

March 10, 2014

VIA ELECTRONIC MAIL

Ms. Melissa Jurgens
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: *Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States*

Dear Ms. Jurgens:

On behalf of The Commercial Energy Working Group (the “**Working Group**”), Sutherland Asbill & Brennan LLP hereby submits these comments in response to the Commodity Futures Trading Commission’s (the “**CFTC**” or “**Commission**”) *Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States* (the “**Request for Comment**”).¹

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. Among the members of the Working Group are some of the largest users of energy derivatives in the United States and globally. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

The Working Group recognizes the tremendous complexity that surrounds the topic of applying U.S. regulation to swap transactions that occur outside the United States or that might

¹ 79 Fed. Reg. 1,347 (Jan. 8, 2014), available at <http://www.cftc.gov/ucm/groups/public/@Irfederalregister/documents/file/2014-00080a.pdf>.

be done between one or more non-U.S. Persons and appreciates the opportunity to provide comments on the Commission's approach to the cross-border application of its regulations. While the Request for Comment relates to a specific topic, given some of the difficulties that have arisen from the Commission's procedural approach to the issues discussed in the Request for Comment, we urge the Commission to review its entire guidance regarding cross-border issues and both improve on such guidance with the benefit of the market commentary it has received and formalize such guidance through a rulemaking proceeding.

I. THE USE OF GUIDANCE IN LIEU OF A RULEMAKING CREATES PROCEDURAL ISSUES, AS EVIDENCED BY THE REQUEST FOR COMMENT.

While the Request for Comment pertains to a limited question, this question highlights the need to handle cross-border regulatory issues in a rulemaking rather than through non-binding guidance.² In essence, many of the difficulties that pertain to issues raised in the Request for Comment are symptoms of the Commission's use of guidance, which provides a basic framework for applying U.S. regulation, but leaves open many interpretive questions.

One of the questions left open by the Interpretive Guidance is the issue discussed in the Request for Comment: the extent to which Transaction Level Requirements³ apply to transactions between a non-U.S. swap dealer ("**SD**") and a non-U.S. Person where the SD uses personnel or agents located in the United States to execute the transaction (each a "**Covered Transaction**").

The uncertainty surrounding the treatment of Covered Transactions resulted from ambiguity in footnote 513 of the Interpretive Guidance.⁴ To address that ambiguity, the CFTC

² The CFTC's approach to the cross-border regulation of swaps is currently set forth in non-binding interpretive guidance. See *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45,292 (July 26, 2013), ("**Interpretive Guidance**"), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf>.

³ Transaction Level Requirements include: (i) required clearing and swap processing; (ii) margining (and segregation) for uncleared swaps; (iii) mandatory trade execution; (iv) swap trading relationship documentation; (v) portfolio reconciliation and compression; (vi) real-time public reporting; (vii) trade confirmation; (viii) daily trading records; and (ix) external business conduct standards. *Interpretive Guidance* at 45,333.

⁴ Footnote 513 states:

Consistent with the foregoing rationale, the Commission takes the view that a U.S. branch of a non-U.S. swap dealer or MSP would be subject to Transaction-Level requirements, without substituted compliance available. As discussed above, a branch does not have a separate legal identity apart from its principal entity. Therefore, the Commission considers a U.S. branch of a non-U.S. swap dealer or non-U.S. MSP to be a non-U.S. person (just as the Commission considers a foreign branch of a U.S. person to be a U.S. person). Nevertheless, the Commission also recognizes its strong supervisory interest in regulating the dealing activities that occur within the United States, irrespective of the counterparty (just as the Commission allows for substituted compliance for foreign branches in certain instances to take into account the strong supervisory interest of local regulators).

issued Staff Advisory 13-69, which was effective immediately and stated that SDs would be required to comply with the Transaction Level Requirements with respect to Covered Transactions. This Staff Advisory caught the market by surprise and many non-U.S. SDs were left scrambling for compliance solutions to an unexpected requirement until the CFTC stayed compliance with Staff Advisory 13-69.⁵

II. THE COMMISSION SHOULD UNDERTAKE A RULEMAKING WITH RESPECT TO THE CROSS-BORDER APPLICATION OF ITS REGULATIONS.

The regulatory uncertainty caused by the Commission's actions regarding Staff Advisory 13-69 is just one example of the negative consequences of the CFTC's procedural approach to the cross-border application of its regulations. To avoid a haphazard regulatory process, the Commission should engage in another holistic review of its approach to cross-border swaps regulation, which should culminate in a rulemaking proceeding. The rulemaking should result in a proposed rule that accomplishes the following objectives:

- i. provide clear and complete guidance to market participants, both SDs and end-users, as to when the CFTC's regulations apply to cross-border transactions;
- ii. reflect the information learned by the CFTC since the publication of the Interpretive Guidance;
- iii. provide proper deference to the jurisdiction and rules of foreign regulators; and
- iv. provide a singular and transparent method for the provision of substituted compliance.

Such a rulemaking would provide a number of improvements over the CFTC's current incremental approach to the cross-border application of its swaps-related regulations, which have led to the confusion regarding the regulatory treatment of Covered Transactions as well as other instances of regulatory uncertainty. *First*, the very form of the Interpretive Guidance as something other than a rule introduces regulatory uncertainty. The Commission states that "unlike a binding rule adopted by the Commission, which would state with precision when particular requirements do and do not apply to particular situations, this Guidance is a statement of the Commission's general policy regarding cross-border swap activities and allows for flexibility in application to various situations."⁶

⁵ See CFTC No-Action Letter 13-71, *No-Action Relief: Certain Transaction-Level Requirements for Non-U.S. Swap Dealers* (Nov. 26, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/13-71.pdf>; see also CFTC No-Action Letter 14-01, *Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers* (Jan. 3, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-01.pdf>.

⁶ *Interpretive Guidance* at 45,297.

Thus, the Interpretive Guidance has limited binding effect on the Commission. Yet, market participants are expected to rely on it to implement applicable compliance measures as if it had the legal force of a rule. While the Working Group understands why the Commission would seek to retain some flexibility with respect to its application of its cross-border jurisdiction, the lack of certainty and absence of clear direction inherent in the use of guidance, rather than a rule, has left many market participants uncertain as to their compliance obligations under the CFTC's various rules.

Second, substantive points should be fully vetted and clearly laid out in text rather than appearing in a less granular way in a footnote. If footnote 513 was intended to stand for the proposition that Covered Transactions are subject to the CFTC's Transaction Level Requirements, that concept was not discussed in a way that would make the point clear to market participants. The application of the CFTC's Transaction Level Requirements to Covered Transactions has important associated consequences and places significant compliance burdens on certain market participants. To provide certainty to the market, important concepts should be discussed clearly and at length – not obliquely in a footnote.

Third, market participants should have adequate time to implement significant changes to law. The issuance of Staff Advisory 13-69 and its immediate effectiveness introduced further regulatory uncertainty into the swaps market. Guidance as significant as Staff Advisory 13-69 should be issued only after market participants have had a proper opportunity to provide comment to the Commission. As such, the Working Group commends the Commission for issuing the Request for Comment.

The Working Group appreciates this opportunity to provide comments on the Commission's approach to the cross-border application of its regulations and respectfully requests that the Commission consider the comments set forth herein.

If you have any questions, please contact the undersigned.

Respectfully submitted,

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Working Group*