



**SUMITOMO MITSUI TRUST BANK, LIMITED**

New York Branch

527 Madison Avenue, New York, NY 10022

Tel: 212-418-4806 Fax: 212-418-4866 E-mail: Ortwine\_Bruce@smtb.jp

**Bruce A. Ortwine**

Joint General Manager

General Counsel

General Counsel, Americas

August 24, 2012

VIA FEDERAL EXPRESS

Mr. David A Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street N.W.  
Washington, D.C. 20581  
Chairman  
Securities and Exchange Commission

2012 AUG 28 PM 3:29  
Office of the  
Secretary  
Received  
CFTC

Re: RIN Number 3038—AD57; Proposed Interpretive Guidance and Policy Statement on Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (the “Proposed Guidance”)

**COMMENT**

Dear Sir:

We write this letter on behalf of Sumitomo Mitsui Trust Bank, Ltd. (“SMTB”) to comment on certain portions of the Proposed Guidance identified below that, if enacted, would have an adverse impact on the operations of not only SMTB, but also most, if not all internationally-based banks, both in the United States and globally.

In addition to the general comment contained in the next following paragraph, this letter of comment responds to the specified Question Number contained in the Proposed Guidance.

General Comment: The Proposed Guidance was published only in July 2012, nearly two months following its publication of the final definitions of “swap dealer” and “major market participant.” Moreover, the Proposed Guidance is just that—a proposed interpretation of the application of final rules regarding swap dealer and major market participant as they relate to non-U.S. persons. Following the conclusion of the comment period to the Proposed Guidance, the Commission will be required to consider the numerous comments that no doubt will be submitted and then prepare a final guidance pertaining to non-U.S. persons and whether they will become subject to possible registration requirements based on their activities in the U.S. and with U.S. persons. Only then

will non-U.S persons be in a position to consider their alternatives and make the necessary business decisions of whether to register as a swap dealer or major market participant or to alter their current business operations in order to avoid registration requirements.

With this in mind, it would be both unfair and unreasonable, and place non-U.S. persons at a competitive disadvantage, if the Commission were to hold non-U.S. persons to the same timeline for registration as it has imposed for U.S. Persons. Accordingly, we propose that any final guidance delay the timeframe for registration requirements for non-U.S. persons appropriately.

Question 1: The proposed definition of “U.S. person” is overly broad. Specifically, clause (ii)(B) would include as a U.S. person any corporation, etc. “in which the direct or indirect owners are responsible for the liabilities of such entity and one or more of such owners is a U.S. person.” There should be a minimum level of ownership by one or more U.S. persons for this clause to apply. For instance, clause (iv), pertaining to commodity pools, etc. would be applicable only if a “majority ownership is held, directly or indirectly, by a U.S. person(s).” The same majority ownership threshold should also apply to clause (ii)(B).

Question 3: Under the Proposed Guidance, a swap transaction between a non-U.S. person and a foreign branch or agency of a U.S. swap dealer would be exempt from the de minimis calculation, even if the transaction is booked in the U.S. swap dealer’s central booking system. However, a swap transaction between a non-U.S. person and a foreign affiliate of the U.S. swap dealer that is booked in the same central booking system would count towards the de minimis calculation. Economically, there is no difference between these two trades and yet under the Proposed Guidance they would have different treatment. Both types of transactions should be exempt from the de minimis calculation.

Question 5: Under the proposed aggregation description, a non-U.S. Person should NOT be required to include the swap transactions entered into by a non-U.S. affiliate that is registered as a swap dealer. To include such swaps would significantly reduce, if not outright nullify, the de minimis exception that would otherwise apply to the non-U.S. person.

Question 8: The Commission should exclude the swap dealing transactions of a non-U.S. person where the counterparties to the swaps are, themselves, non-U.S. persons, irrespective of whether such counterparties' obligations are guaranteed by the U.S. person. To conclude otherwise would result in inconsistent treatment between this type of swap versus a swap in which the counterparty is a non-U.S. branch or agency of a U.S. person and, accordingly, such swap is the primary obligation of the U.S. person.

If for some reason the Commission does not come to this very logical conclusion and, instead, determines to include swaps guaranteed by the U.S. person, then, at a minimum, the Commission should exclude swap obligations in excess of a capped guaranty.

Question 10: Entity level requirements should not be applied to any transactions between non-U.S. persons that take place outside the U.S. To do so would represent an unjustified encroachment upon the regulatory jurisdiction of the home country regulatory agency.

Question 11: From a practical point of view, especially considering the application of this aspect of the Proposed Guidance to non-U.S. persons, a number of the proposed "Transaction Requirements," including swap trading relationship documentation, portfolio reconciliation and compression, daily trading records and external business conduct standard, should instead be classified as "Entity-Level Requirements." None of them are logically linked to particular transactions and would be required to be conducted on a daily basis per counterparty.

Question 26: It is respectfully submitted that the Substituted Compliance aspect of the Proposed Guidance represents an unjustified encroachment by the Commission upon the regulatory jurisdiction of the home country regulatory agency. To condition the acceptability and comprehensiveness of another country's regulatory regime on continuing evaluation and monitoring, requiring the foreign regulatory to submit an application to the Commission requesting substituted compliance and entering into a memorandum of understanding with the Commission whose terms the Commission would surely dictate, to require procedures for the foreign regulatory regime to confirm periodically to the Commission its continuing oversight activities, and to permit the Commission to have access to information, make on-site visits and

receive notification and procedures in certain situations, is regulatory overreach. It is basically an attempt by the Commission to require the rest of the World to adopt and abide by U.S. regulatory standards as determined by the Commission.

The Substituted Compliance concept would be unduly burdensome on a non-U.S. person registered as a swap dealer in its home country that the Commission determined not to be “comparable” to the U.S. It would force the non-U.S. person to make an inevitable decision: to register as a swap dealer in the U.S. and bear the burden of double regulation, or to withdraw from the U.S. market, thereby resulting in decreased competition and liquidity and increased costs for those remaining in the U.S. market.

Question 31: The requirements relating to clearing, trade execution, real-time public reporting, Large Trader Reporting and recordkeeping should not apply to swap transactions entered into between non-U.S. persons who are not registered swap dealers. This should be clearly stated in the final guidance. To require otherwise goes beyond the legitimate interests of the Commission, is inconsistent with the concepts of international comity and is regulatory overreach. It is basically an attempt by the Commission to require the rest of the World to adopt and abide by U.S. regulatory standards as determined by the Commission.

Thank you for your due consideration of these comments.

Respectfully submitted,

Sumitomo Mitsui Trust Bank, Ltd.

By: 

Name: Bruce A. Ortwine

Title: General Counsel, Americas