



U.S. COMMODITY FUTURES TRADING COMMISSION

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Re: Withdrawal of Staff Advisory and No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers

Ladies and Gentlemen:

This letter is issued by the Division of Swap Dealer and Intermediary Oversight (“**DSIO**”), the Division of Clearing and Risk (“**DCR**”), and the Division of Market Oversight (“**DMO**,” and collectively with DSIO and DCR, the “**Divisions**”) of the Commodity Futures Trading Commission (“**Commission**”).

On July 23, 2020, the Commission approved a final rule (the “**Cross-Border Final Rule**”) addressing the cross-border application of the registration thresholds and certain requirements applicable to swap dealers (“**SDs**”) and major swap participants (“**MSPs**”), and establishing a formal process for requesting comparability determinations for such requirements from the Commission.¹ In issuing the Cross-Border Final Rule, the Commission announced its policy regarding application of certain Commission requirements to swaps between SDs that are not U.S. persons² (“**Non-U.S. SDs**”) and counterparties that are not U.S. persons entered into by the

¹ See Final Rule, Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, available on the Commission’s website.

² As used in this letter, the term “U.S. person” has the same meaning as in the Cross-Border Final Rule. See Commission regulation 23.23(a)(23); Cross-Border Final Rule, section II.B. The Cross-Border Final Rule permits SDs to rely on the representations of counterparties regarding their status as U.S. persons obtained pursuant to the Cross-Border Margin Rule or the Guidance (each as defined in the Cross-Border Final Rule). See Cross-Border Final Rule, section II.B.5. SDs may rely on such representations for purposes of this letter to the same extent as permitted by the Cross-Border Final Rule.

Non-U.S. SD using the Non-U.S. SD's personnel or agents located in the United States to arrange, negotiate, or execute the transaction.³

Commenting on the proposal of the Cross-Border Final Rule, several commenters requested that the Commission clarify that any no-action relief or guidance that applies to the requirements not addressed in the Cross-Border Final Rule will remain effective, and that any no-action letter or guidance not specifically revoked by the Cross-Border Final Rule remains in effect.⁴

In keeping with the Commission's policy announced in the Cross-Border Final Rule and in response to the requests from commenters for continued no-action relief, by this letter DSIO is withdrawing CFTC Staff Advisory 13-69 issued on November 14, 2013 (the "ANE Staff Advisory"),⁵ the Divisions are withdrawing the no-action relief related to the ANE Staff Advisory set forth in CFTC Staff Letter 17-36,⁶ and the Divisions are presenting a new no-action position providing relief to Non-U.S. SDs from certain transaction-level requirements under the Commodity Exchange Act ("CEA") and Commission regulations (described below) that were not addressed by the Commission in the Cross-Border Final Rule.

I. Background

A. Transaction-Level Requirements

When entering into a swap, an SD is required to comply with certain regulatory requirements that are applied on a transaction-by-transaction or trading relationship basis.⁷ These "Transaction-Level Requirements"⁸ cover a range of requirements under the CEA and Commission regulations promulgated thereunder. Some of the requirements more directly address financial protection of SDs and their counterparties,

³ See Cross-Border Final Rule, section V.C.

⁴ See, e.g., comment letter of the Institute of International Bankers & Securities Industry and Financial Markets Association at 45, available in the comment file for the proposed Cross-Border Final Rule at: <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=3067>.

⁵ The ANE Staff Advisory is available on the Commission's website: <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/13-69.pdf>.

⁶ CFTC Staff Letter 17-36 (July 25, 2017), available at: <https://www.cftc.gov/csl/17-36/download>.

⁷ See Cross-Border Final Rule, section VI.C.3.

⁸ For purposes of this letter, the term "Transaction-Level Requirements" refers to the requirements set forth in Commission regulations 23.202, 23.205, 23.400 to 23.451, 23.501, 23.502, 23.503, 23.504, 23.505, 23.506, 23.610, 23.700 to 23.704, and applicable regulations in parts 37, 38, 43, and 50 and CEA section 2(h)(8). The Divisions note that the term "Transaction-Level Requirements," as used herein, does not include the Commission regulations on margin requirements for uncleared swaps, Commission regulations 23.150 to 23.161.

while others address more directly systemic risk, market efficiency, and/or price discovery.

B. The ANE Staff Advisory

In November 2013, DSIO issued the ANE Staff Advisory in response to inquiries from swap market participants regarding the applicability of certain of the Commission's Transaction-Level Requirements where Non-U.S. SDs use personnel or agents located in the U.S. to arrange, negotiate, or execute swaps with non-U.S. persons.

In the ANE Staff Advisory, DSIO stated its belief that “a non-U.S. SD (whether an affiliate or not of a U.S. person) regularly using personnel or agents located in the U.S. to arrange, negotiate, or execute a swap with a non-U.S. person generally would be required to comply with the Transaction-Level Requirements.”

C. Previous Relief Requested and Granted

Subsequent to issuance of the ANE Staff Advisory, the Divisions received multiple requests from Non-U.S. SDs for time-limited relief from compliance with the Transaction-Level Requirements when entering into swaps with non-U.S. persons that are not guaranteed affiliates⁹ or conduit affiliates¹⁰ of a U.S. person using personnel or agents located in the United States to arrange, negotiate, or execute such swaps (such swaps, “**Covered Transactions**”).

The Non-U.S. SDs represented that, in order to avoid market disruption for their non-U.S. counterparties, such time-limited relief was necessary to allow them to organize their internal policies and procedures to come into compliance with the Transaction-Level Requirements when entering into Covered Transactions.

On November 26, 2013, the Divisions granted the requested time-limited no-action relief that has been extended multiple times, most recently by CFTC Staff Letter 17-36.

⁹ For purposes of this letter, the terms “guarantee” and “guaranteed affiliate” have the same meaning as in the Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 43785 at 43794 (July 22, 2013). For the avoidance of doubt, nothing in this letter is intended to alter the eligibility of market participants to elect the exemption from the clearing requirement under Commission regulation 50.52 or relief from the trade execution requirement pursuant to CFTC Staff Letter 17-67 (Dec. 14, 2017), available at: <https://www.cftc.gov/csl/17-67/download>.

¹⁰ For purposes of this letter, the term “conduit affiliate” has the same meaning as in the Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (the “**Guidance**”), 78 FR 45292, 45358-59 (July 26, 2013).

II. Cross-Border Final Rule

Pursuant to the Cross-Border Final Rule, the Commission announced its policy that use by Non-U.S. SDs of personnel or agents located in the United States to “arrange, negotiate, or execute” swap transactions with non-U.S. counterparties would not be considered a relevant factor for purposes of applying the Transaction-Level Requirements addressed by the Cross-Border Final Rule.¹¹ These “addressed” Transaction Level Requirements are Commission regulations 23.202, 23.501-504, 23.400-451, and 23.700-23.704.¹²

The Commission also stated its intention to address the issue with respect to the remaining Transaction-Level Requirements in connection with future cross-border rulemakings relating to such requirements. The remaining Transaction-Level Requirements not addressed by the Cross-Border Final Rule are Commission regulations 23.205, 23.505, 23.506, 23.610, and applicable regulations in parts 37, 38, 43, and 50, and CEA section 2(h)(8) (the “**Unaddressed TLRs**”). As part of any such rulemaking, the Commission stated that it expects to first engage in fact-finding to determine the extent to which the use by Non-U.S. SDs of personnel or agents located in the U.S. to arrange, negotiate, or execute swaps with non-U.S. persons raises policy concerns that are not otherwise addressed by the CEA or Commission regulations.¹³

Finally, the Commission stated that, until such time, the Commission will not consider, as a matter of policy, a Non-U.S. SD’s use of their personnel or agents located in the United States to “arrange, negotiate, or execute” swap transactions with non-U.S. counterparties for purposes of determining whether the Unaddressed TLRs apply to such transactions.¹⁴

III. Staff Positions

A. Withdrawal of ANE Staff Advisory

Given the foregoing policies announced by the Commission in the Cross-Border Final Rule, DSIO hereby withdraws the ANE Staff Advisory in its entirety.

B. Withdrawal of No-Action Position and New No-Action Position

Based on the policies announced by the Commission in the Cross-Border Final Rule, the Divisions understand that the Commission intends to continue to diligently assess the

¹¹ See Cross-Border Final Rule, section V.C.

¹² See Cross-Border Final Rule, sections VI.A.2 and VI.A.3.

¹³ See Cross-Border Final Rule, section V.C.

¹⁴ See *id.*

many issues that must be addressed to ensure an appropriate balance between domestic and foreign regulatory interests with respect to the domestic activity of Non-U.S. SDs and application of the Unaddressed TLRs. Therefore, the Divisions believe that withdrawal of CFTC Staff Letter 17-36 and issuance of new staff no-action relief is warranted until the effective date of any Commission action addressing whether a particular Unaddressed TLR is or is not applicable to a Covered Transaction (each, a “**Subsequently Addressed TLR**”).¹⁵ For purposes of this letter, Commission action addressing the applicability of a particular Unaddressed TLR does not include action by Commission staff, whether under delegated authority from the Commission or otherwise, but may include, without limitation, a rulemaking or an order addressing such requirements.

In accordance with the foregoing:

- (A) The Divisions hereby withdraw CFTC Staff Letter 17-36 in its entirety; the no-action relief provided by CFTC Staff Letter 17-36 is superseded by this letter and no person may rely on CFTC Staff Letter 17-36 after the date of this letter; and
- (B) The Divisions will not recommend that the Commission take an enforcement action against a Non-U.S. SD (whether or not an affiliate of a U.S. person) for failure to comply with an Unaddressed TLR other than a Subsequently Addressed TLR when entering into a Covered Transaction.

This letter, and the positions taken herein, represent the views of the Divisions only, and do not necessarily represent the positions or views of the Commission or of any other office or division of the Commission.

The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the CEA or in Commission regulations issued thereunder, nor may any person other than Non-U.S. SDs rely on it to excuse compliance with any applicable requirement contained in the CEA or in Commission regulations issued thereunder.

Further, this letter, and the relief contained herein, is based upon the representations made to the Divisions. Any different, changed or omitted material facts or circumstances might render this no-action relief void. This letter does not create or confer any rights for or obligations on any person or persons subject to compliance with the CEA that bind the Commission or any of its other offices or divisions. As with all no-action letters, the Divisions retain the authority to condition further, modify, suspend,

¹⁵ The Guidance sets forth the Commission’s general views regarding the applicability of the Unaddressed TLRs to transactions involving non-U.S. persons. *See* Guidance, 78 FR at 45350-59 and Appendix F.

terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

Should you have any questions, please contact Frank Fisanich, Chief Counsel, DSIO, at (202) 418-5949, Sarah Josephson, Deputy Director, DCR, at (202) 418-5684, or Roger Smith, Special Counsel, DMO, at (202) 418-5344.

Sincerely,

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