

March 9, 2020

Via Electronic Submission

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581
RIN 3038-AE84, 85 Fed. Reg. 952

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:

Credit Suisse welcomes the opportunity to provide comments on the proposed rule pertaining to the cross-border application of the registration thresholds and certain requirements applicable to swap dealers (“SDs”) and major swap participants (“MSPs”) (hereinafter “the Proposal”) issued by the Commodity Futures Trading Commission (“the CFTC” or “the Commission”).¹

Credit Suisse appreciates that Commission leadership, past² and present³, is aware of the industry-wide desire for a rules-based swap dealer registration framework.⁴ The Proposal attempts, and in many respects achieves, to provide the industry with regulatory clarity and consistency, which ultimately leads to more transparent and liquid swaps markets. Notably, Credit Suisse supports Chairman Tarbert’s guiding principles in approaching cross-border reform as a matter of sound regulatory policy, namely: (1) protecting the U.S. national interest by focusing on material risks from abroad that are most likely to affect the U.S.; (2) avoiding duplicative and overlapping regulations with respect to both foreign and other U.S. regulators; and, (3) reflecting Securities and Exchange Commission (“SEC”) harmonization where appropriate.⁵

Credit Suisse commends the Commission for its efforts to date. This comment letter provides recommendations for how the CFTC could more closely align the Proposal, and other cross-border reforms, with Chairman Tarbert’s guiding principles.

¹ Credit Suisse has three provisionally registered swap dealers with the CFTC: Credit Suisse Capital LLC (“CS Capital”), Credit Suisse International (“CSI”), and Credit Suisse Securities Europe Limited (“CSSEL”).

² Chairman Christopher Giancarlo, “Cross-Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation” at 12-13, October 1, 2018, *available at* https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118_0.pdf.

³ Chairman Heath Tarbert, “Statement of Chairman Heath Tarbert in Support-of the Cross-Border Swaps Proposal” December 18, 2019, *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement12181>.

⁴ Consistent with the recommendations set out in this comment letter, Credit Suisse supports the historical accountings and proposed recommendations in the comment letters submitted in response to this Proposal by the Futures Industry Association (“FIA”), the comment letter from the International Swap and Derivatives Association (“ISDA”), and the comment letter submitted jointly by the Securities Industry and Financial Market Association (“SIFMA”) and Institute of International Bankers (“IIB”) (collectively, “the Trade Associations”).

⁵ Proposal, 85 Fed. Reg. at 1,005-07.

Proposal Recommendations

- **U.S. Person** – Codify the “U.S. person” definition and extend it to other SD regulations such as Capital and Margin Rules.
- **SRS** – Include an exclusion for subsidiaries of intermediate holding companies (“IHCs”) consistent with the exclusion for subsidiaries of U.S. bank holding companies (“BHCs”).
- **Foreign Branch/U.S. Branch** – Align the scope of these terms for the purposes of the final rule in an effort to avoid duplicative regulation and disparate treatment of SDs.
- **ANE** – Repeal existing ANE Staff Advisory related to mandatory clearing, trade execution, and real-time public reporting in a manner consistent with the Proposal.

Related Cross-Border Recommendations

- **17-64 No-Action Relief** – Codify 17-64 No-Action Relief for CFTC registered SDs who are non-U.S. persons in transactions with non-U.S. counterparties.
- **17-64 No-Action Relief** – In the event the Commission does not codify 17-64, the Commission should extend no-action relief consistent with the implementation of the recent swap data reporting proposals.

1. Proposal Recommendations

Credit Suisse supports the recommendations and requests for clarification from the Trade Associations as they relate to most of the considerations around definitions and exceptions. Below are additional considerations critical to the Proposal:

a. **“U.S. Person”**

Subject to the proposed exclusions, the Proposal would define a “U.S. person” as any person that is: (i) a natural person resident in the U.S.; (ii) a legal person organized, incorporated, or established under the laws of the U.S., or having its principal place of business in the U.S.; (iii) an account (whether discretionary or non-discretionary) of a U.S. person; or (iv) an estate of a decedent who was a resident of the U.S. at the time of death.⁶

Credit Suisse agrees with the proposed definition due to its straightforward application and consistency with the SEC’s security-based swaps (“SBS”) regime definition.⁷ As Credit Suisse prepares to reevaluate its SD practices in light of the Proposal and the SEC final SBS rules, a harmonized U.S. Person definition between the two agencies provides a consistent approach from operational and compliance perspectives. Credit Suisse encourages further harmonization of the Proposal’s “U.S. person” definition, to the extent possible, within the context of SD activity, including the CFTC’s Capital and Margin rules.

b. **Significant Risk Subsidiary (“SRS”)**

Credit Suisse encourages the CFTC to include an exclusion for subsidiaries of intermediate holding companies (“IHCs”) consistent with the exclusion for subsidiaries of U.S. bank holding companies (“BHCs”) and the principles outlined by Chairman Tarbert. The Proposal recognizes that BHC subsidiaries are subject to consolidated supervision and regulation by the Federal Reserve Board.⁸ Accordingly, duplicative regulations by the CFTC would be unduly burdensome. The Federal Reserve Board also has supervisory and regulatory authority over IHCs.⁹ As SIFMA and IIB point out, IHCs are subject to prudential regulation, including Basel capital requirements, stress testing, liquidity, and risk management requirements.¹⁰ Additionally, IHCs are subject to supervision from the Federal Reserve, in a consistent manner with BHCs.¹¹

⁶ Proposed §23.23(a)(22).

⁷ See 17 C.F.R. § 240.3a71-(3)(a)(4).

⁸ For the purposes of this comment letter, “the Federal Reserve Board” refers to the Board of Governors of the Federal Reserve System.

⁹ See Federal Reserve Board, Bank Holding Company Supervision Manual, section 1060.0.1, Overview and Applicability, February 2019. Available at: <https://www.federalreserve.gov/publications/files/bhc.pdf>. “Each large financial institution (LFI) is expected to ensure that the consolidated organization (or the combined U.S. operations in the case of foreign banking organizations), including its critical operations and banking offices, remain safe and sound and in compliance with laws and regulations, including those related to consumer protection... The LFI rating system applies to: bank holding companies with total consolidated assets of \$100 billion or more; all non-insurance, non-commercial savings and loan holding companies with total consolidated assets of \$100 billion or more; and U.S. intermediate holding companies of foreign banking organizations with combined U.S. assets of \$50 billion or more established pursuant to the Federal Reserve’s Regulation YY.”

¹⁰ See 12 C.F.R. Part 252, Regulation YY.

¹¹ Vice Chair Randal Quarles, “Spontaneity and Order: Transparency, Accountability, and Fairness in Bank Supervision,” January 17, 2020. Available at: <https://www.federalreserve.gov/newsevents/speech/quarles20200117a.htm>.

From a regulatory perspective, the Federal Reserve Board has recently finalized rules that tailor how its regulations apply to foreign and domestic banks.¹² The tailoring effort has categorized BHCs and IHCs based on size and risk profile, which accounts for risk-based indicators such as cross-jurisdictional activity and nonbank assets. Upon request, Credit Suisse can provide additional information the CFTC may require in considering excluding subsidiaries of IHCs in addition to the proposed exclusion for subsidiaries of BHCs.

While Credit Suisse does not anticipate any imminent benefit from an IHC exclusion, the final rule should exclude IHCs to the same extent as BHCs as a matter of consistent regulatory policy with the Federal Reserve Board's framework.

c. U.S. Branch and Swaps Conducted Through a U.S. Branch

The Proposal would define a "U.S. branch" to mean a branch or agency of a non-U.S. banking organization where such branch or agency: (i) is located inside the U.S.; (ii) maintains accounts independently of the home office and of the accounts of other foreign branches, with the profit or loss accrued at each branch determined as a separate item for each foreign branch; and, (iii) engages in the business of banking and is subject to substantive banking regulation in the state or district where located.¹³ A "swap conducted through a U.S. branch" would mean a swap entered into by a U.S. branch where: (i) the U.S. branch is the office through which the non-U.S. person makes and receives payments and deliveries under the swap pursuant to a master netting or similar trading agreement, and the documentation of the swap specifies that the office for the U.S. person is such U.S. branch (in other words, the U.S. branch is where the swap is booked); or (ii) the swap is reflected in the local accounts of the U.S. branch.¹⁴

In agreement with the Trade Associations, Credit Suisse suggests that the Commission consider conforming the definition of a "swap conducted through a U.S. branch" with the definition of a "swap conducted through a foreign branch." The U.S. branch definition is broader than the foreign branch definition because the definition is disjunctive and omits the prong for the swap entered into by the U.S. branch in its normal course of business.¹⁵ As a matter of policy, Credit Suisse encourages the CFTC to provide consistent flexibility for U.S. branches and foreign branches.

d. Arranged, Negotiated, and Executed Transactions

Credit Suisse appreciates the CFTC's decision to limit the use of arranged, negotiated, or executed ("ANE") transactions to anti-fraud and anti-manipulation, provided neither non-U.S. counterparty is an SRS or Guaranteed Entity. With the exception of the aforementioned uses, moving on from an ANE transactional approach is largely consistent with the principles set out by the Commission, namely focusing on material risks to the U.S. markets. From Credit Suisse's perspective, most transactions not directly subject to the provisions of the Proposal are otherwise subject to foreign regulatory requirements similar to the CFTC's requirements. While Credit Suisse understands the rationale for considering an ANE approach throughout the Commission's regulations since Dodd Frank, narrowing down its use is an important act of deference from the CFTC to other non-U.S. regulators and a sign

¹² Federal Reserve Board, "Federal Reserve Board finalizes rules that tailor its regulations for domestic and foreign banks to more closely match their risk profiles," October 10, 2019. Available at: <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20191010a.htm>.

¹³ Proposed § 23.23(a)(20).

¹⁴ Proposed § 23.23(a)(16).

¹⁵ See § 7(e) of SIFMA and IIB's comment letter in response to this Proposal.

that the industry's regulatory landscape is different than the one that existed at the inception of Dodd Frank.¹⁶

Based on our understanding of the Commission's approach, Credit Suisse appreciates the statements and text supporting the limited use of ANE. However, Credit Suisse remains concerned about the potential for confusion in future Administrations around the existing ANE Staff Advisory.¹⁷ Credit Suisse echoes the Trade Associations advocacy for formally repealing the existing ANE Staff Advisory related to mandatory clearing, trade execution, and real-time public reporting in a manner consistent with the Proposal.

2. Related Cross-Border Recommendations

The Proposal demonstrates the Commission's renewed focus on material risks impacting the U.S. and a greater recognition of non-U.S. regulatory frameworks. The Proposal is an important step towards regulatory comity in the global derivatives markets that ultimately benefits the investing public. Credit Suisse believes there are other areas of cross-border reform that, if addressed by the CFTC, help solidify the principles in the Proposal.

a. 17-64 No-Action Relief

As the Commission is aware, the CFTC extended no-action relief from certain reporting requirements for certain SDs and MSPs established under the laws of Australia, Canada, the European Union, Japan, and Switzerland.¹⁸ The recommendation, among other things, provides Part 45 and 46 relief to the Proposal's non-U.S. persons and U.S. branches with respect to swaps with non-U.S. counterparties that are not guaranteed affiliates, or conduit affiliates of a U.S. person.

Although not included in the Proposal, Credit Suisse suggests that codification of this no-action relief is directly aligned with the Commission's principles set out in the Proposal. Credit Suisse believes these underlying principles not only represent sound regulatory policy, but also allow the CFTC to tailor its efforts to the U.S. markets. Codifying 17-64 will also have the indirect benefit of tailoring the data the Commission receives to the information it has already identified as being pertinent or in the case of data covered in 17-64, not pertinent, to evaluating U.S. market risk.

Furthermore, codifying 17-64 is consistent with the Proposal's practice of regulatory deference. Many SDs are already facing operational challenges stemming from the EU's General Data Protection Regulation ("GDPR"). The trades between non-U.S. SDs and non-U.S. counterparties not only lack a U.S. material risk, but may contain GDPR-sensitive information of market participants who have no direct exposure to the CFTC other than the relationship with the provisionally registered CFTC SD. Credit Suisse suggests that these instances have historically called for Memorandums of Understanding between the CFTC and non-U.S. home country regulators, which allows for the transmission of non-public market information to the CFTC subject to certain conditions.

¹⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78).

¹⁷ CFTC Staff Advisory No. 13-69, Applicability of Transaction-Level Requirements to Activity in the United States, November 14, 2013; CFTC Staff Letter 17-36, Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers, November 30, 2017.

¹⁸ CFTC Letter No. 17-64, Extension of Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan or Switzerland, November 30, 2017. Available at: <https://www.cftc.gov/PressRoom/PressReleases/pr7652-17>.

In the event the CFTC does not elect to codify 17-64, Credit Suisse strongly encourages the extension of its relief to align with the effective date of the recent data proposals. With the broader industry effort focused on revamping reporting structures as a result of these proposals, Credit Suisse believes it would be logical to align an extended no-action relief with the effective dates of the revised reporting rules.

Credit Suisse appreciates the CFTC's consideration of the recommendations in this comment letter and the recommendations presented by FIA, ISDA, SIFMA, and IIB. Should you have any questions, please do not hesitate to contact the undersigned or Maria Chiodi at (212) 325-6724 (maria.chiodi@credit-suisse.com), Drew Shoemaker at (919) 994-1161 (drew.shoemaker@credit-suisse.com), or Keaghan Ames at (202) 626-3307 (patrick.ames@credit-suisse.com).

Respectfully submitted,



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