



David Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Plaza
1155 21st Street, NW
Washington, DC 20581

23 August 2012

Dear Mr. Stawick:

Re: RIN No. 3038-AD57, Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act

LCH.Clearnet Group Limited (“LCH.Clearnet” or “The Group”) is pleased to respond to the request for comment on the Commodity Futures Trading Commission’s (“the CFTC” or “Commission”) proposal on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (“proposed guidance”).¹

The Group strongly supports the policy goals underpinned by the proposed guidance and the statutory provisions contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).

The Commission proposes interpretive guidance regarding the cross-border application of the swaps provisions of the Commodity Exchange Act (“CEA” or “Act”). The proposed guidance describes the general manner in which the Commission will consider whether a person’s swap dealing activities or swaps positions may require registration as a swap dealer or major swap participant and the application of the related requirements under the CEA to swaps involving these persons. The draft guidance also describes the application of the clearing, trade execution, and certain reporting, and recordkeeping provisions under the CEA to cross-border swaps involving one or more counterparties who are not swap dealers or major swap participants. The Group’s comments focus on the application of the Commission’s swaps reporting and clearing rules to swaps that occur outside the US and are cleared by a derivatives clearing organization (“DCO”) registered with the Commission in two situations. With regard to swaps between a US person and a non-US person occurring outside the US and cleared on a registered DCO, LCH.Clearnet strongly urges the Commission to reach agreement with its foreign regulatory counterparts on the application of Dodd-Frank and the Commission’s regulations as well as the laws and regulations in other jurisdictions. For swaps between two non-US persons occurring outside the US and cleared on a registered DCO, LCH.Clearnet seeks clarity that the non-US counterparties are not required to comply with the Commission’s reporting and clearing rules although the DCO would have to comply with all Commission rules applicable to DCOs.

¹ 77 FR 41214 (July 12, 2012).

LCH.Clearnet Overview

LCH.Clearnet is the leading independent clearing house group, serving major international exchanges and platforms, as well as a range of OTC markets. It clears a broad range of asset classes including: securities, exchange traded derivatives, commodities, energy, freight, foreign exchange, interest rate swaps, credit default swaps, and euro and sterling denominated bonds and repos. LCH.Clearnet works closely with market participants and exchanges to identify and develop clearing services for new asset classes.

The Group consists of three operating subsidiaries: LCH.Clearnet Limited, LCH.Clearnet LLC, and LCH.Clearnet SA. LCH.Clearnet Limited is registered with the Commission as a DCO and is regulated as a Recognised Clearing House by the UK Financial Services Authority. Several of LCH.Clearnet Limited's business lines, SwapClear, ForexClear, and EnClear, clear swaps. LCH.Clearnet LCC, formerly International Derivatives Clearinghouse, LLC, was recently acquired by the Group and is registered with the Commission as a DCO. LCH.Clearnet SA has filed an application with the Commission for a DCO license², is regulated as a credit institution by a regulatory college of the market regulators and central banks of France, the Netherlands, Belgium and Portugal, and is regulated as a Recognised Overseas Clearing House by the UK Financial Services Authority. LCH.Clearnet SA's CDSClear service clears swaps and security-based swaps. LCH.Clearnet Limited and LCH.Clearnet SA are subject to the European Markets Infrastructure Regulation ("EMIR") and will have to apply for reauthorisation in 2013 under EMIR.

Both LCH.Clearnet Limited and LCH.Clearnet SA operate global swap clearing services in multiple jurisdictions. Our clearing members for these services include global banks as well as banks that limit their swap activities to their domestic markets. The clients of these clearing members include a wide variety of US and non-US participants in the swaps market including banks, asset managers, hedge funds, insurance companies, and corporations. LCH.Clearnet Limited is well-placed to assist our clearing members and their clients in discharging clearing mandates under both Dodd-Frank and EMIR because it is registered and conducts business in both the US and European Union. We are also committed to seeking appropriate recognition to allow counterparties in other G-20 countries to discharge their clearing mandates by clearing on LCH.Clearnet Limited. LCH.Clearnet SA is following a similar approach by seeking a DCO license. The Group's approach allows counterparties in two different jurisdictions to discharge the clearing mandate in their respective jurisdictions at the same CCP, and is consistent with the global nature of the swaps industry.

Clearing Rules

LCH.Clearnet respectfully requests that the Commission clarify the reach of the CFTC's clearing mandate when clearing occurs on a registered DCO, the swap cleared is also subject to the clearing mandate of a foreign regulatory regime, and the swap counterparties are a US person and a non-US person. LCH.Clearnet urges the Commission to reach agreement with its regulatory counterparts in the G-20 to ensure that each counterparty can clear the swap on a DCO in compliance with the rules of its home jurisdiction. LCH.Clearnet also asks the Commission to confirm that the proposed guidance provides that clearing and other transaction

² The Commission is currently seeking comment on LCH.Clearnet SA's DCO application. <http://www.cftc.gov/PressRoom/PressReleases/pr6319-12>.

level rules implementing Dodd-Frank will not apply to swaps between two non-US persons and executed outside the US that are cleared on a DCO.

LCH.Clearnet urgently requests that the Commission reach agreement with its foreign regulatory counterparts on a common regulatory approach to swaps that are subject to oversight in multiple jurisdictions. The situation in which LCH.Clearnet clears a swap between counterparties in different jurisdictions is a common one. As the Commission points out,³ without cooperation between regulators, the counterparties to these swaps potentially face conflicting or duplicative regulatory requirements. In urging clear standards for swaps subject to oversight in multiple jurisdictions, LCH.Clearnet is not seeking general relief for itself. LCH.Clearnet will continue to comply with the requirements of each jurisdiction in which we are licensed. If these requirements conflict, we will seek specific guidance and, if necessary, exemptive relief, from the regulators involved.

The Commission recently proposed making most of the interest rate swaps cleared by LCH.Clearnet Limited's SwapClear service subject to a mandatory clearing determination.⁴ LCH.Clearnet strongly supports the Commission's proposal. However, many of the swaps proposed to be subject to the Commission's mandatory clearing determination and cleared on LCH.Clearnet Limited are between non-US persons and executed outside the United States. In addition, the Group has received countless inquiries from our non-US clearing members and their clients across all of our swaps clearing services asking whether they will be subject to the Commission's rules implementing Dodd-Frank if swaps that they currently clear through LCH.Clearnet Limited or LCH.Clearnet SA are subject to a Commission clearing mandate. These counterparties would remain beyond the reach of the Commission's mandate and the related rules implementing Dodd-Frank if they chose to clear on a central counterparty (CCP) that is not a registered DCO. The situation should be no different if two non-US persons execute a swap outside the US and choose to clear it on a registered DCO unless they choose to clear their swap under the Commission's Part 22 rules.⁵ Given the vigorous efforts in a number of jurisdictions to finalize legislation and rules to implement the commitments made by the leaders of the G20 in Pittsburgh in 2009 regarding the reporting and, clearing of OTC derivatives, our suggested approach is very unlikely to lead to regulatory gaps. Swaps cleared by LCH.Clearnet Limited or LCH.Clearnet SA between two non-US persons and executed outside the US may not be subject to the Commission's clearing mandate and related rules but they will be subject to the clearing mandate and related rules in their home jurisdiction. Our suggested approach also maintains a level playing field between CCPs that limit their activities to a single jurisdiction and those who embrace a global model and, as a result, seek licenses in multiple jurisdictions.

LCH.Clearnet's suggested approach to swaps between two non-US persons is consistent with the Commission's proposed guidance. Appendix B of the proposed guidance includes a table

³ *Id.* at 41235.

⁴ Clearing Requirement Determination under Section 2(h) of the Commodity Exchange Act, 77 FR 47169 (August 7, 2012).

⁵ The Commission's Part 22 rules describe the treatment of cleared swaps customer positions and collateral. In LCH.Clearnet's experience, some non-US customers voluntarily choose to clear swaps with a futures commission merchant clearing member. These customers should have to comply with all of the Commission's regarding swaps even if the swap is executed outside the US.

outlining when the Commission's Category A: Risk Mitigation and Transparency rules will apply. Clearing and swap processing rules fall into Category A. The table shows that these rules will not apply to a swap between a non-US based swap dealer and a non-US person where neither counterparty is guaranteed by a US person and the swap is booked outside the US.⁶ Appendix C follows this same approach for swaps between two non-US persons who are not required to register as swap dealers or major swap participants ("MSPs").⁷ LCH.Clearnet asks the Commission to confirm that our reading of the proposed guidance is correct.

Swap Reporting Rules

LCH.Clearnet requests that the Commission reconcile the statements in the proposed guidance on the applicability of the swap data repository ("SDR") reporting rules with the text of those rules in the situation where two non-US persons, neither of whom is required to register as a swap dealer or major swap participant ("MSP"), enter into a swap outside the US and the swap is cleared on a registered DCO.

The Commission's proposed guidance states

Accordingly, with respect to swaps where one (or both) of the counterparties to the swap is a U.S. person, the Commission proposes to interpret section 2(i) in a manner so that the Dodd-Frank Act requirements relating to clearing, trade-execution, real-time public reporting, Large Trader Reporting, and SDR Reporting, and recordkeeping apply to such swaps. Conversely, where a non-U.S. person enters into a swap with another non-U.S. person outside the United States, and where neither counterparty is required to register as a swap dealer or MSP, the Commission would not apply the Dodd-Frank Act requirements to such swaps.⁸

LCH.Clearnet agrees with this clear statement that SDR reporting requirements should not apply to swaps entered into outside the US between two non-US persons who do not have to register as swap dealers or MSPs. This statement is consistent with Appendix C of the Commission's proposed guidance.⁹

However, the provisions of the Commission's proposed guidance appear to be odds with Commission's SDR reporting rules. CFTC Rule 45.8(f) states

(f) Notwithstanding the provisions of paragraphs (a) through (e) of this section, if neither counterparty to a swap is a U.S. person, but the swap is executed on a swap execution facility or designated contract market or otherwise executed in the United States, or is cleared by a derivatives clearing organization:

⁶ 77 FR at 41327.

⁷ *Id.*

⁸ *Id.* at 41234 (emphasis added). The proposed guidance contains an exception for large trader reporting by clearing members in specified physical commodity swaps or swaptions.

⁹ *Id.* At 41238.

(2) For an off-facility swap, the counterparties shall agree as one term of their swap which counterparty shall be the reporting counterparty [to an SDR].¹⁰

LCH.Clearnet believes two non-US persons, neither of whom is required to register as a swap dealer or MSP, who execute a swap outside the US and clear on a registered DCO should not be subject to the potential of Commission enforcement action if they fail to comply with Rule 45.8(f), a rule of which they may well be unaware. The Commission's proposed guidance suggests an approach that will limit the reporting burden on non-US persons who are not required to register with the Commission as swap dealers or MSPs and minimize the possibility of duplicative reporting of the same swap to trade repositories in multiple jurisdictions while upholding the legitimate regulatory interest of Commission in the activities of DCOs. The proposed guidance raises the possibility that, in specified circumstances, even a swap involving a US counterparty may not have to be reported to an SDR.

With respect to transactions that are subject to the SDR Reporting and swap data recordkeeping requirements, the Commission proposes to interpret section 2(i) so as to permit substituted compliance, provided that the Commission has direct access to the swap data for these transactions that is stored at the foreign trade repository. The Commission has a strong supervisory interest in applying the SDR reporting and recordkeeping requirements to any transactions involving a U.S. counterparty in order to effectively monitor the swap activities of U.S. persons. Nevertheless, the Commission believes that substituted compliance is warranted where it would ease the burden on the counterparties that report their swaps data to a foreign trade repository and the Commission is assured of prompt access to the information critical to its oversight of the swaps market.¹¹

LCH.Clearnet commends the Commission for its flexibility in recognizing that SDR reporting, even for swaps involving a US person, is not the only way to satisfy its need for information about swaps in which it has a legitimate regulatory interest. This flexibility is even more necessary in cases where two non-US counterparties, neither of whom is required to register as a swap dealer or MSP, execute a swap outside the US and choose to clear it on a DCO such as LCH.Clearnet that also operates outside the US. We urge the Commission to confirm in its final cross-border guidance that section 2(i) permits a swap executed by two non-US counterparties outside the US, where neither counterparty is required to register as a swap dealer or MSP, and cleared on a DCO to be reported to a non-US trade repository provided that the CFTC has access to the data for these transactions.¹²

The Commission should also give strong consideration to following this approach when two non-US persons who are registered as swap dealers or MSPs execute a swap outside the US and clear on a DCO. In this case, the Commission will continue to have visibility into these swaps

¹⁰ Rule 45.8(f) only applies when neither counterparty to the swap is a swap dealer or an MSP. See, 77 FR 2167 (January 13, 2012).

¹¹ *Id.* at 41235.

¹² The Commission would have information about these swaps through the DCO's required daily reports under Rule 39.19(c)(1)(D).

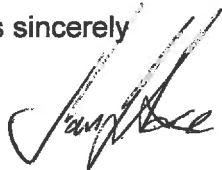
through reporting by the DCO but the non-US swap dealers and MSPs would not be subject to both Commission's reporting requirements and those of their home jurisdictions.

Finally, we urge the Commission to urgently work with its regulatory counterparts in the G-20 to provide greater clarity on the situations where a swap involves a US counterparty and is subject to more than one reporting regime. The proposed guidance shows a commendable willingness on the Commission's part to allow the swap to be reported to a foreign trade repository if the Commission is assured of prompt access to the information on the swap. However, without clear agreement between the Commission and its G-20 counterparts on exactly how to achieve this result in practice, this flexibility may prove to be illusory. Reporting systems are most effective and efficient when rules are clear and reporting occurs automatically. Putting DCOs and other reporting parties in a situation where potentially they must report promptly large numbers of transactions based on case-by-case decisions on which set of a range of similar, but not identical, reporting rules to apply is obviously far from desirable. In addition, such a system is likely to lead to duplicative reporting of some transactions and runs the risk that other transactions will not be reported at all. LCH.Clearnet is confident that the Commission and its G-20 counterparts will be able to develop clear guidance on the reporting of swaps where more than one reporting regime applies. We stand ready to assist in this process.

Conclusion

LCH.Clearnet appreciates the opportunity to share our views on the Commission's draft guidance on the cross-border application of the swaps provisions of the CEA. We look forward to working with the Commission as it continues to implement the Dodd-Frank Act. Please do not hesitate to contact Lisa Rosen at +44 (0)207 426 7541 regarding any questions raised by this letter or to discuss these comments in greater detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian Axe', written over a light blue horizontal line.

Ian Axe
Chief Executive Officer