

**MEMO# 30447**

December 5, 2016

## **Draft ICI Global Comment Letter on Proposed CFTC Guidance on Cross-Border Transactions; Member Comments Requested by December 12, 2016**

[30447]

December 5, 2016

TO: Derivatives Markets Advisory Committee

ICI Global Regulated Funds Committee

ICI Global Trading & Markets Committee

International Committee

Registered Fund CPO Advisory Committee

Securities Operations Advisory Committee RE: Draft ICI Global Comment Letter on Proposed CFTC Guidance on Cross-Border Transactions; Member Comments Requested by December 12, 2016

As previously reported, the Commodity Futures Trading Commission (“CFTC”) proposed new rules and interpretations that address the application of certain swap provisions of the Commodity Exchange Act to cross-border transactions.<sup>[1]</sup> The proposed rules specify when the CFTC would require US and non-US persons to include their cross-border swap dealing transactions or swap positions in their swap dealer or major swap participant registration threshold calculations and the extent to which swap dealers and major swap participants would be required to comply with the CFTC’s business conduct standards in cross-border transactions.<sup>[2]</sup> The proposed rules also define key terms for cross-border transactions that, if adopted, will apply not only to the registration thresholds and external business conduct standards but to the cross-border application of other swap requirements.

ICI Global's draft comment letter on the proposed rules is attached for your review. If you have any comments on the draft letter, please send them to Jennifer Choi at [jennifer.choi@ici.org](mailto:jennifer.choi@ici.org) or Kenneth Fang at [kenneth.fang@ici.org](mailto:kenneth.fang@ici.org) by close of business on December 12, 2016.

Our draft letter focuses on the proposed rules’ definition of “US Person.” It recommends that the CFTC: 1) specifically exclude from the definition funds that are publicly offered only to non-US persons and not offered to US persons; and 2) exclude a test that would deem funds and other collective investment vehicles that are majority-owned by one or more US persons as US persons.

On the first recommendation, the draft letter highlights the nominal nexus funds that are publicly offered only to non-US persons and not offered to US persons have to the United States and the inappropriate reach that the CFTC's proposed rules and other swap rules would have on such entities under the proposed definition. It also discusses the disadvantages that US asset managers could face with such an interpretation, such as complying with two sets of regulations and potentially being excluded from managing a portfolio's assets or from engaging in swap transactions by entities that do not want to risk incurring the burdens of additional regulations. The letter, instead, recommends that the CFTC define "US person" focusing on whether the fund makes an "offer to US persons," which could provide certainty to counterparties at the outset of a swap transaction regarding which jurisdiction's rules will govern and would look at whether the fund is attempting to target the US market or US investors and should be appropriately subject to US laws.

On the second recommendation, the letter explains the structural and operational challenges to verifying the US person status of shareholders, especially with the prevalence of the omnibus account structure, in fully supporting the CFTC's determination to remove the majority US ownership test from the "US person" definition.

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## [Attachment](#)

### **endnotes**

[1] See Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 Fed. Reg. 71946 (Oct. 18, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-10-18/pdf/2016-24905.pdf>. For a summary of the proposed rules, see ICI Memorandum 30351 (Oct. 26, 2016), available at <https://www.iciglobal.org/iciglobal/pubs/memos/memo30351>.

[2] In addition, the proposed rules outline whether and to what extent these thresholds and standards would apply to swap transactions that are arranged, negotiated, or executed using personnel located in the United States.