December 16, 2016

Submitted via http://www.cftc.gov

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

Re: Comments on Proposed Rules on the Application of Certain Swap Provisions of the Commodity Exchange Act in Cross-Border Transactions – RIN # 3038-AE54

Ladies and Gentlemen:

This letter is submitted by Custom House USA, LLC and Western Union Business Solutions (USA), LLC, on behalf of themselves and their affiliates in response to the request for public comment set forth in the Commodity Futures Trading Commission's (the "Commission") October 18, 2016 notice of proposed rulemaking titled "Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants" (the "Proposed Rules"). We commend the Commission and Commission staff for continuing to implement Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank," or "Title VII")[1] in a manner that strives to improve the safety and soundness of the U.S. financial markets through the regulation of the over-the-counter swap market, while remaining sensitive to the costs such regulatory efforts impose on market participants. In particular, we commend the Commission for its efforts to consider the perspectives of all market participants and members of the public as it evaluates the applicability of Section 2(i) of the Commodity Exchange Act (the "CEA") to the *de minimis* exception from swap dealer registration,[2] which is a key component of the Commission's swap market regulation.

About Western Union

The Western Union Company (together with its subsidiaries, "Western Union") is a leading global provider of money transfer, currency exchange and international payment services. Western Union provides currency exchange and international payment services for business customers through Western Union's business solutions subsidiaries under the trade name "Western Union Business Solutions" or "WUBS." WUBS conducts its business through direct

[1] Pub. L. 111-203 (2010).

[2] *See* Commission Regulation 1.3(ggg)(4).

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and indirect wholly-owned subsidiaries that are incorporated or authorized to do business in the local jurisdiction (or region) of their respective customers.[3] To help customers manage the risks attendant in making and receiving payments in foreign currencies associated with their business needs, WUBS offers foreign exchange products, including swaps, to customers. Each WUBS entity that enters into a derivative transaction with a customer in turn typically hedges such transaction with a U.S. and/or non-U.S. hub entity via inter-affiliate transactions, certain of which may be swaps. These hub entities may then enter into foreign exchange transactions, including swaps, with third-party financial institutions in an effort to hedge WUBS' foreign exchange rate risk. As such, WUBS is both a provider of swaps to its business customers, and an end-user of the swaps markets for hedging purposes. WUBS therefore has a deep interest in the Commission's swap dealer registration regime, both as applied to WUBS itself and as a participant in the broader regulated swaps markets. We provide certain comments below in order to assist the Commission in improving and refining the Proposed Rules.

Comments

Expansion of the Foreign Consolidated Subsidiary Definition to Swap Dealer Registration has a Disproportionate Impact on Non-Registrants and should be Distinguished from Margin Requirements

We understand that the Commission believes it is following what is now a well-worn path in proposing the Foreign Consolidated Subsidiary ("FCS") definition that is included in the Proposed Rules, because effectively the same definition has been finalized with respect to the application of the Commission's uncleared swaps margin rules. However, we believe fundamental differences between swap dealer registration and margin for uncleared swaps warrant different approaches with respect to the FCS concept. While reliance on the FCS concept for determining application of the Commission's margin requirements may be appropriate, reliance on the same concept for determining which entities must register with the CFTC as swap dealers in the first instance represents, in our view, an unwarranted expansion of the Title VII swaps regime beyond U.S. borders. The Commission's margin requirements only apply where one or more of the counterparties to an uncleared swap is a registered swap dealer or major swap participant. That means any entity that becomes subject to margin requirements has already opted into the U.S. regulatory regime by registering as a swap dealer and by structuring its business in a manner that requires such registration. In other words, the FCS concept currently does not serve a "gating" purpose for Commission jurisdiction; it merely determines the extent to which the Commission's swap regulations apply to those entities that are already subject to the Commission's jurisdiction. With respect to the Proposed Rules, however, the Commission is dealing not with how the rules will apply to those entities over which it has jurisdiction, but is instead proposing to assert jurisdiction over an entirely new group of entities. We do not think the Commission should assume that the cross-border approach taken with respect to uncleared swaps margin should simply be applied to the swap dealer registration requirement in an effort to achieve consistency. Where the impact of the FCS concept in the context of margin requirements may be incremental to a swap dealer currently operating in anticipation of such requirements, the impact of implementing the same concept to swap dealer registration is substantial to any organization not currently subject to

[3] WUBS operating entities currently offer derivatives to clients in the United States, the European Union, Switzerland, Canada, Australia, New Zealand, Hong Kong, Singapore and Malta.

a registration requirement based on the Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (the "Cross-Border Guidance")[4].

One alternative would be to limit the application of the FCS definition to only those entities that are part of an affiliated group that includes at least one U.S. entity that is a registered swap dealer. Doing so would more accurately calibrate the FCS definition to only those entities capable of transmitting systemic risk to the U.S. financial system, without unduly burdening other organizations. Those organizations that already include at least one U.S. registered swap dealer need not take extraordinary measures to register an additional foreign affiliate as a swap dealer, as much of the compliance infrastructure will already be in place. By comparison, an organization newly thrust into the U.S. swap dealer regulatory regime due to the activities of its FCS affiliates would have substantial new compliance obligations. Further, such an entity may have extremely limited (or no) swap dealing activity in the United States. In the case of WUBS, the Proposed Rules in their current form could subject a WUBS FCS to registration, even though (a) neither it nor ***any*** of its affiliates has a significant level of swap dealing activity in the United States, and (b) the FCS may already be subject to extensive regulation in its home jurisdiction. We do not believe this result serves a public interest and it does not further the policy goal of Dodd-Frank of limiting risk to the U.S. financial system.

International Comity and Unfair Competition

We believe capturing swap dealing by FCSs with no nexus to the United States beyond merely being ultimately owned by, and consolidated with, a U.S. entity represents a significant and unwarranted expansion into the internal legal and regulatory affairs of other countries and would be inconsistent with principles of international comity. In doing so, the Commission risks triggering reciprocal actions by foreign regulators that would substantially complicate both U.S. and foreign regulators' ability to adequately oversee their local markets. The Commission should defer to the local regulatory authority that has jurisdiction over the entity organized and operating in the local jurisdiction. In addition, FCSs that are required to incur the costs of swap dealer registration and compliance will be subject to an unfair competitive disadvantage as compared to other non-US entities that are not required to register as swap dealers and are only subject to local compliance obligations. For example, an Australian FCS with a U.S. ultimate parent could be required to register as a swap dealer in order to engage in swap dealing activities in Australia, while a second Australian entity with a Japanese ultimate parent could engage in identical activities, but without being required to register with the Commission in any capacity. We see no justification for putting U.S.-owned foreign entities at such a significant competitive disadvantage. The fact that an FCS has an ultimate U.S. parent does not, in our view, provide sufficient grounds for the Commission to create an unfair playing field with respect to business conducted outside of the United States.

The Commission's Analysis does not Address the Potential Impact of the Proposed Rules on Organizations in which there is no Registered Swap Dealer

We believe the Commission's analysis with respect to the number of potential new registrants that would result from adopting the new FCS definition may be based on overly

[4] 78 Fed. Reg. 45292 (July 26, 2013).

simplistic assumptions about the universe of would-be registrants that could be impacted by the Proposed Rules. The Commission estimates that only fourteen FCSs would be required to register if the Commission adopts the Proposed Rules as drafted. However, this is based on swap data from inter-affiliate swaps entered into between *existing swap dealers* and their affiliates. While fourteen might be a valid estimate of the number of new swap dealer-affiliated FCSs that may be required to register, the calculation disregards entirely new swap dealer registrants that are not affiliated with a currently-registered swap dealer. For example, an organization currently may be engaged in *de minimis* swap dealing activity, determined consistent with the Commission's Cross-Border Guidance, but, if required to count dealing swaps of its FCS affiliates with non-US counterparties as per the Proposed Rules, could be required to register one or more entities as a swap dealer. The Commission has provided no information about how many such entities may be required to register, nor has it provided a cost/benefit analysis with respect to the potential burden of registration on such entities. In addition, as the Commission has indicated publically that it is severely under-resourced, the Proposed Rules' expansion of the universe of swap dealer registrants would exacerbate the resource strain. The Commission may have greatly underestimated the adverse impact of adopting the proposed FCS definition as it relates to the *de minimis* exception from swap dealer registration. We believe that, if the Commission does determine to adopt the Proposed Rules, the Commission should first conduct further cost/benefit analysis to ensure that it is not creating an undue expansion of the swap dealer registration regime that far exceeds any supervisory benefits of such expansion.

The Commission Should Finalize its Approach to the Swap Dealer De Minimis Threshold Before Adopting New Rules Addressing Cross-Border Issues

We request that the Commission wait to take final action on the Proposed Rules until after the Commission has made a final and permanent determination as to the level and structure of the swap dealer *de minimis* threshold. In its recent order delaying the automatic lowering of the *de minimis* threshold to December 31, 2018, the Commission stated that it needed more time to evaluate the relevant data before making a final decision. We respect and support that delay and we understand the substantial data challenges faced by the Commission and Commission staff in making a determination of where to set the permanent swap dealer *de minimis* threshold. However, until the Commission takes final action, businesses like WUBS will be in a difficult position with respect to long-term business planning. A significant change to the Commission's approach to the cross-border application of the *de minimis* threshold (as compared to the approach taken under the Cross-Border Guidance) during a period in which the *de minimis* threshold level itself is uncertain would compound that difficulty. Moreover, adoption of the Proposed Rules, in their current form, prior to finalizing the *de minimis* threshold could lead to an entity being required to register as a swap dealer in the short-term, but ultimately not required to remain registered over the long-term. Any decision by a market participant about whether to register as a swap dealer should be informed by an unambiguous and transparent understanding of the long-term regulatory requirements to avoid market participants incurring the undue cost of moving in and out of registration.

Implementation Timing

Because the Proposed Rules would represent a broad expansion of the scope of the Commission's swap dealer registration jurisdiction, we request that, if the Commission determines

to adopt the Proposed Rules substantially as proposed, the Commission provide a sufficiently long compliance period. We believe that this compliance timeframe should be significantly longer than that used to implement the Commission's rules on margin requirements for uncleared swaps, which did not expand the Commission's registration jurisdiction, but merely subjected those parties already subject to Commission jurisdiction to specific compliance obligations that market participants knew were in the process of being finalized. Such an extended compliance timeframe would be particularly necessary given that many non-U.S. entities may become subject to their own domestic regulatory requirements in the coming years as the global implementation of the G20 derivatives reforms continues. We request that the Commission provide at a least a 36 month period between publishing final rules and requiring compliance with such rules. This should provide sufficient time for compliance without causing unnecessary disruption in the markets.

WUBS appreciates the opportunity to comment on the Proposed Rules. We would be pleased to provide the Commission with any additional information that might be useful in determining the final form of the rulemaking.

* * *

Very truly yours,

Cynthia G. Cross
VP & Associate General Counsel

CC: Nathan A. Howell, Sidley Austin LLP