

February 26th, 2020

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

Re: Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants (RIN 3038-AE84)

Dear Mr. Kirkpatrick:

Japan Securities Clearing Corporation (“**JSCC**”) appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (“**Commission**” or “**CFTC**”) concerning its notice of proposed rulemaking on the Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants (the “**NPR**”).

We commend the Commission for its efforts to codify and modify its regulations applicable to cross border swaps. We appreciate the Commission’s understanding that the regulatory framework for swaps should recognize the global nature of the swaps market and the legitimate supervisory interests of foreign regulators in counterparties and transactions with a nexus to their jurisdictions.

We wish to make the following targeted comments concerning the NPR:

- 1) We strongly support the Commission’s proposed amendments to the definition of U.S. Person. The amended definition is clearer, easier to implement and more consistent with the definition adopted by other U.S. regulators. We request that in any release adopting the amended U.S. Person definition, the Commission specify that such amended definition shall also apply to, and supersede the definition referenced in, the CFTC’s Orders of Exemption from Registration (the “**Exemptive Orders**¹”) that were granted to certain non-U.S. derivatives

¹ Please see the Commission’s AMENDED ORDER OF EXEMPTION FROM REGISTRATION issued for JSCC on

clearing organizations (“**Exempt DCOs**”) and their clearing members not registered with the CFTC as futures commission merchants (“**non-FCM Clearing Members**”).

- 2) We urge the Commission to consider allowing non-U.S. Persons (other than a significant risk subsidiary (“**SRS**”) and non-U.S. persons whose performance under the swap is subject to a guarantee by a U.S. Person) to exclude swaps cleared by registered DCOs or Exempt DCOs from the de minimis calculation for purposes of determining the threshold for registering as a swap dealer.

We discuss each of these points in greater detail below.

I. The amended definition of U.S. Person should apply to, and supersede the definition referenced in, the Exemptive Orders.

Currently, under the Exemptive Orders, Exempt DCOs are prohibited from clearing swaps for U.S. Persons that are not clearing members or affiliates of clearing members. The Exemptive Orders also preclude a clearing member of an Exempt DCO, who is not registered with the Commission as a futures commission merchant, from providing swap clearing services to U.S. Persons, except for its U.S. affiliates. In the Exemptive Orders, “U.S Person” was defined as set forth in the Commission’s Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations (**the “Interpretative Guidance”**)². The Exemptive Orders further provided, however, that “such definition may be amended or superseded by a definition of the term “U.S. person” that is adopted by the Commission with a scope encompassing this Order.”³

JSCC believes that the CFTC should apply a single definition of U.S. Person for purposes of its cross border swaps framework, wherever possible. For purposes of the Exemptive Orders, it is

15th May, 2017 in the following link. The order with the same condition has been issued to ASX Clear (Futures) Pty Limited, Korea Exchange, Inc. and OTC Clearing Hong Kong Limited by the Commission. <http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/jscddcoexemptamdorder5-15-17.pdf>

² Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 FR 45292 (Jul. 26, 2013).

³ Please see (2) U.S. Clearing Services Restricted to Proprietary Swap Positions for U.S. Persons in the Commission’s AMENDED ORDER OF EXEMPTION FROM REGISTRATION issued for JSCC.

appropriate that the U.S. Person definition proposed in the NPR also be applied in the context of customer clearing of swaps by Exempt DCOs.

There are compelling reasons to use the same definitions of U.S. Person in the NPR and the Exemptive Orders. As the CFTC noted in the NPR⁴, the proposed U.S. Person definition is designed to capture those persons with sufficient jurisdictional nexus to the financial system and commerce in the United States. The same policy rationale applies to the restrictions on clearing for U.S. Persons in the Exemptive Orders. In addition, disparate U.S. Person definitions undoubtedly would impose unnecessary costs and regulatory burdens on market participants, without countervailing public policy benefits.

Thus, we request that in any release adopting the amended U.S. Person definition as proposed in the NPR, the Commission clarify that such amended definition shall also apply to, and supersede, the definition referenced in, the Exemptive Orders.

II. A non-U.S. Person should be able to exclude a swaps entered into with a U.S. Person from the de minimis calculation, if the swap is cleared in a registered DCO or Exempt DCO

Proposed § 23.23(d) provides that a non-U.S. Person that is not a Guaranteed Entity or SRS may exclude from its de minimis threshold calculation any swap that it anonymously enters into on a designated contract market (“DCM”), a swap execution facility (“SEF”) that is registered with the Commission or exempted by the Commission from SEF registration pursuant to section 5h(g) of the CEA, or a foreign board of trade (“FBOT”) that is registered with the Commission pursuant to part 48 of its regulations, if such swap is cleared through a registered DCO or Exempt DCO.

Once a bilaterally-executed swap is cleared, the swap is terminated and two new cleared swaps will be created between the DCO and each of the counterparties to the bilateral swap. Therefore, as a result of clearing, any risk in relation to non-U.S. Persons arising from the swap will be replaced and instead managed by the registered DCO or Exempt DCO⁵. This will significantly

⁴ 85 FR 961 (Jan. 8, 2020)

⁵ See the footnote 199 of the NPR (85 FR 973 (Jan. 8, 2020))

reduce the possibility of a non-U.S. Person's risks flowing back to the U.S.⁶, and therefore we believe there is no compelling policy reason to require that a swap be traded on a DCM, FBOT or SEF (including SEFs exempted under section 5h(g) of the CEA) on an anonymous basis in order to be excluded from the de minimis calculation.

We understand the current provisions relating to the de minimis threshold calculation have had the unfortunate result of bifurcating global liquidity pools in the swap markets. There have been reports of cases where non-U.S. swap counterparties have implemented, through internal rules or procedures, a prohibition on any swaps trading with U.S. Persons, to avoid being subject to U.S. regulations, including the swap dealer registration requirement⁷.

Removing this condition would facilitate more open swap markets between the U.S. and non-U.S. jurisdictions, giving greater access to global liquidity for U.S. Persons, while containing the potential for risks to flow back to the U.S. Furthermore, this would provide a strong incentive to clear swaps globally, which we believe is aligned with the CFTC's interests in furthering swaps clearing and in promoting financial stability.

Therefore, we request that proposed §23.23 be amended to provide an exclusion from the de minimis threshold calculation for non-U.S. persons that are not Guaranteed Entities or SRS, as long as their swaps are cleared through registered DCOs or Exempt DCOs.

I. Conclusion

JSCC generally supports the CFTC's effort to update and codify its regulatory framework on cross border swaps. JSCC also supports the Commission's efforts to simplify and harmonise the

⁶ The NPR (85 FR 971 (Jan. 8, 2020)) explains the rationale for inclusion in the de minimis threshold by a non-U.S. person of the swaps with U.S. counterparties as follows : *"In the event of a default or insolvency of a non-U.S. SD, the SD's U.S. counterparties could be adversely affected. A credit event, including funding and liquidity problems, downgrades, default, or insolvency at a non-U.S. SD could therefore have a direct adverse impact on its U.S. counterparties, which could in turn create the risk of disruptions to the U.S. financial system."*

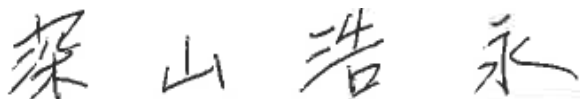
⁷Please see the Annex on the cross border OTC swap trades being cleared in JSCC.

definition of U.S. Person in the context of the CFTC’s cross-border framework, in recognition of the global nature of the swap markets and principles of international comity.

Finally, we also would like to take this opportunity to reiterate our previous comments to the Commission concerning the supplemental notice of proposed rulemaking regarding the exemption from derivatives clearing organization registration (“**Exempt DCO Proposal**”)⁸. We urge the Commission to finalize the Exempt DCO Proposal, as it will facilitate open and transparent global swap markets that will benefit investors, including U.S. persons trading swaps abroad. We urge the Commission to prioritize this rulemaking, particularly given the impending next phase of initial margin requirements for uncleared swaps. The Exempt DCO Proposal appropriately limits the risks to the U.S. market while permitting U.S. swap customers who wish to access non-U.S. swap markets to clear their transactions through Exempt DCOs and their non-FCM Clearing Members⁹.

We appreciate the opportunity to provide these comments and we would welcome further discussion with the Commission on these matters. Should you have any questions, please do not hesitate to contact Mr. Tetsuo Otashiro, Head of Clearing Planning, at +81-50-3361-0928 or by email to t-otashiro@jpx.co.jp.

Yours sincerely,



Mr. Hironaga Miyama
President & CEO, Japan Securities Clearing Corporation

CC: The Honorable Heath Tarbert, Chairman
Ms. Jaime Klima, Chief of Staff for Chairman Tarbert
Mr. Malcolm Clark Hutchison III, Director, Division of Clearing and Risk
Mr. Suyash Paliwal, Director of the Office of International Affairs

⁸ Re: Exemption from Derivatives Clearing Organization Registration (RIN 3038-AE65)

⁹ JSCC’s Comments on the Exempt DCO Proposal are available here:
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62211&SearchText>