



AIMA

167 Fleet Street, London EC4A
2EA, UK
+44 (0)20 7822 8380
info@aima.org

aima.org

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street N.W.
Washington, DC 20581

16 December 2016

Dear Secretary Kirkpatrick,

Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants [RIN 3038-AE54] – AIMA response

The Alternative Investment Management Association¹ (“AIMA”; “we”) welcomes the opportunity to provide comments to the U.S. Commodity Futures Trading Commission (the “CFTC”) on its proposed rule titled *Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants* (the “Proposed Cross-Border Rule”).²

AIMA’s hedge fund manager members are active participants in the global over-the-counter (“OTC”) derivatives market and have a strong interest in the development of a robust global regulatory framework based on consistency of national or regional rules and based on avoiding duplication of requirements for participants who operate on a cross-border basis.

¹ AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,600 corporate members in over 50 countries. AIMA works closely with its members to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes, and sound practice guides. Providing an extensive global network for its members, AIMA’s primary membership is drawn from the alternative investment industry whose managers pursue a wide range of sophisticated asset management strategies. AIMA’s manager members collectively manage more than \$1.5 trillion in assets. AIMA is committed to developing industry skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the industry’s first and only specialised educational standard for alternative investment specialists. For further information, please visit AIMA’s website, www.aima.org.

² Proposed Rule, *Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants*, Commodity Futures Trading Commission, 81 FR 71946 (18 October 2016).



We have long expressed our concerns to policymakers in both the U.S. and E.U. that their respective rules were being developed and applied in a manner that would subject some of our members to duplicative and even conflicting regulatory requirements on account of their cross-border activities.

In particular, we argued that the definition of U.S. Person as set out in the CFTC's Final Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations³ ("CFTC's Cross-Border Final Guidance") could prove problematic for funds managed by investment managers that are authorized in the E.U. under the Alternative Investment Fund Managers Directive (AIFMD).⁴ Such funds fall within the definition of Financial Counterparty under the European Market Infrastructure Regulation⁵ (EMIR) and are therefore subject to European rules on clearing, margining and risk mitigation. To the extent that those funds also have a majority of U.S. investors, then they would also be caught by the following limb of the CFTC's Cross-Border Final Guidance, leading to overlap – and even conflict – with the requirements of EMIR.

(vi) any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons;

We would argue that the fact of a fund having a majority of U.S. Person investors is not a sufficient indication of U.S. nexus for the purposes of Dodd-Frank. Indeed, in the context of mandatory clearing, U.S. jurisdiction cannot be justified on the basis of investor protection, given that the risk of a European CCP failing is no more pronounced than the risk of U.S. CCP failing (particularly given that many CCPs will be dually registered).

We therefore welcome the fact that the Proposed Cross-Border Rule does not incorporate this limb within the definition of U.S. Person. We believe that this greatly advances the goal of a more coherent global regulatory framework for OTC derivatives, thereby contributing to safer, more efficient OTC markets. We strongly encourage the CFTC to adopt the proposed changes to the U.S. Person definition in its final rulemaking on this topic.

³ Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292 (26 July 2013).

⁴ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010. Available online at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0061&from=EN>.

⁵ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. Available online at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=EN>.



While we support the CFTC's approach to the U.S. Person definition, we believe that other aspects of the Proposed Cross-Border Rule should be reconsidered. For example, we share the concerns expressed by other industry bodies that the concept of Foreign Consolidated Subsidiary ("FCS") will lead to an overly expansive application of U.S. regulatory requirements, creating possible regulatory conflicts and undermining the potential for constructive reciprocal agreements on cross-border recognition with other regulatory authorities outside of the U.S.. The FCS construct could also lead to increased market fragmentation, as non-U.S. persons with no U.S. nexus would be likely to avoid transacting with FCSs, ultimately leading to less efficient pricing in global swaps markets and thereby harming the end users who rely on those instruments for hedging purposes. We encourage the CFTC to reconsider its approach to FCSs with a view to avoiding this regulatory overreach.

In conclusion, we very much welcome the opportunity to comment on the CFTC's Proposed Cross-Border Rule and appreciate the considerable efforts that the CFTC has made to address the concerns that we have identified in our previous submissions on this topic. Please don't hesitate to contact Adam Jacobs-Dean (ajacobs-dean@aima.org) if you have any questions regarding this submission.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "J. Król", is written over a light blue circular watermark or stamp.

Jiří Król
Deputy CEO
Global Head of Government Affairs
AIMA