



October 9, 2020

VIA ELECTRONIC SUBMISSION

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, D.C. 20581

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

Dear Mr. Kirkpatrick:

Prudential Global Funding LLC (“Prudential”)¹ appreciates the opportunity to respond to the U.S. Commodity Futures Trading Commission’s (the “Commission” or “CFTC”) proposal that addresses derivatives clearing organizations (“DCO”) registration and compliance with Commodity Exchange Act (“CEA”) core principles (the “Exempt DCO Proposal”).²

With the Commission’s recent adoption of the final Alternative Compliance DCO rulemaking,³ we wish to provide our comments as an end-user of listed futures and over-the-counter (“OTC”) derivatives, and focus on the proposed restriction in the Exempt DCO Proposal that U.S. persons who wish to clear at an exempt DCO *must* go through a foreign intermediary and not a registered futures commission merchant (“FCM”).⁴

¹ Prudential Global Funding LLC is a subsidiary of Prudential Financial, Inc. Established in 1875, Prudential Financial, Inc. is a financial services leader with a 140-year history of helping Americans secure their financial future and achieve financial wellness. At a time when workers are facing a steady reduction in coverage and benefits provided by defined benefit plans, our subsidiaries and affiliates offer a wide array of financial products and services in the marketplace that help individuals and their families provide for their financial futures. These financial products and services include fixed and variable annuities, life insurance, including variable life insurance, retirement-related services, mutual funds, investment advisory programs, and investment management products, among other products and services.

² Exemption from Derivatives Clearing Organization Registration, 84 Fed. Reg. 35456 (July 23, 2019) [hereinafter “Exempt DCO Proposal”].

³ See Press Release, CFTC Finalizes Rules to Improve Swap Data Reporting, Approves Other Measures at September 17 Open Meeting, CFTC (Sep. 17, 2020), available at <https://cftc.gov/PressRoom/PressReleases/8247-20> (linking to final rule on “Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations”) [hereinafter “Alternative Compliance DCO Final Rule”].

⁴ See Exempt DCO Proposal, *supra* note 2, 84 Fed. Reg. at 35457.

Prudential supports the Exempt DCO Proposal and the Commission’s efforts to expand U.S. customers’ access to global derivatives markets and clearing with non-U.S. DCOs. However, it is our firm belief that such expanded access should allow for customer choice to clear through an FCM, as is permitted under the Alternative Compliance DCO final rule. Without such a change to the Exempt DCO Proposal, its impact on the efficiency of a global swaps regime will be unnecessarily thwarted and fragmented, resulting in sub-optimal consequences for end-users. Such an approach would also lead to inconsistent and incompatible operational structures, with the Alternative Compliance DCO final rule and the Exempt DCO Proposal requiring end-users to access clearing in two different ways. Prudential supports the proposed change to the Exempt DCO Proposal published by Commissioner Dawn Stump in February 2020⁵ that would provide for the ability to also clear through an FCM. We encourage the Commission to incorporate that framework into the Exempt DCO Proposal.

For the reasons discussed below, and as Commissioner Stump highlighted in her remarks in February, Prudential believes the Commission should ultimately allow U.S. end-users to access non-U.S. DCOs pursuant to a regulatory regime for swaps that is similar to the Commission’s longstanding Part 30 rules for futures. This would entail either going through a foreign intermediary or a registered FCM to reach a non-U.S. DCO.⁶ The increasing calls for U.S. customers to have the choice to go through a registered FCM to reach a non-U.S. DCO suggest that any final rule on exempt DCO registration provide for such optionality.

Prudential, like other end-users, trades futures on foreign clearinghouses pursuant to the CFTC’s Part 30 regime.⁷ For example, Prudential trades equity indexes on both Asian and European futures exchanges (including TOPIX futures on the Osaka Exchange in Japan), and has in the past traded interest rate futures in Europe. The “foreign futures” structure has worked, giving Prudential the ability to access foreign futures markets. As a sophisticated market participant and end-user looking for cost-effective tools to manage risk, we believe that a similar “part 30-type” regime, which has worked well for futures for years, should be constructed for swaps.

Most importantly, Prudential believes it is critical that we are able to access non-U.S. derivatives markets in an efficient and cost-effective manner. Life insurance companies must be able to properly manage their portfolios, which have a direct impact on their ability to provide millions of American families with well-performing and affordable financial security and retirement products and benefits. Artificial impediments to global markets prevent life insurance companies like Prudential from being able to most efficiently hedge commercial risk, which only adds unnecessary cost to policyholder customers. Our comments on the most appropriate market structure should be read as complementary to our goal of having access to global derivatives markets.

⁵ See Keynote Address of Commissioner Dawn D. Stump at FIA-SIFMA AMG Asset Management Derivatives Forum, CFTC (Feb. 6, 2020), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/opastump5?utm_source=govdelivery [hereinafter “Commissioner Stump Speech”].

⁶ See *infra* text accompanying notes 12-13.

⁷ 17 CFR Part 30.

I. U.S. Customers Should be Given Flexibility in How They Access the Foreign Markets.

Prudential supports regulatory efforts to mitigate market fragmentation and grant deference to regimes with comparable regulations. We agree with the Futures Industry Association (“FIA”) that the Commission’s rules should facilitate such cross-border access while preserving market integrity.⁸ As the FIA notes, opening borders and allowing market participants, particularly end-users, to access more markets to find the products that allow them to most efficiently manage risk, mitigates overall risk and supports economic growth.

Prudential also supports customer choice. End-user swaps customers are sophisticated market participants – by statute, they are limited to eligible contract participants (“ECPs”)⁹ – and possess the requisite financial and other qualifications to assess the potential commercial, regulatory, legal, and bankruptcy protection risks, among other factors, when deciding when and how to transact in these markets. We agree with the Securities Industry and Financial Markets Association (“SIFMA”) that swaps customers, not the Commission, are best-positioned to decide which clearing structure suits them best.¹⁰

II. Placing Unnecessary Restrictions on Access to Foreign Swaps Markets Puts U.S. End-Users at a Competitive Disadvantage.

While Prudential appreciates any Commission action that eases access to non-U.S. markets, the Exempt DCO Proposal’s restriction that an intermediary that clears swaps for a U.S. person must not also be an FCM is problematic for U.S. customers seeking to access foreign clearinghouses. The Exempt DCO Proposal may have the effect of restricting the access the Commission seeks to provide because the cost and complexity of using only foreign intermediaries would be significant for end-users. U.S. customers that trade cross-border need to be able to access a wide range of clearinghouses. There will be significant demand for clearing, particularly at non-U.S. DCOs, due to the next initial margin implementation phase, the impending adoption of mandatory clearing requirements in non-U.S. jurisdictions, and the obvious benefits of netting.¹¹

Mandating only one avenue to access foreign clearinghouses limits the choice of intermediaries that may be used to access exempt non-U.S. DCOs, which will create inefficiencies for end-users like Prudential by requiring them to access cleared OTC markets using different intermediaries. Prudential, like others, prefers to use an FCM that can offer access to a full range of products. If the Exempt DCO Proposal was to be adopted as proposed, we would be forced to use an FCM for our U.S. swaps and find a foreign intermediary that is not a registered FCM for our foreign swaps

⁸ Letter from Jackie Mesa, Chief Operating Officer and Senior Vice President of Global Policy, FIA to Christopher Kirkpatrick, Secretary, CFTC at 4 (Nov. 18, 2019), *available at* <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62265> [hereinafter “FIA Letter”].

⁹ *See* 7 U.S.C. § 2(e) (“It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 7 of this title.”).

¹⁰ Letter from Kyle Brandon, Managing Director, SIFMA to Christopher Kirkpatrick, Secretary, CFTC at 6-7 (Nov. 18, 2019), *available at* <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62250>.

¹¹ *See* Letter from Hironaga Miyama, President & CEO, Japan Securities Clearing Corporation to Christopher Kirkpatrick, Secretary, CFTC (Oct. 7, 2019), *available at* <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62210> [hereinafter “JSCC 2019 Letter”].

trading. While bifurcated access to these markets is better than the status quo, there are likely to be increased costs associated with documenting and clearing flows when accessing the foreign futures markets as a result of providing access to the foreign swaps market, putting us and other U.S. customers at a competitive disadvantage.

III. The Commission Should Create a Swaps Regime Similar to the CFTC’s Part 30 Regime for Futures.

Under the current Part 30 regime for foreign futures, U.S. customers – including retail customers – have the option to access foreign listed derivatives by going through either (1) an FCM that has an omnibus account with a foreign intermediary that is a clearing member of the non-U.S. DCO;¹² or (2) a foreign intermediary that is both a clearing member of the non-U.S. DCO and holds the proper CFTC exemption.¹³ So long as certain disclosures are provided to and acknowledged by the customer, it is the customer who can decide how it wants to proceed.

This reasonable, established framework provides for optionality and efficiency in how U.S. customers access foreign futures markets, and should be created for the foreign swaps market. A framework for foreign swaps that aligns with that for foreign futures would reasonably be expected to reduce costs and improve the customer experience. It also would respect customer choice and encourage a competitive marketplace, while preserving customer protections.

We agree with the Japan Securities Clearing Corporation (“JSCC”) that such a framework should permit:

- an exempt DCO, that has implemented Principles for Financial Market Infrastructures (“PFMI”)-compliant levels of customer protections, to clear swaps for U.S. customers (including FCM customers); and
- non-U.S. clearing members in an exempt DCO to clear for U.S. customers, without needing to register as an FCM, as long as those foreign intermediaries can demonstrate that they are properly supervised, regulated, and licensed to provide customer clearing services in their home countries, where the regulatory authority maintains appropriate cooperative arrangements with the Commission.¹⁴

In her address at the FIA-SIFMA AMG Asset Management Derivatives Forum in February 2020, Commissioner Stump reenergized debate on the best approaches to permitting U.S. customers to access non-U.S. DCOs. While she supported the Exempt DCO Proposal and the now recently

¹² See 17 C.F.R. § 30.7.

¹³ See 17 C.F.R. § 30.10.

¹⁴ Letter from Hironaga Miyama, President & CEO, Japan Securities Clearing Corporation to Christopher Kirkpatrick, Secretary, CFTC (Oct. 5, 2018) at 5, *available at* <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61826>. We also support JSCC’s request that the Commission reconsider its criteria for the assessment of “substantial risk to the U.S. financial system” as defined in the proposed CFTC Regulation 39.2, such that the test should permit the Commission to exercise its discretion only if both of the two thresholds are close to 20%. See JSCC 2019 Letter, *supra* note 11, at 7.

adopted Alternative Compliance DCO rule,¹⁵ Commissioner Stump noted her concern “that those proposals are too rigid to pragmatically facilitate increased swaps clearing by U[.]S[.] customers.”¹⁶ Commissioner Stump explains:

We must recognize the sophistication of the customers in this space. Those trading swaps must be eligible contract participants. We should provide them with workable options, rather than dictate the relationships they must have and the level of legal risk they may take. . . . My personal view is that you all, as some of the most sophisticated customers in our markets, should be allowed to make decisions in coordination with your clearing members about the most efficient means of accessing a comparably and comprehensively supervised and regulated foreign [central counterparty (“CCP”)].¹⁷

We agreed with Commissioner Stump in February 2020 and we agree with her more recent statement: “U.S. customers deserve optionality in how they access a third country CCP that does not present substantial risk to the U.S. financial system and is subject to regulation that is comprehensive and comparable to our own.”¹⁸

We place a high value on having access to these markets. We can assess the benefits and detriments of different options and decide what will best support our business. Ultimately, the Exempt DCO Proposal does not provide sufficient optionality needed by and due to ECPs to allow for an efficient foreign swaps market. We encourage the Commission to reconsider the Exempt DCO Proposal and empower market participants, particularly ECP end-users, to have the choice as to how they access non-U.S. swaps markets.

IV. The Commission Should Act Quickly to Provide Relief.

Cross-border access for U.S. customers to non-U.S. DCOs is critical for the well-being of our economy. The time to act is now.

To that end, we encourage the Commission to finalize the Exempt DCO Proposal, but remove the condition that an intermediary that clears swaps for a U.S. Person may not be registered with the Commission as an FCM, such that ECPs (i.e., sophisticated end-users) can choose whether to use a foreign intermediary or an FCM to access an exempt DCO.

While Prudential prefers this simple amendment be made in connection with the adoption of the Exempt DCO Proposal, if the Commission needs more time to consider this approach, we agree

¹⁵ See Alternative Compliance DCO Final Rule, *supra* note 3.

¹⁶ Commissioner Stump Speech, *supra* note 5.

¹⁷ *Id.*

¹⁸ Statement of Commissioner Dawn D. Stump Regarding Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, CFTC (Sep. 17, 2020), *available at* <https://cftc.gov/PressRoom/SpeechesTestimony/stumpstatement091720>.

with other commenters, including the FIA,¹⁹ that bifurcated relief sooner is better than full relief later (or no relief at all).

In this case, we urge the Commission to adopt the Exempt DCO proposal as written, and secondarily, provide time-limited no action relief or immediately propose new rules intended to give U.S. customers the option to utilize an FCM to access an exempt DCO for the purpose of clearing foreign swaps (akin to Commissioner Stump's proposed change).

As an end-user, we cannot emphasize enough the importance of the Exempt DCO Proposal and strongly encourage its adoption. It is our belief that a global swaps regime will only be successful if sophisticated customers are given the freedom to choose how to transact, in particular when the provision of such optionality does not present substantial risk to the U.S. financial system and is subject to sufficient regulation.

We urge the Commission to move swiftly to begin offering that choice.

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We appreciate the opportunity to provide our comments to the CFTC on these issues and look forward to discussing these issues with you. Please do not hesitate to contact the undersigned with any questions you may have.

Sincerely,



Michael Long
President
Prudential Global Funding LLC

CC: The Honorable Heath Tarbert, Chairman
The Honorable Brian Quintenz, Commissioner
The Honorable Rostin Behnam, Commissioner
The Honorable Dawn Stump, Commissioner
The Honorable Dan Berkovitz, Commissioner
Clark Hutchison III, Director, Division of Clearing and Risk
Josh Sterling, Director, Division of Swap Dealer & Intermediary Oversight

¹⁹ See FIA Letter, *supra* note 8.