

From: Lloyd, Colin D.
Sent: Monday, June 17, 2013 7:14 PM
To: Kim, Carlene; Josephson, Sarah E
Cc: Rosen, Edward J.; Sarah A. Miller, Esq.; Miller, Ryne
Subject: Cross-Border Follow-Up

Dear Carlene and Sarah:

As discussed this evening, I have attached language regarding the treatment of funds under the U.S. person definition and issues raised by non-U.S. privacy rules. We would be pleased to discuss the attached further with you at your convenience.

Kind regards,

Colin Lloyd

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Proposed Fund Prong of the “U.S. Person” Definition

“U.S. person” means—

[...]

Any collective investment vehicle that—

(a) is organized or incorporated under the laws of the United States;

(b) has its principal place of business in the United States;* or

(c) (i) is marketed, offered or sold in the United States or to persons located in the United States and is majority-owned, directly or indirectly, by U.S. persons, as of the end of the most recent calendar year.**

(ii) Treatment of indirect investors.—In determining whether a transaction-level collective investment vehicle is a U.S. person under clause (c)(i), indirect owners shall not be considered unless the transaction-level collective investment vehicle, or any person that holds an ownership interest in the collective investment vehicle, has been structured to evade subtitle A of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act by permitting U.S. persons to participate in swap activities through a collective investment vehicle that is not considered a U.S. person.

**Commission guidance on “principal place of business”: The Commission construes a collective investment vehicle’s “principal place of business” as the location at which the business and operations of the vehicle are conducted and/or managed. The activities of a collective investment vehicle’s investment manager or trading advisor are not relevant to the vehicle’s principal place of business, unless the manager or advisor is also engaged in conducting or managing the non-investment management operations or activities of the vehicle.*

***Commission guidance on existing vehicles: The Commission recognizes that existing collective investment vehicles may not have the information necessary to determine whether they are majority-owned by U.S. persons, as defined by the Commission. Accordingly, the Commission is adopting a safe harbor from status as a U.S. person in the case of a collective investment vehicle formed prior to the effective date of the “U.S. person” definition, the interests in which were initially offered and sold in reliance on Regulation S under the Securities Act of 1933.*

Proposal to Address Conflicts between CFTC Rules and Foreign Privacy Requirements

- Phase-in implementation of Parts 20, 45 and 46 by maintaining the existing relief under the December 21, 2012 exemption and CFTC Letter 12-46 until December 31, 2013.
- Grant swap dealers a limited exception from Parts 20, 45 and 46 for swaps with non-U.S. persons that are solicited, executed and booked by a branch of a swap dealer located outside the United States, Japan and the European Union, provided that the aggregate notional value of all swaps for which the swap dealer elects the exception does not exceed [ten] percent of the aggregate notional value of all swaps entered into by the swap dealer, in each instance measured in U.S. dollar equivalents and calculated on an annual basis. As a condition to this exception, the swap dealer would be required to provide the Commission an annual report listing the branches for which the swap dealer is relying on the exception, the aggregate notional value of swaps covered by the exception in each calendar quarter, and the aggregate notional value of all swaps entered into by swap dealer during each annual period.
- Adopt a Commission non-enforcement position with respect to a swap dealer's failure, in response to a Commission request, to make information available for inspection or production where the swap dealer has:
 - Notified the Commission, as part of the swap dealer's submission of Section 4s Implementing Regulations documentation to the National Futures Association (the "NFA") or other submission to the NFA, of (1) any statutory or regulatory prohibition or common law doctrine that might impede inspection of a branch or other location by the Commission or the production of information to the Commission and (2) which branches or other locations of the swap dealer are covered by such prohibitions or doctrines;
 - Formed a reasonable belief that:
 - Based on a written opinion of outside legal counsel, statutory or regulatory prohibitions in a non-U.S. jurisdiction preclude the swap dealer from making the requested information available; or
 - Based on a written opinion of outside legal counsel, common law in a non-U.S. jurisdiction could expose the swap dealer to criminal or civil liability for making the requested information available to the Commission;
 - Not yet obtained counterparty or employee consent or non-U.S. regulatory authorization, as applicable, necessary to make the information available;
 - Made reasonable and demonstrable efforts to obtain such consent or regulatory authorization, as applicable;

- Retained, as part of its compliance with Commission recordkeeping requirements, written evidence of its reasonable and demonstrable efforts to obtain the consent of counterparties or employees or authorization of the local regulatory authority, as applicable;
- Retained, as part of its compliance with Commission recordkeeping requirements, a copy of the written opinion of outside legal counsel on which it based its reasonable belief regarding the non-U.S. privacy, blocking or secrecy laws as they pertain to Commission inspections or information requests; and
- Provided, upon Commission request, such written evidence and a copy of the written opinion of outside legal counsel.