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Commodity Futures Trading Commission Proposes Guidance on Cross-Border Application of Certain Swaps Provisions

2012-07-11

The Commodity Futures Trading Commission (CFTC or Commission) has proposed guidance on the applicability of its regulations to cross-border swaps activities.[1] This proposed guidance will potentially affect all U.S. and many non-U.S. persons and entities that conduct cross-border swaps transactions. At the same time, the Commission has proposed delaying compliance with many of the requirements discussed in the Cross-Border Release.[2]

The Commission's proposed guidance expresses its view on: (a) who is considered a "U.S. Person"; (b) which non-U.S. firms are required to register as Swap Dealers (SDs) or Major Swap Participants (MSPs); and (c) which U.S. regulatory requirements will apply to swaps entered into by various non-U.S. entities. In addition, the Commission has proposed to rely on regulation by non-U.S. regulators as a means of complying with certain of the Commission's requirements. However, market participants should note that the Commission will not permit such "substituted compliance" for all of its requirements.

The following discussion answers a number of questions central to understanding the impact of the Commission's guidance on various market participants.

I. Registration Issues

To which non-U.S. persons[3] would the DFA's swaps requirements generally apply?

> Non-U.S. persons that act as SDs or MSPs and that exceed the thresholds for SDs or MSPs would be deemed to be engaged in activities that have a "direct and significant" connection with or effect on U.S. commerce and thereby would be subject to the provisions of the Dodd-Frank Act (DFA).[4] Accordingly, they would be required to register with the CFTC and be subject to the substantive requirements under Title VII of the DFA that apply to U.S. SDs and MSPs. However, as a matter of international comity, the Commission, as explained in greater detail below, will not apply all U.S. requirements to such entities.

Swap Dealer Registration

Which non-U.S. entities would have to register as SDs?

> Foreign entities whose obligations are not guaranteed by U.S. persons would have to register if: (a) swap dealing is part of their regular business with respect to U.S. persons as

counterparties; and (b) their swap dealing with U.S. counterparties exceeds the *de minimis* aggregate notional value level ($3 billion, with a phase-in amount of $8 billion) outlined in the Commission's and the Securities and Exchange Commission's (SEC's) joint final rulemaking further defining the terms SD and MSP[5] (Entity Definitions Rulemaking). It would not be necessary to determine whether these swaps or activities are located within or outside of the U.S. If a U.S. person is a counterparty, the swaps activities would be deemed not to be outside of the U.S. for purposes of satisfying the *de minimis* threshold.

Would a non-U.S. SD with only non-U.S. counterparties be required to register?

No. A non-U.S. entity would not be required to apply the *de minimis* test even if it engages in swaps activities as part of a "regular business" unless such "regular business" is with U.S. person counterparties.

Which transactions would a non-U.S. entity include to determine eligibility for the *de minimis* exemption from SD registration?

In determining whether the amount of swap dealing exceeds the *de minimis* level for SD registration, entities would have to include: (a) their swaps and the swaps of their non-U.S. affiliates (i.e., those under common control with the entity) where a U.S. person (other than a foreign branch or agency of a U.S. person) is the counterparty; and (b) their swaps and the swaps of their non-U.S. affiliates where their obligations (or the obligations of their non-U.S. affiliates) are guaranteed or otherwise formally supported by a U.S. person.

On the other hand, a non-U.S. entity could exclude: (a) swaps with foreign branches of U.S. SDs; (b) swaps with non-U.S. persons as counterparties (whether or not their obligations are guaranteed by U.S. persons);[6] (c) swaps entered into by its U.S. affiliates; and (d) swaps the entity enters into with its U.S. or non-U.S. affiliates as counterparties (i.e., the inter-affiliate exclusion from the Entity Definitions Rulemaking).[7]

Would foreign branches or agencies of U.S. SDs have to register separately?

No. The CFTC considers foreign branches and agencies of U.S. SDs to be part of the U.S. parent. The swaps activities of these foreign branches and agencies would have to be attributed to the U.S. parent, which would remain responsible for compliance with all applicable requirements. However, as described below, foreign branches and agencies of U.S. SDs would still be subject to certain regulatory requirements in connection with their swaps.

On the other hand, foreign affiliates or subsidiaries of U.S. SDs would have to register as SDs if they independently meet the requirements for SD registration ("regular business" and *de minimis* threshold). In addition, where a swap negotiated or arranged by a non-U.S. affiliate or subsidiary is booked by a U.S. person (whether directly or indirectly), that U.S. person would also need to register as an SD if it satisfies the registration criteria.

Major Swap Participant Registration

Which non-U.S. entities would have to register as MSPs?

Any non-U.S. person that is not a dealer and that holds swaps positions with U.S. persons as counterparties above the MSP thresholds established in the Entity Definitions

Rulemaking would have to register as an MSP.

Which swaps would need to be included in the threshold determination?

Non-U.S. entities would generally have to include their own and their non-U.S. affiliates' swaps positions with U.S. person counterparties as well as swaps between another non-U.S. person and a U.S. person where such entities guarantee the obligations of the non-U.S. person. The non-U.S. entities could exclude those swaps with non-U.S. counterparties, whether or not the counterparties' obligations are guaranteed by a U.S. person. In the case of a guarantee or other formal support of a non-U.S. entity, the U.S. person to which the non-U.S. entity had recourse would be required to count the swap in its MSP determination.

II. Regulatory Requirements for Non-U.S. SDs and MSPs

What kinds of requirements would apply to non-U.S. SDs and MSPs that are required to be registered?

The CFTC has divided the DFA swaps-related regulatory requirements into two groups: (a) "Entity-Level" requirements that would apply to the entity as a whole for those entities that are required to be registered; and (b) "Transaction-Level" requirements that would apply to the individual swaps transactions.

Entity-Level Requirements

What are Entity-Level requirements and who would have to comply with them?

The Entity-Level requirements, which would apply to entities differently based on a number of factors, are: (a) capital adequacy; (b) chief compliance officer; (c) risk management; (d) swap data recordkeeping; (e) swap data repository (SDR) reporting; and (f) physical commodity swaps reporting (Large Trader Reporting).

The Entity-Level requirements would apply for: (a) foreign branches or agencies of U.S. SDs; and (b) foreign affiliates of U.S. SDs when the swaps are booked in the U.S. SD. The Entity-Level requirements would apply, but substituted compliance would be available, for: (a) foreign affiliates of U.S. SDs where the affiliate is the legal counterparty to the swap (i.e., the swap is not booked in the U.S.), regardless of whether the swap is guaranteed by a U.S. person; and (b) non-U.S. SDs where the swap is neither booked in the U.S. nor guaranteed by a U.S. person. The CFTC proposes, however, that for SDR reporting, substituted compliance would only be permitted if the Commission is allowed direct access to the swaps data stored at the applicable foreign trade repository.

Transaction-Level Requirements

What are the Transaction-Level requirements?

The Transaction-Level requirements, which would apply to entities differently based on a number of factors, are: (a) clearing and swap processing; (b) margin (and segregation) for uncleared swap transactions; (c) mandatory trade execution; (d) swap trading relationship documentation; (e) portfolio reconciliation and compression; (f) real-time public reporting; (g) trade confirmation; (h) daily trading records; and (i) external business conduct standards.

The Transaction-Level requirements would generally apply to non-U.S. SDs and MSPs where the counterparty is a U.S. person.

Substituted compliance would never be permitted if the counterparty is a U.S. person.

With the exception of the external business conduct standards (i.e., sales practices standards, discussed below), the Transaction-Level requirements also would generally apply where the counterparty is a non-U.S. person guaranteed by a U.S. person (but see the question below).

With some exceptions, the Transaction-Level requirements would generally not apply to non-U.S. SDs and MSPs where the counterparty is a non-U.S. person that is not guaranteed by a U.S. person.

How would the Transaction-Level requirements specifically apply to affiliates, subsidiaries, branches, and agencies of U.S. SDs?

(a) Non-U.S. SDs that are not affiliates of U.S. SDs. The Transaction-Level requirements would apply where the swaps are with a U.S. counterparty or with a non-U.S. counterparty whose obligations are guaranteed by a U.S. person even if they are *not* booked in the U.S. (i.e., the foreign SD is the legal counterparty *and* its obligations are not guaranteed by a U.S. person). Substituted compliance would be permitted.

(b) Foreign affiliates of U.S. SDs. The Transaction-Level requirements would apply to the swaps entered into by foreign affiliates of U.S. SDs:

(1) where the swaps are booked in the U.S. Substituted compliance would *not* be permitted, even where the counterparty is a non-U.S. person;

(2) where the swaps are with a non-U.S. counterparty whose obligations are guaranteed by a U.S. person even if they are *not* booked in the U.S. (i.e., the foreign affiliate is the legal counterparty *and* its obligations are not guaranteed by a U.S. person), in which case substituted compliance would be permitted; and

(3) where the foreign affiliate acts as a "conduit" for a U.S. person to execute swaps outside the DFA regime, regardless of where the swaps are booked. A conduit would be a non-U.S. counterparty that: (a) is majority-owned, directly or indirectly, by a U.S. person; (b) regularly enters into swaps with one or more other U.S. affiliates or subsidiaries of the U.S. person; and (c) is included in the consolidated financial statements of the U.S. person. In these instances, substituted compliance would be allowed for transactions between the affiliate conduit and a non-U.S. SD or MSP.

(c) Exception: Foreign affiliates of U.S. SDs acting as agent. In cases in which the subsidiary or affiliate acts only as a disclosed agent and does not otherwise meet the definition of an SD, the Transaction-Level requirements would not apply to the affiliate, provided that the agency relationship is adequately documented and the principal is primarily responsible for the actions of the affiliate.

(d) Foreign branches and agencies of a U.S. SD. The Transaction-Level requirements would apply to foreign branches and agencies of U.S. SDs. Substituted compliance would be permitted where the counterparty is a non-U.S. person, whether or not the non-U.S. person is guaranteed by a U.S. person. In addition, in limited circumstances and subject to certain

conditions, and in the absence of a comparable foreign regulatory regime, compliance might be allowed with local transaction-level requirements. For instance, foreign branches of U.S. SDs in emerging markets, without a comparable regulatory framework, would be able to participate in those markets if the aggregate notional value of the swaps of all of the branches in each market did not exceed 5% of the aggregate notional value of all of the swaps of the U.S. SD.

To which transactions would the external business conduct standards apply?

The external business conduct standards would apply to the swaps entered into by the following entities, but only if they are with U.S. person counterparties: (a) foreign branches or agencies of U.S. SDs; (b) foreign affiliates of U.S. SDs, where the swaps are booked in the U.S. SD; (c) foreign affiliates of U.S. SDs where the affiliate is the legal counterparty (regardless of whether the swaps are guaranteed by a U.S. person); and (d) non-U.S. SDs where the swaps are neither booked in nor guaranteed by a U.S. person.

The Commission would not require that non-U.S. SDs or MSPs meet external business conduct standards for transactions with non-U.S. persons even if performance is guaranteed by a U.S. person.

Substituted compliance would not be permitted for those non-U.S. entities required to comply with external business conduct requirements.

III. Regulatory Requirements for Market Participants

Which regulatory requirements would apply when neither party is an SD or MSP?

Many of the Commodity Exchange Act's (CEA) requirements, namely, clearing, trade execution, real-time public reporting, Large Trader Reporting, SDR reporting, and recordkeeping, would apply to swaps market participants that are not SDs or MSPs if one or both counterparties to a swap is a U.S. person (and not an SD or MSP). Moreover, substituted compliance would not be permitted, except for SDR reporting and swap data recordkeeping, if substituted compliance would provide the Commission access to the swap data for these transactions.

IV. Determining Whether Substituted Compliance Would be Permitted

Assuming substituted compliance would be permitted as described above, when would non-U.S. entities be able to rely on their compliance with the regulatory authority of their home country to satisfy Commission requirements?

According to the Cross-Border Release, in instances in which substituted compliance would be permitted, the CFTC would allow non-U.S. entities that can demonstrate that their home regimes are “comparable” to the provisions of the CEA and Commission regulation to substitute their compliance with their home regulatory regime for compliance with the Entity-Level and/or Transaction-Level requirements. In order to receive approval for substituted compliance, entities would have to apply to the Commission as described below.

How would the CFTC determine if a non-U.S. entity could use substituted compliance in areas where it is permissible?

The Commission intends to review the foreign regulatory regime's laws and determine if they are comparable (not necessarily identical) by taking the following factors into account: (a) the scope and objectives of the relevant regulatory requirement(s); (b) the comprehensiveness of those requirement(s); (c) the comprehensiveness of the foreign regulator's supervisory compliance program; and (d) the foreign regulator's authority to support and enforce its oversight of the non-U.S. SD or MSP applicant.

V. Compliance Dates

When is the compliance date for these requirements?

Under the Proposed Exemptive Order, compliance will be delayed for most of the Entity-Level and Transaction-Level requirements discussed in the Releases. However, the Releases would not affect the effective date or compliance date of any specific DFA rulemaking by the CFTC.

For U.S. SDs and MSPs, compliance with most of the Entity-Level and Transaction-Level requirements will be delayed from the effective date until January 1, 2013. However, as proposed, the relief would not extend to SDR reporting and Large Trader Reporting requirements. Nor would it postpone the date by which U.S. SDs and MSPs would be expected to apply to register.

For non-U.S. SDs and MSPs, compliance with all the relevant requirements (except for SDR reporting and Large Trader Reporting of swaps with U.S. counterparties) will be delayed for 12 months from the date of publication of the Proposed Exemptive Order, as long as the conditions described below are satisfied.

May non-U.S. SDs or MSPs delay compliance with applicable Entity-Level requirements?

Yes. Compliance by non-U.S. SDs and MSPs with Entity-Level requirements may be delayed if:

(a) An application to register as an SD or MSP is filed with the National Futures Association (NFA) by the date such entity is required to apply for registration; and

(b) Within 60 days of filing the application, the applicant files a compliance plan addressing how it plans to comply with each applicable CEA requirement (both Entity-Level and Transaction-Level) once this relief expires.

When would the application for registration be required?

An application for registration is, for practical purposes, due by the effective date of the joint final rule further defining the term "swap." The Commission voted to issue the final definitional rules (jointly with the SEC) on July 10, 2012. These rules are expected to be effective 60 days after their publication in the *Federal Register*.

VI. Next Steps

Interested parties will have 45 days from publication in the *Federal Register* to comment on the Cross-Border Release and 30 days from publication to comment on the Proposed Exemptive Order.

VII. Appendices

For ease of reference, included here are reproductions of charts provided by the Commission in the Appendices to the Cross-Border Release describing the application of Entity-Level and Transaction-Level requirements to the various U.S. and non-U.S. entities.

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[1] Proposed Interpretive Guidance and Policy Statement on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (Cross-Border Release), RIN 3038-AD57 (scheduled to be published in the *Federal Register* in July) (June 29, 2012).

[2] Exemptive Order Regarding Compliance with Certain Swap Regulations (Proposed Exemptive Order), RIN 3038-AD85 (scheduled to be published in the *Federal Register* in July) (June 29, 2012). The Cross-Border Release and the Proposed Exemptive Order are together referred to as the "Releases."

[3] In the Releases, a U.S. person is defined as: (a) A natural person who is a resident of the U.S.; (b) An entity organized or incorporated in the U.S. or having a principal place of business in the U.S., which (1) includes a foreign branch or agency of a U.S. person, but (2) does not include a foreign affiliate or subsidiary of a U.S. person, even if the affiliate or subsidiary has some or all of its swap-related obligations guaranteed by the U.S. person; (c) An entity whose direct or indirect owners are responsible for its liabilities and one or more of such owners is a U.S. person; (d) An individual account (including discretionary accounts) with a U.S. person as a beneficial owner; (e) A commodity pool, pooled account, collective investment vehicle (whether or not organized in the U.S.) where majority ownership or equity interest is held by a U.S. person *or* where its operator would be required to register as a commodity pool operator under the Commodity Exchange Act (CEA); (f) A pension plan for employees, officers, or principals of a legal entity with its principal place of business in the U.S.; or (g) An estate or trust whose income is subject to U.S. income tax, regardless of source.

[4] Section 722(d) of the DFA amended the CEA by adding Section 2(i), which states that the DFA's provisions related to swaps and Commission regulations promulgated thereunder are not applicable to activities outside the U.S. unless those activities: (a) have a "direct and significant connection with activities in, or effect on, commerce" of the U.S.; or (b) "contravene such rules or regulations" that the Commission enacts to prevent evasion of the CEA.

[5] "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant' and 'Eligible Contract Participant,'" 77 Fed. Reg. 30596 (May 23, 2012). *See* WilmerHale's alert, "The SEC and CFTC Issue Joint Rules Further Defining Swap Dealers and Major Swap Participants," May 4, 2012, available at:

http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=10138.

[6] The Cross-Border Release is not completely clear as to whether swaps with non-U.S. counterparties involving guarantees of such parties' obligations by U.S. persons would need to be counted. The Commission notes that the non-U.S. person should count swap dealing between it (or its non-U.S. affiliates) and U.S. persons as well as swap dealing where *its or its affiliates*' obligations are guaranteed by U.S. persons (Cross-Border Release at 27), suggesting that a guarantee by a U.S. person of a non-U.S. counterparty's obligations would not be relevant here. This reading is supported by the Commission's questions, which further suggest that such U.S. person-guaranteed swaps need not be counted. However, a contrary reading is suggested by the following: "In the case of an affiliated group of non-U.S. persons under common control, the Commission believes that all of the affiliated non-U.S. persons should aggregate the notional value of their swap dealing transactions with U.S. persons (and their swap dealing transactions with non-U.S. persons in which such person's obligations are guaranteed by U.S. persons), in order to determine, in effect, the level of swap dealing activities…." (Cross-Border Release at 22). The Commission will need to clarify this point in its final guidance.

[7] *See* Cross-Border Release, n.43.

[8] While the Commission charts refer to foreign affiliates of U.S. persons, the guidance itself in some instances is limited to a discussion of foreign affiliates of U.S. SDs. We would expect that final guidance would clarify any ambiguities.

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