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By Commission Website

March 9, 2020

Mr. Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: RIN 3038-AE84: Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 952 (January 8, 2020)

Dear Mr. Kirkpatrick:

The Futures Industry Association (“**FIA**”)¹ is pleased to submit this letter in response to the Commodity Futures Trading Commission’s (“**Commission’s**”) proposed rule regarding the cross-border application of the registration thresholds and certain requirements applicable to swap dealers and major swap participants.² FIA representatives have had the opportunity to review the letter³ that the International Swaps and Derivatives Association, Inc. (“**ISDA**”) has filed with the Commission as well as the joint letter⁴ that the Securities Industry and Financial Markets Association (“**SIFMA**”) and Institute of International Bankers (“**IIB**”) have filed with the Commission. We strongly support the views expressed in both letters and commend them to the Commission for its consideration. Our letter will focus on the scope of the proposed definition of a US Person, an issue of particular importance to FIA.

¹ FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA’s membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers. Its mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA’s clearing firm members play a critical role in the reduction of systemic risk in global financial markets.

² 85 Fed. Reg. 952 (Jan. 8, 2020).

³ Letter from Scott O’Malia, Chief Executive Officer, ISDA, to Christopher J. Kirkpatrick, Secretary of the Commission, dated March 9, 2020.

⁴ Letter from Kenneth E. Benson, Jr., President and Chief Executive Officer, SIFMA, and Briget Polichene, Chief Executive Officer, IIB, to Christopher J. Kirkpatrick, Secretary of the Commission, dated March 9, 2020.

Scope of the US Person Definition

The proposed rule would amend and codify the interpretation of the definition of US Person that the Commission adopted in connection with its 2013 interpretive guidance and policy statement regarding compliance with certain swap regulations (“**Guidance**”).⁵ In adopting the Guidance, the Commission, at the request of FIA and others, confirmed that it would “apply its interpretation of the term “US person” only to swaps regulations promulgated under Title VII, unless provided otherwise in any particular regulation.”⁶ The Commission added that it “does not intend that this Guidance address how the term “person” or “US person” should be interpreted in connection with any other Commodity Exchange Act (“**CEA**”) provisions or Commission regulations promulgated thereunder.”

In the Federal Register release accompanying the proposed rule, the Commission implies that the scope of the definition of a US Person will be similarly limited. For example, the release states that the “Commission is proposing to define certain terms for the purpose of applying the Dodd-Frank Act swap provisions addressed by the Proposed Rule to cross-border transactions”.⁷ The Commission also states that the proposed rule “would not supersede the Commission’s policy views as stated in the Guidance or elsewhere with respect to any other matters”.⁸ However, there is no direct statement that the scope of the proposed US person definition will not apply in connection with any other CEA provisions or Commission regulations thereunder beyond the swap provisions addressed by the proposed rule.

In light of the foregoing, we would encourage the Commission to remove any regulatory uncertainty and make clear and explicit that the scope of the proposed definition of a US Person will not extend to those provisions of the CEA governing the activities of FCMs with respect to both (i) exchange-traded futures, whether executed on a designated contract market or a foreign board of trade, and (ii) cleared swaps.

As we noted in our August 2012 comment letter on the proposed Guidance (the “**2012 Letter**”) and our December 2016 comment letter on the Commission’s 2016 rule proposal⁹ (the “**2016**

⁵ 78 Fed. Reg. 45292 (July 23, 2013).

⁶ *Id.* at 45316. In their separate comment letters on the Guidance, FIA and SIFMA argued that the definition of a US person should not extend to those provisions of the CEA governing the activities of FCMs with respect to both (i) exchange-traded futures, whether executed on a designated contract market or a foreign board of trade, and (ii) cleared swaps. Rather, “consistent with existing market practice, only those persons located in the United States should be required to maintain accounts with a US FCM.” *See* Letter from Walt L. Lukken, President and CEO, FIA, to David A. Stawick, Secretary of the Commission, dated Aug. 27, 2012, p. 2.

⁷ Proposed Rule at 958.

⁸ Proposed Rule at 958.

⁹ Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to [SDs] and [MSPs], 81 Fed. Reg. 71946 (Oct. 18, 2016).

Letter” and together with the 2012 Letter, the “**Prior Comment Letters**”), the Commission historically has taken the position that an intermediary is required to be registered with the Commission in an appropriate capacity if either the intermediary is located in the US or the intermediary’s customer (or potential customer) is located in the US. This position appears to have been adopted first in 1976 in a Commission staff letter, in which the Office of the General Counsel stated that a pool operator would not be required to be registered with the Commission as a commodity pool operator, *provided*: (i) the pool operator was located outside of the US; (ii) the operator confined its activities to areas outside of the US; and (iii) none of the pools had funds or capital contributed from US sources.¹⁰

The Commission formally adopted this position a few years later in amending its registration rules, explaining:

The Commission believes that, given this agency’s limited resources, it is appropriate at this time to focus its customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users of the futures markets and that the protection of foreign customers of firms confining their activities to areas outside this country, its territories, and possessions may best be for local authorities in such areas.¹¹

The Commission’s foreign futures and options rules adopt this same approach, defining a “foreign futures or foreign options customer” to mean “any person located in the United States, its territories or possessions who trades in foreign futures or foreign options.”¹²

The Commission reaffirmed this policy in amending Part 3 of its rules to exempt from registration as an FCM a foreign broker¹³ that “submits any commodity interest transactions executed bilaterally, on or subject to the rules of a designated contract market, or on or subject to the rules

¹⁰ Commission Staff Letter 76-21 (Aug. 15, 1976). This position frequently has been cited with approval in subsequent staff letters, including: Commission Interpretative Letter No. 96-79 (Oct. 7, 1996); Commission Interpretative Letter No. 97-03 (Jan. 15, 1997); Commission Interpretative Letter No. 98-80 (Nov. 25, 1998); Commission Staff Letter No. 00-95 (Oct. 3, 2000); and Commission Staff Letter No. 01-62 (June 13, 2001).

¹¹ 45 Fed. Reg. 18356 (Mar. 20, 1980); *see also* 48 Fed. Reg. 35248 (Aug. 3, 1983).

¹² Commission Rule 30.1(c), 17 C.F.R. § 30.1(c).

¹³ As defined at Commission Rule 1.3(xx), a “foreign broker” is:

any person located outside the United States, its territories or possessions who is engaged in soliciting or in accepting orders only from persons located outside the United States, its territories or possessions for the purchase or sale of any commodity interest transaction on or subject to the rules of any designated contract market or swap execution facility and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

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of a swap execution facility, for clearing on an omnibus basis through an FCM registered in accordance with section 4d of the Act.”¹⁴ In proposing this amendment, the Commission noted that its purpose is to “create uniformity in treatment of commodity interest transactions that do not involve a US customer, regardless of whether the transaction is made on a designated contract market or an [sic] SEF.”¹⁵

As noted in the Prior Comments Letters, FCMs and other Commission registrants have been conducting business consistent with this policy for 40 years. Their operations and, in many cases, the operations of their non-US affiliates have been based on their understanding of the Commission’s registration requirements. Altering this policy by applying a different and expanded definition of a US person for this purpose would be tremendously disruptive to the market and impose a significant operational burden on registrants and their non-US affiliates.

Further, maintaining a different US person standard is consistent with the different regulatory purposes underlying the registration of FCMs and other “traditional” registrants, on the one hand, and swap dealers and major swap participants, on the other. Registration of FCMs and other registrants is intended primarily as a means of assuring customer protection by assuring that registrants meet certain minimum qualifications. In contrast, registration of swap dealers and major swap participants is intended to reduce systemic risk and enhance market transparency.

* * * *

FIA appreciates the opportunity to submit this comment letter for the Commission’s consideration. If the Commission has any questions regarding the matters discussed above, please contact Allison P. Lurton, FIA’s Chief Legal Officer and General Counsel, at (202) 466-5460 or alurton@fia.org.

Sincerely,



Allison Lurton
Chief Legal Officer and General Counsel

cc: Honorable Heath P. Tarbert, Chairman
Honorable Brian D. Quintenz, Commissioner
Honorable Rostin Behnam, Commissioner
Honorable Dan M. Berkovitz, Commissioner

Division of Swap Dealer and Intermediary Oversight
Joshua B. Sterling, Director

¹⁴ Amendment to Commission Rule 3.10(c)(2). 77 Fed. Reg. 51898 (Aug. 28, 2012).

¹⁵ Registration of Intermediaries, 76 Fed. Reg. 12888, 12889 (Mar. 9, 2012).