



Commodity Futures Trading Commission

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Fact Sheet – Notice of Supplemental Proposal on Exemption from Derivatives Clearing Organization Registration

In August 2018, the Commodity Futures Trading Commission (“Commission”) proposed regulations that would codify the policies and procedures that the Commission is currently following with respect to granting exemptions from registration as a derivatives clearing organization (“DCO”) for the clearing of proprietary swap transactions for U.S. persons and futures commission merchants (“FCMs”) (“2018 Proposal”) ([83 FR 39923](#)). The Commission today issued a supplemental notice to further propose to permit DCOs that are exempt from registration (“exempt DCOs”) to clear swaps for U.S. customers through foreign intermediaries (“Supplemental Proposal”). The Supplemental Proposal will be published in the Federal Register and open for a 60-day public comment period.

Key Elements of the Proposal

U.S. Customer Clearing at Exempt DCOs: The Supplemental Proposal would permit exempt DCOs to clear swaps for U.S. customers through foreign intermediaries, in addition to clearing proprietary swaps for U.S. clearing members and FCMs. Due to uncertainty regarding the protection of U.S. customer funds, exempt DCOs would not be permitted to accept U.S. customer trades through an FCM, either directly or indirectly through a foreign member of the exempt DCO.

To facilitate an exempt DCO’s ability to clear swaps for U.S. customers through a foreign intermediary, the Commission is proposing to permit a foreign intermediary to accept funds from U.S. persons to margin swaps cleared at an exempt DCO, without registering as an FCM. Among other things, such foreign intermediary would need to: (1) be a clearing member of an exempt DCO; (2) clear U.S. persons’ swap transactions directly at an exempt DCO; and (3) not otherwise engage in FCM activities or voluntarily register as an FCM. A foreign intermediary would be exempt not only from the registration requirement of section 4d(f) of the Commodity Exchange Act, but also from all other provisions and regulations applicable to FCMs, including regulations regarding the holding of customer segregated funds and FCM capital and financial reporting requirements.

Eligibility for Exemption: In addition to the eligibility requirements proposed in the 2018 Proposal, the Supplemental Proposal would require that a non-U.S. clearing organization does not pose “substantial risk to the U.S. financial system.” The Commission is proposing a test to determine whether a non-U.S. DCO poses substantial risk to the U.S. financial system. The two-part test focuses on the amount of initial margin (“IM”) required at the DCO.

The first part of the proposed test is whether required IM from U.S. clearing members at the DCO constitutes 20 percent or more of the required IM for U.S. clearing members at all registered and exempt DCOs. This part of the test focuses on the DCO’s share of the total global required IM from U.S. clearing members.

The second part of the proposed test is whether 20 percent or more of the required IM at the DCO is attributable to U.S. clearing members. This part of the test focuses on the percentage of the required IM at the DCO that comes from U.S. clearing members.

Where one or both of these thresholds are close to 20 percent, the Commission may exercise discretion in determining whether the DCO poses substantial risk to the U.S. financial system. In these cases, in making its determination, the Commission may look at other factors that may reduce or mitigate the DCO’s risk to the U.S. financial system or provide a better indication of the DCO’s risk to the U.S. financial system.

Conditions of Exemption: In addition to the conditions proposed in the 2018 Proposal, the Supplemental Proposal includes certain additional conditions. First, an intermediary that clears swaps for U.S. persons at an exempt DCO would be prohibited from registering as an FCM.

An exempt DCO that clears swaps for U.S. customers would be required to have rules that require its clearing members to provide written notice to, and obtain acknowledgement from, U.S. persons prior to clearing. The notice would be required to state that (1) the clearing member is not a registered FCM; (2) the exempt DCO is exempt from registration with the Commission; and (3) the protections of the U.S. Bankruptcy Code do not apply to the U.S. person's funds. The notice would also need to explicitly compare the protections available to U.S. persons under U.S. law with those of the exempt DCO's home country regulatory regime.

An exempt DCO that is unable to provide the Commission with an unconditional annual certification of its continued compliance with the Principles for Financial Market Infrastructures ("PFMIs") in all respects would be required to identify any underlying material non-observance of the PFMIs and identify whether and how such non-observance has been or will be resolved.

Furthermore, the Supplemental Proposal would modify the reporting requirements proposed in the 2018 Proposal to better align them with the information necessary for the Commission to evaluate an exempt DCO's initial and continued eligibility for exemption and assess the extent of U.S. business cleared by the exempt DCO.

Modification or Termination of Exemption upon Commission Initiative: The Supplemental Proposal would add a process and conditions under which the Commission may modify the terms and conditions of an order of exemption or terminate an exemption upon the Commission's initiative. As proposed, the Commission would retain its authority to modify or terminate an exemption from DCO registration if any of the terms or conditions of the order of exemption is not met. For example, the Commission may modify or terminate an exemption upon a determination that an exempt DCO has failed to observe the PFMIs in any material respect, is no longer subject to "comparable, comprehensive supervision and regulation" by its home country regulator, or poses substantial risk to the U.S. financial system.