



August 7, 2018

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 De Minimis Exception to the Swap Dealer Definition – RIN 3038-AE68

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") June 12, 2018 notice of proposed rulemaking titled "De Minimis Exception to the Swap Dealer Definition" (the "Proposed Rules"). We commend the Commission and Commission staff for their efforts to refine the Commission's rules implementing 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 *de minimis* exception from swap dealer registration, 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 and indirect wholly-owned subsidiaries that are incorporated or authorized to do business in the 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, to customers. Each WUBS entity that enters into a derivative transaction with a customer in turn typically

¹ Pub. L. 111-203 (2010).

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.

hedges such transaction with a hub entity via inter-affiliate transactions, certain of which may also 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

\$8 Billion Swap Dealer De Minimis Threshold

We support the Commission's proposal to amend paragraph (4) of the definition of "swap dealer" under the Commission's regulations to set the aggregate gross notional threshold to \$8 billion. As the Commission noted in the preamble to the Proposed Rules³ and as indicated in prior reports prepared by Commission staff,⁴ 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. Significantly increasing the number of required swap dealer registrants in order to capture a vanishingly small amount of the swaps market that is presently uncovered by the swap dealer registration regime would put an unnecessary strain on the Commission's already limited resources, and it would not represent a sensible ratio of regulatory benefit to regulatory burden. Further, the swap dealer registration regime is only one tool in the Commission's regulatory toolkit with respect to the swaps markets. Reporting, recordkeeping and other Commission rules unrelated to swap dealer registration are sufficient to achieve the goals of Title VII with respect to the small amount of the swaps market that does not involve a registered swap dealer.⁵

³ Proposed Rules, 83 FR at 27450-27454.

⁴ See, e.g., Swap Dealer *De Minimis* Exception Final Staff Report (August 15, 2016) at 20.

⁵ While the Proposed Rules do not address 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 "FCS Proposed Rules"), WUBS believes that the FCS Proposed Rules, as they relate to the swap dealer *de minimis* exception, should be considered in conjunction with the Proposed Rules, as the two proposals are inextricably connected for multi-national businesses such as WUBS. 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") submitted in response to the FCS Proposed Rules. While we support setting the gross notional threshold at \$8 billion as indicated above, we remain concerned that multi-national businesses like WUBS will be in a difficult position with respect to long-term business planning without certainty regarding cross-border aggregation requirements with respect to calculating the swap dealer *de minimis* threshold. As such, we believe that the Commission should take this opportunity to also address the FCS Proposed Rules in the context of the swap dealer *de minimis* threshold. For the reasons stated above, we do not believe the FCS concept should be applied to the swap dealer *de minimis* threshold.

Swaps Entered Into to Hedge Financial or Physical Positions

We generally support the Commission's proposal to add a new broader hedging exception to the "swap dealer" definition. We also specifically support the Commission's statement in the preamble to the Proposed Rules that, even under the existing swap dealer definition, swaps that hedge positions that were entered into as part of swap dealing activity would not need to be counted towards a person's *de minimis* threshold calculation if they meet the requirements of the proposed exception.⁶ To this end, we commend the Commission for proposing to include in the swap dealer definition the specific factors that would indicate when a swap is entered into to hedge financial or physical positions and therefore would not need to be counted towards the *de minimis* threshold. Such an approach would help swap market participants know with greater certainty which swaps must be counted towards the *de minimis* threshold.

We do, however, request that the Commission provide additional clarity on the statements in the proposal related to the proposed condition that a person entering into a hedging swap must not (1) be the "price maker" of the hedging swap; (2) receive or collect a bid/ask spread, fee, or commission for entering into the hedging swap; or (3) receive other compensation separate from the contractual terms of the hedging swap in exchange for entering into the hedging swap. While we agree that the presence of one or more of these factors may suggest that the relevant hedging swap is actually part of a profit seeking business, and hence should be viewed as swap dealing activity, we are concerned that the way in which the condition is phrased could inadvertently require certain hedging activity that should not constitute swap dealing activity to be treated as swap dealing activity (*i.e.*, falling outside of the new hedging exclusion), including, as the Commission itself notes, certain swaps that hedge positions that were entered into as part of swap dealing activity.

By way of example, while WUBS is always a "price taker" with respect to swaps it enters into with third party dealers to offset market risk incurred as a result of WUBS' customer-facing transactions, the foreign exchange rates WUBS is able to offer its customers generally is driven by the foreign exchange rates WUBS is able to receive on the back end from its dealer counterparties. The difference between the customer-facing and dealer-facing terms typically is retained by WUBS and is WUBS' source of revenue with respect to this portion of its business. While such difference in terms may be referred to as a "spread," WUBS does not act as a liquidity provider with respect to its dealer-facing swaps nor does it accommodate counterparty demand in the marketplace with respect to such dealer-facing swaps. In addition, WUBS does not collect a bid/ask spread, fee or commission *solely* with respect to its hedging swaps nor does it receive other compensation *solely* with respect to the hedging swaps separate from the contractual terms of such swaps. The spread is inherent in the pricing of WUBS' customer-facing swaps relative to its dealer-facing swaps. We think it is likely that the Commission had something other than these arrangements in mind when it drafted the Proposed Rules, but we believe the Proposed Rules, as drafted, may be ambiguous as to whether the WUBS model would allow WUBS to exclude its hedging swaps pursuant to the newly proposed

⁶ Proposed Rules, 83 FR at 27463 ("The SD Definition Adopting Release also states that, generally, swaps that hedge positions that were entered into as part of swap dealing activity would also not need to be counted towards a person's *de minimis* threshold calculation if they meet the requirements of the proposed exception.").

hedging exception. We request that the Commission clarify in the final rule release that the practices described herein would not preclude reliance on the new hedging exception.

Methodologies for Calculating Notional Amounts

We support the Commission's proposal to add a new paragraph to the "swap dealer" definition providing that the Commission may approve or establish methodologies for calculating notional amounts for purposes of determining whether a person exceeds the *de minimis* threshold.⁷ For the reasons stated by the Commission in the preamble to the Proposed Rules, we also support the delegation by the Commission of authority to make any such determinations, either on its own or by written request, to the Director of the Commission's Division of Swap Dealer and Intermediary Oversight.⁸

Exception for Non-Deliverable Forwards

We agree with the Commission that non-deliverable forwards ("NDFs") are economically and functionally similar to deliverable foreign exchange forwards in that the same net value is transmitted and the market in many respects treats the two as the same functional product. Accordingly, we support the Commission's suggestion that NDFs should be excluded from the calculation of aggregate gross notional amount of swap dealing activity for purposes of the *de minimis* exception. Excepting NDFs would result in a more comparable regulatory treatment for these transactions when compared with physically settled foreign exchange swaps and foreign exchange forwards.

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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,



SVP & Deputy General Counsel
Cynthia G. Cross

CC: Nathan A. Howell, Sidley Austin LLP

⁷ Proposed Rules, 83 FR at 27465.

⁸ Proposed Rules, 83 FR at 27465.