

MEMO# 26978

February 6, 2013

ICI and ICI Global Comment Letter on CFTC's Further Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions

[26978]

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 17-13

DERIVATIVES MARKETS ADVISORY COMMITTEE No. 16-13

ICI GLOBAL MEMBERS

INTERNATIONAL MEMBERS No. 9-13

SEC RULES MEMBERS No. 18-13 RE: ICI AND ICI GLOBAL COMMENT LETTER ON CFTC'S FURTHER PROPOSED INTERPRETIVE GUIDANCE ON THE CROSS-BORDER APPLICATION OF CERTAIN SWAPS PROVISIONS

ICI and ICI Global have filed a comment letter with the Commodity Futures Trading Commission ("CFTC") on its proposed further guidance on the cross-border application of the swaps provisions of the Commodity Exchange Act ("CEA"). [\[1\]](#) The comment letter is attached and briefly summarized below.

The letter focuses on the CFTC's proposed revisions to the definition of "U.S. person." The letter states that the alternative definition proposed by the CFTC for a pool, fund or other collective investment vehicle does not fully address the concerns previously expressed to the CFTC in response to the Proposed Guidance. [\[2\]](#) Specifically, the wording of the proposed alternative (which would clarify that a pool, fund or other collective investment vehicle that is publicly-traded will be deemed a U.S. person only if it is offered, directly or indirectly, to U.S. persons) may not exclude from the definition of U.S. person non-U.S. funds that are publicly offered only to non-U.S. persons but do not "trade" in a secondary market.;

According to the CFTC, the proposed clarification is intended to address concerns expressed by commenters (including ICI) that ownership verification is particularly difficult for pools, funds and other collective investment vehicles that are publicly traded. The letter notes that, as discussed in the August 2012 ICI and ICI Global Letter, because of the manner in which many regulated fund shares are held, non-U.S. funds that are not publicly-traded in the secondary market also cannot verify whether fund shareholders are U.S. persons even though their shares are not offered to U.S. persons. The letter recommends changes that

would be consistent with the CFTC's intention to "capture collective investment vehicles that are created for the purpose of pooling assets from U.S. investors and channeling these assets to trade or invest in line with the objectives of the U.S. investors, regardless of the place the vehicle's organization or incorporation."

Jennifer S. Choi
Senior Associate Counsel – Securities Regulation

[Attachment](#)

endnotes

[1] See Further Proposed Guidance regarding Compliance with Certain Swap Regulations, 78 FR 909 (Jan. 7, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-31734a.pdf> ("Further Proposed Guidance") (in conjunction with the Further Proposed Guidance, the CFTC issued a final order granting market participants temporary conditional relief from certain provisions of the CEA); Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214, available at <http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-16496.pdf> (July 12, 2012) ("Proposed Guidance").

[2] See Letter from Karrie McMillian, General Counsel, ICI, and Dan Waters, Managing Director, ICI Global, to David Stawick, Secretary, CFTC, dated Aug. 23, 2012 ("August 2012 ICI and ICI Global Letter"). For a summary of the ICI letter on the Proposed Guidance, please see ICI Memorandum No. [26408](#) (Aug. 23, 2012), available at <http://www.ici.org/iciglobal/pubs/memos/memo26408>.