

18 November 2019

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

Re: Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations (RIN 3038-AE87)

ASX Clear (Futures) Pty Ltd (“ASXCF”) welcomes the opportunity to provide its views to the Commodity Futures Trading Commission (“CFTC”) on the CFTC’s Notice of Proposed Rulemaking regarding registration with alternative compliance for non-U.S. derivatives clearing organizations (“NPR”).

Summary

ASXCF supports the CFTC’s efforts to codify a regulatory and supervisory approach based on the recognition of, and the deference to, the home country regulators of non-US Clearinghouses advocated in the NPR. However, ASXCF – which is currently exempted from registration as a DCO with the CFTC - would not be able to use the proposed alternative compliance framework, for the reasons outlined in this submission.

We request that the Commission finalise its supplemental notice of proposed rulemaking (“SNPR”) (RIN3038-AE65) regarding exemptions from DCO registration, which was proposed separately, and under which ASXCF has provided separate comments.

ASXCF also requests that the CFTC creates or extends a part 30-type regime for swaps in addition to proceeding with the SNPR. A part 30-type regime could achieve cost savings and improved customer experience for some U.S. customers, who could access foreign futures markets and exempt DCOs for swaps under an aligned framework and structure, eliminating the need for them to potentially enter into duplicative or new relationships with alternative non-U.S. affiliated clearing members.

Challenges for ASX Clear (Futures) in using the proposed framework

Broadly, ASXCF would not be able to use the proposed alternative compliance framework for due to the following two reasons:

1. Feasibility of maintaining sufficient FCM direct members to support U.S. customer clearing at ASX Clear (Futures).
2. ASXCF’s Client Protection Model is PFMI-compliant, and meets Australian Financial Stability Standards, but is not exactly aligned with U.S. customer protection requirements.

1. Maintaining sufficient FCM direct members to support U.S. customer clearing at ASX Clear (Futures) is not likely to be feasible.

The ASXCF clearing house currently provides central clearing for exchange traded futures and options products (traded via the ASX 24 market), and OTC interest rate swaps. ASX 24 was granted an Order of Registration as a Foreign Board of Trade (“FBOT”) by the CFTC on 15 May 2018. Under the FBOT model, U.S. customers currently access the ASX 24 market (and central clearing of exchange traded futures and options products) by documenting directly with a FCM who in turn is

documented with a non-U.S. clearing member of ASXCF. In many cases, the direct clearing member of ASX Clear (Futures) is a foreign affiliate (i.e. Australian broker dealer entity) of the FCM.

As outlined in the NPR, U.S. customer clearing for OTC swaps would need to occur via entities registered as FCMs with the CFTC. To achieve sufficient protection for U.S. customers under the Client Protection Model of ASXCF – in particular, the opportunity to achieve customer portability in the event of an FCM clearing member’s default, we envisage that multiple FCM clearing members would need to become direct members of ASXCF and offer access to U.S. customers.

Where an FCM already has a non-U.S. affiliate that is a member of ASXCF providing access to exchange-traded futures and options products under the FBOT model, we expect that the cost of onboarding an FCM entity solely to provide OTC swaps clearing services to U.S. customers would be prohibitively expensive. Similarly, registering an additional foreign affiliate (i.e. Australian entity) as an FCM to provide OTC swap access to U.S. customers would be cost prohibitive, and therefore not likely to provide U.S. customers with access to ASXCF’s OTC swaps services.

2. Compliance with customer protection requirements under the CFTC regulations

Notwithstanding that the swap markets are global in nature, the NPR does not address the fundamental issues that limit U.S. customers accessing swap clearing. This is because the NPR still only permits U.S. customers to access swap clearing directly through CFTC-registered FCMs and DCOs, without recognizing the appropriate customer segregation implemented in non-U.S. jurisdictions under the Principles for Financial Market Infrastructure (“PFMIs”).

The ASXCF Client Protection Model is a client protection framework that has been implemented in accordance with the local regulatory framework (Australian Financial Stability Standards) that are consistent with fundamental international standards captured in the Principles for Financial Market Infrastructure (PFMIs).

Under the NPR, non-U.S. clearinghouses must comply with the customer segregation requirements under the CFTC’s regulatory framework, including the treatment of U.S. customer collateral under the U.S. Bankruptcy Code, without any regulatory deference by the CFTC to the regulators in non-U.S. jurisdictions. Moreover, clearing members of non-U.S. clearinghouses must not clear for U.S. customers, unless they are registered with the CFTC as FCMs. These regulatory constraints to U.S. customers accessing swap clearing should be of particular concern in the current environment where there has been an increase in U.S. customers seeking to clear swaps and a decrease in the overall number of FCMs.

ASXCF requests that the Commission prioritises progress of the current SNPR as the most urgent priority, but concurrently, or immediately following the implementation of the SNPR, introduces a part-30 type regime for swaps to provide the greatest flexibility and choice for U.S. customers.

Yours faithfully,

Helen Lofthouse
Executive General Manager, Derivatives & OTC Markets, ASX Limited.