



August 27, 2012

Mr. David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
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Re: Comment Letter on the Proposed Interpretive Guidance Regarding Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57)

Dear Mr. Stawick:

Deutsche Bank AG (“**DB AG**” and, together with its affiliates, “**Deutsche Bank**”) appreciates the opportunity to provide the Commodity Futures Trading Commission (the “**Commission**”) with our views and suggestions regarding the Commission’s Proposed Interpretive Guidance Regarding Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (the “**Proposed Interpretive Guidance**”).¹ We are concerned that several provisions of the Proposed Interpretive Guidance are unclear and that others could pose significant costs and challenges without corresponding benefit if finalized as proposed. Consequently, we write to share our concerns as well as to suggest clarifications or modifications that would improve the Proposed Interpretive Guidance and lead to successful implementation of Title VII requirements more generally.

“U.S. Person” Definition

As we noted in our letter of August 13, 2012² on the Proposed Exemptive Order Regarding Compliance with Certain Swap Provisions (the “**Proposed Exemptive Order**”),³ the definition of U.S. person is critically important to the impact of Title VII swap regulations. We believe that a number of changes can be made to the final U.S. person definition (the “**Final Definition**”)⁴ to alleviate many of difficulties and inconsistencies created by the definition in the Proposed Interpretive Guidance (the “**Proposed Definition**”) without losing the entities we believe the Commission intended to capture. In particular, the Proposed Definition introduces a number of novel and practically challenging components—including the concept of “indirect”

¹ Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,214 (proposed July 12, 2012).

² Letter submitted by Deutsche Bank on the subject of the proposed exemptive order regarding compliance with certain swap regulations (August 13, 2012) (*available at* <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58365&SearchText=>

³ Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 Fed. Reg. 41,110 (proposed July 12, 2012).

⁴ As stated in our letter of August 13, we propose that, during an interim period commencing on the effective date of the Exemptive Order and continuing for a period of 90 days after the Final Definition is adopted, firms use a definition of U.S. person consistent with the approach that the firms have used to in evaluating the potential applicability of already existing U.S. regulations. We propose such a definition in our letter.



ownership for both corporations and commodity pools and the linking of a commodity pool's U.S. person status to the operator of the pool rather than the pool's investors—that are both difficult from a compliance standpoint and exceed the restriction on the Commission's cross-border jurisdiction in Section 2(i) of the Commodity Exchange Act ("**CEA**"), which limits application of the Title VII swap regulations outside the United States to those activities that have a direct and significant connection with activities in, or effect commerce of, the United States or contravene anti-evasion rules promulgated by the CFTC.

Consequently, we support the definition proposed by the Securities Industry and Financial Markets Association ("**SIFMA**") in their comment letter to the Commission on the Proposed Interpretive Guidance. Specifically, SIFMA has proposed the following definition:

- (i) any natural person who is a resident of the United States;
- (ii) any plan within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, excluding any plan maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens (a "**Plan**");
- (iii) any commodity pool, pooled account, collective investment vehicle or other vehicle the assets of which are invested on a collective basis regardless of form of organization (a "**Commodity Pool**"), in each case where:
 - a. the Commodity Pool is organized or incorporated under the laws of the United States; or
 - b. the Commodity Pool is (1) directly majority owned as of the beginning of a calendar year by U.S. persons or, in the case of ownership by a Commodity Pool, a Commodity Pool that is a U.S. person solely by virtue of clause (a) above, and (2) not a publicly offered Commodity Pool that is initially offered outside the United States (in a manner compliant with Regulation S under the Securities Act of 1933) and listed principally on an exchange located outside the United States.
- (iv) any corporation, partnership, limited liability company, association, joint-stock company, endowment or any form of enterprise similar to any of the foregoing (other than an Estate, Trust, Plan or Commodity Pool), in each case that is either:
 - a. organized or incorporated under the laws of the United States or
 - b. having its principal place of business in the United States.
- (v) any individual account (discretionary or not) (other than an Estate, Trust, Plan or Commodity Pool) where the direct beneficial owner is a U.S. person by virtue of clause (i) or (iv) above in this definition;
- (vi) any estate (other than a Trust, Plan or Commodity Pool) ("**Estate**") of which any executor or administrator is a U.S. person by virtue of clause (i) or (iv) above in this definition, except that any such Estate shall not be a U.S. person if (1) an executor or administrator of the Estate who is not a U.S. person has sole or shared investment



discretion with respect to the assets of the Estate and (2) the Estate is governed by foreign law; and

- (vii) any trust (other than an Estate, Plan or Commodity Pool) (“**Trust**”) of which any trustee is a U.S. person by virtue of clause (i) or (iv) above in this definition, except that any such Trust shall not be a U.S. person if (1) a trustee who is not a U.S. person has sole or shared investment discretion with respect to the Trust assets, and (2) no beneficiary of the Trust (and no settlor if the Trust is revocable) is a U.S. person by virtue of clause (i) or (iv) above in this definition.

A more detailed discussion of this suggested Final Definition is available in the SIFMA letter. However, we wish to emphasize a few changes from the Proposed Definition:

- SIFMA’s suggested Final Definition removes prong ii(B) of the proposed definition, which would capture entities “in which the direct or indirect owners [of an entity] are responsible for the liabilities of such entity and one or more of such owners is a U.S. person.”⁵ We believe that the language of prong ii(B) as proposed could be read to include an entity guaranteed by a U.S. person, which appears at odds with the separate treatment elsewhere in the Proposed Interpretive Guidance for entities guaranteed by U.S. persons.⁶
- SIFMA’s suggested Final Definition eliminates the concept of indirect ownership from the Proposed Definition. In addition to the practical difficulty of knowing the indirect owners of an entity, we believe incorporation of an indirect ownership standard could lead to inconsistent treatment of counterparties among swap dealers and major swap participants (“**MSPs**”). We also believe that it would be beyond the Commission’s jurisdictional authority under Section 2(i) of the CEA.
- SIFMA’s suggested Final Definition eliminates the Commission’s proposed prong (v), which would require U.S. person treatment for any commodity pool, the operator of which is required to register as a commodity pool operator under the CEA. We believe this prong is overbroad in tying U.S. person status to a pool’s operator. We believe that looking to the ownership of a commodity pool is a more appropriate way to identify commodity pools that are U.S. persons.

We believe that SIFMA’s suggested Final Definition would capture entities that the Commission has a mandate and policy interest in regulating, while lessening the regulatory burdens on non-U.S. entities that lack sufficient connection to the United States and likely will be subject to regulatory supervision in their home jurisdictions.

We also believe that this definition should be the final and complete definition of U.S. person, not subject to further expansion by the Commission. In the Proposed Interpretive Guidance, the proposed U.S. person definition is prefaced by the language “as proposed, the term ‘U.S. person’ would include, but not be limited to.”⁷ We believe this language injects an

⁵ *Id.* at 41,218.

⁶ See, e.g., *id.* at 41,218 (“a foreign affiliate or subsidiary of a U.S. person would be considered a non-U.S. person, even where such an affiliate or subsidiary has certain or all of its swap-related obligations guaranteed by the U.S. person.”)

⁷ Proposed Interpretive Guidance at 41,218.



unnecessary and detrimental uncertainty to the analysis of U.S. person status. Instead, we believe that the Final Definition should not be subject to further expansion by the Commission.

We believe that an entity should be responsible for its own determination as to whether it is or is not a U.S. person. An entity, rather than its counterparty, is in the best position to determine its own status. In addition, having an entity determine its own status would decrease the overall burden on market participants, as the determination would have to be made by each entity only once rather than every time that entity transacts with a new swap dealer or MSP, and would eliminate the possibility of differential treatment of the same counterparty by different swap dealers or MSPs. To this end, we believe that, consistent with the Commission's guidance with regard to Title VII external business conduct standards, a swap dealer should be able to rely on the written representation of a counterparty with regard to that counterparty's U.S. person status. Requiring the swap dealer or MSP to know its counterparty's status using something beyond reasonable reliance on counterparty representations would be both burdensome and practically impossible to implement in the many cases when a swap dealer will not have access to the information necessary to make an independent analysis of counterparty's U.S. person status according to the definition.

We also believe that swap dealers and MSPs should be allowed a transition period when a non-U.S. person counterparty becomes a U.S. person. When a counterparty becomes a U.S. person, the swap dealer or MSP will need to begin complying with U.S. margin, clearing, trading, reporting, documentation and external business conduct standards for swaps with that counterparty. In some instances, the legal entity used by the swap dealer may change; for example, Deutsche Bank may need to move the counterparty relationship to a different swap dealer affiliate. Due to the substantial changes to internal systems and documentation that would be required to do so, we suggest that the Commission provide that a non-U.S. swap dealer or MSP trading with a counterparty who becomes a U.S. person will have ninety days after receiving notice of such change in status before the non-U.S. swap dealer or MSP is required to conform its swap trading activity with that counterparty to the rules that apply to swap activity with U.S. persons.

Aggregation Issues

The Proposed Interpretive Guidance requires that a non-U.S. person engaged in swap dealing activity for which registration may be required must aggregate its own U.S.-facing (or U.S.-guaranteed) swap dealing activity with that of any non-U.S. affiliates in order to determine whether it meets the *de minimis* threshold triggering registration requirements.⁸ This aggregation requirement does not make an exception for swaps activity by registered swap dealer affiliates. As a result, all affiliates of a registered swap dealer that engage in swap dealing business, no matter how small, with U.S. persons or for which the affiliate is guaranteed by a U.S. person would lose the protection of the *de minimis* threshold and be required to register as a swap dealer. For example, DB AG, a non-U.S. person, will register as a swap dealer. However, DB AG has several non-U.S. affiliates that engage in a small amount of swap dealing activity with persons who may be U.S. persons depending on the Final Definition of U.S. Person. If these affiliates are required to aggregate DB AG's swap dealing positions with their own, each will have to separately register as a swap dealer.

⁸ Proposed Interpretive Guidance at 41,220.



We believe this interpretation captures a much broader swath of entities than the Commission intended and reaches beyond the jurisdictional limitations of the Commodity Exchange Act. In addition, such an approach effectively requires multiple registrations based on the activity of a single swap dealer, which already will be subject to regulation. As a result, we believe that the Commission should clarify that, when calculating the *de minimis* activity threshold for any particular entity, the swap activity of any registered swap dealer affiliate is excluded from the aggregation requirement.

Emerging Market Exemption

The Proposed Interpretive Guidance includes a provision that allows foreign branches and agencies of U.S. swap dealers to comply with home-jurisdiction regulations in jurisdictions for which a comparability determination has not been made. In order to qualify, the swaps transacted in such markets may not exceed 5% or of the aggregate notional value of all swap activities of the U.S. swap dealer of which the branch or agency is a part.⁹ This exemption (the “**Emerging Market Exemption**”) is intended to relieve regulatory compliance burdens in markets where a fully comparable regulatory regime is not in place and, as a result, substituted compliance is not available.

There is no indication whether, or the extent to which, this Emerging Market Exemption will apply to non-U.S. swap dealers. If the Emerging Market Exemption does not apply to non-U.S. swap dealers, a non-U.S. branch of a U.S. swap dealer would be able to transact with a non-U.S. affiliate conduit or a non-U.S. person guaranteed by a U.S. person under home-country regulations not found comparable to U.S. requirements. However, a non-U.S. swap dealer would not be able to engage in the same transaction with the same counterparty under the same home-country regulations. There is no policy rationale for such disparate treatment. We therefore believe that the Commission should clarify that the Emerging Market Exemption will be applicable to non-U.S. swap dealers for their transactions with non-U.S. persons guaranteed by U.S. persons and with non-U.S. affiliate conduits.

Substituted Compliance

The Proposed Interpretive Guidance would allow non-U.S. swap dealers and non-U.S. branches of U.S. swap dealers to substitute home-country regulations for U.S. swap requirements where the Commission finds the home jurisdiction’s requirements comparable.¹⁰ We strongly support the Commission’s inherent acknowledgement that swap dealers organized outside the United States will, in many cases, be subject to home or host country regulation seeking to achieve the same objectives as Title VII swap regulation and it will often be more appropriate not to extend the extraterritorial reach of U.S. regulation to such entities.¹¹ In this regard, we wish to express our support of an approach to substituted compliance based on regulatory recognition involving a dialogue among regulators that was described by the Global

⁹ *Id.*, at 41,230–31.

¹⁰ However, we believe that the Commission should clarify that transactions between entities that are neither swap dealers nor major swap participants are subject to at least the same substituted compliance treatment as transactions involving swap dealers and major swap participants

¹¹ We think, however, that the Commission’s comparability determination should be solely based on the foreign jurisdiction’s regulatory regime. As a result, we disagree with the Commission’s requirement that a foreign swap data repository must allow the Commission access to the information reported to the swap data repository in order to be considered comparable.



Financial Markets Association in its letter commenting on the Proposed Interpretive Guidance dated August 13, 2012. We also agree with the European Commission that the Commission should adopt a similar approach to that of the European Union, specifically that a substituted compliance determination should be made on the recognition of "equivalent" jurisdictions and not of individual firms.¹² In any event, the Commission's comparability determination should be solely based on the foreign jurisdiction's regulatory regime. As a result, we disagree with the Commission's requirement that a foreign swap data repository must allow the Commission access to the information reported to the swap data repository in order to be considered comparable.

While the Commission permits a non-U.S. swap dealer to comply with a substituted compliance regime under certain circumstances, the Commission should clarify that a non-U.S. swap dealer transacting in a non-U.S. jurisdiction will be permitted to comply with the compliance regime most relevant to the transaction or transactions in question as determined by the swap dealer, which may be the compliance regime of the home country or the host country. For example, Deutsche Bank's Singapore branch, when transacting with a Singaporean counterparty guaranteed by a U.S. person, should be allowed to choose to comply with the regulatory regime applicable in Singapore (i.e., host country) rather than be required to comply with the regulatory regime applicable in Germany (i.e., home country). This will allow non-U.S. swap dealers to rationally implement compliance across multiple jurisdictions while ensuring that an appropriate regulatory regime is being followed.

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We thank the Commission for consideration of our comments. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

Handwritten signature of Joseph Polizzotto in blue ink.

Joseph Polizzotto
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for the Americas
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Handwritten signature of Eric Gallinek in blue ink.

Eric Gallinek
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¹² See also Letter from Jonathan Faull, European Commission, Directorate General Internal Market and Services to Commission, August 24, 2012.