



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

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Director

CFTC Letter No. 12-61
No-Action
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Division of Swap Dealer and Intermediary Oversight

Re: No-Action Relief: U.S. Bank Wholly Owned by Foreign Entity May Calculate De Minimis Threshold Without Including Activity From Its Foreign Affiliates

Ladies and Gentlemen:

This letter responds to requests from multiple market participants received by the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) asking for relief with respect to the ability of a U.S. bank that is wholly owned by a foreign entity to rely on the *de minimis* exception to the swap dealer registration requirement under Commission Regulation 1.3(ggg)(4).¹ Specifically, the entities requesting the relief are foreign-owned U.S. banks, and they request that they be permitted to determine whether they satisfy the *de minimis* exception without having to consider the swap activity of their foreign affiliates (including their foreign owner).

On May 23, 2012, the Commission prescribed rules addressing certain definitions under section 1a of the Commodity Exchange Act (the “Act”), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), including the definition of a swap dealer and the “*de minimis* exception” to the swap dealer definition, among other things.² The Dodd-Frank Act required that the Commission exempt from designation as a swap dealer any entity “that engages in a *de minimis* quantity” of swap dealing “in connection with transactions with or on behalf of customers.” Accordingly, the Commission promulgated Commission Regulation 1.3(ggg)(4), which sets forth the factors that must be satisfied to qualify for the *de minimis* exception. Under Commission Regulation 1.3(ggg)(4), a person is not deemed to be a swap dealer where the aggregate effective notional amount of swap dealer activity – including swap dealer activity by a person controlling, controlled by or under common control with such person – over the immediately preceding 12 months, does not exceed: (1) \$3

¹ 17 CFR 1.3(ggg)(4).

² See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 Fed. Reg. 30596 (May 23, 2012) (hereinafter “Adopting Release”).

billion, subject to a phase in level of an aggregate effective notional amount of more than \$8 billion, applied in accordance with Commission Regulation 1.3(ggg)(4)(ii); and (2) \$25 million when the counterparty is a “special entity,” as defined in Section 4s(h)(2)(C) of the Act³ and Commission Regulation 23.401(c). The Commission made clear in the Adopting Release that the notional thresholds set forth in the *de minimis* exception encompass swap dealing positions entered into “by an affiliate controlling, controlled by or under common control with the person at issue.”⁴

The foreign-owned U.S. banks represent that they engage in an amount of swap activity that would entitle them to rely on the *de minimis* exception, and that they would qualify for the exception if only they could calculate their swap positions without including the swap positions of their foreign affiliates that will timely register as swap dealers.

The foreign-owned U.S. banks believe that the following factors constitute appropriate boundaries that justify the evaluation of their swaps activities under the *de minimis* exception without taking into consideration the swap positions of their foreign affiliates: (1) the strength of the banks’ respective U.S. financial holding companies and the banks’ stand-alone and publicly available financial profiles; (2) the banks’ separate legal existence and oversight by a prudential U.S. banking regulator; and (3) the banks’ independent and distinct swaps operations from those of their foreign affiliates. These considerations are described more fully below.

The foreign-owned U.S. banks are subject to comprehensive U.S. prudential banking regulation. As national banks regulated by the Office of the Comptroller of the Currency (the “OCC”), they are subject to significant restrictions on their transactions with their foreign affiliates under Sections 23A and 23B of the Federal Reserve Act and Regulation W. They also are separated from their foreign affiliates by an intermediary U.S. bank holding company that is organized under U.S. law and subject to the supervision, regulation, and examination of the Board of Governors of the Federal Reserve System (the “Federal Reserve”) under the Bank Holding Company Act of 1956, as amended (the “BHCA”). The foreign-owned U.S. banks and their U.S. parent holding companies are subject to regulatory capital requirements that do not look to the resources of the banks’ foreign affiliates. The holding companies are “financial holding companies” (as defined under the BHCA), with assets that independently meet the higher standards established by the Federal Reserve for bank holding companies that are “well capitalized” and “well managed” (as such terms are defined under the BHCA) without relying on the capital strength of their foreign parents. Further, the financial holding companies voluntarily issue public quarterly earnings releases and file quarterly and annual financial statements (Forms 8-K, 10-Q, and 10-K) with the Securities and Exchange Commission.

In light of the foregoing, the Division will not recommend that the Commission take enforcement action against any U.S. bank that is wholly owned by a foreign entity for failure to consider the swap dealing activities of its foreign affiliates, or the U.S. branches of such affiliates, with respect to swap positions executed from and after October 12, 2012, when

³ 7 U.S.C. § 6s(h)(2)(C).

⁴ Adopting Release, *supra* note 2, at 30632 n.444.

determining whether such U.S. bank satisfies the *de minimis* exception to the swap dealer definition and registration requirements, so long as the U.S. bank meets the following conditions:

1. It is indirectly wholly owned by a foreign entity and is a nationally chartered bank regulated by the OCC, the Federal Reserve, or the Federal Deposit Insurance Corporation (“FDIC”). Its ultimate foreign owner is registered with the Commission as a swap dealer. The foreign-owned U.S. bank’s direct parent entity is registered with and subject to oversight and supervision by the Federal Reserve as a financial holding company under the BHCA and files its financial statements with the SEC. The foreign-owned U.S. bank and its U.S. bank financial holding company are both capitalized separately from the U.S. bank’s foreign affiliates.
2. The foreign-owned U.S. bank will strictly comply with all organizational formalities to maintain its existence separate from its foreign affiliates and will promptly correct any known misunderstanding, if any, regarding its separate identity. The foreign-owned U.S. bank has its own principal executive and administrative offices through which its business is conducted, separate from those of its affiliates. The foreign-owned U.S. bank will prepare separate financial statements from those of its foreign affiliates and will not provide copies of financial statements of its foreign affiliates to its swaps customers or otherwise state or suggest that its foreign affiliates are undertaking any specific financial responsibility in connection with its swaps activities.
3. No swap obligations of the foreign-owned U.S. bank will be guaranteed, or otherwise supported through keep-well agreements or other arrangements, by its foreign affiliates. None of the affiliates outside the U.S. will hold out their credit or assets to the marketplace as being available to satisfy the swap obligations of or pledge its assets in support of those obligations.
4. Overall the foreign-owned U.S. bank and its foreign affiliates serve different aspects of the U.S. swap market (understanding that there might be circumstances in which customers of the foreign-owned U.S. bank are also customers of its foreign affiliates).
5. The foreign-owned U.S. bank will not rely on its foreign affiliates for operational servicing of its swaps business, and will at all times maintain separate core operational capabilities appropriate to the scope of its swap business. The foreign-owned U.S. bank will make its own credit determinations with respect to its swaps activities; *provided* that such credit determinations will be subject to (and may be reduced as a result of) broader enterprise risk management oversight, in addition to a foreign regulator’s applicable requirements.
6. The foreign-owned U.S. bank will at all times comply with the requirements of Section 23B(c) of the Federal Reserve Act, which provides that “[a] member bank or any subsidiary or affiliate of a member bank shall not publish any advertisement or enter into any agreement stating or suggesting that the bank shall in any way be responsible for the obligations of its affiliates.” As a result, the foreign-owned U.S. bank will at all times

hold itself out to the public and all other persons as a legal entity separate from its foreign affiliates and any other person. Although marketing and other materials may reference the foreign-owned U.S. bank's affiliation with its foreign affiliates, the foreign-owned U.S. bank will at all times conduct its swaps business in its own name, with all swap trading documentation (e.g., ISDA Master Agreements and confirmations), and required disclosures of material risks and characteristics, showing only the foreign-owned U.S. bank and not any of its affiliates as the relevant counterparty to the customer.

7. To the extent a foreign-owned U.S. bank claiming no-action relief under this no-action letter may hereafter be unable to observe any of the foregoing conditions, the foreign-owned U.S. bank agrees to notify the Division promptly to determine whether such changed circumstances alter the relief provided. If the Division determines that relief is no longer appropriate in such circumstances, the foreign-owned U.S. bank would agree to register as a swap dealer or cease swap dealing activities within two months of the date of such determination.

Claiming the No-Action Relief

This relief is not self-executing. Rather, an eligible foreign-owned U.S. bank must file a claim to perfect the relief. A claim of no-action relief by such a bank will be effective upon filing, so long as the claim is materially complete.

Specifically, the claim of no-action relief must:

1. State the name, main business address, and main business telephone number of the foreign-owned U.S. bank that is claiming the relief;
2. Be signed by a legal representative of the bank filing the claim; and
3. Be filed with the Division via email using the email address dsionoaction@cftc.gov and stating "Foreign-Owned Banks and De Minimis Exception" in the subject line of such email.

This letter, and the positions taken herein, represent the view of this Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the Act or in the Regulations issued thereunder. For example, affected persons remain subject to all antifraud provisions of the Act. Further, this letter, and the relief contained herein, is based upon the representations made to the Division. Any different, changed or omitted material facts or circumstances might render this no-action relief void.

Should you have any questions, please do not hesitate to contact Frank Fisanich, Chief Counsel, at 202-418-5949.

Very truly yours,

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cc: Regina Thoele, Compliance
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