 (providing no-action relief to NADB from the swap clearing requirement of section 2(h)(1) of the CEA), available on the Commission’s website at:

<https://www.cftc.gov/idc/groups/public/%40rllettergeneral/documents/letter/17-59.pdf>.

Commission. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the CEA or in Commission regulations. Further, this letter, and the positions taken herein, are based upon the representations made to DSIO. Any different, changed, or omitted material facts or circumstances might render this no-action position void.

Questions concerning this letter may be directed to me at (202) 418-5213; or Frank Fisanich, Chief Counsel, at (202) 418-5949.

Very truly yours,

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