



moving money for better

September 25, 2017

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 Project KISS Request for Information – RIN # 3038-AE55

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") May 9, 2017 request for information regarding "Project KISS" ("Project KISS").¹ We commend the Commission for its efforts to consider the perspectives of all market participants and members of the public as it evaluates how the Commission's existing rules, regulations, or practices could be applied in a simpler, less burdensome and less costly manner as part of Project KISS.

Please note that this letter addresses issues regarding both registration and reporting. The letter is being submitted to the Commission under the "registration" subject area to avoid duplication.

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 and indirect wholly-owned subsidiaries that are incorporated or authorized to do business in the

¹ See CFTC, *Project KISS*, Request for Information, 82 Fed. Reg. 21494 (May 9, 2017), available at: <https://www.gpo.gov/fdsys/pkg/FR-2017-05-09/pdf/2017-09318.pdf> and CFTC, *Project KISS*, Request for Information; Correction, 82 Fed. Reg. 23765 (May 24, 2017), available at: <http://www.cftc.gov/idx/groups/public/@lrfederalregister/documents/file/2017-10622a.pdf>.

local jurisdiction (or region) of their respective customers.² 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 and FX forwards, to customers. Each WUBS entity that enters into a derivative transaction with a customer in turn typically hedges such transaction with a 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.

Comments

Swap Dealer De Minimis Threshold

WUBS believes the scheduled reduction of the swap dealer *de minimis* threshold³ from \$8 billion to \$3 billion is unduly burdensome, as we noted in our comment letter dated January 18, 2016 (the "De Minimis Exception Comment Letter")⁴ submitted in response to the Commission's "Swap Dealer De Minimis Exception Preliminary Report" published on November 18, 2015 (the "De Minimis Report"). Based on the De Minimis Report, a drop in the *de minimis* threshold from \$8 billion to \$3 billion would capture a significant number of market participants, causing them either to be required to register as swap dealers or to reduce swaps-related services to the marketplace, including important hedging and risk-management services. However, the lower threshold would not increase appreciably the notional amount, number of transactions or number of unique counterparties covered by swap dealer registration. Nearly doubling the number of required swap dealer registrants, as estimated in the De Minimis Exception Comment Letter, in order to capture a vanishingly small amount of the presently uncovered swap markets would seem to put an unnecessary strain on the Commission's already limited resources, and it would not appear to represent a sensible ratio of regulatory benefits to regulatory burdens.

Clarification with Respect to Hedging Swaps

WUBS also requests that the Commission clarify ambiguous aspects of the De Minimis Exception that have increased regulatory uncertainty for certain market participants. WUBS believes that the Commission should clarify whether swaps entered into to hedge risks incurred as a result of swap dealing activity themselves constitute swap dealing activity. The Commission has not yet stated whether hedging swaps should be treated as swap dealing activity. The Commission, in fact, suggested that such swaps may not necessarily be viewed as swap

² 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.

³ See Commission Regulation 1.3(ggg)(4) (the "De Minimis Exception").

⁴ De Minimis Exception Comment Letter from Custom House USA, LLC and Western Union Business Solutions (USA), LLC to the Commission (Jan. 18, 2016), available at: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60593&SearchText>.

dealing activity.⁵ In furtherance of the De Minimis Exception’s policy objective of regulatory certainty, we believe that the Commission or Commission staff should clarify the treatment of such swaps. We believe it most appropriate for the Commission not to treat such swaps as swap dealing activity to align with another of the policy objectives advanced by the De Minimis Exception—to enable entities to engage in small amounts of swap dealing with limited concerns about whether their activities would require registration.

Expansion of the Foreign Consolidated Subsidiary Definition to Swap Dealer Registration

WUBS believes the Commission’s proposed application of the Foreign Consolidated Subsidiary (“FCS”) definition to swap dealer registration is inconsistent with principles of international comity and would create an unfair competitive disadvantage for certain market participants, as we previously noted in our comment letter dated December 16, 2016 (the “FCS Comment Letter”)⁶ submitted in response to the Commission’s 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”). At the time it issued the Proposed Rules, the Commission indicated that it believed it was following what was a well-worn path in proposing the FCS definition that is included in the Proposed Rules, because effectively the same definition had 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 Commission as swap dealers in the first instance represents, in our view, an undue expansion of Dodd-Frank’s 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

⁵ See Cross-Border Guidance, n. 433. In the same footnote in which the SEC stated its view regarding the treatment of security-based swaps entered into to hedge or offset security-based swap dealing activity, the Commission stated as follows: “For purposes of the *de minimis* exception to the swap dealer definition, we [the CFTC] take the view that the relevant question in determining whether swaps count as dealing activity against the *de minimis* thresholds is whether the swaps fall within the swap dealer definition under the statute and the final rules, as further interpreted by this Adopting Release. If hedging or proprietary trading activities did not fall within the definition, including because of the application of CFTC Regulation § 1.3(ggg)(6), they would not count against the *de minimis* thresholds.”

⁶ FCS Comment Letter from Custom House USA, LLC and Western Union Business Solutions (USA), LLC to the Commission (Dec. 16, 2016), available at:

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61051&SearchText=>.

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 are concerned that extending the FCS concept to the swap dealer registration context in an effort to achieve consistency could lead to an unfair and overly burdensome result for certain market participants. Where the impact of the FCS concept in the context of margin requirements may be incrementally burdensome to a registered swap dealer, the impact of implementing the same concept to swap dealer registration is substantial to any organization not already subject to the swap dealer registration requirement.

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-U.S. 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 have serious concerns that this concept puts U.S.-owned foreign entities at 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.

Even if the Commission desires to move forward with the Proposed Rules (which we do not think it should), 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 (see related discussion above). In its 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. 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 level and structure of 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.

Certain Reported Swap Data Elements

WUBS believes that the modification to existing swap data elements and introduction of new swap data elements that reporting parties would be required to report to a swap data repository (“SDR”) would be overly burdensome and expensive for many market participants, who have expended time and resources to establish systems to comply with existing reporting requirements, as we previously noted in our comment letter dated March 1, 2016 (the “Swap Data Comment Letter”)⁷ submitted in response to the Commission’s “Draft Technical Specifications for Certain Swap Data Elements” (the “Request for Comment”) published on December 22, 2015. The Request for Comment describes a number of possible modifications to existing data elements required to be reported to an SDR and a number of new data elements that could be required to be reported to an SDR in the future.

WUBS transacts in higher volumes of FX forwards than swaps. In some cases, the obligation of reporting WUBS swaps and FX forwards with customers falls on WUBS under the Commission’s reporting regulations. WUBS is therefore required to report a large number of FX forwards to a SDR. WUBS is unlike most other reporting parties in that, while certain of WUBS transactions may have high notional values, WUBS tends to enter into a large number of transactions with relatively low notional values. By contrast, we believe most swap dealers enter into a smaller number of trades with comparatively high notional values. As the cost of reporting a small notional trade is comparable to the cost of reporting a large notional trade, WUBS bears an unusually high reporting cost relative to the typical size of each reported transaction.

The implementation of the changes described in the Request for Comment would be extremely costly and time-consuming for WUBS and similarly situated market participants, as it would require development and testing of entirely new algorithms to provide certain of the data elements. For example, while WUBS understands the Commission’s desire to have more transparency into life cycle events, the proposal to require versioning of such events, while it appears simple on its face, will require a massive overhaul of the way in which WUBS and similar market participants currently collect and report their data. WUBS, like many other market participants, has already expended significant time and resources to put in place the systems necessary to comply with the existing reporting requirements. We recognize that changes in the reporting fields may improve the quality of data being collected and that this is a desirable end-result for both the Commission and market participants. However, in light of the difficulties of creating a data reporting system that perfectly incorporates the nuanced aspects of every type of contemplated transaction, the value of adding new or improved data elements should be weighed against the cost of obtaining those data elements.

In addition, WUBS recommends that the Commission and Commission staff work with SDRs to refine the existing data already being collected before requiring the reporting of new data elements altogether. Indeed, at the February 23, 2016 meeting of the Commission’s Technology Advisory Committee, representatives from the four existing SDRs (BSDLR LLC, Chicago Mercantile Exchange Inc., DTCC Data Repository and ICE Trade Vault) each expressed

⁷ Swap Data Comment Letter from Custom House USA, LLC and Western Union Business Solutions (USA), LLC to the Commission (Mar. 1, 2016), *available at*: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60678&SearchText=>.

similar sentiments. The SDRs indicated that the laudable goals of obtaining more accurate and comprehensive information regarding the swaps markets would be better served by improving the quality of the existing data being provided by reporting parties to the SDRs, and by the SDRs to the Commission, rather than requiring reporting parties to report additional or different data elements. We agree with the SDRs in this regard.

WUBS appreciates the opportunity to comment on the Project KISS initiative. We would be pleased to provide the Commission with any additional information that might be useful in facilitating the Commission's review of its rules, regulations and practices.

* * *

Very truly yours,



Cynthia G. Cross
Deputy General Counsel