



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and Risk

CFTC Letter No. 17-59
No-Action
November 7, 2017
Division of Clearing and Risk

Ryne V. Miller
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004

Re: No-Action Relief for North American Development Bank from the Swap Clearing Requirement in Section 2(h)(1) of the Commodity Exchange Act and Commodity Futures Trading Commission Regulations 50.2 and 50.4

Dear Mr. Miller:

On July 20, 2017, you sent a letter on behalf of North American Development Bank (“NADB”) (“Request Letter”), to the Division of Clearing and Risk (“Division”) of the Commodity Futures Trading Commission (“Commission”) requesting relief from the swap clearing requirement of section 2(h)(1) of the Commodity Exchange Act (“CEA”) (“Clearing Requirement”). Based on the facts described in the Request Letter, the Division has decided to not recommend that the Commission take enforcement action against NADB for failure to comply with the Clearing Requirement as implemented by Commission regulations 50.2 and 50.4.¹ The Division believes that granting this no-action relief to NADB would be consistent with the final Federal Register release adopting the end-user exception to the Clearing Requirement (“End-User Exception”),² in which the Commission determined that certain international financial institutions should not be subject to the Clearing Requirement.³

¹ Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284 (Dec. 13, 2012) and Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps, 81 Fed. Reg. 71,202 (Oct. 14, 2016) (collectively, “Clearing Requirement Determination”).

² End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42,560 (July 19, 2012) (“End-User Exception”).

³ End-User Exception, 77 Fed. Reg. at 42,561-42,562.

Applicable Regulatory Requirements

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”)⁴ amended the CEA by adding section 2(h), which establishes the Clearing Requirement. Under section 2(h)(1)(A) of the CEA and Commission regulation 50.2, it is unlawful for a person to engage in a swap that is required to be cleared by the Commission unless the swap is submitted for clearing to an eligible derivatives clearing organization. The Commission has determined that two classes of credit default swaps and four classes of interest rate swaps are required to be cleared.⁵ However, pursuant to the End-User Exception, certain non-financial entities may enter into non-cleared swaps that would otherwise be subject to the Clearing Requirement to hedge or mitigate commercial risks associated with their underlying businesses, such as energy exploration, manufacturing, farming, transportation, or other commercial activities.⁶ In addition, in the final Federal Register release adopting the End-User Exception, the Commission concluded that based on considerations of public policy and international comity, certain international financial institutions, as well as foreign governments and foreign central banks, “should not be subject to” the Clearing Requirement.⁷

The Commission provided the following reasons for its conclusion that international financial institutions should not be subject to the Clearing Requirement. First, because many international financial institutions operate with the benefit of certain privileges and immunities under U.S. law, they may be treated similarly in other contexts under certain circumstances. Second, the Commission noted that there is nothing in the text or history of the swap-related provisions of the Dodd-Frank Act to establish that Congress intended to deviate from the traditions of the international system by subjecting international financial institutions to the Clearing Requirement. Third, the Commission stated that it expects that if any international financial institution of which the U.S. is a member were to engage in swap transactions in foreign jurisdictions, then the actions of that entity with respect to those transactions would not be subject to foreign regulation.⁸

In 2013, the Division granted a request for relief from the Clearing Requirement to Corporación Andina de Fomento (“CAF”) because the Division found that CAF’s mission and

⁴ Pub. L. 111-203, 124 Stat. 1376 (2010).

⁵ Clearing Requirement Determination.

⁶ End-User Exception and Commission regulation 50.50.

⁷ End-User Exception, at 42,562.

⁸ *Id.* For the purposes of the final release adopting the End-User Exception, the Commission considered international financial institutions as those institutions that are defined as “international financial institutions” in 22 U.S.C. 262r(c)(2) (Annual Report by Chairman of National Advisory Council on International Monetary and Financial Policies) and those institutions defined as “multilateral development banks” in the Proposal for the Regulation of the European Parliament and of the Council on OTC Derivative Transactions, Central Counterparties and Trade Repositories, Council of the European Union Final Compromise Text, Article 1(4a(a)) (Mar. 19, 2012) (published in final form on July 4, 2012 with no change to Article 1(4a(a))). NADB is not included on either list.

ownership structure was analogous to the missions and ownership structures of the international financial institutions referenced in the final Federal Register release adopting the End-User Exception.⁹

Summary of Request for Relief

The Request Letter represents that NADB's function, structure and development mission are comparable to those of other institutions identified by the Commission as international financial institutions, and to CAF.

NADB was created under the auspices of the North American Free Trade Agreement as a collaboration between the governments of the United States and Mexico. The United States and Mexico are the sole members of NADB. NADB's mission is to preserve and enhance environmental conditions and the quality of life of communities within 100 kilometers north of the U.S.-Mexico border and communities within 300 kilometers south of the border. One way in which NADB furthers its mission is by providing project financing in the form of loans and grants to public and private entities. As a result of these project financing activities, NADB incurs interest rate and currency risks. NADB uses derivatives to hedge these risks and for no other purpose.

NADB's total authorized capital is \$3 billion, with equal commitments from each member country. Of NADB's authorized capital, 90% is used to finance environmental infrastructure projects and 10% is used to finance community adjustment and investment. NADB is governed by a ten-member Board of Directors, comprised of federal government and local representatives from the United States and Mexico. The federal government representatives include the U.S. Secretary of the Treasury, the U.S. Secretary of State, the Administrator of the U.S. Environmental Protection Agency, the Mexican Secretary of Finance and Public Credit, the Mexican Secretary of Foreign Relations, and the Mexican Secretary of the Environment and Natural Resources. The local representatives include a state representative from a U.S. border state, a representative of the general public of the United States who resides in a border state, a governor from a Mexican border state, and a representative of the general public of Mexico who resides in the border region.

NADB operates with certain privileges and immunities that are typical of those enjoyed by international financial institutions. NADB's property and assets are free from expropriation, controls, moratoria, regulations, or restrictions. NADB's income, property, and other assets are exempt from taxation.

In summary, the Request Letter asserts that the policy considerations on which the Commission relied to exclude international financial institutions from the Clearing Requirement, and on which the Division subsequently relied to grant no-action relief from the Clearing Requirement to CAF, apply to NADB. Like CAF and other international financial institutions,

⁹ CFTC Letter 13-25 (June 10, 2013).

NADB is a multilateral development bank serving the public interest and is owned by sovereign nations each of which grants NADB legal privileges and immunities.

Grant of No-Action Relief

Based on the facts described by the Request Letter, the Division will not recommend that the Commission take enforcement action against NADB for failure to comply with the Clearing Requirement. This letter does not, however, provide relief from other provisions of the CEA and Commission regulations, such as the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations, which would apply to a non-cleared swap entered into by NADB opposite a counterparty that is subject to the CEA and Commission regulations with regard to that transaction.¹⁰

This letter represents the position of the Division only and does not necessarily represent the views of the Commission or those of any other division or office of the Commission. Because this position is based upon the representations contained in the Request Letter, it should be noted that any different, changed, or omitted material facts or circumstances may require a different conclusion or render this no-action 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 questions regarding this matter, please contact Peter A. Kals, Special Counsel, at (202) 418-5466.

Sincerely,

Brian A. Bussey
Director

¹⁰ End-User Exception, 77 Fed. Reg. at 42,562.