



HSBC Bank USA, N.A.
452 Fifth Avenue
New York
NY 10018

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

Re: Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, RIN 3038-AE54 (the “Proposed Rules”)¹

Secretary Kirkpatrick:

HSBC Bank USA, N.A. (“**HBUS**”) on behalf of itself and its affiliates worldwide (collectively, “**HSBC**”) welcomes the opportunity to provide the Commodity Futures Trading Commission (the “**Commission**”) with comments on the Proposed Rules.

Our comments focus on steps that we believe the Commission should take to avoid disproportionate, and likely unintended, adverse effects on globally active firms that operate through multiple subsidiaries, rather than local branches of a single bank. Our recommendations generally supplement those made by the Institute of International Bankers and the Securities Industry and Financial Markets Association, whose joint comment letter we support. We are also writing separately, however, because we believe that there are significant additional implications of the Proposed Rules for HSBC and other firms with similar operating structures and that these bear additional consideration by the Commission.

I. Discussion

Our concerns primarily relate to the new requirement in the Proposed Rules that a non-U.S. person, which is neither a foreign consolidated subsidiary (“**FCS**”) nor a U.S.-guaranteed entity, (an “**Other Non-U.S. Person**”) count swap dealing transactions with FCSs, U.S.-guaranteed entities that are registered as swap dealers (or affiliated with a registered swap dealer) or whose U.S. guarantor is a non-financial entity (“**U.S.-Guaranteed Entities**”), and non-U.S. branches of U.S. swap dealers towards the Other Non-U.S. Person’s aggregate, group-wide swap dealer *de*

¹ 81 Fed. Reg. 71,946 (October 18, 2016).

minimis threshold.² The costs and burdens of this proposal would have a disproportionately adverse effect on firms, such as HSBC, that transact with FCSs, U.S.-Guaranteed Entities, and non-U.S. branches of U.S. swap dealers through multiple locally organized and regulated subsidiaries. In particular, the Proposed Rules will likely create undesirable obstacles to these firms' ability to provide effective banking and hedging services to customers globally, leading to increased concentration and less competition in the market to service FCSs and U.S.-Guaranteed Entities – including many U.S.-headquartered commercial end users – and non-U.S. branches of U.S. swap dealers. In contrast, firms that conduct their non-U.S. swap dealing activity with FCSs, U.S.-Guaranteed Entities, and non-U.S. branches of U.S. swap dealers through a branch network will generally not need to modify their operations to the same extent to comply with the Proposed Rules.

A. The Proposed Rules do not take into account non-U.S. firms that operate through subsidiary structures

In support of expanding the types of swap dealing activity of an Other Non-U.S. Person subject to the *de minimis* threshold, the Commission notes in the Proposed Rules that “[f]inancial groups that are active in the swap market typically operate in multiple market centers and carry out swap activity with counterparties around the world using a number of different operational structures.”³ However, the only examples of such financial groups that the Commission identifies in the Proposed Rules are financial groups that have a U.S. ultimate parent. In addition, the Commission seems to have assumed that financial groups' swap dealing activity is only traded through and booked into a limited number of legal entities that would potentially need to register as swap dealers.

The Commission's analysis of the Proposed Rules, including its assessment of their potential costs and benefits, does not separately consider their significant additional impact on financial groups, such as HSBC, that utilize a subsidiary structure where the group's swap dealing activity is traded through and booked across several different legal entities that are organized, managed, and regulated locally. Moreover, the significant additional costs imposed by the Proposed Rules on financial groups that utilize a subsidiary structure do not justify the incremental benefits that the Commission identifies the Proposed Rules might provide in protecting against the risks that an Other Non-U.S. Person's swap dealing activity with FCSs, U.S.-Guaranteed Entities, and non-U.S. branches of U.S. swap dealers may pose to the U.S. financial system.

B. The Proposed Rules would affect scores of subsidiaries doing no business in the United States

By way of background, HSBC has two entities that are currently provisionally registered as swap dealers – HBUS in the United States and HSBC Bank plc in the United Kingdom. However, HSBC provides risk management products, including swaps, to its local customers in

² *Id.* at 71,972.

³ *Id.* at 71,947.

approximately 60 different jurisdictions. This activity is conducted through an equivalent number of locally-incorporated, locally-managed, locally-regulated, and separately-capitalized banking subsidiaries⁴ of an ultimate non-U.S. parent, HSBC Holdings plc, rather than out of local branches. These HSBC subsidiaries are not guaranteed or owned by HSBC's U.S. entities. As separate legal entities, each such subsidiary would need to individually register if its swap dealing activity, and that of its unregistered affiliates, exceeded the *de minimis* threshold solely as a result of their non-U.S. swap dealing activity with FCSs, U.S.-Guaranteed Entities, and non-U.S. branches of U.S. swap dealers. Consequently, the number of HSBC entities potentially affected by the Proposed Rules would be many times that of financial groups that operate through branch network structures.

C. Registering all of these subsidiaries would impose disproportionate burdens and stretch limited Commission resources

Registering a large number of these entities would involve significant costs and legal and logistical challenges – both for the relevant entities and for the Commission in conducting oversight of them as registrants. Even if these entities could rely on substituted compliance to the fullest extent permissible under Commission regulations and guidance, the registration process itself (including fingerprinting, U.S.-style background checks for principals, and preparation and submission of 4s documentation) can create challenges under local foreign laws and put significant strains on limited group-wide U.S. legal and compliance expertise. Moreover, the Commission would be faced with the need to supervise entities located all over the world, in different time zones and where business is rarely conducted in English, even though those entities do no business in the United States.

In contrast, firms that rely more heavily on a branch structure are able to have a similar global footprint by conducting their swap dealing activity across multiple branches of a limited number of legal entities that are incorporated or located in key jurisdictions. Not only will these firms face fewer compliance costs by not needing to separately register entities in each jurisdiction in which they conduct swap dealing activity, but they will also be able to benefit from comparability determinations that have already been issued, as well as future determinations that will likely be prioritized. Moreover, significantly expanding its regulation of firms that utilize a subsidiary structure will require the Commission to analyze the comparability of laws in dozens of additional jurisdictions or else force those subsidiaries to navigate the duplicative application of U.S. and local law.⁵

⁴ It is important to clarify that the use of a subsidiary structure by many of these firms, including HSBC, predates passage of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010), and the rules adopted thereunder, and has not resulted from a desire of these firms to evade regulatory requirements or achieve specific regulatory outcomes (*e.g.*, avoidance of registration).

⁵ Firms that utilize a subsidiary structure will be disparately impacted by the Proposed Rules because they will need to wait for the Commission to review and issue comparability determinations for each jurisdiction in which they must register an entity as a swap dealer. In contrast, firms that utilize a branch structure need only register entities in a couple of jurisdictions, which generally tend to be ones that already benefit from the existence of comparability determinations. Similarly, it would require a tremendous effort on the part of the Commission to review

D. FCSs, U.S.-Guaranteed Entities, and non-U.S. branches of U.S. swap dealers would face reduced hedging, banking, and investment opportunities

Monitoring the use of an aggregate, group-wide *de minimis* threshold across all non-U.S. subsidiaries will be a significant challenge if they do not register, and may lead to certain subsidiaries ceasing swap dealing activity with FCSs, U.S.-Guaranteed Entities, and non-U.S. branches of U.S. swap dealers. Consequently there is the potential that the Proposed Rules will limit non-U.S. subsidiaries' ability to participate in, and their counterparties access to, key liquidity pools.

It would also not be practical for local FCS and U.S.-Guaranteed Entity customers to move their relationships to HSBC's existing provisionally registered swap dealers because swap trading activity is just a component of the much broader commercial or investment banking relationships that those customers have with their local HSBC entity. Customers also prefer dealing with local HSBC entities, rather than one in a different jurisdiction, for a number of reasons. These include having a single point of contact for all HSBC relationships, optimization of collateral arrangements, the ability to be governed by local, rather than foreign law, and regulatory requirements (*e.g.*, certain products in certain jurisdictions can only be entered into by a client with a locally incorporated or licensed entity).

II. Recommendations

In light of the foregoing considerations, we do not believe that the Commission should modify its swap dealer *de minimis* calculation to require an Other Non-U.S. Person to count swap dealing transactions with FCSs, U.S.-Guaranteed Entities, and non-U.S. branches of U.S. swap dealers towards the Other Non-U.S. Person's aggregate, group-wide swap dealer *de minimis* threshold.

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comparability determination requests for all of the jurisdictions in which firms that utilize a subsidiary structure will need to register individual entities, especially where such comparability determinations may only benefit a single potential registrant in certain of these jurisdictions. Even if the Commission desires to issue comparability determinations for each of these jurisdictions, this would lead to an inherently complex compliance framework that would require each of these individual entities of the same financial group to approach implementation and compliance with the same regulatory regime differently, due to the variations in local laws for each jurisdiction for which each of these determinations would invariably need to account.



Thank you for your attention to HSBC's comments on the Proposed Rules. We would welcome the opportunity to provide additional information that the Commission may consider helpful.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Mark R. Hutchinson". The signature is fluid and cursive, with a large, stylized initial "M" and "H".

Mark R. Hutchinson
Managing Director & General Counsel, Global Banking & Markets - Americas
General Counsel, US Wholesale Banking
HSBC Securities (USA) Inc., HSBC Bank USA, N.A.