



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

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Acting Director

CFTC Letter No. 15-37
No-Action
June 4, 2015
Division of Swap Dealer and Intermediary Oversight

Re: No-Action Relief from Introducing Broker and Commodity Trading Advisor Registration for Persons Located Outside the United States in Connection with Certain Activities for Customers That Are International Financial Institutions

Ladies and Gentleman:

This letter is in response to requests received by the Division of Swap Dealer and Intermediary Oversight (“**DSIO**” or the “**Division**”) of the U.S. Commodity Futures Trading Commission (“**CFTC**” or “**Commission**”) from market participants who represent that they are located outside the United States (“**Requestors**”) asking staff for no-action relief from the requirement to register as an introducing broker (“**IB**”) under Section 4d(g) of the Commodity Exchange Act (“**CEA**” or “**Act**”) or as a commodity trading advisor (“**CTA**”) under Section 4m of the CEA with respect to activities involving swaps for a customer that is an international financial institution (“**IFI**”)¹ located within the United States.

¹ IFIs, for purposes of this no-action relief, are those institutions defined in the Commission’s entities rulemaking: Int’l Monetary Fund, Int’l Bank for Reconstruction and Development, European Bank for Reconstruction and Development, Int’l Development Association, Int’l Finance Corp., Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, Inter-American Investment Corp., Council of Europe Development Bank, Nordic Investment Bank, Caribbean Development Bank, European Investment Bank and European Investment Fund (Int’l Bank for Reconstruction and Development, Int’l Finance Corp. and Multilateral Investment Guarantee Agency are parts of the World Bank Group). *See* Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” 77 FR 30596, 30692 n.1180 (May 23, 2012) (“Final Entities Definitions”).

I. Regulatory Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act² (“Dodd-Frank Act”) established a new comprehensive regulatory framework for swaps and security-based swaps. As part of this new framework, the phrase “or swap” was added to the definitions of IB and CTA by amendment to Section 1a of the CEA through Section 721(a) of the Dodd-Frank Act. Thus, Section 1a(31)(A) of the CEA defines an IB, with certain exclusions, as: any person (except an individual who elects to be and is registered as an associated person of a futures commission merchant (“FCM”)) who solicits or accepts orders for the purchase or sale of futures contracts, swaps and other Commission-regulated financial products.³ In addition, Section 1a(12) of the CEA defines a CTA, with certain exclusions, as: any person who, for compensation or profit, advises others, directly or indirectly, as to the advisability of trading in, *inter alia*, futures contracts and swaps.⁴

Sections 4d(g) and 4m of the CEA make it unlawful for any person to be an IB or a CTA, respectively, unless such person is registered with the Commission as an IB or as a CTA.⁵ However, Commission regulation 3.10(c)(3) provides a registration exemption for IBs and CTAs that are located outside the United States. Specifically, Commission regulation 3.10(c)(3) states in pertinent part that:

A person located outside the United States, its territories or possessions engaged in the activity of: An introducing broker, as defined in § 1.3(mm) of this chapter; a commodity trading advisor, as defined in § 1.3(bb) of this chapter...in connection with any commodity interest transaction⁶ executed bilaterally or made

² See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

³ Commission Regulation 1.3(mm) further defines an IB as:

any person who, for compensation or profit, whether direct or indirect, (i) is engaged in soliciting or accepting orders for the purchase or sale of any...swap...and (ii) does not accept any money, securities or property (or extent credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

⁴ Commission regulation 1.3(bb) further defines a CTA as any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery, security futures product, or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the CEA; any commodity option authorized under section 4c of the CEA; any leverage transaction authorized under section 19 of the CEA; any person registered with the Commission as a CTA; or any person, who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing.

⁵ 7 U.S.C. §§ 4d(g), 4m; *see also* Commission regulation 3.10.

⁶ Commission regulation 1.3(yy) defines “commodity interest” as (1) any contract for the purchase or sale of a commodity for future delivery; (2) any contract, agreement or transaction subject to a Commission regulation under

on or subject to the rules of any designated contract market or swap execution facility only on behalf of persons located outside the United States, its territories or possessions, is not required to register in such capacity provided that any such commodity interest transaction is submitted for clearing through an FCM registered in accordance with section 4d of the Act.⁷

In adopting this rule, the Commission aimed to provide a registration exemption to certain foreign-located IBs and CTAs acting solely on behalf of customers located outside the United States.⁸

II. Summary of the Request for No-Action Relief

Based on the representations made by the Requestors, we understand the relevant facts to be as follows. The Requestors act as underwriters with respect to non-U.S. offerings of structured notes issued by certain IFIs. These IFI clients of the Requestors generally enter into swaps to hedge the risk of their exposure under the structured notes. If the Requestors do not offer a product suitable for an IFI's hedging needs or the Requestors have not established a trading relationship with the IFI, the Requestors or non-U.S. affiliates of the Requestors, acting from outside the United States, may facilitate (and sometimes advise on) an appropriate swap with the IFI's preferred swap counterparty (or counterparties). The offices of many of the Requestors' IFI clients are within the United States in New York City or Washington, DC. In other words, many of the Requestors' IFI clients are located within the United States.

The Requestors state that IFIs are operated to satisfy public purposes and have as their members sovereign nations from around the world. The Requestors also point out that the Commission has recognized the unique attributes and status of IFIs in certain other contexts.⁹ For example, in an interpretative letter issued by the Commission to the World Bank Group in 1991, the Commission determined that the World Bank 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 option transactions through a firm that is not registered as an

section 4c or 19 of the Act; (3) any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the Act; and (4) any swap as defined in the Act, by the Commission, or jointly by the Commission and the Securities and Exchange Commission.

⁷ 17 C.F.R. 3.10(c)(3)(i).

⁸ Exemption from Registration for Certain Foreign Persons, 72 Fed. Reg. 63976, 63977 (Nov. 14, 2007).

⁹ For example, the Requestors state that, as part of the Final Entities Definitions in 2012, the Commission granted IFIs an exclusion from registration as swap dealers ("SD") and major swap participants. Final Entities Definitions, 77 FR at 30692-93. Likewise, in recognition of the important public policy implications related to the application of the mandatory clearing requirement and exceptions from that requirement, the Commission determined that IFIs should not be subject to mandatory clearing. End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560, 42561-62 (July 19, 2012) ("End-User Exception").

FCM, registered as an IB, or exempted from such registration requirements.¹⁰ 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.¹¹ 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 an FCM or exempt from registration as such under Commission regulations.¹²

II. Staff Position

Based on the facts presented and representations made by the Requestors, particularly the unique attributes and status of IFIs, and in consideration of international comity, DSIO believes that no-action relief is warranted. Granting this request would treat IFIs in a manner similar to the manner in which the Commission has treated IFIs in relation to foreign futures and options, and swap dealing activities. This relief also is consistent with the Commission's stated purpose in promulgating the exemption from registration for IBs and CTAs under Commission regulation 3.10(c)(3). Moreover, although the registration exemption in regulation 3.10(c)(3) is conditioned on the derivative transaction or transactions in question being cleared through an FCM registered with the Commission, and therefore the Requestors may not avail themselves of the regulation 3.10(c)(3) exemption, DSIO believes that the Requestors should be able to receive this relief. This is consistent with the Commission's position in determining that IFIs should not be subject to mandatory clearing.¹³

Accordingly, the Division will not recommend enforcement action against a person that is located outside the United States: (1) for failure to register as an IB solely with regard to activities involving swaps for a customer that is an IFI; or (2) for failure to register as a CTA in connection with providing advice solely incidental to those activities. All relief in this letter will end at 12:01 p.m. Eastern time on the later of the effective date or the compliance date of any final rule or final order of the Commission providing relief from IB and CTA registration for persons located outside of the United States who facilitate swap transactions for IFIs with offices in the United States, as described in this letter.

¹⁰ CFTC Interpretative Letter to World Bank Group, Comm. Fut. L. Rep. ¶25,149 (Oct. 30, 1991) ("CFTC Letter to World Bank").

¹¹ *Id.*

¹² CFTC Letter to World Bank.

¹³ End-User Exception, 77 FR at 42651 ("given considerations of comity and in keeping with the traditions of the international system, the Commission believes that foreign governments, foreign central banks, and international financial institutions should not be subject to Section 2(h)(1) of the CEA.").

This letter, and the positions taken herein, represent the views of DSIO only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse the Requestors from compliance with any other applicable requirements contained in the CEA or in the Commission's regulations issued thereunder. Further, this letter, and the relief contained herein, is based upon the facts presented and representations made to DSIO. Any different, changed or omitted material facts or circumstances might render this letter void. Finally, as with all no-action letters, DSIO retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

Should you have any questions, please do not hesitate to contact Gregory Scopino, an attorney on my staff, at (202) 418-5175.

Very truly yours,

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Division of Swap Dealer and Intermediary Oversight

cc: Regina Thoele, Compliance
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