



Commodity Futures Trading Commission

Office of Public Affairs

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
www.cftc.gov

October 11, 2016

Fact Sheet – Proposed Rule Regarding the Cross-Border Application of Certain Swap Provisions

The Commodity Futures Trading Commission (CFTC or Commission) is adopting a proposed rule for the application of certain swap provisions of the Commodity Exchange Act (CEA) and Commission regulations in the context of cross-border transactions (Proposed Rule).

Overview of the Proposed Rule

The Proposed Rule defines key terms for purposes of applying the CEA's swap provisions on a cross-border basis and addresses the cross-border application of the registration thresholds and external business conduct standards for swap dealers and major swap participants, including the extent to which they would apply to swap transactions that are arranged, negotiated, or executed using personnel located in the United States (ANE transactions).

The Commission expects to address the cross-border application of other swap requirements, including their application to ANE transactions and the availability of substituted compliance, in subsequent rulemakings.

Definition of "U.S. Person" and "Foreign Consolidated Subsidiary"

Generally speaking, the Proposed Rule defines the term "U.S. person" to include those individuals or entities whose activities have a significant nexus to the U.S. market by virtue of their organization or domicile in the United States. The definition generally follows the traditional, territorial approach to defining a U.S. person, and the Commission believes that this definition provides an objective and clear basis for determining those individuals or entities that should be identified as a U.S. person.

Under the Proposed Rule, the term "Foreign Consolidated Subsidiary" identifies a non-U.S. person that is consolidated for accounting purposes with an ultimate parent entity that is a U.S. person (U.S. ultimate parent entity).

The proposed definitions of "U.S. person" and "Foreign Consolidated Subsidiary" are based on the definition of these terms in the Commission's recent rulemaking on the cross-border application of the margin requirement for uncleared swaps and would apply not only for purposes of the Proposed Rule but also for future cross-border rulemakings.

Proposed Interpretation Regarding the Scope of ANE Transactions

In November 2013, the Commission's Division of Swap Dealer and Intermediary Oversight issued a staff advisory providing that a non-U.S. swap dealer that regularly uses personnel or agents located in the United States to arrange, negotiate, or execute a swap with a non-U.S. person would generally be required to comply with the "Transaction-Level Requirements," as the term was used in the Commission's Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations. In January 2014, the Commission published a request for comment on all aspects of the Staff Advisory.

In the Proposed Rule, the Commission sets forth its views on whether persons engaged in ANE transactions (as defined above) or transactions arising from this activity fall within the scope of the Dodd-Frank Act.

For purposes of the Proposed Rule, the Commission uses the terms "arrange" and "negotiate" to refer to market-facing activity normally associated with sales and trading, as opposed to internal, back-office activities, such as ministerial or clerical tasks, performed by personnel not involved in the actual sale or trading of the relevant swap. Accordingly, the terms would not encompass activities such as swap processing, preparation of the underlying swap documentation (including negotiation of a master agreement and related documentation), or the mere provision of research information to sales and trading personnel located outside the United States. In line with Commission precedent, "executed" would refer to the market-facing act of becoming legally and irrevocably bound to the terms of the swap transaction under applicable law.

The Proposed Rule also addresses the application of the swap dealer registration threshold and external business conduct standards to ANE transactions, as described below.

Cross-Border Application of the Swap Dealer Registration Threshold

Under the Proposed Rule, in making its swap dealer de minimis threshold calculation:

- A U.S. person would include all of its swap dealing transactions.
- A non-U.S. person would include all swap dealing transactions with respect to which it is a "U.S. Guaranteed Entity." For purposes of this proposed rulemaking, "guarantee" has the same meaning as in the cross-border margin rule.
- A Foreign Consolidated Subsidiary would include all of its swap dealing transactions.
- A non-U.S. person that is neither a Foreign Consolidated Subsidiary nor a U.S. Guaranteed Entity (Other Non-U.S. Person) would include all of its swap dealing transactions with counterparties that are U.S. persons, U.S. Guaranteed Entities, or Foreign Consolidated Subsidiaries, unless the swap is executed anonymously on a registered designated contract market (DCM), swap execution facility (SEF), or foreign board of trade (FBOT) and cleared. It would not, however, include any of its swap dealing transactions with Other Non-U.S. Persons, even if they constitute ANE transactions.
- All potential swap dealers, whether U.S. or non-U.S. persons, would aggregate their swap dealing transactions with those of persons controlling, controlled by, or under common control with the potential swap dealer to the extent that those affiliates are themselves required to include those swaps in their own de minimis thresholds, unless the affiliated person is a registered swap dealer.

Cross-Border Application of the Major Swap Participant Registration Thresholds

Under the Proposed Rule, a potential registrant that is not a swap dealer would count swap positions toward the major swap participant threshold calculations to the same extent as potential swap dealers count swap

dealing transactions toward the swap dealer de minimis calculation (as described in the first four bullet points under “Cross-Border Application of the Swap Dealer Registration Threshold” above). In addition, all swap positions that are subject to recourse would be attributed to a guarantor, whether it is a U.S. person or a non-U.S. person, unless the guarantor, the guaranteed entity, and its counterparty are Other Non-U.S. Persons.

Cross-Border Application of the External Business Conduct Standards for Swap Dealers and Major Swap Participants

Under the Proposed Rule, the Commission’s external business conduct standards (EBC standards) would apply to cross-border transactions as follows:

- U.S. swap dealers and major swap participants (SD/MSPs) would comply with applicable EBC standards, without substituted compliance, except with respect to transactions conducted through a foreign branch of the U.S. SD/MSP.
- Non-U.S. SD/MSPs and foreign branches of U.S. SD/MSPs would comply with applicable EBC standards, without substituted compliance, if the counterparty is a U.S. person (other than a foreign branch of a U.S. SD/MSP).
- Non-U.S. SD/MSPs and foreign branches of U.S. SD/MSPs would not be subject to EBC standards for their swaps with non-U.S. persons and foreign branches of a U.S. SD/MSP, subject to one narrow exception: foreign branches of U.S. SDs and non-U.S. SDs that use personnel located in the United States to arrange, negotiate, or execute such transactions would be required to comply with Commission Regulations 23.410 (Prohibition on Fraud, Manipulation, and other Abusive Practices) and 23.433 (Fair Dealing), without substituted compliance.