

MEMO# 26942

January 24, 2013

Draft ICI and ICI Global Comment Letter on CFTC's Further Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions; Member Comments Requested by February 1

[26942]

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 4-13
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 11-13
ICI GLOBAL MEMBERS
INTERNATIONAL COMMITTEE No. 4-13
SEC RULES COMMITTEE No. 7-13 RE: DRAFT ICI AND ICI GLOBAL COMMENT LETTER ON
CFTC'S FURTHER PROPOSED INTERPRETIVE GUIDANCE ON THE CROSS-BORDER
APPLICATION OF CERTAIN SWAPS PROVISIONS; MEMBER COMMENTS REQUESTED BY
FEBRUARY 1

The Commodity Futures Trading Commission ("CFTC") proposed certain further guidance on the cross-border application of the swaps provisions of the Commodity Exchange Act ("CEA"). [1] ICI and ICI Global have prepared a draft comment letter, which is attached and briefly summarized below. If you have comments on the draft letter, please provide them to Jennifer Choi at jennifer.choi@ici.org by Friday, February 1.

In response to the Proposed Further Guidance, the draft letter focuses on the Commission'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 and other 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 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. The proposed alternative, however, would 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 investment vehicles that are publicly traded. The draft 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 sold and recorded on the fund books, non-U.S. funds that are not publicly-traded in the secondary market also cannot verify whether fund shareholders are 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."

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[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>.