



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 13-64
No-Action
October 17, 2013
Division of Swap Dealer and Intermediary Oversight

Re: No-Action Relief: Certain Swaps by Non-U.S. Persons that are Not Guaranteed or Conduit Affiliates of a U.S. Person Not to be Considered in Calculating Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception

Ladies and Gentlemen:

This letter is in response to a September 30, 2013 letter received by the Division of Swap Dealer and Intermediary Oversight (“**Division**”) of the Commodity Futures Trading Commission (“**Commission**”) from Davis Polk and Wardwell, LLP (“**DavisPolk**”) on behalf of certain non-U.S. persons that are not guaranteed or conduit affiliates of U.S. persons. The letter sought no-action relief with respect to the calculation of the aggregate gross notional amount of swap dealing activity for purposes of the de minimis exception from the swap dealer definition set forth in Commission Regulation 1.3(ggg)(4).¹

Commission Regulation 1.3(ggg)(4) establishes an exception from swap dealer registration for persons who are not currently registered as swap dealers and whose aggregate gross notional amount of swap dealing activity remains below a given de minimis level during the immediately preceding twelve months. Pursuant to Commission Regulation 1.3(ggg)(4)(iii),² a person that crosses the de minimis threshold is not required to register as a swap dealer until two months after the end of the month in which it crosses the de minimis threshold (“**Interim Period**”). The Commission addressed the application of section 2(i) of the Commodity Exchange Act (“the Act”) to the swaps provisions of the Act, including the provisions relating to the registration of swap dealers, in its Cross-Border Interpretive Guidance and Policy Statement (“**Cross-Border Guidance**”).³ Therein, the Commission stated that its policy would be to allow non-U.S. persons that are not guaranteed or conduit affiliates of U.S. persons not to count toward their de minimis thresholds their swap dealing transactions with, among others, a guaranteed affiliate of a U.S. person that is a swap dealer, or a guaranteed or conduit affiliate that is not a

¹ 17 CFR 1.3(ggg)(4).

² 17 CFR 1.3(ggg)(4)(iii).

³ See 78 FR 45292 (July 26, 2013).

swap dealer and itself engages in de minimis swap dealing activity and which is affiliated with a swap dealer.⁴

Davis Polk is requesting that the Division's staff grant no-action relief to allow non-U.S. persons that are not guaranteed or conduit affiliates of U.S. persons to exclude from counting for purposes of the de minimis exception swaps with guaranteed affiliates of U.S. persons that are affiliated with a swap dealer, have crossed the de minimis threshold, and intend to register as a swap dealer within the Interim Period. Davis Polk represents that without such relief, non-U.S. persons that are not guaranteed or conduit affiliates of U.S. persons may refuse to trade with guaranteed affiliates of U.S. persons during the Interim Period.

Based upon the representations made by Davis Polk, the Division believes that no-action relief is warranted. Accordingly, the Division will not recommend that the Commission take an enforcement action against any non-U.S. person that is not a guaranteed⁵ or affiliate conduit⁶ of a U.S. person for failure to include, in its de minimis calculation for purposes of the swap dealer definition under Commission Regulation 1.3(ggg)(4), a swap executed with a guaranteed affiliate of a U.S. person on or before the date such non-U.S. person is required to register with the Commission as a swap dealer under Commission Regulation 1.3(ggg)(4)(iii), provided that (1) the guaranteed affiliate is affiliated with a swap dealer registered with the Commission; (2) the guaranteed affiliate has crossed the de minimis threshold; and (3) the guaranteed affiliate represents in writing, with a copy thereof delivered to the Division no later than 48 hours after execution of such swap using the email address dsionoaction@cftc.gov, that (a) such guaranteed affiliate intends to register as a swap dealer; and (b) the date its registration is required under Commission Regulation 1.3(ggg)(4)(iii).⁷

The no-action relief provided herein contains a collection of information, as that term is defined in the Paperwork Reduction Act.⁸ Therefore, a control number for the collection must be obtained from the Office of Management and Budget. In accordance with 44 U.S.C. § 3507(d) and 5 C.F.R. §§ 1320.8 and 1320.10, the Division will, by separate action, prepare an information collection request for review and approval by OMB, and will publish in the *Federal Register* a notice and request for public comments on the collection burdens associated with the no-action relief. If approved, non-U.S. persons that are not guaranteed or conduit affiliates of U.S. persons may not rely on the Division's determination not to recommend an enforcement action to the Commission

⁴ *Id.* at 45324.

⁵ See Cross-Border Guidance at 45320 for guidance regarding the Commission's interpretation of the term "guarantee."

⁶ See Cross-Border Guidance at 45358-59 for guidance regarding the Commission's interpretation of the term "affiliate conduit."

⁷ 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 no-action letter when excluding such swap from the calculation of the aggregate gross notional amount of swap dealing activity.

⁸ 44 U.S.C. § 3501 *et seq.*

unless the guaranteed affiliate in the related swap transaction with such non-U.S. person has provided the information the Division has determined is essential to the provision of no-action relief.

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 Act or in the Regulations issued thereunder. Further, this letter, and the relief contained herein, is based upon the information made available to the Division. Any different, changed or omitted material facts or circumstances might render this no-action relief void.

Should you have any questions, please do not hesitate to contact the undersigned, or Frank Fisanich, Chief Counsel, at 202-418-5949; Ward Griffin, Associate Chief Counsel, at (202) 418-5425; or Marcia Blase, Special Counsel, at 202-418-4138 of my staff.

Very truly yours,

Gary Barnett
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cc: Regina Thoele, Compliance
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