



State Street Corporation

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

Via Electronic Submission

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

Dear Secretary Kirkpatrick:

State Street Corporation (“State Street”) appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the “Commission”) regarding the Commission’s proposed rule (“Proposed Rule”) addressing the cross-border application of registration thresholds and certain requirements applicable to swap dealers and major swap participants, as published on January 8, 2020.¹

Headquartered in Boston, Massachusetts, State Street specializes in providing institutional investors, such as collective investment funds, pension funds, sovereign wealth funds and endowments with investment servicing, investment management, data and analytics, and investment research and trading services. With \$34.358 trillion in assets under custody and/or administration as of December 31, 2019, State Street operates in more than 100 geographic markets globally. State Street is organized as a U.S. bank holding company, with operations conducted through several entities, primarily its wholly-owned insured depository institution subsidiary State Street Bank and Trust Company (“SSBT”). SSBT is provisionally registered with the Commission as a swap dealer and is a major provider of foreign exchange (“FX”) services, operating through multiple branches in U.S. and foreign markets.

¹ Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants; Notice of Proposed Rulemaking, 85 Fed. Reg. 952 (January 8, 2020).

Overall, State Street supports the Proposed Rule, which we view as an important improvement over and codification of the Commission's July 2013 cross-border guidance. While we make several modest recommendations below, largely related to ensuring a smooth transition from the compliance requirements associated with the 2013 guidance to the new mandates of the Proposed Rule, we urge the Commission to move quickly to finalize the Proposed Rule.

State Street, however, remains highly concerned that current Commission rules and guidance have created fragmented global pools of liquidity in foreign exchange markets, particularly for FX non-deliverable forwards ("NDFs"). This fragmentation is harmful to U.S.-based FX dealers and their clients and is the result of an unfortunate combination of the Commission's cross-border, trade execution and swap execution facility rules. While we do not suggest the Commission delay finalization of the Proposed Rule to address this issue, we provide comments on the topic below and urge the Commission to address this fragmentation in future rulemakings or guidance.

State Street Recommendations

Definition of U.S. Person

State Street supports the Proposed Rule's revised definition of U.S. person. The proposed alignment with parallel rules issued by the U.S. Securities and Exchange Commission will simplify market practice and reduce complexity, as will the elimination of several unneeded "prongs" of the existing definition. We particularly support the elimination of the requirement to "look-through" non-U.S. collective investment vehicles to identify and track U.S. beneficial owners of such vehicles. As a major provider of FX services to the collective investment fund market, both in the U.S. and globally, this "prong" of the definition has been particularly challenging to State Street. In our experience, there are significant practical impediments to accurately identifying U.S. person beneficial ownership of such funds and limited benefits from doing so.

While we support the Proposed Rule's approach to the definition of U.S. person, we urge the Commission to adopt two changes to help ensure a smooth and consistent transition to the new definition.

We appreciate the Proposed Rule's time-limited relief, until December, 31, 2025, allowing reliance on representations made under the Cross-Border Margin Rule², and the language in the preamble to the Proposed Rule indicating that the Commission "is of the view that market participants would be able to rely on representations previously obtained using the "U.S. person" definition in the [2013] Guidance." We agree with the Commission that persons designated as U.S. persons under the Cross-Border Margin Rule and 2013 Guidance would also be U.S. persons under the new, proposed U.S. person definition, and we appreciate the

² Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross Border Application of the Margin Requirements, 81 Fed. Reg. 34818 (May 31, 2016).

Commission's view that market participants should not have to "immediately obtain new representations from their counterparties."

Given these Commission views, however, we fail to see the need for making this relief time-limited. Providing permanent relief, we believe, raises no new policy considerations, eliminates a "cliff effect" in 2025, and eliminates the potential need for market participants to seek Commission extension of the 2025 deadline should circumstances arise where seeking new representations are impractical or unduly burdensome. We suggest the Commission make the relief for reliance on previous representations under the Cross-Border Margin Rule permanent, rather than time-limited.

With respect to the preamble's language related to the 2013 Guidance, we are supportive of the concept, but believe it needs greater clarity. It is unclear, for example, if reliance on representations based on the 2013 Guidance is, like those based on the Cross-Border Margin Rule, also time-limited. We suggest the Commission increase clarity and market efficiency by explicitly stating that reliance on U.S. Person classifications of counterparties based on representations made pursuant to the U.S. Person definition in the 2013 Guidance is permanent, regardless of the Commission's ultimate decision on whether to time-limit reliance on the Cross-Border Margin Rule definition, as discussed above. We prefer this relief for reliance on the 2013 Guidance be included in the final rule text, rather than the preamble.

Recommendations:

- 1) *Adopt the Proposed Rule's new definition of "U.S. Person";*
- 2) *Make permanent the proposed time-limited relief for reliance on representations made under the Commission's Cross-Border Margin Rule;*
- 3) *Clarify, as part of the final rule text, that firms may permanently continue to rely on representations made under the 2013 Guidance.*

Foreign Branch Group B Exception

State Street supports the Proposed Rule's revised approach to providing a *de minimis* exception from Group B requirements³ for foreign branches of a U.S. swap entity with respect to swaps conducted by those branches with Other U.S. Persons. As with the 2013 Guidance, the Proposed Rule exempts foreign branches of U.S. swap dealers from the Group B requirements in jurisdictions which, in the aggregate, do not exceed five percent of the aggregate notional value of all swaps of the U.S. swap dealer. While the 2013 Guidance limited a swap dealer's ability to use this exception to certain specified markets⁴, the Proposed Rule permits swap dealers greater flexibility by allowing such dealers to use the *de minimis* exception as appropriate without limiting the jurisdictions in which it may be available.

³ Swap trading relationship documentation, portfolio reconciliation and compression, trade confirmation, daily trading records

⁴ Foreign jurisdictions other than Australia, Canada, the European Union, Hong Kong, Japan or Switzerland.

We agree with the Commission's view that, while by definition a limited part of a swap dealer's business, swaps entered into that qualify for the exceptions under both the 2013 Guidance and Proposed Rule "may nevertheless be an integral element of a U.S. swap entity's global business." We also support the elimination of the jurisdictional limitations under the Proposed Rule, as doing so more appropriately reflects the goal of the exception and will result in better alignment of the regulatory obligations of swap dealer branches with their market presence.

While we support this approach, State Street believes the exception could be made clearer and more effective by providing further guidance on precisely which transactions are subject to the five percent notional cap. Specifically, there may be instances where a swap dealer has branch transactions which might be eligible for the proposed exception, but where the dealer chooses not to avail itself of this particular exception due to the existence of another exception or various other strategic, regulatory or business reasons. We suggest the Commission clarify that the calculation of the five percent notional cap for a swap dealer only include transactions the swap dealer entered into "in reliance on" the exception, not all swaps eligible for the exception.

Recommendations:

- 1) *Adopt the proposed Foreign Branch Group B exception;*
- 2) *Clarify that the five percent notional cap on the exception applies only to transactions entered into "in reliance on" the exception.*

Comparability Determinations

State Street strongly supports the Commission's proposed revised approach to reaching comparability determinations regarding a foreign jurisdiction's regulation of swap entities. The new approach is described in the preamble as emphasizing a "holistic, outcomes based approach."

While we appreciate and have benefited from the Commission's previous efforts to secure cross-border comparability determinations, our experience has been that the value of such determinations has been limited by a rule-by-rule approach as opposed to the outcomes-based approach now suggested by the Commission. For example, the portfolio compression requirements of Article 2(1)(47) of the Markets in Financial Instruments Regulation (MiFIR⁵) are not clearly covered by the Commission's existing comparability relief.⁶ In the preamble to the Proposed Rule, the Commission "acknowledges that requiring foreign branches of U.S. swap entities to comply with U.S.-based requirements in non-U.S. markets may place them at a competitive disadvantage." As a U.S.-based swap dealer often operating through branches,

⁵ See, Article 2(1)(47) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of May 15, 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 ("MiFIR"), and the "written agreement" requirements of Article 17(2) of the Commission Delegated Regulation (EU) 2017/567 of May 18, 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions (the "MiFIR Delegated Regulation").

⁶ Comparability Determinations for the European Union: Certain Transaction-Level Requirements, 78 Fed. Reg. 78878 (December 27, 2013).

State Street agrees, and we urge the Commission to use the process described in the Proposed Rule to seek to alleviate these competitive disadvantages.

Recommendation:

- *Adopt the Proposed Rule's outcomes-based process for comparability determinations.*

Foreign Exchange Non-Deliverable Forward Market Fragmentation

State Street has long been concerned by the fragmentation of global FX non-deliverable forward ("NDF") markets resulting from the Commission's swaps related ruleset and guidance.⁷

The global NDF market today is split into two liquidity pools: one set of swap trading platforms willing to comply with and registered under the Commission's swap execution facility ("SEF") rules (so called "on-SEF" platforms), and a second set of swap trading platforms unwilling to do so ("off-SEF" platforms). "On-SEF" platforms allow participation by U.S. persons; "off-SEF" platforms generally ban U.S. persons to avoid the need to register and operate as a SEF. A significant amount of global NDF liquidity is on "off-SEF" platforms. As a swap dealer often operating overseas through foreign branches that are considered U.S. Persons under Commission rules, State Street, like other U.S. firms, is therefore effectively excluded from participating in "off-SEF" liquidity pools. This bifurcation creates challenges to servicing our clients.

This negative situation has resulted from a combination of Commission rules and guidance. First, as noted above and in the preamble to the Proposed Rule, the Commission's approach to cross-border regulation, by deeming foreign branches of U.S. swap dealers, in all circumstances, U.S. persons, disadvantages such foreign branches when operating in their local markets. The NDF outcome described here is a clear indication of the competitive disadvantage created by the Commission's approach. Second, the Commission's SEF rules are often viewed as unduly burdensome and inconsistent with market practice for many non-US swap trading platforms, creating a strong reluctance by operators of such platform to even consider U.S. SEF registration. Finally, the Commission's mandate that, essentially, all multi-participant swap trading platforms must be registered SEFs, even in the absence of a Commission central clearing and trade execution mandate (as is the case for NDFs)⁸ means multi-lateral off-SEF platforms will continue to exclude U.S. persons from their NDF markets.

⁷ State Street Corporation. "Proposed Rule - Swap Execution Facilities and Trade Execution Requirement." March 15, 2019, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62055&SearchText=>

State Street Corporation. "Notice of Proposed Rulemaking - De Minimis Exception to the Swap Dealer Definition." August 13, 2018, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61784&SearchText=>

State Street Corporation. "Commodity Futures Trading Commission Request for Public Input on Simplifying CFTC Rules (Project KISS)." September 29, 2017, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61472&SearchText=>

⁸ Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33481, Footnote 88 (June 4, 2013).

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While State Street accepts that the NDF market fragmentation issue described above will not be addressed through this pending rulemaking, we continue to believe this is an urgent cross-border issue that should be addressed by the Commission. We urge the Commission to do so in future rulemakings.

Recommendation:

- *Address fragmentation of global NDF liquidity pools created by Commission rulemaking and guidance in future Commission rulemaking.*

Conclusion

Once again, thank you for the opportunity to comment on the Proposed Rule. As noted above, we support the proposal, with minor changes, and urge adoption of a final rule as quickly as possible.

Please feel free to contact me at jjbarry@statestreet.com should you wish to discuss State Street's submission in further detail.

Sincerely,

A handwritten signature in black ink, appearing to read "JJ Barry", with a stylized flourish at the end.

Joseph J. Barry