

MEMO# 26812

January 2, 2013

CFTC Issues Final Cross-Border Exemptive Order and Further Proposed Guidance

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 1-13
ICI GLOBAL MEMBERS
INTERNATIONAL MEMBERS No. 1-13
INVESTMENT ADVISER MEMBERS No. 1-13
SEC RULES MEMBERS No. 1-13 RE: CFTC ISSUES FINAL CROSS-BORDER EXEMPTIVE ORDER
AND FURTHER PROPOSED GUIDANCE

The Commodity Futures Trading Commission (“CFTC” or “Commission”) has issued a final order granting market participants temporary conditional relief from certain provisions of the Commodity Exchange Act (“CEA”) and has proposed further guidance on certain specific aspects of the proposed interpretive guidance regarding the cross-border application of the swaps provisions of the CEA. [\[1\]](#) Comments on the further proposed guidance are due 30 days after publication in the Federal Register.

Final Order

Under the final order, a non-U.S. person that registers as a swap dealer (“SD”) or major swap participant (“MSP”) may delay compliance with certain entity-level requirements of the CEA and the CFTC regulations and non-U.S. SDs and MSPs and foreign branches of U.S. SDs and MSPs may delay compliance with certain transaction-level requirements of the CEA and the CFTC regulations subject to specified conditions. [\[2\]](#) The final order will expire on July 12, 2013.

Further Proposed Cross-Border Guidance

The CFTC has not adopted final guidance on the cross-border application of the swaps provisions and is continuing to consider several approaches. In this regard, the CFTC seeks comment on two areas – aggregation of affiliates’ swaps for purposes of the de minimis test and the definition of “U.S. person.” We describe the CFTC’s proposed alternative definition of “U.S. person” below.

The CFTC is proposing alternatives for two aspects of the proposed definition of the term

“U.S. person” in the Proposed Guidance: the first – (ii)(B) – relates to U.S. owners that are responsible for the liabilities of a non-U.S. entity; and the second – (iv) – relates to commodity pools and funds with majority-U.S. ownership.

The CFTC proposes to limit the first prong to a legal entity that is directly or indirectly majority-owned by one or more natural persons or a legal entity that meets prong (i) or (ii) of the definition of the term “U.S. person” in the final order, [3] in which such U.S. person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity. The proposed definition would likely exclude registered funds because the liabilities of fund investors are limited to their investment in the fund.

The CFTC also is proposing an alternative under which any commodity pool, pooled account, investment fund or other collective investment vehicle would be deemed a U.S. person if it is (directly or indirectly) majority-owned by one or more natural person or legal entities that meet prong (i) or (ii) of the definition of the term “U.S. person” in the final order.

Moreover, the alternative would clarify that a pool, fund or other 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. According to the CFTC, it is proposing the alternative to address concerns expressed by commenters (including ICI) [4] that ownership verification is particularly difficult for pools, funds and other investment vehicles that are publicly traded. Although this revised proposed definition may be helpful in excluding registered funds that are traded on a secondary market, it is unclear whether all foreign publicly offered funds would be considered “publicly traded” to be excluded from the definition of “U.S. person.”

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endnotes

[1] Final Exemptive Order Regarding Compliance with Certain Swaps Regulations; Further Proposed Guidance (Dec. 21, 2012), available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister122112.pdf>. See 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] The Entity-Level Requirements include: (1) capital adequacy; (2) chief compliance officer; (3) risk management; (4) swap data recordkeeping; (5) swap data repository (“SDR”) reporting; and (6) large trader reporting. The Transaction-Level Requirements include: (1) clearing and swap processing; (2) margining and segregation for uncleared swaps; (3) trade execution; (4) swap trading relationship documentation; (5) portfolio reconciliation and compression; (6) real-time public reporting; (7) trade confirmation; (8) daily trading records; and (9) external business conduct standards.

[3] The final order defines a “U.S. person” as any person identified by the following five criteria: (i) A natural person who is a resident of the United States; (ii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock

company, fund or any form of enterprise similar to any of the foregoing, in each case that is (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or (B) effective as of April 1, 2013 for all such entities other than funds or collective investment vehicles, having its principal place of business in the United States; (iii) A pension plan for the employees, officers or principals of a legal entity described in (ii) above, unless the pension plan is primarily for foreign employees of such entity; (iv) An estate of a decedent who was a resident of the United States at the time of death, or a trust governed by the laws of a state or other jurisdiction in the United States if a court within the United States is able to exercise primary supervision over the administration of the trust; or (v) An individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in (i) through (iv) above.

[4] 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>.

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