



**By Commission Website**

December 19, 2016

Mr. Christopher J. Kirkpatrick  
Secretary of the Commission  
Commodity Futures Trading Commission  
1155 21<sup>st</sup> Street NW  
Washington DC 20581

**Re: RIN 3038-AE54: Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 Fed. Reg. 71946 (October 18, 2016)**

Dear Mr. Kirkpatrick:

The Futures Industry Association (“**FIA**”)<sup>1</sup> is pleased to submit this letter in response to the Commodity Futures Trading Commission’s (“**Commission’s**”) proposed rules regarding the cross-border application of the registration thresholds and external business conduct standards applicable to swap dealers and major swap participants.<sup>2</sup> FIA representatives have had the opportunity to review the letter that the Securities Industry and Financial Markets Association (“**SIFMA**”) and Institute of International Bankers (“**IIB**”) have filed with the Commission.<sup>3</sup> We strongly support the views expressed therein and commend them to the Commission for

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<sup>1</sup> FIA is the leading trade organization for the global futures, options and over-the-counter cleared derivatives markets. Its mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system and promote high standards of professional conduct. FIA’s core constituency consists of futures commission merchants (“**FCMs**”), and the primary focus of the association is the global use of exchanges, trading systems and clearing organizations for derivatives transactions. FIA’s members also include leading derivatives exchanges and clearing organizations from more than 20 countries.

FIA’s FCM members serve as the primary clearing members of US futures exchanges. They handle more than 90 percent of the customer funds held for trading on the exchanges and provide the majority of the funds that support the clearing organizations of the exchanges. In providing these clearing services, they commit a substantial amount of their own capital to guarantee customer transactions.

<sup>2</sup> 81 Fed. Reg. 71946 (Oct. 18, 2016).

<sup>3</sup> Letter from Kenneth E. Benson, Jr., President and Chief Executive Officer, SIFMA, and Sarah A. Miller, Chief Executive Officer, IIB, to Christopher J. Kirkpatrick, Secretary of the Commission, dated December 19, 2016.

its consideration. Our letter will focus on the scope of the proposed definition of a US Person, an issue of particular importance to FIA.<sup>4</sup>

### **Scope of the US Person Definition**

The Commission has proposed to amend and codify the interpretation of a US Person that the Commission adopted in connection with its interpretive guidance and policy statement regarding compliance with certain swap regulations (“**Guidance**”).<sup>5</sup> In adopting this Guidance, the Commission, at the request of FIA and others, confirmed that it would “apply its interpretation of the term “US person” only to swaps regulations promulgated under Title VII, unless provided otherwise in any particular regulation.”<sup>6</sup> The Commission added that it “does not intend that this Guidance address how the term “person” or “US person” should be interpreted in connection with any other [Commodity Exchange Act (“**CEA**”)] provisions or Commission regulations promulgated thereunder.”

In the Federal Register release accompanying the proposed rules, the Commission implies that the scope of the definition of a US Person will be similarly limited. For example, the Commission states that the rules “define [ ] key terms for purposes of applying the [CEA’s] swap provisions to cross-border transactions” and confirms that the proposed rules are not intended to “address the cross-border application of any substantive Dodd-Frank requirements beyond the SD/MSP registration thresholds and external business conduct standards.”<sup>7</sup> Nonetheless, the Commission also states elsewhere in the Federal Register release that it “expects to apply the definitions and classification scheme for market participants resulting from the proposed rule in future cross-border rulemakings.”<sup>8</sup> Consequently, the potential scope of the proposed US Person definition is unclear.

In light of the foregoing, we encourage the Commission to remove any regulatory uncertainty and, once again, make clear that the scope of the proposed definition of a US Person will not extend to those provisions of the CEA governing the activities of FCMs with respect to both (i) exchange-traded futures, whether executed on a designated contract market or a foreign board of trade, or (ii) cleared swaps.

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<sup>4</sup> Proposed Rule 1.3(aaaaa)(4), 81 Fed. Reg. 71946, 71973 (Oct. 18, 2016).

<sup>5</sup> 78 Fed. Reg. 45292 (July 23, 2013).

<sup>6</sup> *Id.* at 45316. In their separate comment letters on the Guidance, FIA and SIFMA had argued that the definition of a US person should not extend to those provisions of the CEA governing the activities of FCMs with respect to both (i) exchange-traded futures, whether executed on a designated contract market or a foreign board of trade, and (ii) cleared swaps. Rather, “consistent with existing market practice, only those persons located in the United States should be required to maintain accounts with a US FCM.” *See* Letter from Walt L. Lukken, President and CEO, FIA, to David A. Stawick, Secretary of the Commission, dated Aug. 27, 2012, p. 2.

<sup>7</sup> 81 Fed. Reg. at 71946-47 (Oct. 18, 2016).

<sup>8</sup> *Id.* at 71964.

As we noted in our August 2012 comment letter on the proposed Guidance, the Commission historically has taken the position that an intermediary is required to be registered with the Commission in an appropriate capacity if either the intermediary is located in the US or the intermediary's customer (or potential customer) is located in the US. This position appears to have been adopted first in 1976 in a Commission staff letter, in which the Office of the General Counsel stated that a pool operator would not be required to be registered with the Commission as a commodity pool operator, *provided*: (i) the pool operator was located outside of the US; (ii) the operator confined its activities to areas outside of the US; and (iii) none of the pools had funds or capital contributed from US sources.<sup>9</sup>

The Commission formally adopted this position a few years later in amending its registration rules, explaining:

The Commission believes that, given this agency's limited resources, it is appropriate at this time to focus its customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users of the futures markets and that the protection of foreign customers of firms confining their activities to areas outside this country, its territories, and possessions may best be for local authorities in such areas.<sup>10</sup>

The Commission's foreign futures and options rules adopt this same approach, defining a "foreign futures or foreign options customer" to mean "any person located in the United States, its territories or possessions who trades in foreign futures or foreign options."<sup>11</sup>

The Commission reaffirmed this policy in amending Part 3 of its rules to exempt from registration as an FCM a foreign broker<sup>12</sup> that "submits any commodity interest transactions executed bilaterally, on or subject to the rules of a designated contract market, or on or subject to the rules of a swap execution facility, for clearing on an omnibus basis through an FCM

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<sup>9</sup> Commission Staff Letter 76-21 (Aug. 15, 1976). This position frequently has been cited with approval in subsequent staff letters, including: Commission Interpretative Letter No. 96-79 (Oct. 7, 1996); Commission Interpretative Letter No. 97-03 (Jan. 15, 1997); Commission Interpretative Letter No. 98-80 (Nov. 25, 1998); Commission Staff Letter No. 00-95 (Oct. 3, 2000); and Commission Staff Letter No. 01-62 (June 13, 2001).

<sup>10</sup> 45 Fed. Reg. 18356 (Mar. 20, 1980); *see also* 48 Fed. Reg. 35248 (Aug. 3, 1983).

<sup>11</sup> Commission Rule 30.1(c), 17 C.F.R. § 30.1(c).

<sup>12</sup> As defined at Commission Rule 1.3(xx), a "foreign broker" is:

any person located outside the United States, its territories or possessions who is engaged in soliciting or in accepting orders only from persons located outside the United States, its territories or possessions for the purchase or sale of any commodity interest transaction on or subject to the rules of any designated contract market or swap execution facility and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

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registered in accordance with section 4d of the Act.”<sup>13</sup> In proposing this amendment, the Commission noted that its purpose is to “create uniformity in treatment of commodity interest transactions that do not involve a US customer, regardless of whether the transaction is made on a designated contract market or an [sic] SEF.”<sup>14</sup>

FCMs and other Commission registrants have been conducting business consistent with this policy for 40 years. Their operations and, in many cases, the operations of their non-US affiliates have been based on their understanding of the Commission’s registration requirements. Altering this policy by applying a different and expanded definition of a US person for this purpose would be tremendously disruptive to the market and impose a significant operational burden on registrants and their non-US affiliates.

Further, maintaining a different US person standard is consistent with the different regulatory purposes underlying the registration of FCMs and other “traditional” registrants, on the one hand, and swap dealers and major swap participants, on the other. Registration of FCMs and other registrants is intended primarily as a means of assuring customer protection by assuring that registrants meet certain minimum qualifications. In contrast, registration of swap dealers and major swap participants is intended to reduce systemic risk and enhance market transparency.

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FIA appreciates the opportunity to submit this comment letter for the Commission’s consideration. If the Commission has any questions regarding the matters discussed above, please contact Allison P. Lurton, FIA’s Senior Vice President and General Counsel, at (202) 466-5460 or [alurton@fia.org](mailto:alurton@fia.org).

Sincerely,



Walt L. Lukken  
President and CEO

cc: Timothy Massad, Chairman  
Sharon Y. Bowen, Commissioner  
J. Christopher Giancarlo, Commissioner

Paul Schlichting, Assistant General Counsel  
Laura B. Badian, Assistant General Counsel  
Elise Bruntel, Counsel

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<sup>13</sup> Amendment to Commission Rule 3.10(c)(2). 77 Fed. Reg. 51898 (Aug. 28, 2012). The Commission recently proposed to amend Rule 3.10(c)(2) to remove the requirement that commodity interest transactions must be submitted for clearing through a registered FCM. 81 Fed. Reg. 51824 (Aug. 5, 2016).

<sup>14</sup> Registration of Intermediaries, 76 Fed. Reg. 12888, 12889 (Mar. 9, 2012).