

March 9, 2020

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

Via Electronic Submission

Re: Comment to Notice of Proposed Rulemaking – Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants [RIN 30038-AE84]

Dear Secretary Kirkpatrick:

Chatham Financial (“Chatham”) is pleased to provide comments in response to the notice of proposed rulemaking, “Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants”¹ (the “Proposal”), from the U.S. Commodity Futures Trading Commission (the “Commission”). Chatham supports the Commission’s desire to focus its authority on potential significant risks to the U.S. financial system and advance the global harmonization of swap regulation. Chatham believes the efforts undertaken in support of these goals will be consequential in advancing the goals of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) – in particular, increasing transparency in the OTC derivatives market and mitigating systemic risk by promoting enhanced regulatory cooperation.

As a global financial advisory services and technology solutions firm, Chatham specializes in the debt and derivatives markets. Advising and providing services to more than 3,000 clients annually on interest rate, currency, and commodity hedging, Chatham is a global firm with operations in the United States, Europe, Australia, and Asia. Chatham is currently engaged as a third-party reporter for over 160 clients who have Dodd-Frank reporting obligations. In addition to reporting transactions on behalf of our clients, Chatham also assists globally active swap dealers in assessing and improving their compliance with swap data reporting requirements. Our comments reflect our comprehensive expertise supporting both buy- and sell-side market participants with their swap data reporting obligations.

Chatham supports the Commission’s Proposal, which overhauls its cross-border regime by introducing new definitions, a new method of counting swaps toward the swap dealer (the “SD”) *de minimis* exception, and a different approach to categorizing regulatory requirements available for substituted compliance. Chatham appreciates the Commission’s acknowledgment of the developing global swaps supervisory landscape, and believes the Proposal properly represents a more limited U.S. approach to the cross-border reach of the Dodd-Frank Act (as compared to the 2013 and 2016 releases) and would allow market participants increased opportunities to take advantage of substituted compliance with foreign regulatory regimes.

¹ 17 CFR 23 (January 8, 2020).

Chatham is limiting the scope of our current comments for this Proposal and may revisit our comments based on future related rulemakings the Commission may issue, if warranted.

Comments on the Proposal

B. Key Definitions

Chatham appreciates the Commission's efforts to provide new and amended definitions of important terms to assess whether a direct and significant connection exists such that certain swaps should be counted toward the swap dealer ("SD") or major swap participant (the "MSP") *de minimis* threshold and subject to the cross-border application of certain Dodd-Frank Act requirements.

Does the proposed definition of "U.S. person" appropriately identify all individuals or entities that should be designated as U.S. persons? Is the proposed definition too narrow or broad? Why?

So defined, "U.S. Person" not only establishes a significant nexus to the United States, but also broadly harmonizes the prospective application of the Proposal with the SEC's regulations regarding cross-border securities-based swap activities, which contains a definition consistent with the Proposal's definition. The CFTC's 2013 Interpretive Guidance's (the "Guidance") "U.S. Person" definition is non-exhaustive and makes for a complex analysis as to whether an entity should be classified as a U.S. Person. In contrast, the Proposal's definition, limited to persons enumerated in the rule, results in a more transparent, simplified approach for market participants. Chatham does not recommend the Commission to adopt the "U.S. Person" definition used in the Cross-Border Margin Rule as the proposed "U.S. Person" definition brings greater consistency with the definition of "U.S. Person" used by the SEC. Similarly, Chatham does not recommend the proposed "U.S. Person" definition to include a catch-all provision as the inclusion of such language works against the core purposes of the Proposal – to enhance regulatory cooperation and transparency. The proposed definition permits market participants to more easily determine their "U.S. Person" status, as well as ensures the Commission focuses its authority on entities that pose potential significant risks to the U.S. financial system.

Should the definition of "U.S. person" include the U.S. majority ownership prong for funds and other collective investment vehicles, as set forth in the Guidance? Please explain.

The Commission seeks to exclude commodity pools, pooled accounts, investment funds, or other collective investment vehicles ("CIV") that are majority-owned by one or more U.S. persons from the proposed "U.S. Person" definition. Chatham supports the Commission's view that including majority-owned CIVs within the proposed definition would cause more CIVs to incur additional costs associated with the related Dodd-Frank Act requirements and ongoing assessments where the composition of a CIV's beneficial owners is not likely to have a significant bearing on the degree of risk that the CIV's swap activity poses to the United States financial system. By no longer having to determine the U.S. Person ownership of CIVs, the revised, streamlined "U.S. Person" definition under the Proposal would make it easier for swap entities to determine their counterparties' U.S. Person statuses based on externally visible factors.

In Chatham's experience, correctly and accurately completing the analysis required to determine whether a CIV is majority owned by U.S. Persons is oftentimes a time-consuming and frustrating process, as many fund managers

do not collect all of the information from their investors in order to correctly classify them as U.S. Persons or not under Dodd-Frank. Tracking a CIV's beneficial ownership poses challenges in certain circumstances, mostly regarding the CIV structure and its relation to the parent entity. Significant costs are associated with making beneficial ownership determinations as there is no "one-size-fits-all" approach. Moreover, as a limited partner's investment in a CIV is limited to its investment, it is the recourse to the general partner, which often only owns a de minimis stake in the CIV that should be the relevant consideration.

Excluding CIVs from the majority ownership test in the proposed "U.S. Person" definition does not permit them to operate *carte blanche* with no regulatory oversight. Rather, being organized or having a principal place of business in the United States would bring them under the Commission's authority, and majority owned CIVs may be subject to foreign jurisdiction margin requirements depending on their activities within those jurisdictions. In taking this approach the Commission further promotes its interest in focusing its authority on potential significant risks to the U.S. financial system.

Should the definition of "U.S. person" include certain legal entities owned by one or more persons described in prongs (1), (2), (3), (4), or (5) (Proposed Rule § 23.160(a)(10)(i), (ii), (iii), (iv) or (v)) of the proposed U.S. person definition who bear(s) unlimited responsibility for the obligations and liabilities of the legal entity? Please explain.

The Commission omits the current Unlimited U.S. Responsibility prong from the "U.S. Person" definition in the Proposal, noting that this test was designed to capture persons that could give rise to risk to the United States financial system in the same manner as non-U.S. Persons whose swap transactions are subject to explicit financial support arrangements from U.S. Persons. Persons that would be captured under the Unlimited U.S. Responsibility prong are unlimited liability corporations, general partnerships, and sole proprietorships – all corporate structures that the Commission accurately notes as not commonly in use in the marketplace. Chatham does not recommend that the Commission include an Unlimited U.S. Responsibility prong in the proposed "U.S. Person" definition for the reasons noted by the Commission.

Should the broader use of the term "guarantee" in the Guidance be used instead of the proposed definition, and if so, why? Would an alternative definition be more effective in light of the purpose of the margin requirements, and if so, why?

Similarly, Chatham agrees with the proposed definition of "guarantee" in the Proposal. The "guarantee" definition in the Proposal is narrower than the one used in the Guidance, which in turn achieves a more workable framework for non-U.S. persons because it provides greater legal certainty around what is considered to be a guarantee. Additionally, this proposed definition would align with the definition of a guarantee under the Cross-Border Margin Rule, thus eliminating confusion for market participants where the same credit support is considered a guarantee under one rule set and not a guarantee under another rule set. The Commission's current interpretation of "guarantee" aligns with its interest in focusing its authority on potential significant risks to the United States financial system, as noted in the Proposal.

The Commission's introduction of "significant risk subsidiary" is a timely replacement of the "conduit affiliate" definition from the Guidance.² Moving away from the subjective "conduit affiliate" definition allows market participants to conclusively distinguish whether or not they are subject to SD registration, and the narrower scope of the "significant risk subsidiary" definition better reflects a risk-based approach to regulation of "conduit affiliate". To avoid confusion on the classification of a non-U.S. person, the Commission should not address both "conduit affiliates" and "significant risk subsidiaries" in its cross-border rules. The "significant risk subsidiary" definition reflects the Commission's more limited approach to the cross-border reach of the Dodd-Frank Act.

C. ANE Transactions

Advisory 13-69 provided that a non-U.S. SD would generally be required to comply with transaction-level requirements for ANE Transactions. The Commission subsequently provided no-action relief from most aspects of Advisory 13-69,³ which remains in place pending finalization of further rules or guidance clarifying the scope of Commission requirements applicable to ANE Transactions. The Proposal effectively eliminates Advisory 13-69 and treats ANE Transactions in the same manner as any other transactions between non-U.S. persons.

The Commission cites international comity, undue market distortions and other policy considerations to support their position. The Proposal provides greater legal certainty and standardization regarding the treatment of ANE Transactions while retaining the Commission's anti-fraud and anti-manipulation authority. Moving away from entity- and transaction-level requirements furthers the Commission's goal to recognize and respect the regulatory interests of foreign jurisdictions where the actual financial risks of ANE Transactions lie.

D. Substituted Compliance

Is the scope of substituted compliance under the Proposed Rule appropriate? Should additional or fewer transactions be eligible for substituted compliance, and if so, how should the Proposed Rule be modified?

The Commission believes that all U.S. swap entities must be fully subject to the Dodd-Frank Act requirements, without regard to whether their counterparty is a U.S. or non-U.S. Person, as these swap activities inherently have a "direct and significant" connection with activities in, or effect on, U.S. commerce.⁴ While the Proposal does not alter this approach, the Commission properly recognizes that non-U.S. swap entities' activities with non-U.S. persons may sometimes have a more attenuated nexus to U.S. commerce and that foreign jurisdictions also have a supervisory interest in such activity. Accordingly, the Commission's Proposal more finely calibrates the available substituted compliance regime by eliminating the Guidance classifications of Entity-Level Requirements and Transaction-Level Requirements, creating new requirements, classified as "Groups A, B, and C Requirements". The Proposal's scope is suitable and should not be further narrowed or expanded.

Substituted compliance promotes the benefits of integrated global markets by reducing the likelihood that market participants will be subject to duplicative regulations. Chatham joins the Commission in noting that substituted compliance may be appropriate for non-U.S. swap entities and foreign branches of U.S. swap entities in certain

² The Proposal, in exchange, drops the "foreign consolidated subsidiaries" classification used in the 2016 Proposed Rule and Cross-Border Margin Rule.

³ Commission No-Action Letter No. 13-71 (Nov. 26, 2013).

⁴ 85 CFR 985.

circumstances and agrees that it is therefore practicable to allow substituted compliance for both Group A and Group B requirements in furtherance of international comity.

Conclusion

Chatham appreciates the opportunity to submit our comments in response to the Proposal. We commend the Commission for its efforts to advance the goals of the Dodd-Frank Act's swap reform and advancing the global harmonization of swap regulation while continuing to be committed to improving transparency and fostering competitive markets. We look forward to working with the Commission as it continues to consider these issues and ultimately proceeds to finalize the Proposal. If we can provide any further information, please contact Laura Grant, Chief Operating Officer, 484-731-0006 or lgrant@chathamfinancial.com, or Heather Fritzinger, Managing Director, Global Head of Controls and Regulatory Operations, 484-731-0014 or hfritzinger@chathamfinancial.com with any questions.