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Division of Clearing and Risk

Ananda Radhakrishnan
Director

CFTC Letter No. 14-07
No-Action
February 6, 2014
Division of Clearing and Risk

Ms. Amanda J. Harkness
Group General Counsel & Company Secretary
ASX Group
Exchange Centre
20 Bridge Street
Sydney NSW 2000
PO Box H224
Australia Square NSW 1215, Australia

Dear Ms. Harkness:

This is in response to your letter dated September 18, 2013 ("Letter"), to the Division of Clearing and Risk ("Division") of the Commodity Futures Trading Commission ("Commission"). In the Letter, you request that the Division confirm that it will not recommend that the Commission take enforcement action against ASX Clear (Futures) Pty Limited ("ASXCLF") for failure to register as a derivatives clearing organization ("DCO") pursuant to Section 5b(a) of the Commodity Exchange Act ("CEA").[1]

Under this requested relief, ASXCLF would be permitted to clear Australian and New Zealand dollar-denominated interest rate swaps ("A$ IRS" and "NZ$ IRS," respectively, and together, "A&NZ$ IRS") for the proprietary trades of qualified U.S. clearing participants and their parent entities and affiliates. You request that such relief be effective until the earlier of December 31, 2014 or the date upon which the Commission, acting pursuant to its authority under Section 5b(h) of the CEA, exempts ASXCLF from the DCO registration requirement of the CEA.[2] You further represent that ASXCLF is ready to apply for an exemption from

[1] 7 U.S.C. § 7a-1(a).

[2] Section 5b(h) of the CEA, 7 U.S.C. § 7a-1(h), permits the Commission to exempt a DCO from registration for the clearing of swaps to the extent that the Commission determines that such DCO is subject to comparable, comprehensive supervision by the Securities and Exchange Commission or the appropriate government authorities

registration as a DCO once the Commission addresses the process or specific criteria and conditions necessary to obtain exemptive relief.

Statement of Facts

Based upon the representations made by ASXCLF to the Division in the Letter as well as representations made in meetings and telephone conversations, we understand the relevant facts to be as follows:

ASXCLF is a wholly-owned subsidiary of the ASX Clearing Corporation, which is part of ASX Group. ASXCLF operates as a futures clearinghouse and as of September 2013, provides dealer-only clearing services in A$ IRS.[3]

Currently, ASXCLF limits its swap clearing services to clearing participants that are not U.S. persons. However, the Australian branches of two U.S. swap dealers have expressed a strong interest in becoming direct participants of ASXCLF for the purpose of clearing proprietary A$ IRS transactions.

In addition to providing clearing services for proprietary A$ IRS transactions, ASXCLF would also like to provide clearing services to U.S. persons for interest rate swaps in other non-U.S. currencies, such as NZ$ IRS.

With respect to the regulation and supervision of ASXCLF, all clearing organizations in Australia must be licensed under the Australian Corporations Act of 2001, which requires the Treasury Minister to make a finding that the clearing organization has adequate operating rules and procedures to ensure that systemic risk is reduced and that the clearing organization operates in a fair and effective manner. In making this assessment, the Treasury Minister considers advice from two independent government agencies, the Australian Securities and Investment Commission ("ASIC"), which ensures that a clearing organization's operations are carried out in a fair and effective way and that other conditions on a clearing organization's license are satisfied, and the Reserve Bank of Australia ("RBA"), which is responsible for ensuring the financial system stability of the clearing organization.

Clearing organizations in Australia must also comply with the Australian Financial Stability Standards ("FSS"), which set forth requirements relating to the reduction of systemic risk. On March 29, 2013, new FSS became effective. The new FSS align with the Principles for Financial Market Infrastructures ("PFMIs") developed by the Bank for International Settlements' Committee on Payment and Settlement Systems ("CPSS") and the Technical Committee of the

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in the home country of the DCO. At present, no foreign clearing organization has been granted an exemption from registration for the clearing of swaps.

[3] ASXCLF has represented that it is developing client clearing services, which are scheduled for commercial launch in the second quarter of 2014. *See* Letter at 1 n.2.

International Organization of Securities Commissions ("IOSCO"). ASIC and the RBA have both confirmed that they apply domestic regulations to ASXCLF that are consistent with the PFMIs.[4] In addition, the Australian Prudential Regulation Authority ("APRA") has confirmed that it considers ASXCLF to meet the criteria of a "Qualifying CCP," which means that APRA affirms that ASXCLF is prudentially supervised in a jurisdiction where the relevant regulator has established and publicly indicated that it applies, on an ongoing basis, domestic rules and regulations that are consistent with the PFMIs.[5] In August 2013, CPSS-IOSCO noted in the "Implementation Monitoring of PFMIs – Level 1 Assessment Report" that Australia's implementation of CCP-related PFMIs is complete.[6]

Discussion of Request for No-Action Relief and Applicable Legal Requirements

The Division accepts, without independent analysis, ASXCLF's representation that the A&NZ$ IRS contracts subject to its request are swaps under the CEA and Commission regulations. The Division also accepts, without further inquiry, that the Australian branches of two U.S. swap dealers have expressed a strong interest in becoming direct participants of ASXCLF for the purpose of clearing proprietary A$ IRS transactions, and that these branches would provide liquidity to the A$ IRS market.

Section 1a(47)(A)(iii)(I) of the CEA includes interest rate swaps within the definition of "swap" and Regulation 1.3(iii) includes interest rate swaps as one of the major swap categories.[7] Section 5b(a) of the CEA provides that a clearing organization may not perform the functions of a DCO with respect to swaps unless it is registered with the Commission.[8]

ASXCLF's request for relief is consistent with recent requests for no-action letters permitting non-U.S. clearing organizations to clear swaps for U.S. Persons prior to becoming

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[4] *See* Letter at 2 n.4.

[5] *See* Letter at 2 n.5.

[6] Available at http://www.bis.org/publ/cpss111.pdf .

[7] Section 1a(47)(A) of the CEA, 7 U.S.C. § 1a(47)(a), states: "Except as provided in subparagraph (B), the term 'swap' means any agreement, contract, or transaction-- … (iii) that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates … including any agreement, contract, or transaction commonly known as— (I) an interest rate swap …." Regulation 1.3(iii), 17 C.F.R. §1.3(iii), states: "… the terms *major swap category, category of swaps* and any similar terms mean any of the following category of swaps listed below…. (1) *Rate swaps*. Any swap which is primarily based on one or more reference rates, including but not limited to any swap of payments determined by fixed and floating interest rates …."

[8] Section 5b(a) of the CEA, 7 U.S.C. § 7a-1(a), states: "Except as provided in paragraph (2), it shall be unlawful for a derivatives clearing organization, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a derivatives clearing organization with respect to … (B) a swap. (2) EXCEPTION. – Paragraph (1) shall not apply to a derivatives clearing organization that is registered with the Commission."

registered with the Commission as a DCO.[9] Granting the relief requested by ASXCLF during the pendency of its application for an exemption pursuant to Section 5b(h) of the CEA, is appropriate in order to facilitate the centralized clearing of the A&NZ$ IRS contracts and to promote competition and enhance choice in clearing services for such contracts. The Division notes, however, that the Commission has not established a regulatory framework for exempting a clearing organization from registration as a DCO pursuant to Section 5b(h) of the CEA. Accordingly, the Division's granting of no-action relief herein should not be interpreted to mean that the Commission will exempt ASXCLF from registration as a DCO.

Grant of No-Action Relief

Based on the facts presented and the representations you have made, the Division will not recommend that the Commission take enforcement action against ASXCLF for failure to register as a DCO pursuant to the requirements of Section 5b(a) of the CEA, subject to the following conditions:

(1) Product Scope. This relief is limited to A&NZ$ IRS contracts accepted for clearing by ASXCLF;

(2) Participant Scope. The relief applies to ASXCLF's clearing of the proprietary trades of ASXCLF's U.S. clearing participants, including transactions of a parent or affiliate of an ASXCLF U.S. clearing participant (meaning, ASXCLF shall not accept, and no ASXCLF member shall offer for clearing through ASXCLF, swaps on behalf of a U.S. customer);

(3) Reporting. ASXCLF shall comply with the reporting obligations applicable to DCOs under the Commission's Part 45 regulations; and

(4) Limited Duration. The no-action relief shall expire at the earlier of: (i) December 31, 2014 or (ii) the date upon which the Commission either registers ASXCLF as a DCO under Section 5b(a) of the CEA or exempts ASXCLF from registration as a DCO under Section 5b(h) of the CEA.

The position taken herein concerns enforcement action only and does not represent a legal conclusion with respect to the applicability of any provision of the CEA or the Commission's regulations. In addition, the Division's position does not necessarily reflect the views of the Commission or any other division or office of the Commission. Because this position is based upon the representations contained in the Letter, it should be noted that any

[9] *See* CFTC No-Action Letter No. 13-73 (Dec. 19, 2013) (extending previous grant of no-action relief to Japan Securities Clearing Corporation and certain of its clearing members); CFTC No-Action Letter No. 13-43 (July 11, 2013) (granting no-action relief to LCH.Clearnet SA and certain of its clearing members); CFTC No-Action Letter No. 13-33 (July 11, 2013) (granting no-action relief to Eurex Clearing AG and certain of its clearing members); CFTC No-Action Letter No. 12-63 (Dec. 21, 2012) (granting no-action relief to Singapore Exchange Derivatives Clearing Limited and certain of its clearing members); and CFTC No-Action Letter No. 12-56 (Dec. 17, 2012) (granting no action relief to Japan Securities Clearing Corporation and certain of its clearing members).

different, changed, or omitted material facts or circumstances may require a different conclusion or render this letter void. Finally, as with all no-action letters, the Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

Should you have any questions, please do not hesitate to contact me at (202) 418-5188, or Andrea Musalem, Special Counsel, at (202) 418-5167.

Sincerely,

Ananda Radhakrishnan
Director

cc: Andrea Musalem