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

July 17, 2020

Swap Clearing Requirement Exemptions, RIN 3038-AE33

Dear Mr. Kirkpatrick:

Thank you for the opportunity to provide the Commodity Futures Trading Commission (the "***CFTC***" or the "***Commission***") with comments on the CFTC's proposed rules regarding exemptions from the swap clearing requirement set forth in "Swap Clearing Requirement Exemptions", 85 Fed. Reg. 27955 (May 12, 2020) (the "***Proposed Exemption***"). We are providing these comments on behalf of our clients, Inter-American Development Bank, the Inter-American Investment Corporation, the International Bank for Reconstruction and Development and the International Finance Corporation (each, our "***Client***" and, collectively, our "***Clients***"). The Proposed Exemption codifies, as part of 17 C.F.R. § 50, the exemption from the clearing requirement for swaps entered into with central banks, foreign governments and international financial institutions set out in the preamble to the "End-User Exception to the Clearing Requirement for Swaps", 77 Fed. Reg. 42560 (Jul. 19, 2012) (the "***End-User Exception***").

Background

The exemption in the preamble to End-User Exception made reference to reporting requirements, but did not provide that the availability of the exemption for central banks, foreign governments and international financial institutions is conditional on compliance with reporting requirements:

> "The Commission notes, however, that if a foreign government, foreign central bank, or international financial institution enters into a non-cleared swap with a counterparty who is subject to the [Commodity Exchange Act] and Commission regulations with regard to that transaction, then the counterparty still must comply with the CEA and Commission regulations as they pertain to non-cleared swaps.

> For example, the party must comply with the recordkeeping and reporting requirements under Parts 23 and 45 of the Commission's regulations.[1]

In contrast, the Proposed Exemption (at CFTC Rules 50.75 and 50.76) would exempt swaps entered into by a central bank, a sovereign entity or an international financial institution (an "***IFI***") from the clearing requirement, but subject to the condition (the "***Reporting Condition***") that the swaps are reported to a swap data repository pursuant to Part 45 of the CFTC's regulations (the "***Reporting Requirement***").[2]

Comments

Our Clients believe that making the availability of the exemption subject to the Reporting Condition runs contrary to the guiding principles set forth in the End-User Exception, all for the reasons set forth in greater detail below. Accordingly, we respectfully request, on behalf of our Clients, that the CFTC remove the Reporting Condition (at CFTC Rules 50.75 and 50.76) when finalizing the Proposed Exemption.

Making the Exemption Subject to the Reporting Condition Undermines the International System

When adopting the End-User Exception, the CFTC recognized that there are important public policy implications related to the application of the clearing requirement to foreign governments, foreign central banks and IFIs:

> The Commission expects that if any of the Federal Government, Federal Reserve Banks, or [IFIs] of which the United States is a member were to engage in swap transactions in foreign jurisdictions, the actions of those entities with respect to those transactions would not be subject to foreign regulation. However, if foreign governments, foreign central banks, or [IFIs] were subjected to regulation by the Commission in connection with their swap transactions, foreign regulators could treat the Federal Government, Federal Reserve Banks, or [IFIs] of which the United States is a member in a similar manner. The Commission notes that the Federal Reserve Banks and the Federal Government are not subject to the clearing requirement under the Dodd-Frank Act.
>
> Canons of statutory construction "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." In addition, [IFIs] operate with the benefit of certain privileges and immunities under U.S. law indicating that such entities may be viewed similarly under certain circumstances. There is nothing in the text or history of the swap-related provisions

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1 2012 End-User Exception, at 42,652.

2 "Swaps entered into by an international financial institution shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act and this part if reported to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter", Proposed Exemption at 27,973).

> of Title VII of the Dodd-Frank Act to establish that Congress intended to deviate from these traditions of the international system by subjecting foreign governments, foreign central banks, or [IFIs] to the clearing requirement set forth in Section 2(h)(1) of the CEA.
>
> Given these considerations of comity and in keeping with the traditions of the international system, the Commission believes that foreign governments, foreign central banks, and [IFIs] should not be subject to Section 2(h)(1) of the CEA.[3]

By making the availability to a foreign government, foreign central bank or IFI of the clearing exemption depend upon compliance by a swap counterparty with the Reporting Requirement, the CFTC is undermining these considerations of comity and the traditions of the international system. As noted by the CFTC in the End-User Exception, the United States has taken appropriate actions to implement international obligations with respect to immunities and privileges arising under the International Organization and Immunities Act and the Foreign Sovereign Immunities Act. To be consistent with these principles, an IFI should not face the uncertainty of whether it is entitled to an exemption based upon whether or not a swap dealer or major swap participant complies with its independent legal obligations to satisfy the Reporting Requirement.

An IFI Cannot Monitor Compliance with the Reporting Requirement

Because none of our Clients is (i) a U.S. person pursuant to cross-border guidance promulgated by the CFTC or (ii) a swap dealer or major swap participant[4], none of our Clients would be required to report a swap under CFTC Rules 45.3 and 45.4, nor would a Client be able to satisfy the Reporting Requirement. Only its swap counterparty would be able to satisfy the Reporting Requirement.[5]

Whether a swap has been reported under CFTC Rules 45.3 and 45.4 is not available to the public, so none of our Clients would be able to verify whether the Reporting Requirement has been satisfied. It would be unfair to impose the risk of noncompliance with United States laws and regulations (and potential CFTC enforcement action) on an IFI when the IFI has no ability to

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3 End-User Exception, at 42,561-42,562.

4 CFTC Rules 45.3 and 45.4 impose regulatory reporting requirements on (a) swap execution facilities ("***SEFs***") or designated contract markets ("***DCMs***") for swaps executed on or pursuant to the rules of a SEF or DCM, and (b) on the reporting counterparty, as determined pursuant to CFTC Rule 45.8 for off-facility swaps. Under CFTC Rule 45.8, where a counterparty is a non-U.S. person that is not a swap dealer or major swap participant, the reporting counterparty will be the other counterparty if it is a swap dealer, major swap participant or U.S. person. If the other counterparty is a non-U.S. person that is not a swap dealer or major swap participant, under the CFTC's cross-border guidance, the swap would not be subject to the regulatory reporting requirements (or the swap clearing requirement).

5 It is our Clients' understanding that the exemptive relief that is currently available, without the Reporting Condition, has worked well and has not adversely affected compliance by swap dealers and major swap participants with reporting obligations under CFTC Rules 45.3 and 45.4.

control the risk associated with noncompliance. In addition, an IFI would be exposed to economic risk of early termination of a swap that is not reported (at the swap counterparty's side of the market) by reason of a misrepresentation that the swap complies with applicable laws[6].

A Swap Counterparty is Required to Comply with the Reporting Requirement

We understand that, as a policy matter, the CFTC wishes to ensure that swaps are reported to a swap data repository. As a practical matter, each swap counterparty facing one of our Clients will have significant legal and business incentives to comply with the Reporting Requirement, due to (i) their own compliance procedures, (ii) the threat of CFTC enforcement action and (iii) the risk of early termination (at our Client's side of the market). Making the Reporting Condition an element of the exemption from clearing under CFTC Rules 50.75 and 50.76 is unlikely to create any incremental incentive for the swap counterparty to comply with the Reporting Requirement, a requirement to which the swap counterparty is already subject.

The Proposed Parity of Treatment Does Not Reflect Statutory Parity

In the preamble to the Proposed Exemption, the CFTC refers to the inclusion of similar conditions in the exemptions in CFTC Rules 50.5(a) and (b). However, CFTC Rules 50.5(a) and (b) implement related provisions of the CEA which already include the requirement that swaps be reported to a registered swap data repository[7]. However, the Proposed Exemption is not related to these CEA provisions (or any other CEA provisions or CFTC rules which include this condition).

Conclusion

Our clients support the CFTC's proposal to codify exemptions for foreign governments, foreign central banks and IFIs (such as our Clients) from the clearing requirement. Nonetheless, our Clients believe that making availability of the Proposed Exemption subject to the Reporting Condition is contrary to the guiding principles set forth in the End-User Exception. Principles of international comity would be violated. Our Clients have no means of monitoring compliance with the Reporting Requirement. Swap dealers have adequate existing incentives to comply with the Reporting Requirement—making the Reporting Condition an element of the exemption from clearing under CFTC Rules 50.75 and 50.76 is unlikely to create any incremental incentive for the swap counterparty to comply. Conditions in other regulations concerning swap data reporting are driven by a different statutory provision. Accordingly, we respectfully request, on behalf of our

6 See 2002 ISDA Master Agreement, Sections 4(c), 5(a)(iv) and 6(a).

7 Section 2(h)(6) of the CEA.

Clients, that the CFTC remove the Reporting Condition (at CFTC Rules 50.75 and 50.76) when finalizing the Proposed Exemption.

Very truly yours,

/s/ Brian D. Rance

Brian D. Rance

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